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M. T. MacCrimmon

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## CONTROLLING ANTICOMPETITIVE BEHAVIOUR IN CANADA: A CONTRAST TO THE UNITED STATES

By M.T. MACCRIMMON\*

### I. INTRODUCTION

Canadian and American competition rules address the same types of collusive or exclusionary anticompetitive behaviour. The purpose of this article is to discuss some of the similarities and differences of these laws. The first section of the paper will outline briefly the Canadian legislation. Following that, the discussion of the rules of the two countries is divided into two parts: administration and enforcement, and substantive application of the rules.

Three themes underlying the discussion are judicial methodology, legislative reform, and economic structure. First, Canadian judicial decisions reflect a mechanical judicial methodology which relies on conceptual analysis and ignores the role of legal rules as a means of effecting the ends of the legislation.<sup>1</sup> In particular, there is an unwillingness by both judges and counsel

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\* Associate Professor, Faculty of Law, The University of British Columbia. I am indebted to W.T. Stanbury, Malcolm Smith and David Cohen for their helpful comments. I am also grateful to the Law and Economics Program at the University of Chicago Law School for creating a stimulating environment for study and research during my stay as a fellow in 1981-82.

<sup>1</sup> See Pound, *Mechanical Jurisprudence*, (1908), 8 Colum. L. Rev. 605; and White, *Tort Law In America* (Oxford: Oxford University Press, 1980) at 71; Dewees, "The Courts and Economic Regulation" in Freidland, *Courts and Trials: A Multidisciplinary Approach*, (Toronto: University of Toronto Press, 1975) at 119; Weiler, *Court of Last Resort* (Toronto: Carswell/Methuen, 1974). The attitude of Canadian courts towards economic evidence is changing. See *R. v. Consumers Glass* (1981), 57 C.P.R. (2d) 1 (Ont. S.C.). However, the following statement in 1942 in *R. v. Container Materials* [1942] S.C.R. 147, (1942), 74 C.C.C. 113 at 118 accurately reflects the judicial attitude in many cases:

to consider the economic rationale for controlling anticompetitive behaviour and to consider the underlying intent of Parliament in adopting the legislation. Hence judges have been reluctant to give a purposive reading to the provisions of the principal Canadian legislation, the *Combines Investigation Act*.<sup>2</sup> Four recent decisions of the Supreme Court which have made some of the provisions virtually unenforceable were partly the result of a failure to appreciate the economic impact of the activities.<sup>3</sup> In contrast, in the United States, the courts, which have not been reluctant to consider economic evidence, have taken the broad provisions of the *Sherman Act* and developed specific rules against anticompetitive conduct.<sup>4</sup> These decisions have effectively curbed activities such as price fixing, market sharing agreements, and monopolization.

The second theme is legislative reform. Since the early 1970s there have been several unsuccessful attempts to legislate changes to competition law in Canada.<sup>5</sup> Critics have abandoned any expectation that effective competition laws will evolve through the process of adjudication, particularly in the light of the recent decisions of the Supreme Court. The latest official public reform proposal was made in the spring of 1981 by the Minister of Consumer and Corporate Affairs.<sup>6</sup> Although it appears that this attempt at reform has failed, discussion of the proposals will aid in understanding Canada's approach to

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It is well for the Court to avoid even the suspicion of political bias but rather to leave to the statesmen and the economist, the decision as to what modifications of the law, indeed if any, are in the public interest . . . I do not feel that I am justified in the circumstances of this case, in developing any new jurisprudence based on alleged new or fashionable economic theory[.]

<sup>2</sup> R.S.C. 1970, c. C-23 as amended by 1970, c. 10 (1st Supp.), s. 34; 1970, c. 10 (2nd Supp.), s. 65; 1974-75-76, c. 76.

<sup>3</sup> *R. v. K.C. Irving Ltd.* (1977), 32 C.C.C. (2d) 1, 72 D.L.R. (3d) 82 (S.C.C.). *Aetna Insurance Co. et al v. R.* (1977), 34 C.C.C. (2d) 157, 30 C.P.R. (2d) 193 (S.C.C.). *Atlantic Sugar Refineries Co. Ltd. et al. v. R.* (1980), 54 C.C.C. (2d) 373, 115 D.L.R. (3d) (S.C.C.). *Jabour v. The Law Society of British Columbia* (1979), 98 D.L.R. (3d) 442 (B.C.S.C.), (1981), 115 D.L.R. (3d) 549 (B.C.C.A.), (1982) 5 W.W.R. 289 (S.C.C.).

<sup>4</sup> *Sherman Act*, (1890), 26 Stat. 209, (1974) as am. 15 U.S.C.A. s. 2.

<sup>5</sup> See Stanbury, *Business Interests and the Reform of Canadian Competition Policy, 1971-1975* (Toronto: Carswell/Methuen, 1977); Prichard, Stanbury and Wilson (eds.) *Canadian Competition Policy: Essays in Law, Economics* (Toronto: Butterworths, 1979). Attempts at reform since 1969 are: Bill C-256, 1971; Stage I, Bill C-227, 1973-75; Stage II, 1976-78; Bill C-42, 1976-77; Bill C-13, 1977-78. In 1976, some amendments were adopted. See Canada, Bureau of Competition Policy, *Background Papers: Stage I, Competition Policy* (Ottawa: Department of Consumer and Corporate Affairs, 1976) and Kaiser, "The Stage I Amendments", in Prichard, *et al.*, *supra*, at 25.

<sup>6</sup> Minister of Consumer and Corporate Affairs, "Proposals for Amending the Combines Investigation Act: A Framework for Discussion" (Ottawa: Dept. of Consumer and Corporate Affairs, April, 1981, mimeo 22 pp.). See Stanbury and Reschen-thaler, *Reforming Canadian Competition Policy* (1980-81), 5 Can. Bus. L.J. 381. While this is the latest official public proposal, draft legislation was prepared following the Minister's proposals which was never introduced. Its contents have not been revealed to the general public although the government has shown parts of the draft legislation to a selected group of business representatives including representatives from the Canadian Chamber of Commerce, the Canadian Manufacturers' Association and the Business Council on National Issues. It is possible to glean some of the contents of the draft legislation from an article by Linda McQuaig in *Maclean's Magazine*, July 18, 1983, "Ottawa's Cautious Competition Bill." A more complete summary of the draft legislation is contained in: *Ottawa Revises Combines Law Reform Proposals* (1983), 4 Can. Comp. Policy Record 3. Subsequent notes will point out the differences between the Minister's 1981 proposals and the draft legislation.

competition policy.<sup>7</sup> The Canadian reliance on Parliament to initiate reform may be contrasted to the United States, where many rule changes have evolved largely without legislative change. For instance, it is expected that the 1982 Department of Justice Guidelines on Mergers will reshape the judicial view of mergers.<sup>8</sup> In another instance, the Department of Justice has issued a statement calling for judicial reinterpretation of the *per se* illegality of resale price maintenance. It has also intervened on the side of the defendant in a case to be decided by the United States Supreme Court during the 1983 term on the basis that resale price maintenance is justified in certain circumstances.<sup>9</sup>

The third theme is the contrast between the economic structure of Canada and the United States. Economist Richard E. Caves has described the Canadian economy as "small, open to international trade, rather capital intensive, geographically dispersed in some of its markets, and a net importer of technology and of direct investment."<sup>10</sup> The Canadian economy is much more concentrated, although the largest companies in Canada are smaller than their American counterparts. The higher concentration is linked to the minimum size required by economies of scale and there is a conflict between increasing the number of competitors and efficiency. Currently, imports are constrained by a variety of government measures such as customs tariffs, import controls, and antidumping laws.<sup>11</sup> Removal of these constraints and increasing competi-

<sup>7</sup> See Gwyn, "Lalonde Trading Competition Act for Popularity," *Ottawa Citizen*, Dec. 30, 1982 at 8. A new Minister of Consumer and Corporate Affairs, Judy Erola, was appointed in August, 1983. She is the seventh person to hold the portfolio in twelve years. In August, 1983, she stated that the timing of the introduction of competition policy legislation was "up in the air," *The Globe and Mail*, August 24, 1983. While she is committed to bringing in changes "sooner rather than later," she wants to discuss the matter with the cabinet before promising that changes will be made and the timing of such changes. The prospect of legislative change is not bright. It is evident nothing will happen before 1984 and many doubt that any changes will be introduced in the light of the upcoming federal election campaign.

<sup>8</sup> Reproduced in (1982), 27 *Antitrust Law Bulletin* 619, and CCH Trade Reg. Rep. No. 546, Extra Ed., June 16, 1982.

<sup>9</sup> Reproduced in (1982), CCH Trade Reg. Rep. para. 50, 442. The Reagan administration is not relying solely on administrative persuasion. *Spray-Rite Service Corp. v. Monsanto Co.* 684 F.2d 1226 (7th Cir. 1982) (Cert. granted 2-28-83). See "A Powerful Bid to Rewrite the Antitrust Rule Book" *Business Week*, October 10, 1983 at 84. *The Wall Street Journal* on March 29, 1983 at 3, reported that William Baxter announced that proposals have cleared the Reagan cabinet, aimed at "strengthening US competitiveness in world trade." The proposals include a reduction in "rule of reason" civil cases from triple to single damages and increased protections for patent holders. In addition, Baxter announced he is working on several proposals to rewrite antitrust laws including one that would require resale price maintenance be judged under a rule of reason.

<sup>10</sup> Caves, "Industrial Concentration, Corporate Size, and Market Power: Economic Evidence and Strategic Choices for Canadian Competition Policy" in Prichard *et al.* (eds), *supra* note 5, 505 at 506. See also Caves, Porter and Spence, *Competition in the Open Economy* (Cambridge: Harvard University Press, 1980); Khemani, *Concentration in the Manufacturing Industries of Canada: Analyses of Post-War Changes* (Ottawa: Consumer and Corporate Affairs, 1980).

<sup>11</sup> *Anti-dumping Act*, R.S.C. 1970, c. A-15. See also, Slayton, *The Anti-dumping Tribunal* (Ottawa: Minister of Supply and Services, 1979). The Anti-dumping tribunal will impose an anti-dumping duty if it decides dumping (selling goods in Canada at a lower price than in the exporters' country) has caused or is likely to cause material injury to production in Canada of like goods or materially retard establishment in Canada of the production of like goods. Canada has enacted countervailing duty regulations under the *Customs Tariff Act*, R.S.C. 1970 c. C-41 dealing with foreign government subsidization of exports.

tion from foreign goods has been suggested as an alternative means of curbing the oligopolistic power of many industries in Canada.<sup>12</sup> Others conclude that tariff reductions will not force firms to become efficient and that Canadian firms can only compete internationally by becoming much bigger.<sup>13</sup> Based on these characteristics, many have argued that the *per se* rules of the United States are not appropriate in Canada. They argue for minimal intervention and placing reliance on "reinvigorating and reinforcing the dynamic forces" of the market and, further, they argue that each case should be decided on its merits in order to arrive at "economically realistic decisions."<sup>14</sup> The problem is to design competition laws that are appropriate for Canada's economic structure.

A large proportion of domestic economic activity is regulated or controlled by the government in Canada.<sup>15</sup> The regulated sector is very large. Some twenty-nine percent of gross domestic product was subject to some form of direct regulation in 1978.<sup>16</sup> Each province regulates at least one hundred trades, occupations or professions.<sup>17</sup> Provincial agricultural marketing boards account for one-quarter of all farm receipts.<sup>18</sup> Canada's economy is a public enterprise economy. There were at least 233 provincial Crown corporations in 1980 and at least 460 federal ones (including subsidiaries).<sup>19</sup> They account for over one-half of domestic passenger air travel, one third of the expenditures of all radio and television broadcasters in Canada, and almost one half the rail freight transported. It has been estimated that there are sixty-one federal "cor-

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<sup>12</sup> Caves, *supra* note 10.

<sup>13</sup> Skeoch, with MacDonald, *Dynamic Change and Accountability in a Canadian Market Economy* (Ottawa: Minister of Supply and Services, Canada, 1976). Skeoch sees an increasing integration with the world economy. This will be the natural result of the "special skills or strong public reputations" of multinational enterprises. "The developments which will influence the manufacturing and high technology industries will be international — unless inhibited by government intervention" (at 97). See also Skeoch, "The Dynamic Change Report and the Proposed Competition Act" in Prichard *et al.*, *supra* note 5 at 80, 88 and Stanbury, *Dynamic Change and Accountability in a Canadian Market Economy: Summary and Critique* (1977), 15 Osgoode Hall L.J. 1 at 21.

<sup>14</sup> *Id.*, *Dynamic Change* at 97 and 202.

<sup>15</sup> As of 1978 (the latest figure available), the scope of regulation was about the same in both countries while the intensity of social regulation was greater in the U.S. See Stanbury and Thompson (1982) *Regulatory Reform in Canada* (Montreal: The Institute for Research on Public Policy); Economic Council of Canada, *Reforming Regulation* (Ottawa: Minister of Supply and Services, November, 1981).

<sup>16</sup> *Reforming Regulation*, *id.* at 1. In the United States about 26% of the GDP is subject to some form of regulation. See also Stanbury and Lerner, *Regulation and the Redistribution of Income and Wealth* (Unpublished paper, Faculty of Commerce, University of B.C., November, 1982, forthcoming, in *Can. Public Administration*).

<sup>17</sup> Evans and Stanbury, *Occupational Regulation in Canada* (University of Toronto, Faculty of Law. Law and Economics Workshop Series WS III-17, April 1981, mimeo).

<sup>18</sup> Forbes, *et al.*, 1982 *Economic Intervention and Regulation in Canadian Agriculture* (Ottawa: Economic Council of Canada & Institute for Research on Public Policy/Minister of Supply and Services, 1982).

<sup>19</sup> Howard and Stanbury, "Measuring Leviathan: The Size, Scope and Growth of Governments in Canada" in Lerner (ed.), *Government and the Market Economy* (The Fraser Institute, forthcoming).

porate enterprises” which represent roughly sixty-eight percent of the total assets of the Federal Government. Federal and provincial Crown corporations produce about one-eighth of the gross national product.<sup>20</sup>

All of this activity occurs without any constraints imposed by the *Combines Investigation Act*. Recent judicial decisions have exempted the activities of regulated industries and Crown corporations from the Act. In *Jabour v. The Law Society of British Columbia*,<sup>21</sup> the Supreme Court held that an action taken pursuant to a provincial regulatory scheme was exempt from the Act. A recent decision of the Ontario Court of Appeal<sup>22</sup> held that, under the doctrine of Crown immunity, Crown corporations are exempt from the Act unless liability is specifically provided by statute. In this case, the Crown corporations were in competition with privately owned businesses against which proceedings had been initiated and subsequently dropped.

In contrast, in the United States, regulated activities are subject to the antitrust laws unless the state clearly indicates its intention to regulate the specific activity and adequately supervises that regulation.<sup>23</sup> Thus a larger proportion of domestic economic activities are exempt from the competition laws in Canada.

## II. CANADIAN LEGISLATION: THE COMBINES INVESTIGATION ACT

Legislative control of anticompetitive conduct began at about the same time in Canada and the United States. The first competition law in Canada was passed in 1889, a year before the *Sherman Act*, and was incorporated in the Criminal Code in 1892. The first *Combines Investigation Act* (Act) was passed in 1910. From that time until 1960 anticompetitive behaviour was regulated under the *Criminal Code* and the Act, at which time the *Criminal Code* provisions were deleted and embodied in the Act.<sup>24</sup>

Enforcement of the Act is carried out by three different administrative officials or bodies: the Director of Investigation and Research initiates inquiries, the Restrictive Trade Practices Commission (Commission) appraises and reports, and the Attorney-General prosecutes. The Act divides prohibited conduct into criminal offences (Part V) and civil reviewable matters (Part IV.1). Provision is also made for general inquiries into anticompetitive practices.

