

**Cross-Border Co-operation in Combatting Cross-Border Fraud**

**The US/Canadian Experience**



**Unclassified**

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## FOREWORD

The growing use of network technologies and the global nature of electronic commerce increase the likelihood that consumers will interact with businesses outside of their home country. In turn, when problems arise, efforts to resolve cross-border disputes are often met with legal, procedural and factual obstacles that challenge traditional geographically based jurisdictional structures. Recognising the difficulties governments face in defining and enforcing jurisdictional boundaries in this environment, it seems clear that many consumer protection issues can be most effectively addressed through international consultation and co-operation. The Committee on Consumer Policy (CCP) kept these challenges and the need for global co-operation well in mind while developing the recent *OECD Guidelines for Consumer Protection in the Context of Electronic Commerce* (9 December 1999). The Guidelines include a number of recommendations specifically intended to encourage and facilitate global co-operation.

On 22 March 2000 the CCP held a half-day Forum Session intended to explore the challenges and possibilities associated with international co-operation. Using the experience of the United States and Canada as a practical example, the session provided an overview of ongoing efforts to combat the growing problem of cross-border fraudulent, misleading and unfair commercial conduct. The delegations of Canada and the United States took the leading role in preparing for the session, giving the Committee a first-hand look at their experiences working together to facilitate communication, information sharing, and bilateral co-operation in certain cross-border enforcement actions. The following is a summary record of the Forum Session and the presentations given by representatives from the Competition Bureau of Industry Canada and the United States Federal Trade Commission.

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## **CROSS-BORDER CO-OPERATION IN COMBATTING CROSS-BORDER FRAUD: THE US/CANADIAN EXPERIENCE**

### **National Agency Overviews**

#### ***The Competition Bureau of Industry Canada***

*Ms. Joanne D'Auray (Competition Bureau of Industry Canada)*

The Competition Bureau of Industry Canada<sup>1</sup> exists to help create an economic environment where Canadians can enjoy the benefits of lower prices, product choice and quality services in a vibrant and healthy marketplace. Headed by the Commissioner of Competition, the Bureau is comprised of six branches with specific responsibilities:

- Mergers Branch: responsible for the review of merger transactions, including pre-notification filing.
- Civil Matters Branch: investigates competition cases eligible for review by the Competition Tribunal and responsible for the Commissioner's appearances and interventions before regulatory boards and tribunals.
- Criminal Matters Branch: investigates criminal offences relating to anti-competitive behaviour (*i.e.* price fixing, price maintenance and bid-rigging).
- Fair Business Practices Branch: responsible for the investigation of civil and criminal offences relating to misleading advertising and other deceptive marketing practices.
- Economics and International Affairs Branch: co-ordinates the Bureau's work in the area of international issues and provides economic advice to other branches.
- Compliance and Operations Branch: responsible for the development of the Bureau's enforcement policy, the Compliance Program, communications, and public education, as well as the general planning, administration and information activities of the Bureau.

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<sup>1</sup> <http://competition.ic.gc.ca/>

## The Competition Act

To help achieve its overall mission, the Bureau is guided by and responsible for enforcing the *Competition Act* -- a general law intended to maintain and encourage competition and ensure that the marketplace operates efficiently. The *Act* is a federal law that has been in force for more than a century and applies to all sectors of the economy and nearly all businesses, regardless of size.

The *Competition Act* includes both civil and criminal law provisions. Civil provisions of the law cover making false or misleading representations, ineffective warranty, “ordinary price” claims, testimonials, “bait and switch” advertising, sales above advertised price, promotional contests, tied selling, exclusive dealing and abuse of dominant position. Along with conspiracy, bid-rigging, pyramid selling, and deceptive telemarketing, criminal offences under the *Act* include “knowingly and recklessly” making a false or misleading representation.

Under the misleading advertising and deceptive marketing practices provisions of the *Act*, a range of remedies and penalties can be imposed to resolve competition issues. Civil remedies can include orders to cease a particular conduct, to publish notices and information about a reviewable conduct and requiring payment of monetary penalties. Criminal penalties imposed by the courts can include fines and imprisonment for terms ranging from one to five years. Additionally, a recent amendment to the Criminal Code (Bill C-51) targets the proceeds of deceptive telemarketing for seizure and forfeiture.

