Mutual Legal Assistance in Criminal Antitrust Matters

*A Canadian Perspective*

Oliver Borgers and Madeleine Renaud

McCarthy Tétrault LLP

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Mutual Legal Assistance in Criminal Antitrust Matters: A Canadian Perspective

Oliver Borgers and Madeleine Renaud¹

In Canada there has been relatively little experience with the application of mutual legal assistance treaties with foreign jurisdictions in the context of competition law². Because alleged international cartels that have an effect on the Canadian market usually also involve an offence under Canadian competition law, the Canadian Competition Bureau (the “Bureau”) does not need the impetus of a request for legal assistance from a foreign state to commence an investigation and seek evidence. In fact, in the last ten years, the Bureau has prosecuted over 40 cartel participants and obtained guilty pleas which yielded fines in excess of Cdn. $180 million. Most of these cartels were international in nature, and although most of those were brought to the attention of the Bureau by foreign antitrust authorities, very few of these prosecutions involved requests pursuant to mutual legal assistance treaties.

Much has been written about Canadian cartel investigations and cooperation with foreign competition authorities in the context of international enforcement³. This paper proposes to focus on requests for assistance where no breach of Canadian competition laws has occurred. Specifically we propose to review some of the legal issues arising out of requests made by a foreign jurisdiction pursuant to a mutual legal assistance treaty in criminal matters (hereafter

1 Oliver Borgers and Madeleine Renaud are partners in McCarthy Tétrault LLP’s Competition Law Group. Mr. Borgers is located in the Toronto office and Ms. Renaud is located in the Montreal office. The authors wish to thank Cecilia Hoover for her assistance in the preparation of this paper. The views expressed are those of the authors only and should not be treated as legal advice.

2 Competition related cases of which we are aware are: (i) the Sulphuric Acid case (discussed in detail below; see p.6); (ii) the Thermal Fax Paper case which involved an international conspiracy among suppliers of thermal fax paper to increase prices. The conspiracy affected the North America. Joint investigation efforts between the American and Canadian authorities involved coordination of searches and the sharing of documents; (iii) the Disposable Plastic Dinnerware case involved a conspiracy to raise the prices of plastic dinnerware in the United States. The American antitrust authorities were able to secure a conviction in part because of evidence obtained in Canada on the basis of a request for mutual legal assistance; and (iv) the Ductile Pipe case, which affected the Canadian market, involved a conspiracy to have a U.S. ductile pipe supplier exit the market. Further detail in respect of the last three cases can be found in Chapter 4 (International Anticartel Enforcement and Interagency Enforcement Cooperation) of the Final Report of the International Competition Policy Advisory Committee (2000) at 13, which can be found at http://www.usdoj.gov/atr/icpac/chapter4.htm; footnote 49 of Addy, George and Cornwall, Lori, Cartel Investigation and Enforcement – A Canadian Perspective, Antitrust and Trade Law Committee, International Bar Association Conference 2003, 14-19 September, 2003, San Francisco; see also Bingaman, Anne, International Cooperation and the Future of U.S. Antitrust Enforcement American Law Institute, 72nd Annual Meeting, at 6-7; and Business Across Borders—Competition Law in Global Environment : Remarks by Francine Matte, Q.C., 11th Commonwealth Law Conference, Canadian Bar Association Annual Meeting Vancouver, August 27, 1996.

Can a foreign authority successfully cause, on its behalf, evidence to be seized in Canada? The short answer is yes. Recent Canadian experience demonstrates that our judiciary is showing significant support for the mutual legal assistance regime. Canadian courts will go to considerable lengths to enforce treaty obligations such as those created under mutual legal assistance treaties. They are, therefore, often willing to overlook deficiencies which might be taken more seriously in a domestic context.

History of Canadian Mutual Legal Assistance (Criminal)

In the absence of an MLAT that is enforceable pursuant to Canadian enabling legislation, a foreign jurisdiction seeking to obtain evidence located in Canada had to resort to the use of rather inefficient and ineffective instruments known as “letters rogatory”. Letters rogatory, which may be used in either civil or criminal matters, are formal requests by a court or authority in one jurisdiction for the legal assistance of a court or authority in another jurisdiction. Requests for assistance pursuant to letters rogatory are executed on the basis of comity between nations. Due to cumbersome procedural requirements of letters rogatory, it is most often a year or more until the requested court or authority will ultimately deal with the request. Clearly, letters rogatory are particularly inefficient in investigations where evidence must be gathered in a timely manner. Moreover, procedural differences in civil and common law as between the states may further frustrate a request for assistance made pursuant to a letter rogatory. These obstacles can seriously

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4 It is, of course, also possible to enter into mutual legal assistance arrangements in respect of matters not covered by traditional MLATs. In fact, because of the limitation of most MLATs to serious criminal offences, antitrust authorities, including the Canadian Competition Bureau, are developing mutual legal assistance schemes that deal with matters not covered by MLATs (such as lesser criminal violations and civil matters). See the discussion at page 18 of this paper that describes the Canadian status in respect of these developments.


6 Ibid. at 11.

7 The term “letter of request” is used interchangeably with “letter rogatory” to refer to the same types of instruments. For example, the Hague Evidence Convention uses the former terminology.

8 Comity “is the name given to the general principles that encourages the recognition in one country of the judicial acts of another.”: Connaught Laboratories Ltd. v. Medeva Pharma Ltd. (1999), 4 C.P.R. (4th) 508 at p. 518 (Fed. T.D.). It is understood as doing that which would “best promote suitable conditions of interstate and international commerce.”: Morguard Investments Ltd. v. De Savoye, [1990] 2 S.C.R. 1077 at p. 1096 per Justice La Forest. In R. v. Zingre (1981), 23 C.P.C. 259, Justice Dickson stated: “It is upon [the] comity of nations that international legal assistance rests. Thus the Courts of one jurisdiction will give effect to the laws and judicial decisions of another jurisdiction, not as a matter of obligation but out of mutual deference and respect. A foreign request is given full force and effect unless it be contrary to the public policy of the jurisdiction to which the request is directed … or otherwise prejudicial to the sovereignty or the citizens of the latter jurisdiction.”

9 For instance, see Re Westinghouse Electric Corporation and Duquesne Light Company (1977), 16 O.R. 273 where at least one letter rogatory become functus because proceedings in the U.S. had concluded. Although we note that the current regime of mutual legal assistance treaties can also involve substantial delays where challenges are made.
undermine the efforts of foreign states to collect evidence that would be necessary for the prosecution of offenders. In many cases evidence can be lost or destroyed during the time that it takes to secure assistance from the requested state. In other instances, the evidence collected has arrived after the court proceedings for which it was requested.\footnote{See \textit{Re Westinghouse, supra.} note 9 and \textit{Mutual Legal Assistance Treaties: Necessity, Merit and Problems Arising in the Negotiation Process} a paper prepared by the United States Department of Justice. A copy of which can be found at \url{http://www.acpf.org/Activities/public\%20lecture2000/lectureHarriss(E).html}.}