<sup>20</sup> Langford, *The Unchartered Universe of Federal Public Corporations* (Unpublished paper, School of Public Administration, University of Victoria, November 1980).

<sup>21</sup> *Supra* note 3. See Stanbury, “Provincial Regulation and the Combines Investigation Act: The *Jabour* Case” 1983, forthcoming.

<sup>22</sup> *R. v. Uranium Canada Ltd. and Eldorado Nuclear Ltd.*, July 16, 1982, (Ont. C.A.) unreported. Apparently the draft legislation, *supra* note 6, contains an entirely new proposal to make Crown Corporations subject to the *Combines Investigation Act*. See *Canadian Competition Policy Record*, *supra* note 6 at 3.

<sup>23</sup> *Parker v. Brown*, 317 U.S. 341, 63 S. Ct. 307 (1943); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum Inc.*, 445 U.S. 97, 100 S. Ct. 937 (1980). See Gellhorn and Pierce Jr., *Regulated Industries* (St. Paul: West Publishing Co., 1982).

<sup>24</sup> See Stanbury, W.T., *The Legislative Development of Canadian Competition Policy, 1881-1981* (1981), 2 Can. Competition Policy Record 1 (No. 2).

### A. *Criminal Matters: Part V*

Alleged violations are investigated by the Director,<sup>25</sup> while guilt or innocence for criminal offences is determined by the courts. After an investigation, the Director may discontinue or make a recommendation to the Attorney-General that the case be prosecuted (section 15). An alternative procedure, which has not been used since 1975, is for the Director to refer the matter to the Commission which holds a hearing and prepares a report (section 18). The Attorney-General would then consider the report and decide whether to prosecute. The decision to prosecute in criminal matters rests exclusively with the Attorney-General.

Three general classes of activities are prohibited: agreements to lessen competition unduly (section 32), participation in mergers and monopolies detrimental to the public interest (section 33), and unfair trade practices including price discrimination, predatory pricing (section 34(a), (b) and (c)), misleading advertising,<sup>26</sup> the granting of promotional allowances on disproportionate terms (section 35) and resale price maintenance (section 38). The 1976 amendments added the following offences: bid-rigging (section 32.2), implementing foreign directives giving effect to illegal agreements (section 32.1), pyramid and referral selling (sections 36.3 and 36.4), certain conspiracies in relation to professional sports (section 32.3), double ticketing (section 36.2), and bait and switch selling (section 37). The criminal offences in Part V, other than misleading advertising and deceptive marketing practices, are indictable. The maximum penalty for conspiracy in restraint of trade is a one million dollar fine or five years imprisonment or both. The other offences carry an unlimited fine at the discretion of the court or imprisonment from two to five years or both.

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<sup>25</sup> S. 8, *Combines Investigation Act*, *supra* note 2. — The Director has extensive investigatory powers. He may, with the approval of a member of the Commission, on an *ex parte* application, require written returns supplying such information as the Director requests including full disclosure of contracts and agreements (s. 9). With the approval of a member of the Commission, the Director may enter premises and copy or seize documents without specifying the specific sections of the Act which is being investigated (s. 10). The Director may require anyone to appear before the Commission and be examined under oath (s. 12). The search and seizure powers of the Director under ss. 10(1) and (3) have been attacked as being contrary to the right against unreasonable search and seizure, s. 8 of the *Charter of Rights*. The Alberta Court of Appeal in *Southam Inc. v. Director of Investigation and Research*, [1983] 3 W.W.R. 385 (Alta. C.A.), held section 10(1) and (3) to be invalid on the basis that: (1) The Commission was not an independent, impartial decision maker, (2) s. 10(3) did not require that the Director have reasonable grounds to suspect an offence had been committed and (3) s. 10(3) did not require that the application be supported by evidence on oath. The search powers are discussed in *Helix Investments Ltd. v. Director of Investigation and Research* 2 June 1983, Court No. T-1180-83, unreported (Fed. Ct.-Trial Div.). Although it was not necessary to decide their validity, Walsh J. notes that the provisions lack the controls normally found in the common law and suggests it might be necessary for a judge to make the decision on search warrants.

Apparently the draft legislation, *supra* note 6, would require the Director to inform the person in charge of the premises of the nature and scope of the inquiry and a person under inquiry would have the right to be informed of the progress of the inquiry. See *Canadian Competition Policy Record*, *supra* note 6 at 4.

<sup>26</sup> S. 36. This paper does not discuss misleading advertising. See Kaiser, *World Law of Competition Unit A North America: Canada* Vol. 3A (New York: Mathew Bender, 1982) Chapter 6.

### B. Civil Reviewable Matters: Part IV.1

Civil reviewable matters are adjudicated by the Commission. The Commission is empowered to receive applications from the Director to review various restrictive practices listed in Part IV.1 and to issue remedial orders which are binding upon the parties named in it (sections 31.2-31.9). Failure to comply with such an order is an offence and is subject to a fine, imprisonment, or both. Civil reviewable matters include refusals to deal (section 31.2), consignment selling (section 31.4), exclusive dealing (section 31.6), tied selling (section 31.4) and market restriction (section 31.4(3)). The Commission may also review judgments of foreign law directing the conduct of Canadian companies, (section 31.5), the application of foreign law to the Canadian subsidiary of a foreign parent (section 31.6), and the refusal of a foreign supplier to supply in Canada (section 31.7).

### C. General Inquiries

Either the Director, the Commission, or the Minister may conduct general inquiries into practices or conditions which are related to restraint of trade (section 47(1)(a)). The Minister may initiate general inquiries by the Director and the Commission into any matter related to the policy and objectives of the Act (section 47(1)(b)). The Commission is currently conducting two general inquiries: The Telecommunications Equipment Inquiry and an inquiry into the state of competition in the Canadian petroleum industry. In addition, the Director has standing to make representations before any federal administrative agency concerning competition.<sup>27</sup>

## III. ADMINISTRATION AND ENFORCEMENT

Administration and enforcement will be contrasted under the following subject headings: private enforcement, institutional arrangements, and informal enforcement procedures.

One striking contrast is the absence in Canada, until 1976, of a statute-based, *private action* for damages caused by anticompetitive behaviour. In the United States, enforcement is primarily through private action — ninety-five percent of all antitrust actions are private actions for treble damages.<sup>28</sup> Few private actions have been brought in Canada. Furthermore, it does not appear that the private action will become an important tool of enforcement in the near future at least until the constitutionality of the provision is established.<sup>29</sup>

<sup>27</sup> See Restrictive Trade Practices Commission, *Annual Report*, March 31, 1981 at 22-24.

<sup>28</sup> See Posner, *A Statistical Study of Enforcement* (1970), 13 J. of Law & Econ. 365.

<sup>29</sup> S. 31.1(1) creates a statutory cause of action for damages caused by violations of Part V, criminal offences or failure to comply with an order of the Commission or a court order made under the Act. The record of prior proceedings in which the defendant was convicted of a violation of the Act or of an order of the Court or the Commission is, in the absence of any evidence to the contrary, proof that the defendant engaged in conduct contrary to the Act. The constitutionality of this provision is in doubt. Section 31.1 was upheld in *Henuset Bros. Ltd. v. Syncrude Canada Ltd.* (1980), 52 C.P.R. (2d) 173, 114 D.L.R. (3d) 300 (Alta. Q.B.) and held to be *ultra vires* in *Seiko Time Canada v. Consumers Distribution Co.* (1980), 29 O.R. (2d) 221, 50 C.P.R. 147 (Ont. H.C.) and *Rocois Construction Inc. v. Quebec Ready Mix Inc.* (1979), 51 C.C.C. (2d) 516, 105 D.L.R. (3d) 15 (Ont. H.C.). As of 1982 there had been 5 actions under s. 31.1, three of which challenged the constitutionality of the provision.



Even if the constitutionality issue is settled, private actions may not become popular because of the limitation to single damages and the difficulty of bringing a class action.<sup>30</sup> The injured are more likely to rely on a tort action for damages for conspiracy.<sup>31</sup>

<sup>30</sup>The *Combines Investigation Act* does not provide for a class action whereby those injured by conduct contrary to the Act could sue in one representative class. This was proposed in Bill C-42 and C-13 in 1977. See Reid, "Class Actions: Deterrence, Redress or Legal Nightmare" in Rowley and Stanbury (eds.) *Competition Policy in Canada: Stage II, Bill C-13* (Ottawa: Institute for Research on Public Policy, 1978). Plaintiffs must rely on the Rules of Court in each province, e.g. British Columbia Supreme Court Rule 5(11). The courts have required that plaintiffs seek recovery from a fund in which all class members have a common interest so that individual claims do not require an individual assessment. A recent Supreme Court of Canada decision has upheld an Ontario Court of Appeal decision which overturned a trial decision permitting owners of Firenza automobiles to bring a class action to recover damages for a design defect under Ontario Rules of Practice, R. 75. In *General Motors of Canada Ltd. v. Naken* (S.C.C.) March 25, 1982 (unreported). Five judges, in a unanimous decision, limited Ontario Rule 75 (which is essentially the same as B.C. Rule 5(11)) to cases where "there is created in the course of the action or as a result thereof a fund or a pool of assets. The fund is then subject to *pro rata* distribution . . . according to their respective participation . . ." at 28. The claim of Firenza owners raised serious problems about the identification of the members of the class. It would be necessary to determine in each case whether the claimant had purchased the car with reference to the advertising of the defendant and the damages (limited by the pleadings to \$1000). Damages could not be calculated on the basis of the decrease in the resale price of the car because some could have purchased the car for "infinite retention." Class actions may be available, however, in s. 31.1 actions for damages caused by price fixing conspiracies. In that case there is no need to calculate damages on an individual basis. Rather all the members of the class calculate their damage using the same formula: the number of items purchased times the amount of the overcharge. See *Alberta Pork Producers Marketing Board v. Swift Canadian Co.* (1981), 16 Alta. L.R. (2d) 313, 129 D.L.R. (3d) 411 (Alta. Q.B.) The plaintiffs claimed damages by reason of the tortious conspiracy of the defendants to purchase hogs at a price lower than what would have prevailed in the absence of the conspiracy. The Court held a class action was available. See Estey J. in *Naken, supra* at 24. See Prichard, *et al.*, "Private Enforcement and Class Actions" in Prichard, *et al.*, *supra* note 5.

<sup>31</sup>See *B.C. Lightweight Aggregate v. Canada Cement La Farge Ltd.* [1981] 4 W.W.R. 385, 26 B.C.L.R. 292 (B.C.C.A.) (common law action for the tort of conspiracy). The plaintiffs claimed they had suffered damages caused by the defendants' price fixing and market sharing agreement. The defendants had pleaded guilty to conspiracy charges under s. 32 of the *Combines Investigation Act*. The trial judge awarded damages of \$750,000. The common law tort of conspiracy was established by a finding that "the defendants conspired to eliminate all competitors and succeeded in so doing." It was not necessary to show an express intent to injure the plaintiff. It was sufficient that the plaintiff "fell within the broad objective of the conspiracy." The British Columbia Court of Appeal upheld the decision of the trial judge. The Supreme Court reversed the Trial and Court of Appeal decisions and dismissed the action, (1983), 145 D.L.R. (3d) 385 (S.C.C.). Estey J. delivering the judgment defined two cases in which the tort of conspiracy to injure is available:

- (1) whether the means used by the defendants are lawful or unlawful, the predominant purpose of the defendants' conduct is to cause injury to the plaintiff; or,
- (2) where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff (alone or together with others), and the defendants should know in the circumstances that injury to the plaintiff is likely to and does result.

A constructive intent to injure is sufficient under case two. This can be inferred from "the fact that the defendant should have known injury to the plaintiff would ensue." (at 399). Estey J. held that case one did not apply and that the plaintiffs failed to bring themselves within case two because they were not the targets of the conspiracy. They were suppliers not competitors of the defendants. The conspiracy "had to be directed towards the participation of the plaintiff in the concrete products market . . ." (at 400) Estey J. also decided there was no casual connection between the unlawful activities of the defendants and the commercial demise of the plaintiffs.

Two characteristics of the *institutional arrangements* in Canada are the separation of the functions of investigation, prosecution and adjudication as well as the granting of exclusive jurisdiction over each function to a different administrator. First, there is a separation of functions; in particular, the separation of the initiation of cases and adjudication in civil matters between the Director and the Commission. In contrast, the Federal Trade Commission in the United States initiates the cases that it decides. The functions of investigation and prosecution are separated between the Director and the Attorney-General in Canada. They are combined under the Department of Justice in the United States. Second, overlapping jurisdictions are eliminated in Canada. In the United States, the Federal Trade Commission and the Department of Justice have concurrent jurisdiction to investigate and bring proceedings under the *Sherman Act* and the *Clayton Act*.<sup>32</sup> In Canada, only the Director on his own initiative or on the direction of the Minister begins inquiries into either civil or criminal matters.<sup>33</sup> The Attorney-General has exclusive discretion to prosecute and the Director has exclusive jurisdiction to initiate hearings into civil reviewable matters.

The Federal Trade Commission has been criticized on the ground that it initiates the cases it decides. These criticisms have been investigated and rejected by Posner who points out that separation of functions may cause problems of coordination.<sup>34</sup> Canadians appear satisfied with the current separation of investigation and adjudication between the Director and the Commission which has been described as a "necessary, independent check on the single minded enthusiasm of the investigators and policy makers."<sup>35</sup> In fact, recommendations have been made to further separate their functions by transferring the present requirement that the Commission approve of the use of investigatory powers by the Director to a court even though there is no evidence that bias is created by the existing arrangement.<sup>36</sup>

The separation of the investigative and prosecutorial functions between the Director and the Attorney General has meant that some cases are not as vigorously prosecuted as some might desire. This separation of functions also impedes the development of a consistent, centrally-controlled competition policy. It has been suggested that the Director be empowered to lay charges directly and to develop a small, specialized, legal staff together with selected outside counsel to argue the case.<sup>37</sup> If this recommendation is adopted, Canada's institutional arrangements would be better designed to produce a consistent competition policy than the arrangement in the United States

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<sup>32</sup> See Neale and Goyder, *The Antitrust Laws of the United States of America* (Cambridge: Cambridge University Press, 1980), Chapter 12.

<sup>33</sup> S. 8, *Combines Investigation Act*, *supra* note 2. The Minister may overrule a decision to discontinue an inquiry: s. 14(4).

<sup>34</sup> Posner, *The Behaviour of Administrative Agencies* (1972), 1 J. of Leg. Studies 305.

<sup>35</sup> Skeoch, *Dynamic Change*, *supra* note 13 at 326.

<sup>36</sup> *Id.* at 321. See discussion *supra* note 25 on attacks on these powers based on the right against unreasonable search and seizure, s. 8 of the *Charter of Rights*.

<sup>37</sup> Stanbury, *supra* note 13 at 6. Stanbury refers to "the demonstrated lack of enthusiasm of the Department of Justice for combines cases" and "their extensive capacity to repeatedly 'review' and delay justiciable prosecutions."

whereby control is dispersed between the Federal Trade Commission, the Department of Justice and private plaintiffs.<sup>38</sup>

Use of informal administrative enforcement is much more extensive and appears to be more effective in the United States than in Canada. Informal enforcement in the United States includes guidelines, advisory opinions, agreements, and consent decrees.<sup>39</sup> In Canada, the Director has an informal programme of compliance under which he will advise firms as to his opinion on the legality of their actions.<sup>40</sup> Firms are not legally required, however, to contact the Director. There is no mandatory pre-merger notification requirement as there is in the United States.<sup>41</sup> It is difficult to evaluate the effectiveness of this programme because the only data relates to the firms that did ask for advice and not the impact of competition rules on the firms which did not. It is reasonable to assume that this latter group could be quite large given the historically conservative approach of the courts and the recent Supreme Court decisions. The ineffectiveness of the merger legislation, however, is demonstrated by the fact there were only six requests for clearance from 1968 to 1975, a period in which there were hundreds of mergers.<sup>42</sup> Not all critics favour an extensive compliance programme. One critic viewed it as a "necessary evil rather than a virtue" and recommended that the Director should not negotiate with business people except for the non-recurring actions of mergers and rationalization agreements.<sup>43</sup> The imposition in the United States, in 1974, of procedural protections to increase the thoroughness of judicial scrutiny of consent decrees was partly a reaction to criticism that the government was too lenient in granting settlements.