## The Fair Business Practices Branch

The mission of the Fair Business Practices Branch is to promote fair competition in the marketplace by discouraging deceptive business practices and encouraging the companies to provide sufficient information to enable informed consumer choice. Its mandate is to administer the misleading and deceptive marketing practices provisions of the *Competition Act*, the *Consumer Packaging and Labelling Act*, the *Textile Labelling Act*, and the *Precious Metals Marketing Act*. The current priorities of the Fair Business Practices Branch include combatting deceptive telemarketing and mail solicitations, multilevel marketing, promotional contests, Internet advertising and other e-commerce issues -- problems that ignore national boundaries in the increasingly global marketplace.

## ***United States Federal Trade Commission***

*Commissioner Mozelle W. Thompson (United States Federal Trade Commission)*

The Federal Trade Commission (FTC)<sup>2</sup> is an independent law enforcement agency created by the United States Congress in 1913. The FTC's mission is to ensure that there is full and fair competition in the marketplace and to ensure that consumers are protected from deceptive and unfair trade practices. Full and fair competition gives consumers access to the widest array of goods and services at the lowest prices and effective consumer protection enhances consumer trust and confidence in the marketplace. Together, the consumer protection and the competition missions of the FTC promote the larger goals of facilitating informed consumer choice within the market and preventing consumer injury.

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<sup>2</sup> <http://www.ftc.gov>

Under the leadership of its Chairman and four Commissioners, two separate but equally important bureaux, the Bureau of Competition and the Bureau of Consumer Protection, carry out the overall mission of the FTC. The Commission is empowered to: prevent unfair or deceptive acts or practices affecting commerce; seek monetary redress or other relief for injuries to consumers; prescribe trade rules that define with specificity the acts or practices that are unfair or deceptive and establish requirements to prevent such acts; conduct investigations related to the organisation, business practices and management of entities engaged in commerce; and make reports and legislative recommendations to Congress.

#### Bureau of Competition

The FTC's competition (or antitrust) mission is integral to the consumer protection mission. In many instances, competition cases challenge conduct that illegally restricts consumer information and choice in the marketplace. The basic objective of the FTC's competition mission is to keep the marketplace free from anti-competitive business practices and prevent the accumulation of market power that makes those practices possible. The Commission seeks to prevent anti-competitive mergers, price fixing, and other activities that limit competition, striving to maintain a balance between restraining illegal activity and permitting legitimate business activities.

#### Bureau of Consumer Protection

The FTC's Bureau of Consumer Protection is specifically charged with protecting consumers against unfair, deceptive, or fraudulent practices. The Bureau is divided into five divisions, each with its own areas of expertise:

- Division of Advertising Practices
- Division of Enforcement
- Division of Financial Practices
- Division of Marketing Practices
- Division of Planning & Information

The Bureau of Consumer Protection enforces a variety of consumer protection laws enacted by Congress, as well as trade regulation rules issued by the Commission. Its actions include individual company and industry-wide investigations, administrative and federal court litigation, rule-making proceedings, and consumer and business education efforts. In addition, the Bureau contributes to the Commission's efforts to inform Congress and other government entities of the impact that many proposed actions could have on consumers.

#### Federal Trade Commission Act – Section 5

The FTC is the only US agency at the national level with broad consumer protection law enforcement powers. Section 5 of the *Federal Trade Commission Act* prohibits unfair or deceptive acts or practices in or affecting commerce. The Commission also enforces 28 other consumer protection statutes that prohibit specific practices, for example the *Truth in Lending Act*, which, among other things, provides chargeback protections for consumer credit cards. In addition, the agency issues regulations which have the force of law, guides and policy statements intended to interpret the law and describe its enforcement, and, on occasion, advisory opinion letters.

The FTC's consumer protection work is aimed at preventing deception and unfairness. The Commission's standard for deception is that a deceptive representation, omission, or practice is likely to mislead consumers acting reasonably under the circumstances and is "material" -- that is, likely to affect consumers' conduct or decisions with respect to the product or service being marketed. A claim may be explicit or implied, and an advertiser is responsible for all material claims that consumers take from the ads, not just the claims that the advertiser intended to make. An unfair practice is one that causes or is likely to cause substantial injury to consumers, where that injury is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits of the practice. Unfair practices include, for example, the debiting of consumer bank accounts without the consumers' authorisation.