In March of 1985 Canada signed its first MLAT, which was later ratified and came into force in 1990. Then Prime Minister Mulroney and President Reagan met at the “Shamrock Summit” in Québec City and, on behalf of Canada and the United States, they signed the \textit{Treaty Between the Government of Canada and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters}\footnote{A copy of which is attached hereto and can be found at \url{http://www.rcmp.ca/intpolicing/mlat_e.htm#Government}.} (hereafter referred to as the “USMLAT”). However, under Canadian law, a treaty is not enforceable domestically in the absence of enabling legislation. It took the Canadian government another three years to pass enabling legislation, and a further two years before that legislation came into force. It was therefore in 1990 that the \textit{Mutual Legal Assistance in Criminal Matters Act}\footnote{R.S. 1985, c. 30 (4th Supp.).} (hereafter the “MLA Act”) came into force, thereby providing for the implementation of the USMLAT in Canada. The MLA Act is a statute of general application, meaning that any MLAT with another country that meets the criteria of the MLA Act can be enforced pursuant to its provisions. To date, Canada is a party to over 30 MLATs with countries that include the United States, Mexico, Brazil, many European countries and Australia\footnote{This figure includes bilateral MLATs that are currently in force or have been signed. Countries that have an MLAT with Canada include: Argentina, Austria, Australia, Bahamas, China, Czech Republic, France, Greece, Hungary, India, Israel, Italy, Korea, Mexico, Netherlands, Norway, Peru, Poland, Portugal, Romania, Russia, Spain, Switzerland, Sweden, Thailand, Ukraine, United Kingdom, Unites States and Uruguay (currently in force); Belgium, Brazil, Jamaica and Trinidad and Tobago (signed but not in force).}. Moreover, negotiations are underway with a number of other states to implement MLATs between Canada and the corresponding state.\footnote{A list of countries with which Canada is negotiating MLATs includes: Antigua, Denmark, Federal Republic of Germany, Kazakhstan, Pakistan, Panama, Turkey, Turks and Caicos, Venezuela and Vietnam.}

Because of the increase of global cross-border traffic and trade (including, unfortunately, illegal forms of cross-border activity), MLATs have proven to be a very useful tool for foreign authorities to obtain evidence in support of criminal prosecutions abroad. It will come as no surprise that the Attorney General of the United States has made successful use of the USMLAT. Since 1990, there have been numerous requests made to Canada’s Minister of Justice under the MLA Act. With the exception of very few competition cases\footnote{See note 2.}, all such applications (and
ensuing jurisprudence) relate to non-antitrust alleged criminal activity. There are now at least 15 reported cases that examine various aspects of the MLA Act.

**General Overview of the Mutual Legal Assistance in Criminal Matters Act**

A request for assistance made pursuant to an MLAT is governed in Canada by the provisions of the MLA Act. Provided that an MLAT satisfies the MLA Act definition of “agreement”, i.e. a treaty, convention or other international agreement that is in force to which Canada is a party, and it contains a provision respecting mutual legal assistance in criminal matters, the request for assistance may be acted upon in Canada. If no MLAT exists between Canada and another state, the MLA Act contains provisions that would allow administrative arrangements to be entered into whereby mutual legal assistance can be provided in respect of conduct that, if committed in Canada, would be an indictable offence. Canada’s Minister of Justice is responsible for the implementation of every MLAT and for the administration of the MLA Act.

Assistance that can be provided pursuant to the MLA Act includes the collection of fines, restraint, seizure and forfeiture of property, search and seizure, compulsory examination under oath and production of documents, and transfer of detained persons.

A request for assistance is made by the foreign authority to the Minister, who determines whether the request is appropriate pursuant to the relevant MLAT. As a general rule, once the request is approved by the Minister, the necessary documents and information is provided to a “competent authority”, broadly defined as including any authority responsible for the investigation or prosecution of offences. The competent authority will then take the appropriate steps to obtain the requested evidence. In most cases, these steps will involve an application, often *ex parte*, for a court order, and the court will supervise the process, including determining whether the evidence should be provided to the requesting state and under which conditions.

The MLA Act provides for an important and somewhat ambiguous limitation on the execution of requests for assistance in Canada. Subsection 8(1) provides:

> If a request for mutual legal assistance is made under an agreement, the Minister [of Justice] may not give effect to the request by means of the provisions of this Part unless the agreement provides for mutual legal assistance with respect to the subject-matter of the request.

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17 See subsection 2(1) of the MLA Act. An MLAT must also have been published in the *Canada Gazette* in accordance with section 5 of the MLA Act.

18 See section 6 of the MLA Act.

19 Generally indictable offences are the more serious offences which provide for harsher sentences.

20 Currently Irwin Cotler who was reappointed by Prime Minister Martin on July 20th, 2004.

21 See subsection 7(1) of the MLA Act.

22 See sections 11, 9, 9.3, 13, 18 and 24 of the MLA Act.
As we will see in the discussion that follows, this provision may have important implications where the request for assistance relates to conduct which would not amount to a violation of Canada’s *Competition Act* but does amount to a criminal violation of the antitrust laws of another jurisdiction.

The most relevant provisions of the MLA Act for our purposes relate to search and seizure and evidence-gathering orders. In respect of “search and seizure” of evidence, the MLA Act provides that search warrants are obtained on an *ex parte* basis from a judge of the province where the evidence is believed to be located. A special aspect of the MLA Act is that the search warrant must set out the time and place of the hearing which will be held for purposes of determining whether the warrant was executed according to its conditions and whether it is appropriate to order that the record or thing seized be sent to the requesting state. The target of the search as well as any person who claims to have an interest in the seized objects has the right to be heard at such hearing. After having heard the parties, the Court has discretion to place terms and conditions on the sending order that it considers to be desirable in the particular circumstances.

In addition to providing for *ex parte* search warrants, section 18 of the MLA Act allows the competent authority to apply *ex parte* for an evidence-gathering order, compelling any person to submit to an examination under oath, to produce documents or to answer questions that are relevant to the investigation. As with search warrants, a subsequent hearing is held to determine whether it is appropriate that the evidence produced should be sent to the foreign state.

Gathering orders are less intrusive than search and seizure orders and section 12(1)(c) of the MLA Act provides that search warrants should only be issued if “it would not, in the circumstances, be appropriate to make” an evidence-gathering order, a requirement that does not otherwise exist in Canadian law. The Canadian courts have recognized that where possible, gathering orders are to be preferred to the more invasive search warrants. Gathering orders and search warrants are therefore not discrete procedures: sections 12 and 18 of the MLA Act have been judicially interpreted as creating a two-tiered system for collecting evidence. However, the courts have discretion in this regard, as the MLA Act does not indicate which factors should be taken into account in such a determination. As discussed below, recent judicial consideration of sections 12 and 18 illustrates the low threshold needed to be met by authorities when they seek to prove that a gathering order would not be appropriate and a search warrant would be necessary.

The MLA Act also contains provisions regarding the admissibility in Canada of evidence obtained in foreign jurisdictions. These provisions set out, in general terms, what evidence may be admissible. For instance, evidence collected abroad will not be inadmissible in Canadian

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24 Subsection 11(2) of the MLA Act.
25 See sections 12(3) and 15 of the MLA Act.
26 See subsection 12(4) of the MLA Act.
27 See section 20 of the MLA Act.
28 For a clear statement to this effect, see *Re McFarlane* [1995] O.J. No. 686 (Gen. Div.) *subsequent hearing*
proceedings solely on the basis that it constitutes hearsay.\textsuperscript{30} Moreover these provisions dictate that notice must be given to any individuals against whom documents are produced\textsuperscript{31} and what procedure must be followed when serving documents abroad.\textsuperscript{32}

**U.S. MLAT**

Given the prevalence of applications in Canada pursuant to the USMLAT, this paper will focus on the application of the MLA Act to the treaty between Canada and the United States. However, many of the observations below are likely relevant, if not directly applicable to, many other MLATs that Canada has entered into. For example, our review of the MLATs of the U.K., Italy and Greece (an arbitrary sample) show that they are fundamentally similar to the USMLAT.