In addition to providing advisory opinions, the Director has issued guidelines on such conduct as mergers and specialization agreements.<sup>44</sup> There

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<sup>38</sup> See Hawk, "EEC and U.S. Competition Policies — Contrast and Convergence" in Rowe, *et al.* (eds.) *Enterprise Law of the 80's* (New York: American Bar Association, 1980).

<sup>39</sup> See Sullivan, *Handbook of the Law of Antitrust* (St. Paul: West Publishing Co., 1977) chapter 6; and Branfman, "Antitrust Consent Decrees — A Review and Evaluation of the First Seven Years Under Antitrust Procedures and Penalties Act" (1982), 27 *Antitrust Bul.* 303.

<sup>40</sup> See Director of Investigation and Research, *Annual Report* for a discussion of each year's activities. For a discussion and evaluation of the program see Gorecki and Stanbury, "Canada's Combines Investigation Act: The Record of Public Law Enforcement, 1889-1976" in Prichard, *et al. supra* note 5 at 135.

<sup>41</sup> S. 7A of the *Clayton Act*, enacted in 1976, 15 U.S.C.A. s. 18a. Apparently the draft legislation, *supra* note 6, would require notification to the Director of mergers involving assets or revenues in excess of \$500 millions where the business to be acquired had assets or revenues of \$20 millions or more. See *Canadian Competition Policy Record, supra* note 6 at 6.

<sup>42</sup> Gorecki, *The Administration and Enforcement of Competition Policy in Canada, 1960 to 1975: an Application of Performance Measurement* (Ottawa: Ministry of Supply and Services, 1979) at 111:

businessmen had no desire to be addressed upon the subject of the merger provisions realizing that the implication of the *Beer* and *Sugar* decisions essentially meant the law was a dead letter.

<sup>43</sup> Skeoch, *Dynamic Change, supra* note 13 at 221.

<sup>44</sup> Mergers: Director of Investigation and Research, *Annual Report*, March 31, 1966 printed in Kaiser, *World Law of Competition, Canada*, Vol. 3A (New York: Mathew Bender, 1982) at s. 10.04. Specialization Agreements: Henry, "Anti-Combines Legislation in Canada," Meredith Memorial Lectures, McGill University, 1971, printed in Kaiser, s. 8.07. Trade Associations: Henry, Address to the Institute of Association Executives, June 2, 1961, printed in Kaiser, at s. 8.06.

is some enforcement of negotiated settlements in Canada. The Director has no formal power to require undertakings from firms although, recently, the Director did obtain an undertaking in a merger investigation whereby the acquiring firm agreed to treat the target firm as a passive investment.<sup>45</sup> Prohibition orders have been obtained in cases in which there has been no charge or if charges are laid there is no assessment of guilt.<sup>46</sup> In contrast to the Federal Trade Commission, the Commission does not have the power to issue trade regulation rules. The Cabinet makes regulations under the Act.<sup>47</sup>

#### IV. SUBSTANTIVE RULES

The following discussion will focus on the substantive offences of cartel agreements, monopolization, mergers, and vertical restraints such as resale price maintenance and exclusive dealing.<sup>48</sup>

##### A. Cartels

Agreements among firms to restrain competition are governed by section 32 of the Act which prohibits conspiracies, combinations, agreements or arrangements that lessen competition unduly.<sup>49</sup> Between 1910 and 1975, there

<sup>45</sup> Director of Investigation and Research, *Annual Report*, March 31, 1979 at 22-25.

<sup>46</sup> See *infra* at note 85.

<sup>47</sup> S. 48, *Combines Investigation Act*, *supra* note 2.

<sup>48</sup> Due to lack of space, conduct specified in the Act such as: misleading advertising, and price discrimination, will not be discussed. In Canada price discrimination which is injurious to competition among the purchasers of the discriminating seller (secondary-line discrimination) is regulated by section 34(1)(a) of the Act. The Crown must show that the seller knowingly engages in a practice of selling articles of a like quality and price, at a price which is different from that offered at the same time to the competitors of the purchaser. The section, in addition to price advantage, covers concessions such as discounts, allowances, rebates, other advantages, etc. The requirement of discrimination against competitors means that sales to final consumers are not covered by the section. The Crown must show that the purchaser receiving the advantage and other buyers are competitors. The section applies only to articles, not services. Volume discounts are permitted without showing that they are cost justified as is required by Section 2 of the *Clayton Act* as amended by the *Robinson Patman Act* in the US (15 U.S.C.A. s. 13 as amended 49 Stat. 1526 (1936)). In addition, the seller must know it is price discriminating. It would not be guilty, for example, if it did not know the purchasers were competitors. Section 31.3(b) makes the practice of consignment selling for the purpose of price discrimination a civil reviewable matter. There is doubt whether s. 34(1)(b) catches sellers who charge higher prices for a product with the seller's name on it than for products to which purchasers affix their own brand names. The Director, in 1966, doubted whether branded and nonbranded products were of the same quality. (Address of the Director of Investigation and Research August 10, 1966, p. 10). In the United States, it has been held these are the same product and that the practice is price discrimination. The Supreme Court held in *FTC v. Borden* (1966) 383 U.S. 637, 86 S.C. 1092, that there would be no injury to competition if the price difference merely reflected consumer preferences for the sellers' brand name. See Dunlop, "Price Discrimination, Predatory Pricing and Systematic Delivered Pricing" in Pritchard *et al.*, *supra* note 5 at 405, Moore, "Delivered Pricing, Price Discrimination and Price Differentiation" in Pritchard, *id.* at 421; Nozick, *The Regulation of Price Discrimination Under the Combines Investigation Act*, (1976), 54 Can. Bar. Rev. 309. There has been one prohibition order under subsection (a): *R. v. Mary Maxim Knitting Wool*, May 16, 1968, Exchequer Court of Canada, unreported.

<sup>49</sup> Four categories of offences are enumerated in section 32. First, to limit unduly facilities in relation to a product; second, to limit unduly the production of the product or unreasonably enhance its price; third, to lessen competition in the various stages of production and distribution of a product or in the price of insurance; and fourth, "to otherwise restrain or injure competition unduly." Product includes services. In 1976 a new section (s. 32(1.1)) was added to make it explicit that it is not necessary to prove that the parties intended to eliminate completely or virtually all competition.

were seventy-four prosecutions under section 32.<sup>50</sup> This compares with a total of 989 horizontal conspiracy cases brought by the United States Department of Justice from 1890 to 1969.<sup>51</sup> Two recent Supreme Court of Canada decisions adopted stricter rules for conspiracies and the success rate of the Crown dropped from ninety-seven percent in the five years from 1970 to 1975 to forty-eight percent during the period 1975 to 1981.<sup>52</sup>

In contrast to the *Sherman Act*, the Canadian legislation prohibits only those agreements which lessen competition "unduly." In the United States, the courts have classified some agreements as illegal *per se*.<sup>53</sup> In Canada the effect of every agreement must be assessed to determine if it is "undue." Courts have differed as to the appropriate criteria for this assessment. For example, is it confined to an evaluation of the effect on competition or may benefits such as increased employment be taken into account? Even if "undue" is confined to the impact on competition, does it require that competition be completely eliminated or is it sufficient that the parties control a substantial part of the market?

The two recent Supreme Court decisions of *Aetna Insurance* and *Atlantic Sugar* address the issues of 1) the extent to which competition must be lessened, 2) the admissibility of evidence of public benefit and 3) the definition of agreement.<sup>54</sup> Before these decisions, agreements where the parties controlled less than all the market were found to have an "undue" effect. In the 1982 decision in *Atlantic Sugar*, the Supreme Court appears to adopt the test that competition must be lessened to the point where "the participants in the agreement become free to carry on those activities virtually unaffected by the influence of competition."<sup>55</sup> The Court held that a "tacit" agreement by three companies to maintain their market shares over thirteen years where the three jointly accounted for over ninety percent of the market was not an undue lessening of competition. It found that competition had not been eliminated because all price competition had not been suppressed, although there was some discounting to large buyers.

The 1976 amendment to the Act, which specifies that virtual elimination of competition is not necessary, did not apply because the conduct in *Atlantic Sugar* took place before 1976. It is doubtful, however, that the outcome would have been any different because the question of undueness is still a question of fact and it would be open to a court to acquit where the defendants have less than the whole market. In *Atlantic Sugar*, the Supreme Court failed to appreciate the quality of the competition that remained. For example, it is not

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<sup>50</sup> Gorecki, *supra* note 40 at 187.

<sup>51</sup> While this difference is partially explained by the difference in the size of the economies, the U.S. figure does not reflect cases brought by the FTC. Stanbury concludes that "in absolute terms the number of antitrust cases in Canada has been small." Prichard, *supra* note 5 at 159.

<sup>52</sup> Stanbury, *Materials on Competition Policy*. (unpublished, University of British Columbia, Faculty of Law, 1982).

<sup>53</sup> See Neale, *supra* note 32, chapter 1.

<sup>54</sup> *Supra* note 3. See McFetridge and Wong, *Agreements to Lessen Competition After Atlantic Sugar* (1980-81), 5 Can. Bus. L.J. 329; Reschenthaler and Stanbury, *Recent Conspiracy Decisions in Canada: New Legislation Needed*, (1981), 26 Antitrust Bul. 839.

<sup>55</sup> This is the text adopted by Cartwright J. in *Howard Smith Paper Mills Ltd. et al. v. The Queen*, [1957] S.C.R. 403 at 406, 118 C.C.C. 321 at 345 (S.C.C.).

uncommon for a few big buyers or even a monopolist to receive discounts from oligopolistic sellers while the great bulk of sales are made at list price to smaller and less powerful buyers. Two possible explanations for these discounts are that the sellers are exercising countervailing power or that the sellers are practicing price discrimination. In the latter case, it may be argued that the quality of competition remaining does not justify a market sharing agreement. Indeed, the discounting in *Atlantic Sugar* could not have been unrestrained since maintenance of constant market shares over a long period of time requires that the parties not be permitted to take large customers away from a rival through discounting. On the evidence, the competition that remained was insufficient to destabilize the smoothly coordinated market sharing arrangement. For example, when a new firm entered with about six percent of the market, the big three were able to adjust and thereafter maintain the same proportional share as they held before entry. This decision indicates that the existence of almost any competition will support a finding that the lessening of competition was not undue.<sup>56</sup>

The Supreme Court also appears to have changed the rule from undue being assessed solely in terms of the impact of the agreement on competition to permitting an assessment of benefits to the public. The decisions in both *Atlantic Sugar* and *Aetna Insurance* appear to require a specific intent to lessen competition unduly. This requirement necessitates an examination of the objectives of the defendants — objectives which may include public benefits. In *Atlantic Sugar* the trial judge acquitted the accused because, among other things, the defendants intended to achieve industrial price stability. In *Aetna Insurance* the Court gave weight to the various public benefits produced by the agreement among insurance underwriters: the classification of properties into similar risk categories, advice on fire prevention services to local governments, and stabilization of the fire insurance industry. Even if we think this evidence should be considered, it was not adequately evaluated in these cases. At no time did the Court weigh those benefits against the anti-competitive effects of price fixing.

In the United States, in contrast, the Supreme Court has just recently reaffirmed that the impact of agreements, in rule of reason cases, is to be assessed solely in terms of the impact on competition. In *National Society of Professional Engineers*, it was argued that the cartel produced a higher quality product in that competition would have driven engineers to produce unsafe bridges and skyscrapers. The Supreme Court said:

Contrary to its name, the rule (of reason) does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions . . . the purpose of the analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry. . . .<sup>57</sup>

The Supreme Court decision in *Atlantic Sugar* also appears to require evidence of an express agreement between the parties — a tacit agreement is not sufficient. The Court held that the adoption of identical pricing schemes

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<sup>56</sup> The quality of the competition remaining is analyzed in Stanbury, Reschenthaler and MacCrimmon, *The Enforceability of Section 32 of the Combines Investigation Act*, (unpublished paper, University of British Columbia, 1983).

<sup>57</sup> 435 U.S. 679, 98 S.C. 1355 at 1363 (1979).

and maintenance of constant market shares was insufficient to show an agreement among the defendants. There had been no evidence of communication between them and the Court concluded that the uniform prices “. . . was a result of independent decisions called ‘conscious parallelism’ which is not illegal.”<sup>58</sup>

An agreement is necessary in the United States also, but it can be inferred from the circumstances. Evidence of communication is not necessary. In the *Container Corporation* case, an agreement was inferred from the widespread exchange of price information in a market in which the eighteen defendants had over ninety percent of the market and the products were homogeneous.<sup>59</sup>

The principal question is not whether consciously parallel conduct is contrary to section 32, but what evidence is sufficient to establish an agreement. The effect of *Atlantic Sugar* appears to be that evidence of coordinated conduct in the absence of express communication is not sufficient to show an agreement. This conclusion is not necessarily inconsistent with earlier decisions, since it is arguable that in all cases there was evidence of some communication between the defendants in addition to price announcements, uniform pricing and price monitoring, from which agreement could be inferred.<sup>60</sup> Identifying communication as a necessary condition is a mechanistic approach which ignores the realities of the economic impact of the defendant's conduct. If the market conditions indicate a price fixing agreement would be successful and the defendant's conduct is consistent with such an agreement, this should be sufficient.<sup>61</sup> Otherwise, firms will be able to effectively fix prices and escape prosecution by avoiding meetings in “smoke filled rooms.” The Court can be criticized for adopting a legalistic approach to the concept of agreement rather than assessing both the conditions of the market conducive to collusion and relating these conditions to the evidence of collusive behaviour in order to evaluate the impact of the alleged agreement. For example, market conditions conducive to collusion in *Atlantic Sugar* included barriers to entry, a homogeneous product, and the absence of a fringe of small sellers. Conduct of the defendants which implied the existence of an agreement were the fixed relative market shares, the exchanges of price information, and base point pricing.

The Canadian Act exempts some agreements which might lessen competition substantially. Agreements among affiliated companies, including agreements between parents and subsidiaries, are exempt.<sup>62</sup> In the United

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<sup>58</sup> Per Pigeon J., [1980] 2. S.C.R. 644 at 656, 16 C.R. (3d) 128 at 138-9.

<sup>59</sup> *U.S. v. Container Corporation of America*, 393 U.S. 333, 89 S.C. 510 (1969).

<sup>60</sup> In the two cases, where the Crown was successful, which involved signaling through price announcements, there was also evidence of communication: *R. v. Armco Ltd. et al.* (1976), 13 O.R. (2d) 32, 70 D.L.R. (3d) 287, (O.C.A.). *R. v. Canadian General Electric Co. Ltd.* (1976), 17 C.P.R. (2d) 211 (Ont. H.C.).

<sup>61</sup> See Posner, *Antitrust Law* (Chicago: U. of Chicago Press, 1976); Stigler, “A Theory of Oligopoly” in Stigler, *The Organization of Industry* (1968); Stanbury and Reschenthaler, *Oligopoly and Conscious Parallelism: Theory, Policy and the Canadian Cases* (1977), 15 Osgoode Hall L.J. 617.

<sup>62</sup> S. 32(7). Section 32(3) creates an exemption for exchange of information on standards and statistics. The 1976 amendments exempt amateur sport from the operation of the Act. Section 32.3 prohibits limiting the opportunities of any person to participate, as a player/competitor, in professional sports or to impose unreasonable terms or conditions upon such persons including limiting the opportunity for persons to negotiate with or play with the team of its choice in a professional league.