The Commission's consumer protection law enforcement actions attempt to prevent future harm to consumers, usually through court or Commission orders that prohibit misleading practices. The Commission may also seek orders that require law violators to return money to consumers or release their illicitly obtained funds to the government. If a court order is violated, the violators may have to pay additional fines or, in some circumstances, a contempt action may be issued resulting in imprisonment. Those who violate Commission orders may also have to pay fines to the government.

The FTC also has administrative powers and can obtain an administrative cease and desist order barring unfair or deceptive practices. If a respondent violates an order it can be held liable for civil penalties up to USD 11 000 for each violation as well as such other and further equitable relief (including monetary awards) in appropriate cases. There is a wide range of relief available in certain cases, for example in 1999 the Commission levied a civil penalty against Mazda motors for a deceptive lease advertising in which the company -- already under a consent order with the FTC -- was then penalised USD 5 million for violating that order.

### **Historical Evolution of Cross-border Fraud**

*Ms. Lisa Rosenthal (United States Federal Trade Commission)*

The widespread use of telemarketing as a tool for business began approximately 20 years ago in the United States. Telemarketing allowed businesses of all sizes to reach a large number of geographically dispersed consumers very easily and at very low cost. The tremendous growth of this industry was spurred, in part, by developments in the telecommunications industry and the ability for companies to make long distance phone calls and even international phone calls much more cheaply.

These improvements, however, have come with a cost -- not simply the annoyance of telemarketing calls at the dinner hour -- but the alarming increase in telemarketing fraud using scams, often targeting the elderly. The Federal Trade Commission has seen the growth of telemarketing fraud not just domestically, but also across borders. Clever scam artists have exploited the US-Canadian border by setting up shop in one country and targeting only consumers located in another country. In a number of cases, Canadian telemarketing companies have purchased lists of elderly women in the United States over age 65 and use only those lists in making their phone calls and solicitations.

These clever scam artists are exploiting two realities. First they know that the law enforcement authorities in the countries in which they are located have little incentive to spend their scarce resources to protect the consumers of another country. In fact, in many cases, law enforcement agencies may be prohibited by statute to act on behalf of consumers located in another country. Second, they are taking advantage of the legal and practical hurdles faced by the law enforcement agencies in the countries in which the consumers are located. For example the United States does have significant powers and resources to stop fraudulent practices, such as the ability to freeze assets and require that certain

information be turned over to the FTC. However, while this authority exists in US courts and allows the FTC to exercise its powers against companies located in countries outside the United States that cause harm to US citizens, the FTC does not have the power to enforce those powers in another country.

The latest technological advancement in communications to have a significant impact on business-to-consumer communications is the Internet. Advertising, marketing and sales information that was once constrained by geographical borders and the limited reach of more traditional media can now be sent quickly and easily to a global consumer audience. For the most part, the Internet is a profoundly pro-consumer development allowing access to an increasing array of goods and services from around the world 24 hours a day, seven days a week. It also provides a wonderful opportunity for businesses -- particularly small and medium-sized businesses -- with its low barriers to entry offering access to a world wide customer base.

Unfortunately however, the Internet also provides new opportunities to scam artists. The networked environment enables them to further exploit the borderless marketplace and, in fact, the Internet has become a breeding ground for fraud and for scam artists. This also poses new and significant challenges to law enforcement. While still facing the same issues that arise in the context of telemarketing fraud, new issues and challenges caused by the increase in cross-border interactions are on the rise -- businesses located anywhere can harm consumers located anywhere, very cheaply, very quickly and often anonymously. Developments in communications technology and the networked environment have made it more important than ever before for law enforcement agencies from around the world to work together and to share information wherever possible to help protect consumers both nationally and internationally.