The USMLAT is a relatively straightforward and compact document, a copy of which is attached as Appendix A for ease of reference. A request for assistance under the USMLAT can be made to the Canadian authorities with respect to an offence committed under U.S. law for which the statutory penalty is a term of imprisonment of one year or more\textsuperscript{33}. Other aspects of the USMLAT can be readily understood by reference to Appendix A hereto.

**Application of the USMLAT to Antitrust Offences**

The mutual legal assistance regime created by the combined effect of the USMLAT and the MLA Act appears, on its face, to be very effective with respect to requests made by the United States to Canada for assistance in connection with an investigation into possible antitrust offences committed in the United States. The outcome of such a request is no longer hypothetical. In 1999 the United States made a request of the Government of Canada for assistance under the USMLAT in connection with a possible antitrust offence under section 1 of the *Sherman Act*\textsuperscript{34}. The United States requested Canada to execute a search warrant and seize evidence believed to be in the possession of certain Canadian corporations alleged to have participated in a conspiracy in the U.S.\textsuperscript{35} It is interesting to note that as the Bureau had concluded that no offence had been committed by any of these corporations in Canada, its role was limited to providing assistance to the U.S. authorities in the conduct of a strictly American investigation.

Flowing out of these facts, Canada’s first jurisprudence in respect of the application of the MLA Act in the context of an alleged antitrust offence came to be. In the context of the Commissioner’s application for a sending order, the Honourable Madam Justice Ratushny of the Ontario Superior Court of Justice rendered the first decision in October of 2002, styled *Commissioner of Competition v. Falconbridge Ltd.*\textsuperscript{36} (hereafter referred to as the “*Falconbridge*"

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{30} See section 36 of the MLA Act.
\item \textsuperscript{31} See subsection 38(2) MLA Act.
\item \textsuperscript{32} See section 39 of the MLA Act.
\item \textsuperscript{33} See the definition of “offence” in Article I of the USMLAT. This definition also includes offences created under the law of the United States in respect of securities, wildlife protection, environmental protections and consumer protection.
\item \textsuperscript{34} 15 U.S.C. § 1.
\item \textsuperscript{35} These corporations were Falconbridge Ltd., Noranda Inc., Noranda DuPont of Canada Inc. and Noranda Metallurgy Inc.
\item \textsuperscript{36} 2002 Carswell Ont 5103.
\end{itemize}
\end{footnotesize}
Application"). Justice Ratushny’s decision was appealed to the Ontario Court of Appeal, Commissioner of Competition v. Falconbridge Ltd.\(^{37}\) (hereafter referred to as “Falconbridge”), which confirmed Justice Ratushny’s decision in May of 2003. The Court of Appeal’s judgement became final when leave to appeal to the Supreme Court of Canada was denied in January of 2004\(^{38}\).

In *Falconbridge*, it was alleged that Canadian corporations\(^{39}\) had engaged in conduct that amounted to the unlawful restriction of trade in the sulphuric acid industry by price fixing and output restriction, contrary to section 1 of the *Sherman Act*. The request for assistance, which was approved by the Minister of Justice, was dual in nature in that it contemplated the issuance of a search warrant under section 12 of the MLA Act as well as the issuance of a gathering order under section 18. The Canadian Commissioner of Competition (the “Commissioner”), as a “competent authority” under the MLA Act, then obtained *ex parte* the requested search warrants and gathering orders from the Ontario courts. The search warrant application was supported by Informations\(^{40}\) and documents placed under seal. In January of 2000, once all of the searches had been completed, the Commissioner successfully made another *ex parte* application for the issuance of a gathering order, which was also issued on the basis of sealed Informations and documents. The Canadian corporations only received versions of the Informations and documents that had been edited to varying degrees so as to protect the identity of confidential informants. When the Commissioner made an application to the Court seeking an order to send the seized documents to the United States, the Canadian corporations sought to have the search warrants and the evidence-gathering orders set aside on various grounds which are discussed below.

The *Falconbridge* case raised a number of procedural and substantive issues (all of which were ultimately decided in favour of the Commissioner) that will, no doubt, be considered carefully by respondents in future applications under the MLA Act in respect of the USMLAT. *Falconbridge* may also serve as a useful precedent for members of the international antitrust bar to the extent that their countries have similar MLAT arrangements with the United States or other jurisdictions.

Some of the issues litigated in the *Falconbridge* case that may be of interest to members of the international antitrust bar are reviewed in greater detail below. This issues are:

- facial validity of the search warrants;
- sufficiency of the Informations to obtain search warrants;
- appropriateness of a search and seizure order;
- is a *Sherman Act* section 1 violation an “offence” under the USMLAT?;
- reciprocity and dual criminality; and
- is paragraph 45(1)(c) of the *Competition Act* the substantive counterpart of section 1 of the *Sherman Act*?

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\(^{37}\) (2003), 170 O.A.C. 299.


\(^{39}\) See note 35.

\(^{40}\) An Information is a statement under oath, usually by a representative of the investigative body, which sets out the grounds that justify the issuance of the warrant.
Facial Validity of Search Warrants

A search warrant is an order issued by a court under statutory power, authorizing named persons to enter a specified place to search for and seize specified property which will afford evidence of the commission of a crime. Under Canadian law, in order for a search warrant to be facially valid, it must, among other things, adequately describe the offence in respect of which the search is authorized, the place to be searched and the items to be searched for. The purpose of providing such specificity is to allow the officers and the person whose premises are being searched to know with reasonable certainty what is being searched for and the limits of the search.

In the *Falconbridge* case, the search warrants issued by the court described the alleged offence by merely reproducing part of section 1 of the *Sherman Act*. Specifically, the offence was described as follows:

Contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade, punishable by fine not exceeding $10,000,000 if a corporation, or if any other person, $350,000, or by imprisonment not exceeding three years.

As expected, the Ontario Court of Appeal held that this description was in itself insufficient to satisfy the legal requirements. The Court mentioned that the warrant did not set out the dates of the alleged offence or the object of the conspiracy, two critical elements of sufficiency. However, the Court of Appeal went on to say that the entire warrant should be looked at to determine whether the officers and the target of the search can determine the nature of the offence and the object of the search. In this case, the Court endorsed the approach of the application judge, who had found that when the warrants are read in their entirety, there was no defect as to the sufficiency of the description of the offence. According to Justice Ratushnny the descriptions found in the warrant limited the scope of the search to items concerning competitive practices of the target companies relating to sulphuric acid and the time period to which the alleged offences related were also set out.

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**Notes**


42. A search warrant is facially valid if, when read literally and without reference to extrinsic documents, it satisfies the mandatory requirements which the law demands of search warrants. In other words, its form and content must be as prescribed by law. For example, a specified law officer must be named in the warrant, certain information addressed to the target of the warrant may need to appear on the face of the document and the relevant offence must be described with appropriate specificity. On the other hand, an assessment of the “sub-facial” invalidity of a search warrant entails looking beyond the document itself and examining the process whereby the warrant was obtained. Thus, the warrant must have been issued by an appropriate official, it must have been issued on the basis of a sworn Information in appropriate form and containing appropriate information, the issuing authority must have acted on the appropriate principles, etc.