States, agreements between parents and subsidiaries, so called "bathtub conspiracies," when their "purpose and effect is a coercive effect on third parties"<sup>63</sup> are not exempt. In Canada, export agreements are exempt if they do not reduce the volume of exports, do not reduce competition unduly in a domestic market, and do not restrict entry into the exporting business.<sup>64</sup> There is no registration requirement as there is under the *Webb-Pomerene Act* in the United States.<sup>65</sup> The largest exemption to the Act is the non-statutory exemption for regulated industries. As mentioned earlier, it appears that it is sufficient if the statute setting up a regulatory scheme merely authorizes regulation. There is no requirement, as in the United States under the state action doctrine, that the province clearly express its intention to regulate the specific conduct at issue and to actively supervise the scheme.<sup>66</sup>

Bid-rigging was made illegal *per se* by the 1976 amendments.<sup>67</sup> Thus it is not necessary to show that the conduct lessened competition unduly. Agreements not to submit a bid and to submit bids that are arrived at by agreement are prohibited if the agreement is not known to the person calling for bids.

There is no specific exemption from the cartel provisions of section 32 for specialization agreements. Legislation was proposed in 1977 which would permit agreements "likely to bring about substantial gains in efficiency" which "will save resources for the Canadian economy." The Director has issued guidelines which consider the state of the tariff and the effect on entry in determining whether the agreement is undue.<sup>68</sup> Section 32.1 is directed at multinational corporations. Any company in Canada which implements a directive, policy, or instruction of a foreign company or person for the purpose of carrying out a conspiracy to lessen competition unduly is guilty of an offence. The Canadian company need not have known of the conspiracy agreement.<sup>69</sup>

The April 1981 reform proposal would divide agreements to restrain com-

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<sup>63</sup> Neale, *supra* note 32 at 159 n. 1, quoting the *Report of the Attorney General's National Committee to Study the Antitrust Laws*, 1955. The United States Supreme Court will decide during the 1983 term whether it is illegal for a parent and a subsidiary to conspire to restrain trade: *Copperweld Corp. v. Independence Tube Corp.* 691 F.2d 310 (7th Cir. 1982). The Department of Justice has filed an *amicus* brief raising the issue of the extent to which "a parent corporation violates antitrust laws by planning marketing strategies with one of its own subsidiaries." See "A Powerful Bid to Reunite the Antitrust Rule Book," *supra* note 9 at 84.

<sup>64</sup> S. 32(4). Apparently the draft legislation, *supra* note 6, would broaden the exemption for export agreements. See *Canadian Competition Policy Record*, *supra* note 6 at 3.

<sup>65</sup> *Webb-Pomerene Export Trade Act* of 1918, 15 U.S.C.A., ss. 61-65 (1973), s. 5. The *Webb-Pomerene Act* has been supplemented by the *Export Trading Company Act* 15 U.S.C.A., ss. 4001-4003, 4011-4021 (WestSupp. 1983).

<sup>66</sup> Text, *supra* notes 15 to 23.

<sup>67</sup> See *R. v. Travelways School Transit Ltd. et al.* (1980), 52 C.C.C. (2d) 399, 52 C.P.R. (2d) 63, (Ont. H.C.).

<sup>68</sup> *Supra* note 44. The draft legislation, *supra* note 6, provides for approval by the RTPC of specialization agreements where the firms constitute more than 50% of the market and an appeal to the cabinet when the RTPC denies approval. Specialization agreements would be permitted which relate to products already in production which result in substantial gains in efficiency. See *Canadian Competition Policy Record*, *supra* note 6 at 4.

<sup>69</sup> There is no liability for individuals under section 32.1.



petition into two classes.<sup>70</sup> Those agreements which economists recognize as having very few benefits such as price fixing, allocation of market shares, or restrictions on entry would be illegal if competition is likely to be lessened. It would not be necessary to show an undue lessening. All other agreements to restrain competition would be illegal where the parties jointly account for some given percentage of the market. This is to be contrasted with the American rule which would find the first class of agreements illegal *per se* without showing a lessening of competition and the second class which would be subjected to a rule of reason analysis. There may not be much difference in actual outcome in the second class since agreements where the parties have a significant market share will rarely overcome the rule of reason analysis.

## B. Monopolization

Section 33 of the *Combines Investigation Act* provides that every one "who is a party . . . to . . . the formation of, a merger or monopoly is guilty of an indictable offence . . ." In addition to a fine or imprisonment, a court may issue a prohibition order which, among other things, would dissolve the monopoly. This divestiture power has never been used. There has been only one conviction following a trial in a monopoly prosecution.<sup>71</sup> As of 1982, there have been nine other cases heard by the Courts. One case resulted in a guilty plea,<sup>72</sup> three cases resulted in prohibition orders without an admission of guilt,<sup>73</sup> and there were acquittals in five cases.<sup>74</sup>

Monopoly power can arise in several ways: (1) monopolies through efficiencies and internal growth, (2) monopoly through exclusionary conduct, and (3) monopoly through merger. There are different presumptions about the consequences for economic efficiency of these three methods. Method one is presumed to be efficient. In Canada and the United States, possession of a monopoly without exploitation of that power to exclude competitors is not illegal. Method two is presumed to be inefficient and is illegal in both countries. The harmful effects of the exclusionary market practices are usually obvious. Method three, mergers for monopoly, is not as obviously categorized as harmful because the question is the future effect of the merger on competition.

### 1. Mergers for Monopoly

Monopoly power achieved through merger must be distinguished from other causes. In the United States, mergers are regulated under section 7 of the

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<sup>70</sup> Apparently the draft legislation referred to, *supra* note 6, does not distinguish types of conspiracies but merely prohibits conspiracies which "lessen competition significantly." See McQuaig, *supra* note 6 at 38.

<sup>71</sup> *Eddy Match Co. v. The Queen* (1954), 18 C.R. 357, 20 C.P.R. 107, (Que. Q.B.-Appeal side).

<sup>72</sup> *R. v. Electric Reduction Company of Canada Ltd.* (1970), 61 C.P.R. 235 (Ont. H.C.).

<sup>73</sup> *R. v. Canada Safeway Ltd.* (1973), 12 C.P.R. (2d) 3, [1974] 1 W.W.R. 210 (Alta. S.C.); *R. v. Wee Folk Diaper Service Inc. et al.*, Exchequer Court Canada, Feb. 10, 1971 (unreported); *R. v. Anthes Imperial Ltd.* Federal Ct. of Canada, Feb. 23, 1973 (unreported).

<sup>74</sup> *R. v. British Columbia Sugar Refining Company Ltd.* (1960), 129 C.C.C. 7, 32 W.W.R. 577 (Man. Q.B.); *R. v. Allied Chemical Ltd. and Cominco Ltd.* (1975), 24 C.P.R. (2d) 221; *R. v. Canadian General Electric et al.* (1977), 15 O.R. (2d) 360, 34 C.C.C. (2d) 489; *R. v. Hoffman LaRoche Ltd.* Ontario Provincial Court, May 20, 1976 (unreported); *R. v. K.C. Irving Ltd.*, *supra* note 3.

*Clayton Act* and monopolies are regulated under section 2 of the *Sherman Act*.<sup>75</sup> The linking of mergers and monopolies in the Canadian legislation has caused confusion and misunderstanding when monopolies have been formed by merger. The inference of harm from mergers rests on assumptions about the impact of market structure which predict that once monopoly power exists the monopolist will cut output and raise prices. Weighed against this is the possibility of increased efficiencies. In most cases, however, future harm to competition can be assumed in mergers for monopoly and acquisition of a monopoly should be sufficient to establish public detriment. If the merger has not been completed, the remedy of prohibition is relatively costless. In contrast, under method two (monopoly through exclusionary conduct), public detriment is shown by conduct and not by mere control of all the market. The appropriate remedy is also not clear since the American experience with divestiture has shown most such victories to be "pyrrhic."<sup>76</sup> Thus there is an argument for treating monopoly by merger under a merger provision, as is the practice in the United States, and not monopolization. In Canada, this distinction has not been made and in *K.C. Irving*,<sup>77</sup> the Supreme Court, in a merger for monopoly case, held that mere acquisition of one hundred percent of the market did not establish public detriment. This will be dealt with in a later section.

## 2. Monopoly through exclusionary conduct: Operation of a Monopoly

The principal issue is the definition of the conduct constituting monopolization. Monopoly, in the Canadian Act, is defined as a situation where persons in substantial or complete control of the market have operated or are likely to operate the business to the detriment of the public. In both Canada and the United States mere possession of monopoly power is not sufficient. In the United States, the intent and purpose of the defendant with monopoly power must be to create or maintain a monopoly, an intent which is inferred from the acts of the defendant.<sup>78</sup> In Canada, the monopoly must be likely to operate to the public detriment. The principal difference appears to be the type of conduct which is sufficient to establish monopolization. In the United States, the intent and purpose to monopolize can be proved without showing overt acts of exploitation and predation. A distinction is drawn between the firm which is a passive beneficiary of monopoly power and any conduct more positive than this designed to maintain or expand such power. The Canadian position is closer to that of the 1911 United States Supreme Court decision in *Standard Oil* which defined monopolization as "a departure from the normal methods of industrial development" — the kind of conduct which violates section 1 of the *Sherman Act*.<sup>79</sup> In Canada, in *R. v. Electric Reduction Company of Canada Ltd. (ERCO)*, in which the accused pleaded guilty, Stark J. referred to protecting and preserving a "monopolistic situation by unfair

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<sup>75</sup> *Clayton Act*, section 7 (15 U.S.C.A. s. 18). Before the adoption of section 7, the U.S. also experienced difficulty in prohibiting mergers for monopoly under their monopolization provisions: *U.S. v. United Shoe Machinery Co.* 247 U.S. 32 (1918) (fifty acquisitions were considered separately rather than cumulatively, no single merger establishing intent to monopolize).

<sup>76</sup> Elzinga, *The Anti-merger Law: Pyrrhic Victories?* (1969), 12 J. Law. Econ. 43.

<sup>77</sup> *Supra* note 2.

<sup>78</sup> *U.S. v. Aluminum Co. of America*, 148 F. 2d 416 (2d Cir. 1945) (Alcoa); *U.S. v. Grinnell Corp.*, 384 U.S. 563, 86 S.C. 1698 (1966).

<sup>79</sup> *Standard Oil of New Jersey v. U.S.*, 221 U.S. 1 (1911).

means by buying up all existing competition, entering into agreements and arrangements so that the situation of monopoly can be preserved at all costs.”<sup>80</sup> Whether this refers to something less than predatory conduct cannot be determined from the case law. In *Eddy Match*, the one monopoly case resulting in a conviction after a trial, there was ample evidence of abusive conduct such as industrial spying, fighting brands and rebates.<sup>81</sup> In *Cast Iron Soil Pipe*, the Commission inferred public detriment from acts preventing the sale of a plant site to a competitor.<sup>82</sup> In *ERCO*, the defendants entered into arrangements to reduce import competition, in addition to entering into long term contracts which the Commission held foreclosed the market to rivals.<sup>83</sup>

As in the United States, substantial control under section 33 is measured by the market share of the defendants. In the cases before the Courts and the Commission, the defendants have had very high market shares ranging between ninety percent and one hundred percent. Less than this has been sufficient in the United States. In *Alcoa*, Hand J. concluded that ninety percent “is enough to constitute a monopoly; it is doubtful whether sixty or fifty-four percent would be enough; and certainly thirty-three percent is not.”<sup>84</sup>

### 3. Enforcement

A remedy similar to the consent decree procedure in the United States has been developed under the provision empowering a court to issue prohibitions.<sup>85</sup> In *Cast Iron Soil Pipe*, after the Commission found that the defendants were in substantial control of the market and had abused their dominant position, the Company complied with the Commission’s recommendations and the Crown elected not to prosecute. The Crown obtained a prohibition order under section 30(2), implementing its recommendations.<sup>86</sup> This section does not require a conviction under the Act but merely a finding that the person “has done, is about to do or is likely to do any act . . . directed toward the commission of an offence under Part V.” These orders can substantially affect the future conduct of the defendant. Canada Safeway was prohibited from

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<sup>80</sup> *Supra* note 72 at 236. Stark J. said:

it must be clear to any businessman or business company which finds itself in a monopolistic situation that in that case, especially strict standards of conduct are required and must be met by any business, and they are not entitled to protect and preserve that monopolistic situation by unfair means, by buying up all existing competition, entering into agreements and arrangements so that the situation of monopoly can be preserved at all costs.

<sup>81</sup> *Supra* note 1.

<sup>82</sup> Restrictive Trade Practices Commission, *Report Concerning the Production, Manufacture, Supply and Sale of Cast Iron Soil Pipe Fittings in the Prairie Provinces and British Columbia* (1967).

<sup>83</sup> Restrictive Trade Practices Commission, *A Report Concerning the Production, Distribution and Sale of Phosphates, other Phosphorous Chemicals and Sodium Chlorate* (1966).

<sup>84</sup> *Supra* note 78.

<sup>85</sup> S. 39(3). See *supra* note 39.

<sup>86</sup> *Supra* note 82. See also *R. v. Canada Safeway Ltd.* (1973), 12 C.P.R. (2d) 3 (Alta. S.C.) (Prohibition order granted without an admission of guilt.) Restrictive Trade Practices Commission, *A Report in the Matter of an Inquiry Relating to the Manufacture, Formulation, Distribution and Sale of Weed Killers, Insecticides and Related Products* (1965) (Prohibition order concerning sections 32 and 38 without charges being laid); *R. v. Chipman Chemical Ltd. and the Sherwin-Williams Company of Canada Ltd.*, Fed. Ct., Sept. 18, 1972, (unreported).

horizontal acquisitions for five years, from opening more than one store in two markets, increasing the size of existing stores and saturation advertising.<sup>87</sup>

The April 1981 reform recommendation proposes to create a new civil law provision which will replace section 33. Both monopoly and joint monopoly will be regulated. The provision will set out the percentage of market share which will be deemed to be a dominant firm for the purposes of the section. Mere possession of market power will not be sufficient. The firm or firms must engage in one of twelve types of anti-competitive conduct set out and the conduct must have the effect of eliminating a competitor, restricting entry, or restricting the growth of a competitor or be intended to have that effect.<sup>88</sup> The remedy would be a cease and desist order and a court would have the power to order divestiture. This clearly does not go as far as the current American law which does not appear to require overt acts of predation or exclusion, but this may be appropriate within the context of Canada's economic structure. Some suggest that we should not be concerned about monopolies which do not engage in predatory conduct because they can be subjected to international competition. In addition, within the context of the small size of the Canadian economy, a monopoly may be more efficient than a number of smaller firms because of economies of scale. Caves suggests that under a provision which sets the market share threshold for a dominant firm at fifty percent, and also covers joint monopolization, there will not be a major problem created by the "good trust." He concludes that there is a very real possibility that the size is dictated by scale economies. In that case the solution is to maximize the "monopoly's exposure to competition in international trade." Caves also concludes that the probable existence of scale economies means that divestiture should be resorted to only if an injunction is not an adequate remedy.<sup>89</sup>

#### 4. Exclusionary Practices

Section 34(1)(c) creates a separate criminal offence for predatory pricing. It prohibits "engaging in a policy of selling products at prices unreasonably low" which has the tendency or effect or is designed to have the effect of substantially lessening competition. The first conviction for predatory pricing was in 1980 in *Hoffman-La Roche*.<sup>90</sup> La Roche, in response to price competition from rival firms, gave a six months supply of valium free to hospitals. The offer was repeated for a second six months. Evidence showed that the defendant said that "this tactic will not only abort (the rival's efforts) but serve as a warning to others who seem to be showing an interest in this product," and "the pipeline would be kept filled." Over the period of the indictment, La Roche sold 41 million capsules of Valium and gave away 174 million. The Court held that the one year give away constituted a policy in contrast to an isolated incident which would be an acceptable competitive strategy. Because

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<sup>87</sup> *Id.*

<sup>88</sup> The conduct includes: selective price cutting to eliminate or restrict the growth of a competitor or to prevent entry; freight equalization by major firms on the plant of a new entrant, full-line forcing, market saturating advertising to eliminate, or restrict the growth of a competitor or to prevent entry, and conduct which is a criminal offence under the Act or could be the subject of an order under civil provisions. Apparently the draft legislation referred to, *supra* note 6, provides that an "abuse of dominant position" will be a civil wrong to be tried in the courts. See McQuaig, *supra* note 6 at 37.