### **Consumer Sentinel – Bi-national Consumer Fraud Network**

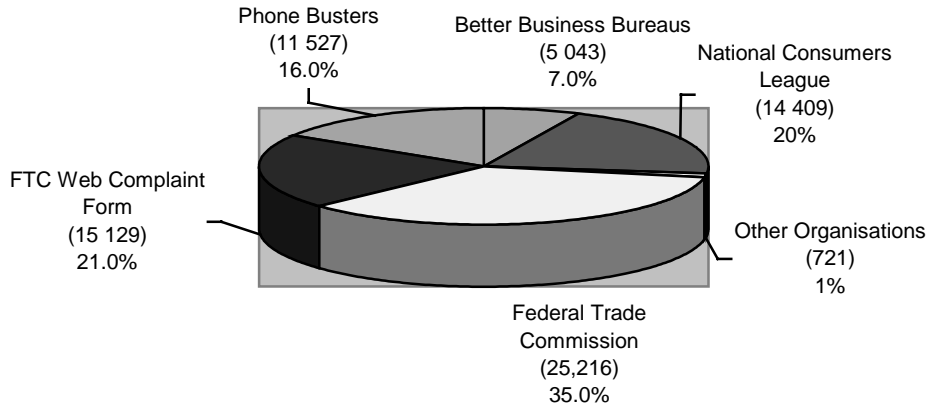
*Mr. Michael Donohue, US Federal Trade Commission*

The *Consumer Sentinel* is a bi-national telemarketing network that provides law enforcement agencies in the United States and Canada with secure access to over 225 000 consumer complaints about telemarketing, direct mail, and Internet fraud. Law enforcement agencies and private organisations contribute consumer complaints to a database that is searchable using any combination of 10 fields of information including the name, address and telephone number of the firm complained about, the type of fraud complained of, and the country and state or province of the consumer. The Consumer Sentinel database is a joint effort of the United States FTC and the *National Association of Attorneys General* along with *CANSHARE* and *Phonebusters* of Canada and affords password protected access to more than 230 US and Canadian law enforcement agencies.

#### Consumer complaint statistics 1995-1999

A variety of statistics can be derived from the consumer complaints recorded by the Consumer Sentinel. These statistics provide a great deal of valuable information, allowing investigators to search the database for problems with particular companies and enabling law enforcement agencies to monitor the statistics to see where the problems are and to spot emerging trends. For the five-year period from 1995 through 1999, these aggregate statistics clearly reveal that telemarketing, direct mail, and Internet fraud is booming and increasingly international.

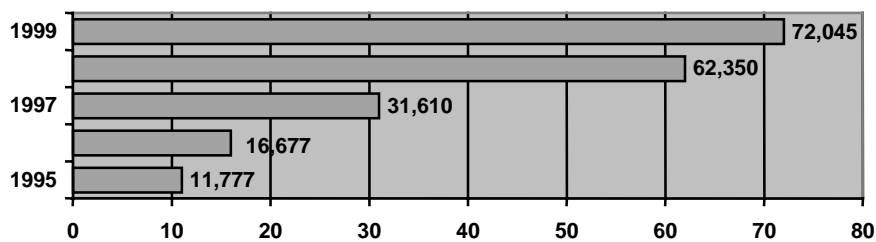
Figure 1. **Source of Complaints for Calendar year 1999**



The complaints in Consumer Sentinel are received from a number of sources. The data show that approximately 72 000 complaints were collected in 1999 by six different sources. Figure 1 outlines the various sources, as well as the different means by which complaints are collected -- for example, 21% were collected via an Internet complaint form. Consumers may complain to any of these entities, regardless of nationality or location.

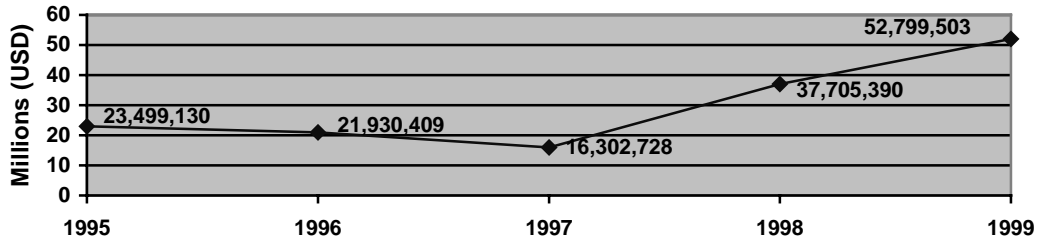
The total number of consumer complaints recorded in Consumer Sentinel consistently increased between 1995 and 1999. Figure 2, with 11 777 complaints in 1995 and 72 045 in 1999. Because law enforcement agencies believe that only a small, albeit relatively constant, fraction of consumers complain, these data are the proverbial tip of the iceberg of ongoing telemarketing, direct sales, and Internet fraud.