43. *Falconbridge* at ¶ 12.


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Thus it seems that the mere allegation of an offence under a *Sherman Act* provision is insufficient for purposes of Canadian search warrant validity. More detail of the nature and time frame of the possible offence is required, which can be inferred from the whole of the warrant.

It may be of interest to the reader that the Ontario Court of Appeal held that the same standard of offence disclosure for evidence-gathering orders was not required due to, among other things, the inherent ability of the target to challenge such orders before compliance.47

**Sufficiency of Informations to Obtain Search and Seizure Warrant**

The Canadian Constitution guarantees all Canadians, including corporations, the right to be secure against “unreasonable” search and seizure.48 This constitutional guarantee also applies to searches conducted on Canadian soil in the context of the MLA Act.49 In a landmark decision arising from a competition law inquiry, the Supreme Court of Canada held that, to be reasonable, a search had to be authorized by a judge or a person capable of acting judicially, who is satisfied that there are reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that evidence of such offence will be found at the place of the search.50 If the search does not meet these requirements, it is unconstitutional and invalid, and the search warrant will be quashed.

As is often the case in investigations involving possible antitrust violations, the prosecutor obtains important information from one or more confidential informants. The *Falconbridge* case was no exception. Because of the protection afforded to confidential informants, the Information used to obtain the search warrants (an affidavit sworn by an officer of the Canadian Competition Bureau) was provided to the targets of the search in redacted form, removing information that would, presumably, reveal the identity of the confidential informant. In such cases, the validity of the search warrant is determined on the basis of the edited Information; in other words, the facts which remain after the editing is completed must be sufficient to support reasonable grounds to believe that an offence has been committed and that evidence will be found at the premises.51

Under Canadian law, the Court which “reviews” the conditions under which a search warrant was issued, for the purpose of determining if the search was constitutional, plays a limited role. If, on the basis of all the materials before the reviewing court (in this case Justice Ratushny and, in the context of the appeal, the Ontario Court of Appeal), the court finds that the judge who authorized and issued the warrant (the “issuing judge”) “could” have granted the warrant, the warrant is valid; the reviewing court cannot intervene by substituting its view for that of the issuing judge.52 In this case, the Ontario Court of Appeal held that the issuing judge could properly find in the Information reasonable grounds to believe that an offence had been

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47 *Falconbridge* at ¶ 16-20.
49 *Supra* note 16.
51 See ¶ 23 of *Falconbridge*.
committed and that evidence of the commission of an offence would be found in the premises identified.

As a general rule, the Information must set out the facts upon which the person who swore it believes that an offence has been committed and, where these facts are based upon second-hand information (“hearsay evidence”), that the source of this second-hand information is credible. Hearsay evidence is not prohibited, provided it is accompanied by sufficient evidence to satisfy the issuing judge of the reliability of the information. In this regard, the issuing judge cannot merely rely on the last person in the chain of hearsay, but must be in a position to determine whether the belief of the person who swore the Information in the existence of reasonable grounds is justified. The reliability of the informer is to be assessed by recourse to the “totality of the circumstances”, including such factors as the degree of detail of the “tip”, the informer’s source of knowledge, and indicia of the informer’s reliability, such as past performance or confirmation from other investigative sources.53

In *Falconbridge*, the Bureau officer who had sworn the Information relied on information obtained from U.S. investigators who had transmitted to him the facts provided to them by a confidential informer. In other words, the Information contained double hearsay evidence: the Bureau officer reported what the U.S. investigators told him they had been told by the confidential informer. Despite the inherent lack of reliability of such information, and the absence of information as to the credibility of the confidential informer, the Court of Appeal held that the issuing judge was able to reach the following conclusions:

- the Bureau officer could reasonably rely on the hearsay information provided to him by the U.S. investigators (with the Antitrust Division of the United States Department of Justice) because he “had dealt with them in the past and considered them to be honest”;54
- the unnamed “informer is said to be an employee with responsibility for sulphuric acid sales. Thus, he or she is in a position within the industry to credibly have information about the alleged conspiracy”;55
- “it is apparent from the detail provided by the confidential informer that the informer was in a position to know about the conspiracy”;56 and
- “the existence of the alleged conspiracy is confirmed by real evidence in the form of documents that the informer has turned over to the United States authorities”, even though such documents were not shown to the Canadian officer who swore the Information.

In the Court of Appeal’s view, the information provided by the confidential informer was sufficiently compelling and there was sufficient confirmation of these facts to make up for the lack of any information as to the credibility of the informer.58 Considering the fact that the

57 *Ibid.* at ¶ 34.
Bureau officer who swore the Information had not seen the documents which apparently confirmed the alleged conspiracy, and that the U.S. investigators had refused to answer relevant questions relating to the conduct of their investigation (see below), we would think there would be at least some issue as to the reliability of the information relied on by the issuing judge.

It is interesting to note how the Ontario Court of Appeal distinguished a decision from the Quebec Court of Appeal in *Future Électronique Inc.* In that decision, the Quebec Court of Appeal quashed a search warrant issued pursuant to the MLA Act on the basis of a similar Information (i.e. double hearsay evidence), on the grounds that the Information was insufficient because it was based on information provided by third persons who were not sworn and whose reliability has not been proven on oath by the person who received this information. The Quebec Court had held as follows:

[The Canadian officer] does not allege any fact explaining why the information provided by the “former employees” should be considered reliable, apart from the affirmation to the effect that [the U.S. investigator] should be believed. He does not produce the statements of the former employees for the issuing judge or indicate the information transmitted by [the U.S. investigator] which could permit [the U.S. investigator] to answer to the issue of the credibility of the informers and the truth of their information. There are therefore no facts which would allow the issuing judge to determine himself the reliability of the information because the “Information” never related explicitly or implicitly the facts alleged to the statements of the former employees, except one single time and regardless, does not provide any facts which explain why these informers should be considered reliable. [...] If we were to agree that this type of affidavit could preclude effective judicial review, that would mean that the affiant could not in effect be examined with a view to verifying the unstated reasons for his belief. [emphasis in the original]

In *Falconbridge*, the Ontario Court of Appeal held that the Information was sufficient because the Bureau officer who swore it knew the U.S. investigators and could vouch for their integrity. If this is the proper test, search warrants may well be very difficult to obtain where the foreign investigators who provide the information to support the reasonable grounds to believe in the commission of an offence are not known by Canadian authorities. It seems to us that the better solution would be to require that the Information be sworn by the foreign investigators, who could then personally attest to the credibility of their informer and to the elements which confirm the tips received.