<sup>89</sup> Caves, *supra* note 10 at 522.

<sup>90</sup> (1981), 48 C.P.R. (2d) 145, 109 D.L.R. (3d) 5 (Ont. H.C.).

there was no evidence whether anyone other than La Roche was adversely affected by the policy, the Crown relied on the above statements of La Roche to show that the defendants intended to lessen competition substantially. The Court concluded that zero price is unreasonably low, looking not only at the level of price, but the length of time, whether it was a defensive move, and whether there was any economic justification.

The definition of unreasonably low prices was considered in *Consumers Glass* in 1981. The Crown alleged that Portion Packaging, a wholly-owned subsidiary of Consumers Glass sold plastic lids at prices below cost to eliminate a new competitor, Amhil Enterprises Ltd.<sup>91</sup> O'Leary J. of the Ontario Supreme Court acquitted the accused, holding that their conduct was loss minimizing in that, at no time did they price below average variable cost, demand was shrinking, and there was excess capacity. He also found that the defendant did not intend to drive Amhil out of the market.

O'Leary J. appears to adopt the criterion of average variable cost. If the price exceeds the firm's average variable cost, it cannot be predatory pricing. The appropriate standard has been the subject of academic debate and judicial decisions in the United States. The view of Areeda and Turner is that any price above short run marginal cost (SRMC) is not predatory.<sup>92</sup> A monopolist pricing below SRMC should be presumed to have engaged in a predatory practice. In practical terms, they propose average variable cost as a useful surrogate for marginal cost. As long as the price is above SRMC the firm is contributing something to its fixed costs and therefore it should not shut down. Another view is that pricing below average total cost is predatory if accompanied by substantial evidence of predatory intent. This, however, would tend to discourage price competition.

Economists have argued that predatory pricing almost never occurs because a rational firm realizes that it involves certain losses today against uncertain gains in the future. The gains are particularly uncertain because, according to some economists, predatory pricing is never effective in eliminating a rival.<sup>93</sup> Even if correct these conclusions do not necessarily imply that Canada's predatory pricing provision should be repealed, particularly in light of the adoption of SRMC as the threshold for predatory pricing. The treatment of economic evidence in *Consumers Glass* indicates lower Canadian courts may be abandoning their former mechanistic approach.

Section 34(1)(b) is sometimes referred to as regional price discrimination, but a better description is predatory price discrimination, that is, price discrimination injurious to the competitors of the discriminating seller. The section prohibits sellers from engaging in a policy of selling products or services in one region in Canada at a price lower than in another region with the intent or effect of lessening competition substantially or of eliminating a competitor.

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<sup>91</sup> *R. v. Consumers Glass* (1981), 57 C.P.R. (2d) 1, 124 D.L.R. (3d) 274 (Ont. H.C.).

<sup>92</sup> Areeda and Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act* (1975), 88 Harvard L. Rev. 697.

<sup>93</sup> Easterbrook, *Predatory Strategies and Counter-strategies* (1981), 48 U. of Chicago L. Rev. 263.

While predatory price discrimination is the best description of the section, it is not a completely accurate one. The section does not fit neatly into either the definition of predatory pricing or price discrimination. Price discrimination focuses on the relationship between the price to the customer and prices to competitors of the customer. Are they paying the same price? Price discrimination is directed at the practice of discrimination between customers on the basis of their preference; those who value the product more, pay more for it. The injury to be prevented is the injury to the competitors of the purchasers. Predatory pricing focuses on the relationship between the cost of the product and the selling price. Is the seller pricing below cost with the intent to exclude or discipline a competitor? The object is to prevent injury to the competition among the seller and its rivals. While subsection 34(1)(b) asks whether customers are paying the same price in different regions, it is directed at preventing anticompetitive effects to rivals of the seller. On the other hand, it is not concerned with the relationship between the costs to the seller and the price. The question is whether such a provision is necessary when there are separate provisions prohibiting predatory pricing and price discrimination.

In the United States, primary-line discrimination (price discrimination injurious to the competitors of the discriminating seller) under section 2 of the *Clayton Act*, has been collapsed into predatory pricing in section 2 of the *Sherman Act*.<sup>94</sup> Although the wording of the amended section 2 of the *Clayton Act* does not require pricing below cost or a showing of market power, as is required by the *Sherman Act*, judicial decisions have equated the *Clayton Act* standard with that of the *Sherman Act* and both are often required for primary-line price discrimination. Thus, the Canadian section 34(1)(b) is stricter than the American law because it does not require market power if there is an intent to lessen competition substantially or eliminate a competitor, and does not require below cost pricing.

Although Section 34(1)(b) does not require below cost pricing, it does have a function in that it combats persistent price discrimination. The section requires that there be a "policy" of regional price discrimination. In *R. v. Carnation Co.*,<sup>95</sup> Carnation sold evaporated milk at a lower price in Alberta and British Columbia than in Ontario. One of Carnation's competitors, Alpha, cut prices in British Columbia. Carnation responded by cutting its price in both British Columbia and Alberta. The Crown alleged that Carnation's price cuts were designed to discipline Alpha for engaging in various non-price competitive practices such as secret discounts, drop shipments and co-operative advertising allowances. The Court held that the discriminatory prices were a "temporary expedient to meet an aggressive competitor" and did not constitute a "policy" as required by section 34(1)(b). In the absence of evidence that Carnation was pricing below cost, a requirement of a policy of discrimination may be sensible. Economists have pointed out that persistent price discrimination could increase the profitability of cartels, increase expenditures on monopolizing and distort the allocation of resources. On the facts Carnation was cutting prices to bring about a cartel agreement. In this case, Carna-

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<sup>94</sup> *Pacific Engineering & Production Co. v. Kerr-McGee Corp.* 551 F. 2d 790 (10th Cir. 1977); *Janish Bros. Inc. v. American Distilling Co.* 570 F. 2d 848 (9th Cir. 1978).

<sup>95</sup> [1969] 4 D.L.R. (2d) 133, 58 C.P.R. 112 (Ont. C.A.).

tion should have been charged with conspiracy to lessen competition unduly rather than predatory price discrimination.<sup>96</sup>

### C. Mergers

The Canadian provision governing mergers is regarded by some as almost totally ineffectual. Section 33 prohibits mergers whereby "competition is or is likely to be lessened to the detriment of . . . the public . . ." Critics point out that only six cases have been prosecuted since 1910 and there has been only one conviction. In that case the accused pleaded guilty. The two decisions which indicate that the section is unenforceable are the acquittals in the *Canadian Breweries* and *B.C. Sugar* cases in 1960.<sup>97</sup> In the *Breweries* case the accused had expanded market share by a series of takeovers over almost thirty years acquiring sixty percent of the beer market in Ontario and forty-six percent in Quebec. In the *B.C. Sugar* case the merger gave the company one hundred percent of the market for refined sugar in British Columbia, Alberta and Saskatchewan and three-quarters of the market in Manitoba. Yet in both cases, the courts held there was no detriment to the public.

In 1976, the Supreme Court of Canada in *K.C. Irving* removed any doubt about the correctness of the *Breweries* and *Sugar* cases.<sup>98</sup> A series of acquisitions resulted in one company owning all five English-language daily newspapers in New Brunswick. Although the mergers had resulted in a monopoly, the Supreme Court held that the Crown had not shown that the mergers had caused public detriment. The Court refused to infer public detriment from the one hundred percent market share of the accused.

The lack of judicial restraint of mergers was accompanied by an increase in the number and size of mergers, particularly in the period 1978 to 1981. From 1970 to 1978 the average number of mergers was 380. The number jumped to 511 in 1978, and 414 in 1980. In at least fifty-five mergers from 1978 to 1981, the transaction value exceeded \$100 million and in nineteen mergers the value exceeded \$400 million.<sup>99</sup> This list includes horizontal, vertical and conglomerate mergers. The level of activity does not imply that the impact on

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<sup>96</sup> Porter J.A. dissenting in the Ontario Court of Appeal thought Carnation had been successful in reaching an agreement. He noted, in reference to meetings between the competitors, that "All of them left the meetings with the impression that when the objectionable trade practices had been eliminated the price would be restored. No one said that, but everybody understood that. In due course when the practices were abandoned the prices did go up and all again sold at the same price." *Id.* at 140.

<sup>97</sup> The accused pleaded guilty in *R. v. Electric Reduction Co. of Canada*, *supra* note 72. The accused were acquitted in *R. v. Canadian Breweries Ltd.* (1960), 34 C.P.R. 179, 126 C.C.C. 133 (Ont. H.C.) and *R. v. British Columbia Sugar Refining Company Ltd. et al.*, *supra* note 74.

<sup>98</sup> *Supra* note 2. See Reschenthaler and Stanbury, *Benign Monopoly: Canadian Merger Policy and the K.C. Irving Case* (1977), 2 Can. Bus. L.J. 135; MacCrimmon and Stanbury, "The Reform of Canada's Merger Law and the Provisions of Bill C-13," in Rowley and Stanbury, eds., *Competition Policy in Canada* (Ottawa: Institute on Research on Public Policy, 1978) at 65; Cairns, *Monopoly: Detriment to the Public, and the K.C. Irving Case* (1981), 30 U. of New Brunswick L.J. 167; Cairns, *Merger Policy in Canada and the Supreme Court's Decision in K.C. Irving Ltd.* (1981), 19 Alberta L. Rev. 303; Roberts, *The Death of Competition Policy: Monopoly, Merger and R. v. K.C. Irving Ltd.* (1977), 16 U. of West. Ont. L. Rev. 215.

<sup>99</sup> Stanbury, *supra* note 52.

the economy was detrimental, but it does suggest the need for some kind of record keeping and assessment of the costs and benefits. It is apparent from the data, for example, that horizontal mergers have greatly increased concentration in several industries such as meat packing, poultry processing, major appliances, forest products, and department stores.<sup>100</sup>

Another effect of the increase in merger activity is the concentration on the buying side of the market. The creation of monopsonies and oligopsonies through mergers are a growing problem. For example, recent acquisitions by the Hudson's Bay Company, have made the Bay the largest retailer in Canada with at least thirty-five percent of the full-service department store market. The Bay has a massive purchasing power which places considerable pressure on suppliers.<sup>101</sup> The courts have tended to ignore factor market concentration as seen in the lack of concern about the monosony power of the defendant sugar companies in *B.C. Sugar*.

Representatives of the Canadian business community do not agree that the existing merger law is ineffectual.<sup>102</sup> The Business Council on National Issues, for example, argues that some mergers have been deterred and even that the existing law prevents mergers which would make Canadian firms more competitive in the international market. The Council would rely to a great extent on the market to discipline management who enter into inefficient mergers. They recommend review by the Commission of those mergers whose effects are "major and national in consequences." The Commission would decide whether a substantial lessening of competition may be justified by "efficiency and international competitive realities" which indicates it would be "for the overall benefit to Canada."<sup>103</sup>

There have been several government proposals to change the rules governing mergers based on the view that the merger law has been ineffectual.<sup>104</sup> The April 1981 proposal adopts an approach based on the structure-conduct-performance paradigm of industrial organization economics which predicts that the conduct of the individual firms in a market will be controlled by the structure of that market.<sup>105</sup> Mergers which would result in a firm accounting for more than a certain percentage share of the market would be subject to a remedial order of the court. The specific percentage to be codified was to be set after consultation with business persons and academics. The courts could either prohibit the merger or permit it subject to certain conditions which

<sup>100</sup> Stanbury, *The Need for New Merger Legislation*, unpublished paper, 1983 and Khemani, *supra* note 10.

<sup>101</sup> See Director of Investigation and Research, *Annual Report*, 1979 at 21-25.

<sup>102</sup> Business Council on National Issues, *A Consideration of Possible Amendments to the Combines Investigation Act* (Ottawa: Business Council on National Issues, 1981). See Stanbury, *The BCNI Study on Competition Policy: A Review* (1981), 2 Can. Competition Policy Record 15 (No. 3).

<sup>103</sup> *Id.* at 27.

<sup>104</sup> See *supra* note 5.

<sup>105</sup> See for example, Scherer, *Industrial Market Structure and Economic Performance* (Chicago: Rand McNally, 1980). Apparently the draft legislation is dramatically different from the Minister's proposals. The structural test has been eliminated. The merger must be shown to "lessen competition substantially" and there is an efficiency defence. In addition there is provision for an appeal to the Cabinet to overturn merger decisions of the Restrictive Trade Practices Commission. See McQuaig, *supra* note 6 at 37.



would "ensure that the merger did not result in a dominant position in any particular market." Mergers which resulted in a market share below that threshold were to be assessed to determine if they were likely to lessen actual or potential competition significantly. No guidelines were set out for this evaluation.

The Canadian proposal is to be contrasted with the new merger guidelines issued by the United States Department of Justice in June, 1982; the first revision of the guidelines since 1968.<sup>106</sup> The structural rule of the 1968 Guidelines has been modified and an inquiry into whether market share accurately reflects the market power of the merged firm is now required for mergers with a post merger Herfindahl Index between 1000 and 1800.<sup>107</sup>

The Department begins with an assumption that these mergers are "beneficial or neutral" and that "mergers generally play an important role in a free enterprise economy." They are not concerned with preventing increased concentration as an end in itself, but of controlling market power.<sup>108</sup> They do not assume there is a causal connection between concentration and prices or profitability. Even if there is a correlation and profitability increases with concentration, that profitability can be brought about by efficiencies and not by supra-competitive prices. This is in sharp contrast to the 1968 Guidelines which included as one of the objectives, "preventing significant increases in concentration in a market," and "preserving significant possibilities for eventual deconcentration in a concentrated market." There is no reference in the 1982 Guidelines to concentration trends, although the Herfindahl Index measure of concentration will flag mergers in less concentrated industries more often than in highly concentrated industries.<sup>109</sup>

Abandonment of the structural approach in relation to some mergers requires an assessment of the characteristics of the market and the behaviour of the firms to predict whether the merger will result in control over prices. The factors set out in the Guidelines relate to market power: ease of entry, the nature of the product and the terms of the sale, information about specific transactions, buyer market characteristics, and conduct of firms in the market.

The structural approach has not been completely abandoned. There are still a group of mergers which the department will always challenge — those in which the post merger Herfindahl Index is above 1800. Thus it may be argued that the proposed structural approach in Canada is not that different from the

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<sup>106</sup> One striking contrast between the American Guidelines and the Canadian proposals is the clear statement in the United States Guidelines of the purpose of merger regulation and the analysis of the factors which are relevant in assessing whether that purpose will be furthered by prohibition of the merger. The law is directed at preventing "the likelihood that one firm or a small group of firms could successfully exercise market power." Market power is defined as the "ability of one or more firms to maintain prices above competitive levels for a significant period of time . . ."

<sup>107</sup> The Herfindahl index is a measure of industry concentration obtained by squaring the percentage share of each firm and then summing these squared values. Thus five firms, each with a 20% share, would have a Herfindahl Index of 2000.

<sup>108</sup> The Federal Trade Commission, in contrast, in an announcement made concurrently with the issuance of the Guidelines, does refer to "concentration trends" as a factor in evaluating the impact of a merger.

<sup>109</sup> See Weinstock, *Using the Herfindahl Index to Measure Concentration* (1982), 27 Antitrust Bul. 285 at 289.