Figure 2. **Total consumer complaints**



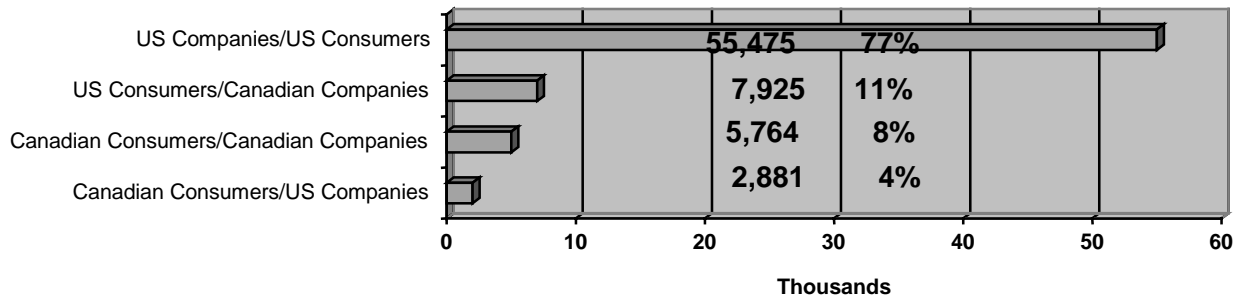
Consumer Sentinel also captures data about injury to consumers (the amounts consumers claim to have paid to the companies in their complaints). The data show that the amount of injury claimed by complaining consumers increased substantially between 1995, when total claimed injury was USD 23 499 130 and 1999, when it rose to USD 52 799 053 (Figure 3). While significant, these claimed losses almost certainly understate total claimed injury because not all consumers who complain provide information about their loss and they are therefore treated as not having a loss in the injury computation. In addition, the injury computation includes only losses for the small fraction of injured consumers who actually complain.

Figure 3. **Claimed consumer injury**



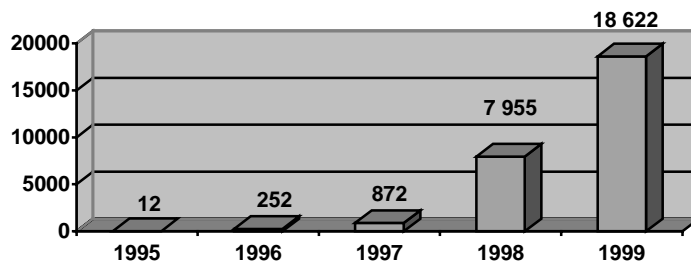
The Consumer Sentinel also provides data that relate the number of complaints received to the locations of the company being complained about and the complaining consumers (Figure 4). In 1999, most of the complaints (approximately 77%) are from US consumers complaining about US firms. However, the data also show that a significant proportion of the complaints (approximately 15%) is related to scams reaching across national borders. When reviewed over a period of years, these data indicate that scams are increasingly international.

Figure 4. **Complaint distribution by company location - 1999**



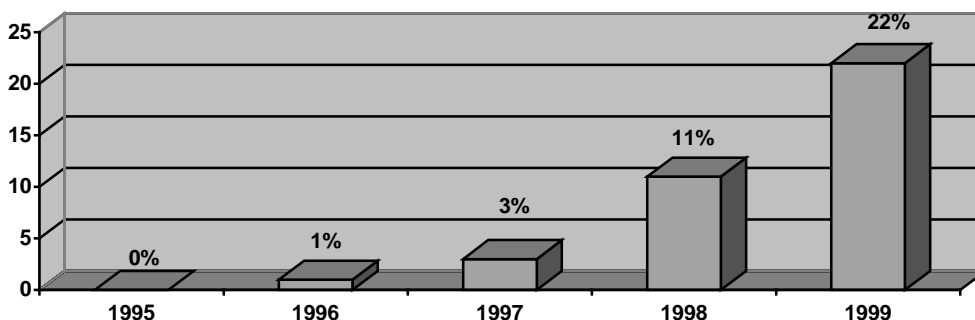
In the Consumer Sentinel database, Internet-related complaints range from complaints where the Internet was used only to make the initial contact with the consumer to complaints where the entire transaction took place online. Based on the number of complaints, fraud that makes use of the Internet has increased substantially since 1995. The number of Internet-related complaints has increased from 12 in 1995 to 18 622 in 1999. (Figure 5.)