60 *Ibid.* at 415-16.
Appropriateness of a Search and Seizure Order

While somewhat technical, the resolution of the issues surrounding the “sub-facial validity”61 of the underlying Informations used to obtain the search warrants are unsettling. As indicated above, the MLA Act provides that search warrants should not be resorted to if it is appropriate to obtain the information through information-gathering orders instead62. In Falconbridge, despite the appellants’ submissions that there were grounds to conclude that a gathering-order would have been appropriate, the Court upheld the use of search warrants. The courts held that they had reasonable grounds to rely on the Bureau’s officer’s belief that a search warrant was necessary. To give the reader a sample of the relatively low threshold that this requirement entails, a sample of the evidence in support of the warrant is set out below (as described by the Ontario Court of Appeal63):

- the U.S. official told the Bureau officer “that, based on information from a cooperating witness, some of the subjects of the investigation may know there is some form of U.S. Department of Justice investigation”;  
- the Bureau officer stated that: “Should the subjects of the investigation learn of the focus of the investigation, they may destroy records to conceal their involvement if search warrants are not used. …. [The Canadian official] has reasonable grounds to believe and does believe, based on his experience of 28 years with the Competition Bureau, that targets of searches have destroyed or attempted to destroy relevant documents once a search warrant has been served at their premises.” In cross examination, this official stated that he had a “real fear”, based on information received from an informant, that documents would be destroyed if the authorities resorted merely to an evidence-gathering order;  
- The Bureau officer indicated that the seizure “must take place concurrently with similar investigative measures to be carried out in various locations in the United States of America…” [emphasis added]. The Canadian official asked his US counterpart what type of process the United States authorities were going to use, but the U.S. official “did not answer his question”; and  
- The Bureau officer also did not disclose in the affidavit in support of the application for the search warrant that he intended to subsequently apply for evidence-gathering orders, on the basis that he did not consider such information relevant.

It may come as a surprise to the reader that the United States officials, did not resort to search and seizure warrants in regards to the U.S. targets of the investigation even though the alleged offences occurred in their jurisdiction. Instead they issued Grand Jury subpoenas which, like evidence-gathering orders, merely require the production of documents and may compel testimony. It may come as a further surprise that the Canadian courts concluded that there was sufficient information to support the conclusion that it was not appropriate to issue evidence-gathering orders instead of search warrants. Justice Ratushny held:

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61 See note 42.  
62 Paragraph 12(1)(c) of the MLA Act.  
63 Falconbridge at ¶ 36-40.
It is certainly common sense to assume that crime participants may hide or destroy evidence if forewarned and particularly so for the personal and informal records that were sought under warrant …. With respect to the arguments that subpoenas were being used in the United States and that there was no basis for believing an offence had been committed under Canadian law, the import of them to this court on review, is something for speculation only and does not affect the reasonable conclusion that there was need for surprise.64

The Ontario Court of Appeal was not persuaded that the Justice Ratushny erred in her view that the information remained sufficient in light of the amplified record. The Court of Appeal emphasized their limited scope for review, noting that under Canadian law, they are not at liberty to substitute their view for that of the issuing judge65. The Court of Appeal was impressed by the Justice Ratushny’s observation that the targets of the searches “were not innocent third parties but persons alleged to be involved in the conspiracy”66. Because the records sought included personal notes and memoranda, among other things, the Court felt that these items were at risk of destruction and it was not apparent that the persons to be subpoenaed in the U.S. were similarly situated.67

The Ontario Court of Appeal did comment on the lack of disclosure relating to the fact that the U.S. authorities did not use search warrants. The Court of Appeal stated that this fact should have been disclosed, thereby possibly sending a signal that such non-disclosure may be an important element in future challenges. It is worth repeating the passage here:

We think that the Canadian authorities should have disclosed that the United States authorities intended to rely upon Grand Jury subpoenas rather than warrants (Mr. Coté’s version) or that they refused to say what process they intended to use (Mr. Drapeau’s version) but that non-disclosure did not remove the basis for granting the warrants. In cross-examination, Mr. Drapeau reaffirmed his position that there was a legitimate concern about destruction of evidence and it is open to the reviewing judge to accept that evidence. The alleged lack of candour, if it could be so characterized and we make no judgment on that, is not in the words of Cromwell J.A. in R. v. Morris (1998), 134 C.C.C. (3d) 539 (N.S.C.A.) at page 553 “so subversive of [the] process that the resulting warrant must be set aside to protect the process and the preventive function it serves.68

The general impression that Falconbridge leaves is that it would almost never be appropriate to issue an evidence gathering-order where the person whose premises are being searched is a target of the investigation. Certainly, the Ontario Court of Appeal appears convinced that the inherent

64 Falconbridge Application at ¶ 50.
65 Falcon bridge at ¶ 42.
66 Ibid. at ¶ 44
67 Ibid.
68 Ibid. at ¶ 45.
risk of destruction of evidence in such cases makes search warrants almost presumptively appropriate. One could argue that this low threshold diminishes the purpose of a two-tiered process since the courts are likely to resort to search warrants more often than not in these circumstances.

**Is a Section 1 Sherman Act offence an “offence” within the meaning of the USMLAT?**

As indicated above, with respect to requests made to Canada, the USMLAT only applies to an offence committed under U.S. law “for which the statutory penalty is a term of imprisonment of one year or more”\(^69\). In considering whether the USMLAT applies to a request from the United States Attorney General in respect of a possible violation of section 1 of the *Sherman Act*, it must be determined\(^70\) whether such an offence is one “for which the statutory penalty is a term of imprisonment of one year or more”.

Section 1 of the *Sherman Act* provides as follows:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court. [emphasis added]

The appellants in the *Falconbridge* case contended that the USMLAT requires that for a U.S. offence to be within the ambit of the USMLAT, it must “carry with it a mandatory minimum prison term of one or more years”. As a Section 1 *Sherman Act* offence clearly does not contain a minimum prison term, it did not, in the submission of the appellants, amount to an “offence” within the meaning of the USMLAT.\(^71\)

Justice Ratushny and the Ontario Court of Appeal did not agree with the appellants. Their views can be summarized as follows\(^72\):

- based on a plain reading of the definition of “offence”, Section 1 of the *Sherman Act* is included in such definition;
- the insertion of “mandatory” and “minimum” in the definition are not necessary to the plain meaning. “To do so would be to twist the plain language of the provision and add requirements that are contextually out of place and inconsistent

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\(^69\) Article I of the USMLAT. The USMLAT also applies to offences listed in an Annex to the USMLAT, which list of offences are not relevant to this discussion.

\(^70\) Canadian law remains unclear whether such a determination is made conclusively by Canada’s Minister of Justice who decides whether to approve a request or whether the judiciary also has a role in deciding whether the approved offence is covered by the USMLAT. See *Falconbridge* at ¶ 53-58.

\(^71\) *Falconbridge* at ¶ 60.

\(^72\) *Ibid.* at ¶ 61-64.
with the fair, large and liberal interpretation to the Acts and Treaties of this nature are entitled73.

- An “offence”, as it relates to Canadian offences, clearly includes circumstances where the Canadian offence would be punishable by a maximum term of six months imprisonment (with no minimum). Such an imbalance between the treatment of United States offences and Canadian offences would be unrealistic and contrary to the intention of the USMLAT74.

The conviction with which the Court of Appeal dismissed the appellants’ submissions that a section 1 Sherman Act offence is not an “offence” within the meaning of the MLA Act suggests that any challenges along these lines in the future are unlikely to meet with success.

**Reciprocity & Dual Criminality**

What if the offence for which one state is seeking assistance is not an offence in the state whose assistance is being sought? Is reciprocity or dual criminality a condition of the application of the MLA Act?