1982 Guidelines. There may be a real difference, however, in the analysis of mergers in the middle area where they are not presumed to be harmful. First, the analysis recommended by the United States Department of Justice Guidelines is much more sophisticated than any analysis which has been done either by the courts or the Commission in Canada, and there may be doubt about their ability to apply such analysis. Canadian courts, in contrast to the Americans', have demonstrated a general reluctance to consider economic evidence.<sup>110</sup> For example, in *Canadian Breweries*, the trial judge viewed the highly concentrated oligopolistic structure of the beer industry without alarm, describing the market in Ontario as consisting of "three strong competitors."<sup>111</sup> Although he did state that the danger of mergers is the resulting power to enhance prices, there is no examination of the market power of the merged firm other than a statement as to the market share percentages. He seemed oblivious to the impact of entry barriers on market power or the possibility that the oligopolistic market structure will facilitate collusive behaviour. This result is perhaps not surprising in the light of the Commission Report which also did not see harm in permitting the merger to continue.<sup>112</sup> If a panel of persons specializing in merger regulation did not find harm, why should a court?

Second, the Canadian rule may require an examination not only of the impact on competition but an evaluation of the broader macro economic effects. Perhaps, as some have suggested, the smaller Canadian economy necessitates an evaluation of such factors as the ability to compete in international markets, unemployment, capital investment, innovation, technological diffusion, and research and development investment. The proposed amendments do not list the factors which will be examined.<sup>113</sup>

Apparently, the Canadian government does not plan in the 1983 session of Parliament to make a legislative attempt to provide workable, effective merger rules. The plan of the Minister of Consumer and Corporate Affairs to introduce extensive amendments to the *Combines Investigation Act* at the February, 1983 session of Parliament did not materialize.<sup>114</sup> It appears the latest reform proposals have gone the way of all previous attempts and, ineffectual or not, the current merger provisions continue to be the law.

## 1. Enforcement

In contrast to enforcement measures in the United States, there is no provision for pre-merger notification or for consent orders.<sup>115</sup> The Director has an

<sup>110</sup> *Supra* note 1.

<sup>111</sup> *Supra* note 97.

<sup>112</sup> Restrictive Trade Practices Commission, *Manufacture, Distribution and Sale of Beer in Canada*, 1955.

<sup>113</sup> Bill C-13, 1977, s. 31.71(4) listed the following factors: substitute products, competition from imports, trend of concentration, size of firms, barriers to entry, history of growth by merger or anti-competitive conduct, intent to reduce competition, foreclosure of factor inputs and outlets, potential entrants, innovation, failing firm, effect on competition, and other factors "relevant to competition."

<sup>114</sup> *Supra* note 7. The Bill was drafted and printed together with its explanatory material. It remains only to introduce it. See, *supra* note 6.

<sup>115</sup> *Supra* notes 39 and 41. The *Antitrust Procedures and Penalties Act*, 15 U.S.C. ss. 16(b)-(h). Provisions on pre-merger notification and consent orders were proposed in Bill C-42 and C-13 in 1977, but neither passed.

informal programme of compliance whereby firms may voluntarily ask for his view on a proposed merger. The Director also keeps a merger register, has issued brief merger guidelines, and monitors merger activity. It appears that some mergers have been discouraged by these informal procedures.<sup>116</sup> In one case the Director has required undertakings from the acquiring firm which would substantially limit that firm's power to influence the operations of the target firm. The arrangement was concurred in by the Deputy Attorney-General of Canada. The Director takes the view that the breach of this agreement may be enforced by injunction although he has not expressly been given the power to require undertakings.<sup>117</sup>

## 2. Mergers with Foreign Firms

In contrast to the almost nonexistent impact of the rules on domestic mergers, the rules governing takeovers by foreign firms are much more stringent. Foreign firms which contemplate merging with a Canadian firm or establishing a new business in Canada must meet criteria established by the *Foreign Investment Review Act*.<sup>118</sup> The Act sets up the Foreign Investment Review Agency (FIRA) which scrutinizes all such activities to assess whether they confer "significant benefits" on Canada and to make a report to the

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<sup>116</sup> Gorecki, *supra* note 42 at 205.

<sup>117</sup> *Annual Report*, *supra* note 45 (The Hudson's Bay, Simpson, Simpsons-Sears Merger).

<sup>118</sup> S.C. 1973-74 c. 46. Acquisitions of Canadian business enterprises and the establishment of new businesses in Canada by foreign individuals is regulated by the *Foreign Investment Review Act* which was proclaimed in April, 1974. The stated purpose of the Act is to ensure that such acquisitions and new businesses occur only when they confer significant benefits on Canada. The Act establishes the Foreign Investment Review Agency which reviews the applications by foreign individuals and advises the Minister of Industry, Trade and Commerce on the likelihood of significant benefit if the application is approved. It also performs surveillance and enforcement functions and conducts general research on foreign investment in Canada. "Non-eligible persons" must file a formal application to the Agency in certain situations. Non-eligible persons include not only non-Canadian citizens but also Canadian citizens if they are not ordinarily resident in Canada, or are prescribed by regulation, and landed immigrants in Canada if they did not apply for citizenship in the year following the time they became eligible to do so. Non-eligible persons also includes foreign governments, subdivisions, and agencies, and corporations, incorporated in Canada or elsewhere which are controlled in fact by a non-eligible person or a group, one of which is such a person. Situations in which a non-eligible person must file an application includes acquisitions in which the gross assets are greater than \$250,000 or the gross revenue will be greater than \$3,000,000. It also includes acquisitions below these limits if the non-eligible person controls an unrelated established Canadian business. New businesses unrelated to an existing business of the non-eligible person in Canada also require an application. In 1981-82 there were 338 applications for acquisitions. Target firms with assets of less than \$2 million accounted for 59.5%. Seventy-eight per cent involved firms with less than 100 employees. If we eliminate the one case involving assets of more than \$5.5 billion, the total value of assets of the targets dropped from the previous year by about \$.5 billion. Services accounted for 57% of the cases, manufacturing 39%, and the resource sector 4%. Applications of U.S. firms dropped to 58% from 64% in 1980-81, while the Western European share increased from 31 to 34%. Foreign Investment Review Agency, *Annual Report*, 1981-82. Significant benefit is judged by the following factors: (1) effect on economic activity in Canada including employment, resource processing, use of Canadian products and services and exports, (2) participation by Canadians, (3) effect on productivity, efficiency, technological development, innovation, and product variety, (4) effect on competition, (5) compatibility with national industrial and economic policies.

Cabinet which makes the final decision. The anticompetitive impact of the merger is only one of the factors to be taken into account and in practice has proved not to be as important as other factors such as employment of Canadians and use of Canadian products. The broad discretion of the Cabinet to approve or disapprove applications by foreign firms and the practice of requiring undertakings, for example, to purchase Canadian goods, has become a source of concern, particularly to American firms. The matter is currently being considered by a panel set up under the General Agreement on Tariffs and Trade in Geneva.<sup>119</sup> Under the existing rules the Director has jurisdiction to investigate mergers which are subject to review by FIRA, but it is highly unlikely that the Director will challenge a merger which has been approved by the Cabinet.

#### D. *Vertical Restraints: Resale Price Maintenance, Refusal to Supply and Exclusive Dealing*

Three types of restraints on distribution which, in practice, are often observed together are resale price maintenance, exclusive dealing, and territorial restrictions. All three may be enforced by refusals to supply. Resale price maintenance is a criminal offence under the Canadian Act. Exclusive dealing and territorial restrictions are civil reviewable matters heard by the Commission.<sup>120</sup> Refusals to supply can be treated both as a criminal offence and as a civil reviewable matter.<sup>121</sup> Due to time and space limitations, territorial restrictions will not be discussed. While it is a potentially important provision, no inquiries have been initiated by the Director.<sup>122</sup>

##### 1. Resale Price Maintenance: Acquisition of Market Power through Agreement

While economists generally agree that price agreements among firms on the same level of distribution (horizontal price fixing) have no positive effects on competition, there is continuing controversy over the effects of price agreements among firms on different levels of distribution, that is, vertical price agreements or resale price maintenance. In the United States, until recently, it was generally accepted that resale price maintenance had the necessary "pernicious effect" to classify it as illegal *per se*.<sup>123</sup> However, in the fall of 1982, William Baxter, Assistant Attorney-General, Antitrust Division

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<sup>119</sup> See Paterson, *The GATT and Restrictions on Foreign Investment: The United States Challenge to Canada's Foreign Investment Law* (1982), 1 U.C.L.A. Pacific Basin Law Journal 224. In June 1983, the practice of FIRA to require the purchase of Canadian products and services was ruled contrary to Article III of the *GATT* (National Treatment on Internal Taxation and Regulation).

<sup>120</sup> Resale Price Maintenance: s. 38(1)(a); Exclusive Dealing: s. 31.4(2); Market Restrictions: s. 31.4(3).

<sup>121</sup> S. 38(1)(b); s. 31.2.

<sup>122</sup> Market restrictions are prohibited if engaged in by a major supplier or if the practice is widespread and is likely to lessen competition substantially. S. 31.4(4) exempts restrictions engaged in for a reasonable amount of time to facilitate entry of a new supplier or product.

<sup>123</sup> *Kiefer-Stewart Co. v. Joseph Seagram & Sons, Inc.*, 340 U.S. 211, 71 S. Ct. 259 (1951). See *Russell Stover Candies Inc.* (1982) CCH Trade Reg. Rep. para. 21, 933 (FTC) for an example of a decision holding resale price maintenance to be illegal *per se*. Chairman James Miller dissented emphasizing the need to examine procompetitive impact.

of the Department of Justice issued a statement calling for treatment of resale price maintenance under the rule of reason. He argued that while elimination of resale price maintenance by a firm may result in a short run price drop, this price drop may suppress "investment incentives for new complex products." Analysis under the rule of reason would permit a court to determine when elimination of intrabrand competition through resale price maintenance was "essential to the attainment of important long range goals."<sup>124</sup>

In Canada, resale price maintenance and refusal to supply have been illegal *per se* since 1951. The provisions have been actively enforced. There have been sixty-four cases resulting in convictions in the period 1951 to 1981 with most of the convictions occurring in the past decade. The average fine in 1981 was \$36,500. The largest fine, \$150,000, was received by Levi Strauss in 1979. Prohibition orders enjoining future misconduct by firms are not unusual.<sup>125</sup>

Should manufacturers and suppliers be permitted to place restrictions on price competition in the distribution of goods and services? A manufacturer of home computers may wish to encourage its distributors to provide services such as demonstrations, and educational displays. One incentive is to eliminate competition from other distributors of the same brand of computer by maintaining uniform resale prices. Should the manufacturer be permitted to send out a suggested retail price list, to advertise this price, to persuade dealers through a variety of means such as discounts to charge the suggested price, or to refuse to supply a dealer who discounts the product?

a) *Economic Rationale*

At first glance it is difficult to understand why a manufacturer would want to maintain a high resale price. Since a higher retail price often reduces the demand for the product, the manufacturer should be motivated to keep the difference between the dealer's cost and the retail price to a minimum by encouraging price competition among dealers. The persistence of manufacturers in engaging in the practice, despite this reasoning, raises the question of whether the effect of resale price maintenance is always anticompetitive.

There is disagreement among economists about the competitive effect of resale price maintenance. Some economists have suggested two reasons for restrictions on price competition, only one of which justifies prohibition of the activity.<sup>126</sup>

One explanation is that the manufacturer is being used by the dealers to enforce a horizontal price fixing agreement among the dealers. When a dealer breaches the agreement by charging a lower price, the dealers may ask the manufacturer to threaten to cut off that dealer unless it charges the suggested

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<sup>124</sup> (1982) CCH Trade Reg. Reporter, para. 50,442. See also the comments of William Baxter on October 4, 1983 on price and non-price restrictions imposed by airlines on travel agents. [1983 Transfer Binder] Trade Reg. Rep. (CCH) para. 50,454.

<sup>125</sup> Stanbury, *supra* note 52.

<sup>126</sup> Posner, *Antitrust Law*, *supra* note 61, at 147-67. Clarkson and Miller, *Industrial Organization: Theory, Evidence and Public Policy* (New York: McGraw-Hill, 1982) 303-17.

retail price. The manufacturer faces being cut off by all the dealers if it does not comply.<sup>127</sup>

A second explanation given by economists is that restriction of price competition between dealers increases non-price competition and thus stimulates the provision of services at the retail level.<sup>128</sup> The producer of home computers may think that point-of-sale services, such as computer experts to demonstrate the various models, will increase the demand for the product. There is no incentive for a dealer to provide these services, however, unless it can recover them in the form of a higher retail price. The dealer will not be able to charge a higher price if there are other dealers selling at a discount. These other dealers are able to save the cost of providing services and information by free-riding on the full service dealers. In other words the discount dealer can send the customer to the full service dealer to acquire information and then the customer is motivated to return to the discounting seller to make the purchase. Facing this competition, the full service dealer will reduce the amount of service it provides.

William Baxter adopted this view of resale price maintenance and concluded that it should be prohibited only if it facilitates horizontal agreements either among manufacturers or dealers.<sup>129</sup> Some economists see an additional harm in that resale price maintenance may prevent the efficient adaptation of distribution channels to consumers' demands. Scherer, in contrast to the Chicago school and William Baxter, thinks that the free-rider problem is minimal.<sup>130</sup> Others argue that restrictions on dealer competition "enable a manufacturer to increase the preference for his brand thus giving monopoly power."<sup>131</sup> Some conclude that resale price maintenance "must at least raise the prices of some goods in some shops above what they would otherwise be."<sup>132</sup> This, of course, does not refute arguments based on the provision of services since manufacturers do not assert that prices will be lower, but that consumers are receiving a valuable service for which they should pay.

It is conceded by proponents and opponents that resale price maintenance does raise retail prices. The question is whether the extra margin gained by retailers through elimination of intrabrand competition has the effect of in-

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<sup>127</sup> Such a request may be made even if there is no horizontal agreement by dealers whereby they threaten to discontinue stocking the product unless a low pricing competitor is brought into line. A manufacturer may comply in order to avoid losing a distributor and thus exposure to the market. See *Combines Investigation Act*, s. 38(6).

<sup>128</sup> See *Continental T. V. Inc. v. GTE Sylvania Inc.* 433 U.S. 36 (1977) (*Sylvania*). Mr. Justice White, dissenting, refused to move away from the *per se* rule for territorial restrictions, arguing that the right of businesses to control the terms on which they trade their goods was "more deeply imbedded in our cases than the notions of 'free rider' effects and distributional efficiencies borrowed by the majority from the 'new economics' of vertical relationships."

<sup>129</sup> *Supra* note 9.

<sup>130</sup> Scherer, *supra* note 105 at 592 n. 103.

<sup>131</sup> See Comanor, *Vertical Integration and Customer Relations* (1968), 81 Harv. L. Rev. 1419 who argues that restrictions on dealer competition "enable a manufacturer to increase the preference for his brand thus giving monopoly power."

<sup>132</sup> Neale, *supra* note 32 at 250.

creasing the level of services supplied to such an extent that competition between brands is increased. Proponents and opponents also agree that resale price maintenance should not be used to facilitate horizontal agreements. The appropriate rule for Canada may be dictated by the economic structure. It can be argued that competition is unlikely to be increased by resale price maintenance because many manufacturers form a tight oligopoly. It is much more likely that the practice will facilitate coordinated behaviour by the firms.<sup>133</sup> Support for a *per se* rule in Canada is also suggested by the conclusion of most economists that the practice probably does not provide much benefit to the small retailer.<sup>134</sup>

#### b) *History of Canadian Legislation*

Resale price maintenance, in Canada, was widespread after World War II due principally to the "training" firms received when the Wartime Prices and Trade Board imposed price maintenance during the war. Legislation directed at the problem was introduced in 1951. The government reasoned that resale price maintenance weakened pressures for greater efficiency and that the small retailer did not require special protection. It concluded that, in any event, small business was not protected because the high profit margins under resale price maintenance would attract entrants to the market. In addition, competition in the form of advertising and services would take the place of price competition and consume the profit margin needed by the small retailer to remain in business.<sup>135</sup>

Resale price maintenance is prohibited by section 38 of the *Combines Investigation Act*. This specific provision can be contrasted with the general statutory provisions in the United States where resale price maintenance is viewed as an aspect of collusive conduct contrary to section 1 of the *Sherman Act* which prohibits agreements to restrain trade. Several changes were made to section 38 in 1976. Amendments extended the section to services as well as products, to horizontal as well as vertical price maintenance, to industrial property holders, to attempts to "influence" as well as to enforce specific resale prices, and to credit card companies which induce retailers not to give discounts for cash purchases.