Figure 5. Internet related complaints



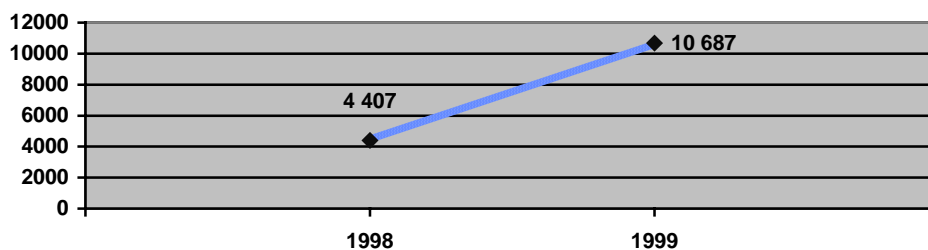
In breaking down the total number of complaints, the data show that Internet-related complaints, as a percentage of total complaints, have increased steadily from approximately 1% in 1996, to 11% in 1998, and doubling to around 22% in 1999. (Figure 6.)

Figure 6. Internet related complaints as a percentage of total complaints



The Consumer Sentinel also allows the enforcement agencies to isolate data. For example, the data show that the volume of a specific type of Internet-related complaint -- Internet auctions -- has increased tremendously in the last few years (Figure 7). Complaints about Internet auctions increased from 4 407 in 1998, to 10 687 in 1999.

Figure 7. Internet auction complaints



## Framework for Canadian-US Cross-border Co-operation

Illegitimate business practices and consumer fraud have an increasingly international component. Scam artists attempt to avoid the authorities in one jurisdiction by targeting consumers in another, tailoring scams to the interests of consumers in countries other than their own. Effective law enforcement across borders can be enhanced through information sharing and enforcement co-ordination. Canadian and US efforts to combat telemarketing and Internet fraud are illustrative of how enforcers have used both informal and formal co-operation arrangements to successfully combat cross-border fraud.

### Information sharing

The type and scope of information that can be shared depends on the relevant national laws. The experiences that Canada and the United States have gained in respecting and navigating these laws provide a practical example of what works and what still needs to be done. In Canada, pursuant to section 29 of the *Competition Act*, unless it has been made public, it is prohibited to communicate to any person other than a Canadian law enforcement agency or for the purposes of the administration or enforcement of the *Act*, the identity of any person from whom information was obtained and any information obtained through an order to produce a written return, or a record, or by a search warrant.

In the United States, the Federal Trade Commission's framework for information sharing is based on a number of specific constraints. There are four categories of investigation related materials that neither the Commission nor the FTC staff are authorised to share with any members of the public (including representatives of other national governments). These categories include: confidential commercial information; information received by the Commission pursuant to compulsory process (comparable to a subpoena); information received by the Commission which is marked confidential but is submitted without the issuance of a subpoena or compulsory process; and all other information marked confidential. Information in this final category, however, can be disclosed if i) it does not also fall under the first three categories, and ii) if the person that submitted the request for confidentiality is notified that it will be disclosed and that person does not object to the disclosure within a ten day period.

With the approval of the Commission, the FTC is allowed to share unsolicited consumer complaints with foreign law enforcement agencies as long as there is a guarantee that all personal information remains confidential. All other information can be disclosed to people and other bodies at the discretion of the Commissioners.

### Mutual Legal Assistance

The Mutual Legal Assistance Treaty (MLAT) and its enabling statute in Canada, the Mutual Legal Assistance in Criminal Matters Act (MLACMA) provides the basic legal framework that allows a law enforcement agency to request formal assistance from another country relating to criminal activity. It provides for specific mechanisms such as search warrants, document production and orders for oral examination. Both Canada and the United States have entered into this type of bilateral co-operation agreement with a number of other countries.

Additionally, in 1995 the Canada-US Agreement regarding the Application of their Competition and Deceptive Marketing Practices Laws established a framework for closer relations between the two countries. The agreement includes a number of specific obligations including, for example:

- Notification -- Each country must notify the other about enforcement activities that affect the other's important interests. (For example activities that: involve anti-competitive practices

originating or being carried out in its territory; involve conduct that the other country required, encouraged, or approved; or involve remedies that would require or prohibit conduct in the other country.) However, formal notification obligations do not currently apply to enforcement activity related to the misleading advertising and deceptive marketing practices provisions of the Competition Act or to the labelling statutes in respect of any other jurisdictions.