Subsection 8(1) of the MLA Act provides:

> If a request for mutual legal assistance is made under an agreement, the Minister may not give effect to the request by means of the provisions of this part unless the agreement provides for mutual legal assistance with respect to the subject-matter of the request. [emphasis added]

In light of subsection 8(1), did the principle of reciprocity in the Falconbridge case require that a section 1 Sherman Act offence amount to an offence under Canadian law? This issue is important because Canadian competition law that prohibits conspiracy requires, roughly speaking, a “rule of reason” approach75. Section 1 of the Sherman Act, on the other hand, can proceed on a per se basis. This gives rise to the possibility that certain acts would be prohibited by the Sherman Act but not prohibited by the Canadian Competition Act.76

In a 1999 judgment of the British Columbia Superior Court, Justice Owen-Flood had reached the conclusion that subsection 8(1) requires dual criminality.77 Armed with Justice Owen-Flood’s

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73 Ibid. at ¶ 62.
74 Ibid. at ¶ 63.
75 Section 45 of the Competition Act.
76 Although, as discussed below, the Ontario Court of Appeal concluded that section 45 of the Competition Act is the substantive counterpart of section 1 of the Sherman Act (a conclusion with which the authors, respectfully, disagree). See page 17 below.
77 See United States of America v. Stuckey (1999), 181 D.L.R. (4th) 144 at pp 163-64. Although Justice Owen-Flood found that the MLA Act required dual criminality, he ultimately held that the alleged offence (fraud) was an offence in the United States and Canada. The British Columbia Court of Appeal in United States of America v. Stuckey (2000), 194 D.L.R. (4th) 729 confirmed Justice Owen-Flood’s order, but held that the issue of dual criminality did not properly arise in that case (because, in fact, the alleged offence had a Canadian counterpart) and specifically declined to endorse or reject Justice Owen-Flood’s interpretation.
conclusion, the appellants in *Falconbridge* sought to obtain a similar ruling from the Ontario Court of Appeal (having failed to do so from Justice Ratushny).

The Ontario Court of Appeal agreed with Justice Ratushny’s conclusion. In her view, the purpose of subsection 8(1) of the MLA Act is to ensure that the Canadian Minister of Justice “is not to give effect to a request unless the treaty or agreement creates an international obligation to do so.”78 In other words, if the offence is one that is within the definition of “offence” in the MLAT (as for example a section 1 *Sherman Act* offence is in respect of the USMLAT), and if the kinds of assistance requested are within the obligations as set out in the Treaty, then the MLAT “provides for mutual legal assistance with respect to the subject-matter of the request”. Dual criminality or reciprocity is not an issue when this interpretation is applied.

The Ontario Court of Appeal went on to identify additional arguments in favour of the rejection of reciprocity. In particular, the Court of Appeal was careful to acknowledge the appellants’ distinction between dual criminality and reciprocity of offence. Because section 3 of Article II of the USMLAT provides: “Assistance shall be provided without regard to whether the conduct under investigation or prosecution in the Requesting State constitutes an offence or may be prosecuted by the Requested State”, the appellants conceded that the USMLAT expressly rejects dual criminality. Instead the appellants argued that subsection 8(1) of the MLA Act amounts to a “reciprocity of offence” requirement, defined as “a reciprocal right to make a request with respect to the same subject matter”79. The Ontario Court of Appeal summarized the appellants’ position as follows:

> In other words, according to the appellants, the focus of s. 8(1) is not on conduct but on the content of the offence for which assistance is being sought and specifically, whether an offence exists in Canada that can be said to be the substantial counterpart of the foreign offence.80

In rejecting the appellants’ submissions, the Ontario Court of Appeal described the appellants’ distinction as “formalistic, not in keeping with the spirit and intent of the [USMLAT] and capable of leading to illogical results”81. There does seem to be a compelling logic to the Court’s conclusion. As they suggest, it would seem an unusual result if a request by the United States under the USMLAT was invalid in the circumstance where the underlying conduct would amount to an offence in Canada, but there was not a Canadian substantive counterpart offence with the same content as the U.S. offence.

In any event, as the Court of Appeal noted, the Canadian Minister of Justice always has the right to deny assistance to the extent that the execution of the request is contrary to Canada’s public interest.82 Among other things, the Ontario Court of Appeal indicates that a law that would “shock Canada’s collective social conscience”83 should allow the Minister to exercise his right to

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78 *Falconbridge Application* at ¶ 73.
79 *Falconbridge* at ¶ 78.
82 Subsection 1(b) of Article V of the USMLAT.
83 *Falconbridge* at ¶ 83.

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deny assistance. If recent proposed reforms to Canadian competition law are any indication, it is quite unlikely that the application of section 1 of the Sherman Act would be considered as a shock to Canada’s collective social conscience.

**Are s. 45 of the Competition Act and s.1 of the Sherman Act Substantive Counterparts?**

Although *obiter dicta*, the Ontario Court of Appeal went on to conclude that had there been a requirement of reciprocity of offence, that section 45 of the Competition Act is, in fact, the substantive counterpart of section 1 of the Sherman Act.

The Court indicated that, in their view, the two restrictive trade offences in the two jurisdictions relate to and address the same subject matter and have the same object. In support of this conclusion they note that Justice Gonthier of Canada’s Supreme Court observed that “American antitrust law has developed the two paradigms of adjudication known as the ‘per se rule’ and the ‘rule of reason’” and that paragraph 45(1)(c) “lies somewhere on the continuum between a per se rule and a rule of reason”. The Ontario Court of Appeal goes on to say that the “offences in the two jurisdictions are closely connected and in our view, the nexus identified by Gonthier J. is sufficient to meet the ‘substantive counterpart’ test.”

We have difficulty agreeing with the Ontario Court of Appeal on this point. Canadian competition law, in relation to hard core cartel activity, is considered by some to be ineffective because of its distinction from U.S. law. One of the requirements of paragraph 45(1)(c) of the Competition Act is that the agreement “unduly” lessen competition. Thus, for example, if a group of trucking companies agree to fix prices for the supply of freight forwarding services from Toronto to various destinations in Western Canada, such an arrangement may not give rise to a violation of Canadian competition law if the Court has reasonable doubt as to the conspirators’ market power. U.S. antitrust law, on the other hand, would presumably treat such a price fixing as a *per se* violation of the Sherman Act with substantially different results.

This fundamental difference between section 1 of the Sherman Act and section 45 of the Competition Act is what leads us to suggest that they are not “substantive counterparts” of each other. We agree that cartel activity is at the heart of what both these provisions seek to regulate. However the “content” of both laws differ significantly, to the point were an act may be a crime in one country, but not in the other. On that basis we respectfully submit that while the two provisions are counterparts of each other, in respect of a fundamental aspect, they are substantively different.

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84 Proposals relating to, among other things, providing for a dual-track treatment of horizontal agreements: criminal *per se* treatment of hard core cartels (such as price-fixing and output restriction) and civil treatment of other horizontal arrangements. See http://strategis.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct02584e.html.

85 *Falconbridge* at ¶ 88-90.


87 *Falconbridge* at ¶ 90.