In contrast to the judicial treatment of conspiracy to lessen competition and merger regulation which indicates that courts do not see the "evil" effect of the defendant's conduct, the decisions on resale price maintenance are nearly indistinguishable from judicial treatment of other criminal offences. This may be because, in most cases, there is an individual "victim" — the dealer who has been coerced into maintaining a higher price or has been cut off from his supply. There is little discussion of the economic justification either for or against the practice other than the statements about the public's right to free competition and the need to "maintain a free market of goods and commodities."<sup>136</sup>

<sup>133</sup> Scherer, *supra* note 105 at 593.

<sup>134</sup> Skeoch, "Canada" in Yamey, (ed.), *Resale Price Maintenance* (London: Weidenfeld, Nicolson, 1966) at 25-64.

<sup>135</sup> *Id.* at 30. See also Thompson, *Resale Price Maintenance and Refusal to Sell: Aspects of a Problem in Competition Policy* (1971), 24 U. of Toronto L.J. 67.

<sup>136</sup> *R. v. Peter Campbell* (1979), 51 C.P.R. (2d) 284 at 287; and see *R. v. Levi Strauss* (1979), 45 C.P.R. (2d) 215 at 217.

Section 38(1)(a) prohibits the employment of particular means to achieve the end of influencing price upwards or discouraging the reduction of prices. The prohibited means are agreement, threat, promise or "any like means." These means must have the logical effect, if carried out, of influencing price. An attempt is sufficient. The agreement or other conduct need not actually maintain prices.<sup>137</sup>

An executed agreement to maintain resale prices is prohibited.<sup>138</sup> An agreement may be inferred from all the circumstances including any written contracts and the conduct of all the actors in the distribution process. Agreement has been inferred from the issuing of suggested resale price lists and one request to remove discount price tags accompanied by a statement by the defendant that it expected the dealer not to discount in the future.<sup>139</sup> There must be an agreement, however, in the absence of threats or promises or any like means. In *Cluett Peabody*, the Court refused to infer an agreement from evidence of a "gentleman's agreement not to use the company name in the advertisement offering off-price merchandising."<sup>140</sup> The practice of not using the name appeared to arise from individual judgment on the part of the retailer "that it was in everyone's best interest not to do so."

The Court looks at the logical effect of the agreement, not the specified purpose. An agreement not to use a manufacturer's name in advertisements of a discount sale of its product was found to be an agreement to "indirectly . . . discourage the reduction of prices."<sup>141</sup> An agreement to reimburse a proportion of the cost of advertising on the condition that the list price of the manufacturer be specified in the advertisement was contrary to the section.<sup>142</sup>

<sup>137</sup> *R. v. Campbell* (1964), 46 D.L.R. (2d) 83 (Ont. C.A.). Prior to 1976, the section referred to means "to induce or require" another to maintain prices. The section now refers to means "to influence upward or discourage" reduction in price. Inducement has been defined as means used "to persuade, influence, or to prevail upon someone to do something they would not otherwise have done." *R. v. William Coultis Co. Ltd.* (1968) 67 D.L.R. (2d) 87. Since influencing appears to encompass the other two means, the drafting change should have little effect on future decisions. Prior to 1976 the section referred to prices specified by the manufacturer, while the new legislation refers simply to influencing "price." Thus a general agreement not to discount without specifying prices, which may not have been caught by the prior legislation (see *Coultis*), is now caught. Section 38(1)(a) has been described as "a very wide section" and perhaps "some amendment might be necessary at some future time when sufficient language is found to make it clearer." *Peter Campbell, supra* note 135, at 287.

<sup>138</sup> *R. v. Kito Canada Ltd.* (1975), 22 C.P.R. (2d) 275 (Man. Q.B.).

<sup>139</sup> *R. v. Rolex Watch Co. of Canada Ltd.* (1978), 44 C.P.R. (2d) 39 (Ont. Co. Ct.), (1981), 50 C.P.R. (2d) 222 (Ont. C.A.). The Director's *Annual Report*, 1978, contains a copy of the prohibition order at 28-29. There was evidence the Company issued suggested retail price lists and that on one occasion two representatives of the company had asked the manager of the dealer to remove discount price tags. This was done and described in a letter from Rolex to the dealer in which the manager was described as "very cooperative." The manager testified that no promises, inducements or threats had been made at that time and there was no evidence of an agreement between the companies. Still Cartwright Co. Ct. J. held that Rolex through its representatives "by agreement induced (the dealer) to resell Rolex . . . watches at the suggested retail prices specified by the accused at that time."

<sup>140</sup> *R. v. Cluett, Peabody, Canada Inc.* (1982), 64 C.P.R. (2d) 30 at 38.

<sup>141</sup> *Id.* at 37.

<sup>142</sup> *R. v. A & M Records* (1981), 51 C.P.R. (2d) 115 (Ont. Co. Ct.), appeal to Ont. C.A. dismissed, 71 C.P.R. (2d) 280.



The threat which influences the dealer may be implicit. It has been sufficient for a defendant manufacturer to present a discounting dealer with a resale price program.<sup>143</sup> A promise to supply a discounting retailer who has been trying to secure a supply for many months is a sufficient inducement or influence over prices.<sup>144</sup> A threat is sufficient, the dealer need not be cut off.<sup>145</sup>

The Crown does not have to show a specific intent to influence prices. The court looks at the projected effect of the agreement on price level and not the expressed purpose of the defendants. An agreement to reimburse a proportion of the cost of advertising if the list price of the manufacturer was specified in the advertisement was held to be an attempt to induce to sell at a higher price.<sup>146</sup> The defendant's argument that their purpose was to induce the dealer not to advertise at a lower price and not to affect the actual selling price was held to be irrelevant. The agreement had the effect of "exerting an influence upon or creating an inducement to resell at not less than the price designated."<sup>147</sup> Thus the innocent purposes of the defendants are "beside the point."<sup>148</sup>

The practice of "suggesting" a resale price is regulated by section 38(3). In 1966 Skeoch concluded that there was a widespread practice of attaching retail prices to a product without a qualification that there is no obligation to pay that price.<sup>149</sup> Section 38(3) and (4) are an attempt to require suppliers to make such a qualification. Section 38(3) provides that suggesting a resale price is "proof of an attempt to influence" the price upwards unless the defendant shows it was clear that the retailer was under no obligation to follow the suggestion.

Section 38(4) was considered in *Philips Electronics*<sup>150</sup> in 1981 which held that advertising a suggested retail price was not an attempt to influence prices by a means set out in the section. The Court held that it did not come within the definition of "any like means." The defendants had run an advertisement listing the stores where their television converter could be purchased and listed the price as "only \$44.95." They did not add "or less" as had been advised by the Director of Investigation and Research in a bulletin.<sup>151</sup>

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<sup>143</sup> *Sunbeam Corp. v. The Queen* [1969] S.C.R. 221, 56 C.P.R. 242 (S.C.C.).

<sup>144</sup> *R. v. H.D. Lee of Canada* (1981), 57 C.P.R. (2d) 186 (Que. Ct. Sess.).

<sup>145</sup> *R. v. Kito Canada Ltd.*, *supra* note 138.

<sup>146</sup> *R. v. Campbell*, *supra* note 137.

<sup>147</sup> *R. v. Moffats Ltd.* [1957] O.R. 93, 25 C.R. 201.

<sup>148</sup> Per Schroeder J. in *Campbell supra*, note 137. The agreement consisted of a series of arrangements between the defendant and the wholesaler and the consumer. The defendant arranged contracts between wholesalers and consumers at a suggested list price and in addition, arranged with the wholesalers to report on the purchases of the consumers and to request repayment of any inappropriate discounts given. This arrangement was found to have the effect of inducing the wholesaler to maintain the list price.

<sup>149</sup> Skeoch, *supra* note 134 at 58.

<sup>150</sup> *R. v. Philips Electronics Ltd.* (1981), 116 D.L.R. (3d) 298 (Ont. C.A.), (1982), 59 C.P.R. (2d) 212 (S.C.C.).

<sup>151</sup> *Misleading Advertising Bulletin*, Department of Consumer & Corporate Affairs, Feb. 1976, at 5.

The Court rejected the argument of the Crown that the effect of section 38(3) was to make the conduct of the defendant in this case contrary to section 38(1)(a). It is necessary to show an attempt to influence upwards and the attempt was made in the manner proscribed. The advertisement was an attempt but it did not come within the definition of "any like means" and there was no evidence of an agreement, threat, or promise. The decision implies that it will also be necessary to show that suggesting a resale price without the stipulation in section 38(3) comes within the prohibited means. It may be that suggesting resale prices is permissible if the firm does not engage in any coercive actions to maintain the suggested prices.

In the United States, the prohibition of resale price maintenance was extended to consignment sales in 1969 by the decision in *Simpson v. Union Oil Co.*<sup>152</sup> Prior to that time such sales had been exempt on the reasoning that a rule against price maintenance was based on the dealer's common law right to resell his own property. If title remained in the supplier, that supplier had the right to dictate prices.<sup>153</sup>

In Canada, resale price maintenance in consignment sales was not prohibited by the Act until 1976. For example, in one Commission hearing, an oil company retained title to the gas supplied to the dealer and specified the resale price. There was no liability for resale price maintenance although the Commission thought it was detrimental to the public interest.<sup>154</sup> Since the 1976 amendments, section 38 does not require a sale, but it should be noted that section 38(2) exempts principal and agent relationships. The amendments made consignment selling a civil reviewable matter under section 31.3. Consignment selling "introduced" for the purpose of price maintenance or price discrimination is subject to a remedial order of the Commission that the practice cease. It is likely that enforcement will proceed under the civil reviewable provisions where the purposes of the supplier could be investigated.

Section 38 is not confined to vertical price agreements. In *Peter Campbell*<sup>155</sup> an attempt by the owner of a car rental agency to stop a price war and to raise prices among car rental agencies was held to be a violation of the Act. Section 38 is so broadly worded that, theoretically, all price fixing agreements

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<sup>152</sup> 377 U.S. 13, 84 S. Ct. 1051 (1964).

<sup>153</sup> *U.S. v. Colgate and Co.*, 250 U.S. 300 (1919). American caselaw has made a distinction between unilateral refusals to supply and refusals to supply pursuant to a resale price agreement. In *Colgate*, the Supreme Court held that unilateral refusals to deal are not illegal in the absence of an agreement although the agreement may be shown by "a course of conduct" or "tacit understandings." The court stated: "In the absence of any purpose to create or maintain a monopoly the act does not restrict the long recognized right of the trader or manufacturer in an entirely private business freely to exercise his own independent discretion as to parties with whom he will deal." In *U.S. v. Parke-Davis & Co.*, 362 U.S. 29, 80 S. Ct. 503 (1960), this exception was effectively narrowed to manufacturers who deal directly with retail dealers. The exception has been described as being confined to facts that are "... of such doric simplicity as to be somewhat rare in this day of complex business enterprise." *George W. Warner & Co. v. Black & Decker Mfg. Co.* 277 F. 2d 787, 790 (2d Cir. 1960).

<sup>154</sup> Restrictive Trade Practices Commission, *Report on the Distribution and Sale of Gasoline in the City of Winnipeg*, June 27, 1966.

<sup>155</sup> *R. v. Peter Campbell* (1979), 51 C.P.R. (2d) 284 (B.C.Co. Ct.). Horizontal price fixing has been covered by s. 38 since 1976.

could be prosecuted under section 38 instead of section 32, the provision on conspiracies to lessen competition unduly. Under section 38 there is no need to show an undue lessening of competition.

## 2. Refusal to Supply: Section 38(1)(b)

Refusals to supply a product "because of the low pricing policy" of the dealer or other person are illegal without demonstrating anticompetitive effects. The Act sets up four defences in section 38(9). The defendant must show that it had reasonable cause to believe and did believe that the dealer charging low prices engaged in any of the following practices: loss-leadering, "bait(ing) and switch(ing)," misleading advertising, or failing to provide a reasonable level of service. The requisite specific intent may be rebutted by evidence of other reasons for the refusal. One supplier was acquitted on the basis that its refusal to supply a retailer was caused by problems with inventory and mistakes by employees not the history of discounting by the retailer.<sup>156</sup>

An existing relationship between the supplier and dealer is not necessary and a potential distributor may not be refused supply because of its discounting policies.<sup>157</sup> This is in contrast to the United States where a supplier is free to choose dealers, and may refuse to supply a potential distributor if it will not adopt the pricing policies of the supplier.<sup>158</sup>

The reasonable level of services provided by the dealer is determined by the services which a purchaser might expect, not the level expected by the supplier. Thus a supplier could not refuse to supply because of the level of services provided by a distributor of jeans when the supplier had not received complaints from customers about the lack of dressing rooms and neat displays in the stores.<sup>159</sup>

A supplier may refuse to supply a dealer who is engaging in loss-leadering, that is, selling the product below cost. This defence was added to the legislation in 1960 in response to the criticism that the 1951 provisions prohibiting resale price maintenance permitted loss-leadering.<sup>160</sup> Two reasons for the prohibition of loss-leadering are that it will harm the reputation of the manufacturer for quality and will limit the manufacturer's access to retail outlets.<sup>161</sup> It

<sup>156</sup> *R. v. Matsushita Electric Co. of Canada Ltd.*, Sept. 30, 1980 (B.C.Co. Ct.) (unreported). The Crown must show that the reason for the refusal was the low pricing policy of the retailer. In *Cluett, Peabody, Canada Inc.*, *supra* note 140, the defendant refused to supply a discount store giving as its reason that the number and location of retail outlets was adequate. While Wren Co. Ct. J. did not believe the defendant, and found the reason for the refusal was the discount practices of the dealer, he states that he would have acquitted if the defendant had established another purpose. *Coutts*, *supra* note 137, held the provisions in s. 38(9) create defences and rejected the Crown's argument that they are mere inferences which are not applicable if there is other evidence of the reason for refusal.

<sup>157</sup> *R. v. Cluett, Peabody, Canada Inc.*, *supra* note 140.

<sup>158</sup> See, *supra* note 153.

<sup>159</sup> *Id.*

<sup>160</sup> Skeoch, *supra* note 134, at 41. Loss-leadering is to be distinguished from predatory pricing in section 34(1)(c) in that predatory pricing must substantially lessen competition or be designed to have that effect.

<sup>161</sup> *Id.* at 35. Grant J. in *Coutts*, *supra* note 137 at 93, described the damage from loss-leaders as follows: "Such practice may have the effect of causing other retailers to withdraw from the sale of such product and if carried on extensively may tend to eliminate competition and thus defeat one of the principal purposes of such Act."

is argued that retailers will refuse to carry a product if it is being sold below cost by another retailer. These predictions are probably overstated. Any discounting practice will be temporary and even if retailers are reluctant to stock a manufacturer's goods for the moment, prices will bounce back and the goods will be stocked.<sup>162</sup> Furthermore, the widespread use of loss-leaders is not supported by the evidence. A Canadian economist concluded that the practice "is so unsubstantial in the circumstances of modern merchandising that it cannot be regarded as a matter of concern."<sup>163</sup>

The courts have given a narrow interpretation to the loss-leader defence. Cost has been defined by the courts as actual cost of the product which does not include the fixed costs of doing business. Judges have recognized that a test requiring that fixed costs be allocated to individual products would involve a technical examination of costs.<sup>164</sup> This approach allays some of the concern which greeted the creation of the loss-leader defence. Economists had criticized the provision on the ground that refusal to supply was permitted without a prior finding by a court of a practice of loss-leadering and that the practice itself was vaguely defined.<sup>165</sup>

### 3. Exclusive Dealing

Exclusive dealing is a requirement by a supplier that distributors not handle goods of rival suppliers. It does not necessarily limit intrabrand competition because the supplier need not restrict number, location or pricing policies of distributors when it insists upon exclusive dealing.