- Enforcement co-operation -- The parties recognise their common interest in co-operating: i) to detect anti-competitive activities or deceptive marketing practices; ii) to enforce their competition laws and deceptive marketing practices laws and iii) to share information, to the extent legally possible and compatible with each country's interests.
- Co-ordination -- The parties recognise that, in appropriate cross-border cases, co-ordination of their enforcement activities may be warranted.
- Meetings -- Include a commitment to hold official biannual meetings.

In 1996, a U.S.-Canadian Task Force on Cross-border Deceptive Marketing Practices was created. The Task Force is intended to identify suspected deceptive marketing operations that are based in either country where the victims of the illegal activity are residents of the other country.

In April 1997, US President Clinton and Canadian Prime Minister Chrétien established a US-Canada Working Group on Telemarketing Fraud and directed it to report on ways to counter the serious and growing problem of deceptive cross-border telemarketing. The Working Group's report, released in November 1997, recommended expanding co-operation and information sharing because they allow law enforcement agencies to avoid duplication of effort and more quickly identify and prosecute ongoing fraud.

### **Other Co-operative Activities**

#### **Internet Surf Days**

As cross-border fraud continues to flourish on the Internet, enforcement authorities are taking advantage of the new technology to develop new ways to fight it. A prime example of such innovative activity can be found in the recent "Internet Surf Days" (or Internet sweep days). Surf days are a co-ordinated effort where law enforcement agencies from across the country and sometimes from around the world get on the Internet at the same time to search for Web sites making fraudulent claims. The searchers are generally looking for a specific kind of scam as they search, such as false claims about health care products or fraudulent business opportunities. The targeted sites are then sent e-mail-warning letters notifying them that the claims that they are making may be against the law. This is done in part to deter fraudulent activity and in part to reach new entrepreneurs and alert those who may be unwittingly violating the law.

The most recent surf day, "GetRichQuick.Con," focussed on Internet-based get rich quick scams, including pyramid schemes, business opportunity and investment schemes, work-at-home schemes, and deceptive day-trading schemes. This was the largest ever, international law enforcement project to fight Internet fraud and involved 150 organisations from 28 countries on five continents. As part of Get.Rich.Quick.Con., surfers from around the world identified about 2 300 suspicious sites, of which about 1 600 received warning e-mails signed by most of the surf participants. In connection with this surf, a Web

site was specially designed to assist in co-ordination. The site included online instructions for the surfers, a contact list, and finally an area to input the results of the search to allow for easier and more comprehensive data.

#### International Marketing Supervision Network (IMSN)

The IMSN is, as its name implies, an international network of government consumer protection enforcement agencies. The primary objective of the IMSN is to facilitate practical action and information sharing in an effort to prevent deceptive marketing practices and provide effective and appropriate redress. The IMSN works to foster co-operative efforts to tackle consumer problems connected with cross-border transactions in both goods and services. It facilitates the exchange of information among the participants for mutual benefit and understanding. The IMSN Web site has a great deal of valuable public information including on-screen links to Member country Web sites and, in some cases includes special bridge pages to provide basic information about the country and its enforcement policies and activities. The site also provides contact information for IMSN members and information about past enforcement activities and sweep day results. The IMSN also maintains a password protected Intranet site only for its members where government enforcers can exchange more detailed information about national enforcement actions.

#### **Conclusion**

The growing popularity of the Internet and other innovative technologies allows advertising, marketing, and sales information that were once constrained by geographical borders and the limited reach of more traditional media to be sent quickly and easily to a global consumer audience. Over the past decade, technology has enabled legitimate commercial activities to grow and increasingly flow across borders. Scam artists are taking advantage of these same technological advances to target consumers in other countries quickly, easily and cheaply. As co-operative efforts like the Consumer Sentinel, CANSHARE and the various bilateral agreements between Canada and the United States show, effective information sharing and co-operation among enforcers has greatly increased and achieved very positive results. There is, however, still much room for discussion about how to broaden and enhance global efforts to combat cross-border fraud.