88 Which roughly sums up the recent case of *R. v. Clarke Transport Canada Inc.* (1995), 64 C.P.R. (3d) 289 (Ont. Gen. Div.) where the conspiring trucking firms were found not guilty of a violation of paragraph 45(1)(c) of the Competition Act because the Court was not satisfied beyond a reasonable doubt that the relevant market was limited to trucking services.
Alternative Mutual Legal Assistance

Since the *Falconbridge* litigation began, the mutual legal assistance landscape in Canada has evolved. In June 2002, various amendments were made to the *Competition Act* when Bill C-23 was passed by Parliament and came into force to provide a framework for entering into competition law related mutual legal assistance arrangements with other countries in circumstances where the MLA Act does not apply (such as non-criminal matters like abuse of dominance and mergers). Thus, even if substantive arguments succeed in limiting the application of the MLA Act, the Canadian competition authorities will be able to provide legal assistance through Part III of the *Competition Act* to countries with whom it has entered into a mutual legal assistance agreement. The mutual legal assistance agreements that may be entered into pursuant to Part III of the *Competition Act* could be considered inter-agency in scope since they would only apply to the enforcement of antitrust law, and therefore only have utility to agencies such as the Competition Bureau and its counterparts in foreign jurisdictions.

Given our discussion above of dual criminality and reciprocity, it is interesting to note that subsection 30.01(a) of the *Competition Act* provides that before Canada can enter into an agreement under Part III, the Minister of Justice must be satisfied that the laws of the foreign state that address conduct that is similar to conduct reviewable or prohibited under the *Competition Act* are substantially similar to the relevant provisions of the *Competition Act*.90

To date the Competition Bureau has not concluded an agreement with any country, although we understand that discussions are at an advanced stage with U.S. antitrust officials. The Competition Bureau has published on its website a copy of a model agreement that would presumably form the basis of an agreement with other countries91.

Conclusion

The *Falconbridge* case yielded Canada’s first jurisprudence relating to the interaction of the MLA Act and antitrust. *Falconbridge* made it clear that Canadian courts are supportive of the provision of legal assistance to foreign states who apply for assistance pursuant to an MLAT in respect of competition matters. While we certainly support measures that help combat cross-border anti-competitive and illegal activity, we remain uneasy about the apparent discrepancy between the treatment of the rights of Canadians under our Constitution. The standard applied by the Ontario courts in connection with the issuance of search warrants pursuant to the MLA Act (based on, among other things, double hearsay) appears to be lower than would be applied to the issuance of a search warrant under domestic Canadian law. It would not be surprising if

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89 Also known as *An Act to Amend the Competition Act*, Chapter 16, S.O.C., 2002.
90 See Part III, subsection 30.01(a) of the *Competition Act*.
92 The *Falconbridge* case prompted commentary such as “[t]he Court of Appeal has set a very low evidentiary standard for granting search warrants in response to foreign requests for legal assistance under the MLA Act. An accused will have very limited means to challenge a search warrant or a sending order under the MLA Act that is granted on the basis of the “double hearsay” evidence originating from an undisclosed foreign informant.”: *Ontario Court of Appeal Court Upholds Competition Commissioner’s provision of Mutual Legal Assistance to U.S. Antitrust Authorities (July 08, 2003)* prepared by Osler, Hoskin, Harcourt LLP, found at www.osler.com/index.asp?navid=1086&layid=1124&csid1=1445.
future case law reflects renewed attempts to challenge this standard on the basis of the Canadian constitutional right to be secure against unreasonable search and seizure.

We would also encourage cooperating antitrust agencies to seek to be consistent in their use of investigative tools (particularly search warrants directed at targets of an investigation). If search warrants are not being executed in the state seeking assistance, we would recommend that the agency providing assistance consider whether search warrants are appropriate in its jurisdiction. It seems only fair, as the Ontario Court of Appeal pointed out, that the assisting authorities make the effort to determine and let the issuing judge know how evidence is being gathered by the foreign investigators seeking assistance. That would, in our view, reflect the proper spirit of mutual legal assistance.
APPENDIX A

TREATY BETWEEN THE GOVERNMENT OF CANADA AND THE GOVERNMENT OF THE UNITED STATES OF AMERICA ON MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS
THE GOVERNMENT OF CANADA AND THE GOVERNMENT OF THE UNITED STATES OF AMERICA, DESIRING to improve the effectiveness of both countries in the investigation, prosecution and suppression of crime through cooperation and mutual assistance in law enforcement matters,

HAVE AGREED AS FOLLOWS:

ARTICLE I - DEFINITIONS

For the purposes of this Treaty,

"Central Authority" means

a. for Canada, the Minister of Justice or officials designated by him;

b. for the United States of America, the Attorney General or officials designated by him:

"Competent Authority" means any law enforcement authority with responsibility for matters related to the investigation or prosecution of offenses:

"Offence" means

a. for Canada, an offence created by a law of Parliament that may be prosecuted upon indictment, or an offense created by the Legislature of a Province specified in the Annex:

b. for the United States, an offense for which the statutory penalty is a term of imprisonment of one year or more, or an offense specified in the Annex:

"Public Interest" means any substantial interest related to national security or other essential public policy:

"Request" means a request made under this Treaty.

ARTICLE II - SCOPE OF APPLICATION

1. The Parties shall provide, in accordance with the provisions of this Treaty, mutual legal assistance in all matters relating to the investigation, prosecution and suppression of offenses.

2. Assistance shall include;
a. examining objects and sites;
b. exchanging information and object;
c. locating or identifying persons;
d. serving documents;
e. taking the evidence of persons;
f. providing documents and records;
g. transferring persons in custody;
h. executing requests for searches and seizures.

3. Assistance shall be provided without regard to whether the conduct under investigation or prosecution in the Requesting State constitutes an offence or may be prosecuted by the Requested State.

4. This Treaty is intended solely for mutual legal assistance between the Parties. The provisions of this Treaty shall not give rise to a right on the part of a private party to obtain, suppress or exclude any evidence or to impede the execution of a request.

ARTICLE III - OTHER ASSISTANCE

1. The Parties, including their competent authorities, may provide assistance pursuant to other agreements arrangements or practices.

2. The Central Authorities may agree, in exceptional circumstances, to provide assistance pursuant to this Treaty in respect of illegal acts that do not constitute an offense within the definition of offence in Article I.

ARTICLE IV - OBLIGATION TO REQUEST ASSISTANCE

1. A Party seeking to obtain documents, records or other articles known to be located in the territory of the other Party shall request assistance pursuant to the provisions of this Treaty, except as otherwise agreed pursuant to Article III(1).

2. Where denial of a request or delay in its execution may jeopardize successful completion of an investigation or prosecution, the Parties shall promptly consult, at the instance of either Party, to consider alternative means of assistance.

3. Unless the Parties otherwise agree, the consultations shall be considered terminated 30 days after they have been requested, and the Parties’ obligations under this Article shall then be deemed to have been fulfilled.
ARTICLE V - LIMITATIONS ON COMPLIANCE

1. The Requested State may deny assistance to the extent that

a. the request is not made in conformity with the provisions of this Treaty; or
b. execution of the request is contrary to its public interest, as determined by its Central Authority.

2. The Requested State may postpone assistance if execution of the request would interfere with an ongoing investigation or prosecution in the Requested State.

3. Before denying or postponing assistance pursuant to this Article, the Requested State, through its Central Authority,

a. shall promptly inform the Requesting State of the reason for considering denial or postponement: and
b. shall consult with the Requesting State to determine whether assistance may be given subject to such terms and conditions as the Requested State deems necessary.

4. If the Requesting State accepts assistance subject to the terms and conditions referred to in paragraph 3(b), it shall comply with said terms and conditions.