Exclusive dealing is a civil reviewable matter under the Act. Section 31.1(4) forbids a requirement, by a major supplier or a widespread practice, that a customer deal exclusively or primarily in a supplier's product if it is likely to impede entry or expansion of a firm, introduction or expansion of sales, or cause any other exclusionary effect with the result that competition is or is likely to be lessened substantially. The Commission may order that the practice cease or make any other order it thinks necessary to overcome the effects or to stimulate competition. Exclusive dealing which is engaged in to facilitate entry into a market is exempt.<sup>166</sup> In the United States, exclusive dealing is specifically prohibited by section 3 of the *Clayton Act*.<sup>167</sup> It is also an unfair trade practice under section 5 of the *Federal Trade Commission Act* and is subject to section 1 of the *Sherman Act*. Cases under section 3, before the decision in *Tampa Electric Nashville Coal Co.*<sup>168</sup> in 1961, adopted a purely quantitative approach deciding on the basis of the degree to which competition was foreclosed. The question was whether a "substantial proportion of commerce was affected."

<sup>162</sup> Scherer, *supra* note 105, at 592.

<sup>163</sup> Skeoch, *supra* note 134, at 61.

<sup>164</sup> *Philips Electronics*, *supra* note 150, at 227-28 and *H.D. Lee of Canada Ltd.* *supra* note 144, at 196. In *H.D. Lee* the defendant's argument that loss-leadering exists when the dealer sells low to advertise was rejected.

<sup>165</sup> Skeoch, *supra* note 134, at 40.

<sup>166</sup> S. 31.4(4)(a).

<sup>167</sup> *Supra* note 75.

<sup>168</sup> *Tampa Electric Co. v. Nashville Coal Co.* 365 U.S. 320, 81 S. Ct. 623 (1961). See Bork, *The Antitrust Paradox* (New York: Basic Books, 1978) at 300.

*Tampa Electric* and the subsequent decision in *GTE Sylvania*,<sup>169</sup> a decision on territorial restrictions, indicates that a more flexible approach, using economic analysis to assess whether the effect of such conduct will be efficient or exclusionary, will be adopted. Thus the court could look at whether promotional activities, services, or repair facilities have been increased. The impact on interbrand competition versus intrabrand competition would be a factor.

In Canada, section 31.1(2), exclusive dealing, requires that the practice either be engaged in by a "major supplier" or be widespread in the market. This is analogous to American case law which refers to "a dominant position in a market . . . (or) myriad outlets with a substantial sales volume coupled with an industry wide practice of relying upon exclusive contracts."<sup>170</sup> The definition of major supplier was considered in the only case to be decided by the Commission under this provision: *Bombardier Ltd.*<sup>171</sup> The Commission held that the exclusive dealing arrangements of Bombardier did not lessen competition or would not be likely to do so given the ease of entry by dealers and the expansion of sales and dealerships by rival firms.

The Commission equated major supplier and market power. The question is whether the firm's actions will "have an appreciable or significant impact on the market where it sells." While market share is important, it is not the only factor. Additional criteria will vary from industry to industry. The Commission listed financial strength and the firm's record as an innovator as two relevant characteristics.<sup>172</sup> Bombardier, which had thirty percent of the North American market for snowmobiles and a strong historical position, was found to be a major supplier.

*Bombardier* may be contrasted with the American case of *Standard Fashion*<sup>173</sup> in which the manufacturer entered into exclusive dealing contracts for the supply of dress patterns. Economic theories explaining exclusive dealing vary. One economic justification for exclusive dealing is that it is a means for a supplier to prevent a distributor from free-riding on a valuable service provided by the supplier. For example, the supplier may be the more efficient provider of advertising. The advertising will attract customers which the distributor can switch to a rival's product with a higher markup to the distributor. In *Standard Fashion*, it is argued the supplier provided investment in design of a pattern line, some of which would be more successful than others. The successful pattern was easily copied and could be offered at a lower price and still provide the dealer with a higher markup. In the absence of an exclusive dealing agreement, the dealer could easily switch a customer to the rival product. In *Bombardier*, the practice of exclusive dealing may have been justified by the expenditures by Bombardier on innovation. The Commission refers to the "strong participation in innovation, in trail setting and in racing which are important in product development and brand image. . . ."<sup>174</sup>

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<sup>169</sup> *Supra* note 128.

<sup>170</sup> *Tampa Electric Co.*, *supra* note 168.

<sup>171</sup> The case is reported in Restrictive Trade Practices Commission, *Annual Report*, March 31, 1981.

<sup>172</sup> *Id.* at 37.

<sup>173</sup> *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346 (1922). See Marval, *Exclusive Dealing* (1982), 25 J. Law. Econ. 1.

<sup>174</sup> *Supra* note 171, at 37.

In both cases it was argued that in some towns there was only one distributor. Bork points out that this simply means that the dealer has a monopoly in the town and that rival manufacturers will compete to supply that dealer.<sup>175</sup> If the dealer agrees to deal exclusively, it must be in the best interests of the dealer and it follows that this is in the best interests of the consumer since it has been shown that a monopolist who purchases at a lower price will sell at a lower price.

#### 4. Tied Selling

Tied selling is a civil reviewable matter under section 31.4(2), the same section which regulates exclusive dealing. A typical tied selling arrangement makes it a condition of purchasing one good (the tying good) that the buyer purchase another good from the seller (the tied good). The theory of the American courts has been that tied selling allows the seller with monopoly power over the tying good, to obtain a second distinct monopoly of the tied good,<sup>176</sup> enabling the seller to obtain monopoly profits from the sale of the tied good. Economists have pointed out that if the two products are necessary to provide a service, such as Xerox machines and the paper used in the machines, the seller does not increase its profits by tying one to the other.<sup>177</sup> This is because the customer is interested in the end product which is composed of both goods and does not care how the costs are distributed between the two products. Demand is a function of the price of the end product and sellers can distribute this price between the two goods as they choose. If they raise the price of the paper, they must lower the price of the machine because the higher the price of the paper, the less consumers will be willing to pay for the use of the machine.

Tied selling can, however, have an anticompetitive effect if it is used to facilitate price discrimination or to create entry barriers. In one method of price discrimination, the tied good is used to meter demand and provide information on the elasticities of demand of different users. For example, it is assumed that the more paper a customer uses, the greater the value of copying service to it. A company could charge a higher price per unit of copying service to heavier users of the service by charging a price for the paper which is in excess of the marginal cost. Another method of price discrimination is block booking.<sup>178</sup> An example of block booking is a movie producer who will permit a theater to rent a certain film only if it agrees to take a second film. For example, it may rent what it considers to be a "winner" only if it also agrees to rent a "dog." If the relative values of the two films are different for different theater owners, then the practice will enable the movie producer to charge more for the package than it could charge for the individual products.

<sup>175</sup> *Supra* note 168, at 307.

<sup>176</sup> *International Salt Co. v. U.S.*, 332 U.S. 392, 68 S. Ct. 12 (1947). The American rules on tied selling will be re-examined by the Supreme Court during the 1983 term in *Jefferson Parish Hospital District No. 2 v. Hyde* 686 F.2d 286 (5th Cir. 1982) (Cert. granted 2-28-83). The Department of Justice has submitted an *amicus* brief supporting the defendant hospital's right to force patients who want surgery to use the anesthesia service supplied by the hospital.

<sup>177</sup> Posner and Easterbrook, *Antitrust, Cases, Economic Notes and Other Materials* (New York: West Pub. Co., 1981) at 802. See Clarkson, *supra* note 126, at 273. Bowman, *Tying Arrangements and the Leverage Problem* (1957), 67 Yale L.J. 19.

<sup>178</sup> See Clarkson, *supra* note 126, at 276.

Tied selling was considered by the Restrictive Trade Practices Commission in *The Director v. BBM Bureau of Measurement*<sup>179</sup> in 1981. BBM measures radio audience listening and television audience viewing in Canada. BBM required advertisers as a condition of obtaining the 'radio data' to purchase the 'television data.' Advertising agencies and station representatives were charged a higher total price for radio and TV data purchased individually than if both were purchased together. In other words, BBM offered the second product at a very large discount. The Director alleged that these practices lessened competition substantially because they raised entry barriers to new entrants and impeded expansion of competitors. BBM had a monopoly in the supply of radio data reports for use in the radio advertising market, but it faced strong competition from A.C. Nielson Company in the provision of television data. The Commission concluded that the practice created an "un-surmountable" (sic) entry barrier and issued an order prohibiting BBM from continuing the practice and requiring them to charge a separate price for each service.

Section 31.4(2) prohibits tied selling which is likely to have an exclusionary effect including impeding entry or expansion of a firm or a product. Tied selling may not create any entry barrier if there are uses for the tied product other than in conjunction with the tying product. But in *BBM*, the tied product, television data, does not have any other use. There is no substantial group demanding television data that does not also want radio data. Therefore the prospect was that Nielson would be forced out of the market unless it provided radio data. The Commission concluded that "(i)t is no answer to say that Nielson is able and free to enter radio data service. . . . The intention of the statute is to free the market so that the producer of any one product has opportunity to enter and compete on a fair basis."<sup>180</sup>

BBM relied on economic evidence to show that their pricing practices, for example, charging \$17,000 for membership and radio data, and an additional \$675 for the television data, were justifiable as two-part tariff pricing. They argued that purchasers were really paying a membership fee which covered the fixed costs of the services of the association and were merely being charged marginal cost for the additional radio or television data. The Commission assumed that this argument was related to BBM's earlier argument that the advertising agencies were not "customers" as required by the section and did not address the merits of the argument. It would be a valid argument in the case in which there are large set up costs of a service and the marginal costs of supplying the service are near zero.

The argument was accepted in the United States in *Broadcast Music, Inc. v. CBS (ASCAP)*.<sup>181</sup> ASCAP had been granted nonexclusive rights by its member music composers to licence nondramatic performances of their works. Radio and television broadcasters and other users of the music purchase a blanket license from ASCAP which permits them to use any of the compositions of ASCAP's members. The fee is a percentage of total revenues

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<sup>179</sup> *Annual Report*, Restrictive Trade Practices Commission, March 31, 1982 at 29.

<sup>180</sup> *Supra* note 178, at 38.

<sup>181</sup> 441 U.S. 1, 99 S. Ct. 1551 (1979). See Coase, *The Marginal Cost Controversy* (1946), 13 *Economica* (N.S.) 169; Posner, *supra* note 177, at 144.

or a flat dollar amount which does not depend on the number or name of the compositions used. This two-part pricing equates the marginal price with the marginal cost of using a musical composition which is zero. The substantial initial investment is covered by the access fee. There is no analysis in *BBM* as to whether this reasoning applies to the pricing practices of *BBM*. *BBM* can be distinguished on the basis that *BBM* had a monopoly in radio data whereas *ASCAP* did not have a monopoly in licensing compositions. Each composer retained the right to license their work. Since *BBM* did not face any competition from other producers of radio data there was no pressure for them to charge a competitive price. In addition, there is no reason to think that the marginal cost of producing data is always below average cost. Whether these distinctions are significant requires more analysis — a process the Commission did not even begin.

## V. CONCLUSION

In summing up, Canadian competition law and jurisprudence will be examined from the viewpoint of the foreign firm. First, the foreign firm operating in Canada will be considered and then the question of the extent to which Canadian courts and the *Combines Investigation Act* assert jurisdiction over foreign firms will be addressed. The first hurdle, and a substantial one for the foreign firms, is the required review under the *Foreign Investment Review Act* of the acquisition of Canadian businesses and the establishment of new businesses by foreign firms. Once this hurdle is overcome the firm must consider the extent to which it should be concerned with the *Combines Investigation Act*.

The discussion of Canadian and American law may lead one to conclude that enforcement of competition policy is not as effective in Canada. There have been few private actions. Certainly the Director of Investigation and Research does not have the formal enforcement powers of American administrators. It is difficult for the Director to discover anticompetitive conduct because there are no formal requirements for domestic firms in Canada to notify the Director of potentially anticompetitive activity such as mergers, export agreements and joint ventures. The Director does not have formal powers to enter into undertakings with firms to correct anticompetitive activity. This lack of formal powers is coupled with the belief by many that conviction will be difficult to obtain under the merger and conspiracy provisions of the Act. Still it would be a mistake to assume that the law is ineffective. Express agreements to fix prices by firms with a substantial market share could be successfully prosecuted. The resale price maintenance section, which does not require a lessening of competition, has been actively enforced. The recent decisions on predatory pricing and the dissenting judgments in *Aetna Insurance* and *Atlantic Sugar* indicate that the courts are beginning to understand and recognize the harm caused by anticompetitive conduct. The expanded jurisdiction of the Restrictive Trade Practices Commission to adjudicate civil reviewable matters could become an effective enforcement mechanism, once the constitutional issues are settled. The possibility also exists of using the Act as a sword and making a complaint to the Director when a foreign firm thinks another firm is acting contrary to the Act.

Canadian courts apply the principle that jurisdiction over crime is limited to crimes committed within the territorial limits of the country. This is in con-



trast to the American claim of jurisdiction over foreign transactions which have a substantial and foreseeable effect on American commerce. Thus the provisions of the *Combines Investigation Act* involving foreign firms are directed at manifestations of the anticompetitive activity in Canada. The provisions specifically directed at foreign firms are: refusal to sell by foreigners (section 31.7), foreign directives to Canadians (sections 36.6 and 32.1), and misleading advertising by foreigners (section 36(2)). The remedial powers of the court are directed toward the firm in Canada. For example, under the refusal to sell provision, the court may order a Canadian firm which was supplied, to supply the firm which was denied supply by the foreign firm. Canadian firms implementing a directive from a foreign person or firm for the purpose of giving effect to a section 32 conspiracy are subject either to criminal proceedings or civil proceedings before the RTPC. The implementation by Canadian firms of foreign directives to give effect to foreign laws is a civil reviewable matter.

Finally, an examination of the substantive differences between Canada and the United States reveals that the principal differences of the Canadian legislation are that the domestic merger provision is ineffective, price fixing is not illegal *per se*, and the price discrimination provisions are much weaker. The provisions on vertical restraints do not appear to be significantly different. Resale price maintenance is illegal in both countries without showing anticompetitive effects, although in the future it may be analysed under the rule of reason in the United States. Exclusive dealing and territorial restrictions are subject to the same kind of analysis in both countries — under the rule of reason in the United States and as a civil reviewable matter in Canada. The Canadian rules on predatory pricing appear to be converging toward those of the United States. Tied selling may be treated differently. It has been classified as illegal *per se* in the United States, while in Canada it must be shown to have an exclusionary effect.

Currently Canada's competition law on conspiracies and mergers is not a major factor in a domestic firm's decisions. Canadian firms operating in international markets are much more concerned about avoiding violations of the United States and European Economic Community competition law. These firms rightly assume that if they avoid violations of these two jurisdictions, they will not have infringed the *Combines Investigation Act*. Canadian competition law is in need of reform particularly in the area of mergers and agreements to restrain trade. The courts have failed to develop workable rules in these two areas and legislative change is necessary. The problem is to design a competition law that reflects, and is appropriate to, the economic structure of Canada.