ARTICLE VI - REQUESTS

1. Requests shall be made by the Central Authority of the Requesting State directly to the Central Authority of the Requested State.

2. Requests shall be made in writing where compulsory process is required in the Requested State or where otherwise required by the Requested State. In urgent circumstances, such requests may be made orally, but shall be confirmed in writing forthwith.

3. A request shall contain such information as the Requested State requires to execute the request, including

a. the name of the competent authority conducting the investigation or proceeding to which the request relates;
b. the subject matter and nature of the investigation or proceeding to which the request relates;
c. a description of the evidence, information or other assistance sought;
d. the purpose for which the evidence, information or other assistance is sought, and any time limitations
relevant thereto; and

e. requirements for confidentiality.

4. The Courts of the Requesting State shall be authorized to order lawful disclosure of such information as is necessary to enable the Requested State to execute the request.

5. The Requested State shall use its best efforts to keep confidential a request and its contents except when otherwise authorized by the Requesting State.

ARTICLE VII - EXECUTION OF REQUESTS

1. The Central Authority of the Requested State shall promptly execute the request or, when appropriate, transmit it to the competent authorities, who shall make best efforts to execute the request. The Courts of the Requested State shall have jurisdiction to issue subpoenas, search warrants or other orders necessary to execute the request.

2. A request shall be executed in accordance with the law of the Requested State and, to the extent not prohibited by the law of the Requested State, in accordance with the dissections stated in the request.

ARTICLE VIII - COSTS

1. The Requested State shall assume all ordinary expenses of executing a request within its boundaries, except

   a. fees of experts;
   b. expenses of translation and transcription; and
   c. travel and incidental expenses of persons travelling to the Requested State to attend the execution of a request.

2. The Requesting State shall assume all ordinary expenses required to present evidence from the Requested State in the Requesting State, including

   a. travel and incidental expenses of witnesses travelling to the Requesting State, including those of accompanying officials: and
   b. fees of experts.
3. If during the execution of the request it becomes apparent that expenses of an extraordinary nature are required to fulfill the request, the Parties shall consult to determine the terms and conditions under which the execution of the request may continue.

4. The Parties shall agree, pursuant to Article XVIII, on practical measures as appropriate for the reporting and payment of costs in conformity with this Article.

ARTICLE IX - LIMITATIONS OF USE

1. The Central Authority of the Requested State may require, after consultation with the Central Authority of the Requesting State, that information or evidence furnished be kept confidential or be disclosed or used only subject to terms and conditions it may specify.

2. The Requesting State shall not disclose or use information or evidence furnished for purposes other than those stated in the request without the prior consent of the Central Authority of the Requested State.

3. Information or evidence trade public in the Requesting State in accordance with paragraph 2 may be used for any purpose.

ARTICLE X - LOCATION OR IDENTITY OF PERSONS

The competent authorities of the Requested State shall make best efforts to ascertain the location and identity of persons specified in the request.

ARTICLE XI - SERVICE OF DOCUMENTS

1. The Requested State shall serve any document transmitted to it for the purpose of service.

2. The Requesting State shall transmit a request for the service of a document pertaining to a response or appearance in the Requesting State within a reasonable time before the scheduled response or appearance.

3. A request for the service of a document pertaining to an appearance in the Requesting State shall include such notice as the Central Authority of the Requesting State is reasonably able to provide of outstanding warrants or other judicial orders in criminal matters against the person to be served.
4. The Requested State shall return a proof of service in the manner required by the Requesting State or in any manner agreed upon pursuant to Article XVIII.

ARTICLE XII - TAKING OF EVIDENCE IN THE REQUESTED STATE

1. A person requested to testify and produce documents, records or other articles in the Requested State may be compelled by subpoena or order to appear and testify and produce such documents, records and other articles, in accordance with the requirements of the law of the Requested State.

2. Every person whose attendance is required for the purpose of giving testimony under this Article is entitled to such fees and allowances as may be provided for by the law of the Requested State.

ARTICLE XIII - GOVERNMENT DOCUMENTS AND RECORDS

1. The Requested State shall provide copies of publicly available documents and records of government departments and agencies.

2. The Requested State may provide copies of any document, record or information in the possession of a government department or agency, but not publicly available, to the same extent and under the same conditions as would be available to its own law enforcement and judicial authorities.

ARTICLE XIV - CERTIFICATION AND AUTHENTICATION

1. Copies of documents and records provided under Article XII or Article XIII shall be certified or authenticated in the manner required by the Requesting State or in any manner agreed upon pursuant to Article XVIII.

2. No document or record otherwise admissible in evidence in the Requesting State, certified or authenticated under paragraph 1, shall require further certification or authentication.

ARTICLE XV - TRANSFER OF PERSONS IN CUSTODY

1. A person in custody in the Requested State whose presence is requested in the Requesting State for the purposes of this Treaty shall be transferred from the Requested State to the Requesting State for that purpose, provided the person in custody consents and the Requested State has no reasonable basis to deny the request.
2. The Requesting State shall have the authority and duty to keep the person in custody at all times and return the person to the custody of the Requested State immediately after the execution of the request.

ARTICLE XVI - SEARCH AND SEIZURE

1. A request for search and seizure shall be executed in accordance with the requirements of the law of The Requested State.

2. The competent authority that has executed a request for search and seizure shall provide such certifications as may be required by the Requesting State concerning, but not limited to, the circumstances of the seizure, identity of the item seized and integrity of its condition, and continuity of possession thereof.

3. Such certifications may be admissible in evidence in a judicial proceeding in the Requesting State as proof of the truth of the matters certified therein, in accordance with the law of the Requesting State.

4. No item seized shall be provided to the Requesting State until that State has agreed to such terms and conditions as may be required by the Requested State to protect third party interests in the item to be transferred.

ARTICLE XVII - PROCEEDS OF CRIME

1. The central Authority of either Party shall notify the Central Authority of the other Party of proceeds of crime believed to be located in the territory of the other Party.

2. The Parties shall assist each other to the extent permitted by their respective laws in proceedings related to the forfeiture of the proceeds of crime, restitution to the victims of crime, and the collection of fines imposed as a sentence in a criminal prosecution.

ARTICLE XVIII - IMPROVEMENT OF ASSISTANCE

1. The Parties agree to consult as appropriate to develop other specific agreements or arrangements, formal no informal.

2. The Parties may agree on such practical measures as may be necessary to facilitate the implementation of this Treaty.
ARTICLE XIX - RATIFICATION AND ENTRY INTO FORCE

1. This Treaty shall be ratified, and the instruments of ratification shall be exchanged at Washington, D.C., as soon as possible.

2. This Treaty shall enter into force upon the exchange of instruments of ratification.

ARTICLE XX - TERMINATION

Either Party may terminate this Treaty by giving written notice to the other Party at any time. Termination shall become effective six months after receipt of such notice.

ANNEX

The definition of offence includes offences created by the Legislature of a Province of Canada or offenses under the law of the United States in the following categories:

1. securities;
2. wildlife protection;
3. environmental protection; and
4. consumer protection.

IN WITNESS WHEREOF the undersigned, being duly authorized thereto by their respective Governments, have signed this Treaty.

DONE in duplicate, in the English and French, each language version being equally authentic, at Quebec City, this 18th day of March, 1985.

FOR THE GOVERNMENT OF CANADA
FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA