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A Report on Canada's Conspiracy Law

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I. Introduction

The history and evolution of Canada's competition law, particularly as a comparison with American antitrust law, is an interesting study. Canadian law is worded in a similar way to section 1 of the Sherman Act.[1] In essence, Canadian law makes illegal any agreement or arrangement that unduly lessens competition. The Sherman Act has been read to require an unreasonable restraint of trade. The wording is not all together different and one might assume that the courts would demonstrate a similar disposition towards their interpretation. That, however, has not been the case.

Canadian competition lawyers will proudly tell their American brethren that our legislation was passed one year before the Sherman Act.[2] In fact, it was the first competition law or antitrust law to be passed in the world. However, the shine of their brow fades

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* Partner, Macleod Dixon, LLP (Toronto Office); the efforts of Huy Do, Peter Cho and Viktor Hohots in the preparation of this report are gratefully acknowledged. In addition, William C. Holmes kindly offered some comments on the report, which, among other things, helped to improve the accuracy of our discussion of American antitrust law; William Stanbury offered useful guidance on performing initial research; and J. Anthony VanDuzer suggested some reference sources that otherwise might have been missed. This report is based, in part, on an article by the author, who was commissioned along with two others to each write a study on the history of Canadian conspiracy laws and to recommend a proposal for reform for the Commissioner of Competition. The papers can be accessed at http://strategis.ic.gc.ca/SSG/ct02277e.html (last visited Apr. 5, 2002).

[1] Sherman Act, 15 U.S.C. § 1 (2001).

[2] The first piece of Canadian competition law legislation was introduced by Parliament in 1889 and was called "An Act for the Prevention and Suppression of Combinations formed in Restraint of Trade," S.C. 1889, c. 41 (Can.). The legislation was introduced in a common law environment in which conspirators could seek the assistance of Canadian courts in forcing "cheaters" to adhere to formal price-fixing or output limitation agreements: Ont. Salt v. Merch. Salt Co., 18 Gr. 540 (1871).

quite quickly when they begin to talk about the enforcement record.

II. The Canadian Enforcement Record

A. General

The law has changed very little since its inception. Most of the modifications have been in the nature of clarifications through the addition of subsections to what is now section 45(1) of the Competition Act. Over the period of 1890 to 1969, a period where there are comparable statistics in Canada and the United States, there were over 1,200 conspiracy prosecutions in the U.S. compared to only 70 in Canada.[3] Since 1975, Canada only had 22 cases,[4] and most

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[3] *See* W.T. STANBURY, CHAPTER 6 - LEGISLATION TO CONTROL AGREEMENTS IN RESTRAINT OF TRADE IN CANADA: REVIEW OF THE HISTORICAL RECORD AND PROPOSALS FOR REFORM, CANADIAN COMPETITION LAW AND POLICY AT THE CENTENARY 128 (R. S. Khemani & W. T. Stanbury, ed., Halifax: Institute for Research on Public Policy) (1991). For the period of 1991-1999 (a more recent period for which statistics were available), Canada had 22 cases compared to over 500 in the U.S. *See* U.S. Department of Justice, *Antitrust Division Workload Statistics: FY 1991-2000, at* http://www.usdoj.gov/atr/public/7344.html (last visited Mar. 1, 2002); H. Chandler and R. Jackson, *Beyond Merriment and Diversion: The Treatment of Conspiracies Under Canada's Competition Act, at* http://www.strategis.ic.gc.ca/SSG/ct01767e.html (last visited Mar. 1, 2002). Note that, until 1900, only "unlawful" conspiracies were illegal, which effectively rendered the Canadian legislation unenforceable. *See* STANBURY, *supra*, at 63. The term "conspiracy" is used throughout this report to mean all agreements or arrangements between or among two or more competitors that might be captured by the language of the Competition Act, R.S.C., ch. C-34, § 45 (1985) (Can.) (when read without the words "unduly" or "unreasonably"), the Sherman Act, 15 U.S.C. §1 (2001), or the Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 81(1), 298 U.N.T.S. 15 [hereinafter Treaty of Rome], irrespective of the impact of such agreement or arrangement on competition. While recognizing the potential scope of our definition, it is suggested that little turns on it.

[4] Another possible explanation for the low number of conspiracy cases in Canada is that our prosecutors have done a better job of filtering out those cases that do not impact competition and, therefore, do not merit prosecution. There are, however, a variety of reasons to doubt such an argument. First, more detailed statistics demonstrate that of the 38 cases for which we have market share data, *only 4 appear to have involved market shares of less than 70%*; and of the 41 cases for which we have data, over half of those cases (25) have been transparent (i.e., notorious or apparent conspiracies). I have considered agreements or arrangements to be "transparent" where either the formation of the alleged conspiracy was transparent to the outside world or the operation of the alleged conspiracy was transparent to the outside world. On the basis of such data, I would suggest that the

of those were what we might call American "tag along" cases. Clearly the smaller economy in Canada explains the gap to some extent, but perhaps a fairer comparison is to look at the relative number of markets in Canada compared to the U.S., and the mix of industry in Canada versus the U.S. On that basis there is a lot more in common with the U.S. than there would be in terms of the economic output.[5]

So what accounts for Canada's poor record of prosecutions? One has to understand that there has been a feeling in Canada for a long time that bigger just might be better.[6] We have had the influence of the Irvings, the McCains, the Thompsons, and more recently the Blacks, where capital has aggregated in very concentrated hands. And those families that have aggregated wealth have generally exercised their power in a fair manner and invested in Canada. They created employment and development that otherwise might not have occurred. And those families instilled in the Canadian psyche somewhat of a comfort with the aggregation of power in an aristocratic elite. Power as such was not a problem, provided it was

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Crown's threshold for commencing actions against conspirators has been very high and most prosecutions have "cried out" for action.

[5] STANBURY, *supra* note 3, at 67-69. Stanbury would argue that the ratio of 18:1 does not reflect the relative sizes of our two economies (approximately 10:1) and, further, that the ratio should be even lower than the relative size of our two economies might suggest because the *number of markets* in Canada, as well as the *mix of industries*, is much higher as a percentage of the number of markets and mix of industries in the United States.

[6] *See Competition Policy in Canada: Past and Future (Backgrounder for Canadian Competition Policy - Preparing for the Future)* (2001), at 2, *at* http://www.ivey.ca/competitionconference2001/proceedings2/ConfSpeech_eng.htm (last visited Mar. 1, 2002) (The framers of the original competition legislation in 1889 did not object to power as such, but rather to its abuse. They believed that Canada as a whole would benefit from large aggregations of capital (such was the means to a higher standard of living for the nation), but recognized that with size came responsibility: consumers, workers and competitors must not be exploited.); E. Clark, *The Dynamic between Domestic Competition and International Competitiveness*, at 2-3, *at* http://www.ivey.ca/competitionconference2001/proceedings2/ConfSpeech_eng.html (last visited Mar. 1, 2002); A.M. Rugman, *The Impact of Globalisation on Canadian Competition Policy*, at 9, *at* http://www.ivey.ca/competitionconference2001/proceedings2/ConfSpeech_eng.html (last visited Mar. 1, 2002). Hence, C. GREEN, CANADIAN INDUSTRIAL ORGANIZATION AND POLICY 298 (3d ed., Toronto: McGraw Hill Ryerson 1990), might be correct when he posits that, "One imagines that the word 'unduly' was thrust into the 1889 legislation just because the protectionist spirit made 'too much' competition suspect. Combinations were acceptable so long as they did not become a total bar to competition. This mentality has not disappeared."

not abused.

The problem, or the difference perhaps, between Canada and the U.S. is that, unlike the U.S., Canada has not experienced the same degree of a substantial middle-class – by which I mean a successful entrepreneurial middle-class – until very recently. And this has left Canada with a feeling that it is far more concerned with the abuse of power than its aggregation.

So what does all this mean in relation to conspiracy law? I suspect it is one of the reasons why the courts have never interpreted the law as having a *per se* standard. There is no such thing as a *per se* illegal conspiracy in Canada. The courts have always indicated that they need to look at the particular facts of the case and determine whether, in fact, the conspiracy was harmful. In some cases, you do find empathy by the courts that prices were too low and the conspiracy did have the effect of stabilizing and raising prices, or that a nasty new entrant was predatorily pricing its products. Thus today, one must prove in Canada that a conspiracy unduly harmed competition in every case with economists, market share analysis, market definition, etc., and this accounts for our very poor record on enforcement.

B. Macleod Dixon LLP's Report for the Commissioner of Competition

Macleod Dixon LLP was recently commissioned by the Commissioner of Competition to write a comparative study on the history of competition laws and to recommend a proposal for reform.[7] We began our work with a fundamental question: Is Canada's conspiracy law working effectively? After considerable research and study, we concluded that the law is not effective. Further, we concluded that the law has never been very effective and may be even less effective in the future.

In the course of looking at the history of our enforcement record, one of the starkest things that we found was that since 1975 there were only seven cases that did not involve a virtual monopoly or monopoly market share.[8] In every single one of those cases, the

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[7] Albert C. Gourley, *A Report on Canada's Conspiracy Laws: 1889-2001 and Beyond*, Aug. 2001, *available at* http://strategis.ic.gc.ca/pics/ct/gourleyrep.pdf (last visited Mar. 1, 2002).

[8] *Id.* at 5. Our study has placed in this category all cases involving market shares of 90% or more, as well as those in which the court indicated that the participants in the alleged conspiracy had a "virtual monopoly."

Crown lost.[9] Just to demonstrate this problem of market definition, in 1995 there was a case involving rail freight forwarding that the Crown lost. All of the companies that were involved in the rail freight forwarding business had conspired to fix prices. The Crown lost because they failed to demonstrate to the court that rail freight forwarding constituted the relevant market.[10]

One of the other things that is quite stark in Canada, and it contrasts quite dramatically with the U.S., is the record of fines in Canada. In 1990, which was not too long ago, the Competition Bureau announced its record-setting fine for bid rigging. It was a CDN$3.4 million fine (in the aggregate) and the level of commerce involved was a half billion dollars over 12 years. It is hard to conclude that such fines act as a deterrent.[11] Our report to the Commissioner looked at this history and the economics of prosecuting price fixing and concluded that times have changed and so should the law.

III. The Economics of Enforcement

A. General

Economists almost universally agree that "hard core" conspiracies contribute little net benefit to society.[12] Some conspiracies do not materially harm our economy, however, because the parties lack the requisite market power to impact on competition. As stated by Hovenkamp:

> If a town contains ten similar grocers, and three of them jointly run a newspaper advertisement quoting retail prices, the arrangement would reduce advertising costs for each of

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[9] *Id.* Only post-1975 cases in relation to which we were able to identify the participants' market share(s) were included.

[10] *See* R. v. Clarke Transp. Can. Inc., 130 D.L.R. (4th) 500 (1995).

[11] Moreover, the Commissioner of Competition pointed out that these results were achieved through effective immunity programs and guilty pleas. In contrast, the Crown's record on contested cases has been abysmal.

[12] *See* M.J. TREBILCOCK ET AL., THE LAW AND ECONOMICS OF CANADIAN COMPETITION POLICY [to be published], Chap. 3 at 1; P.L. Warner & M.J. Trebilcock, *Rethinking Price-Fixing Law*, 38 MCGILL L.J. 679, 683-84 (1993); Competition Bureau, *Competition Policy Considerations in the GATS Negotiations* [draft], at 7, *available at* http://www.strategis.gc.ca/SSI/ct/gats.pdf (last visited Mar. 1, 2002).

> the three. Furthermore, three grocers out of ten could not plausibly fix prices. Customers would buy from the other 7. . . .[13]

One policy debate therefore revolves around the need, and indeed desire, of prohibiting and prosecuting conspiracies that do not materially impact on competition because the conspiring parties do not have market power.

B. Benefits of Impact Analysis

Obviously, the principal benefit associated with a *rule of reason* or *undue* competition impact analysis is the increased likelihood that costs associated with prosecuting cases that do not pose any harm to society (hereinafter "Gray Costs") will be avoided.[14] We believe that such costs would be relatively small because:

- It can generally be assumed that "hard core" conspiracies will not be proposed by businessmen and women who do not believe that they will be effective, although that is no certainty that conspiracies entered into will be effective;[15] and
- We would expect the Crown to exercise prosecutorial discretion to settle many of the cases where a conspiracy clearly had no effect on the economy by offering inducements, such as an

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[13] H. HOVENKAMP, FEDERAL ANTITRUST POLICY 193 (2d ed. 1999). *See also* E.T. SULLIVAN & J.L. HARRISON, UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS 86 (Matthew Bender 1988).

[14] R.A. POSNER, ANTITRUST 128-29 (1974) ("[W]hile it is doubtless true that firms would not enter into price-fixing conspiracies if they were convinced they would not succeed, they may sometimes be mistaken, and such mistakes, even if rare, could account for a large proportion of the small number of price-fixing cases that the enforcement agencies bring.").

[15] *See id.*; HOVENKAMP, *supra* note 13, at 214 (citing Am. Column & Lumber Co. v. U.S., 257 U.S. 377 (1921)); Brook Group v. Brown & Williamson Tobacco, 113 S. Ct. 2578, 2605 (1992) (Stevens, J., dissenting) ("[T]he professional performers who had danced the minuet for 40 to 50 years would be better able to predict whether their favorite partners would follow them in the future than would be an outsider who might not know the difference between Haydn and Mozart."). In some cases, Canadian conspirators have been prosecuted before they achieved sufficient agreement within the relevant industry to exercise joint market power. Such cases do not stand for the proposition, however, that the conspirators intended to implement an agreement that had little chance of success.

agreement to recommend a discharge, conditional discharge, prohibition order or small fine.[16]

We further believe that the Gray Costs are significantly exceeded by the costs associated with maintaining our present *undue* standard (hereinafter "Present Costs").[17]

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[16] The Commissioner (and his predecessors) also exercises considerable discretion in determining those cases that are referred to the Attorney General for prosecution. *See* Director of Investigation and Research, Bureau of Competition Policy, Annual Report for the Period Ending March 31, 1990, at 67 (1990) ("Geralton Hairdressers": resolved by public retraction of joint advertisement); Commissioner of Competition, Competition Bureau, Annual Report for the Period Ending March 31, 1999, at 24 (1999) ("Regional Building Contracts: Bid-rigging": resolved by undertaking of firms not to engage in activities again); Director of Investigation and Research, Bureau of Competition Policy, Annual Report for the Period Ending March 31, 1998, at 9 and Table 3 (1998) ("Conspiracy": resolved by negotiations leading to termination of agreements; "Dry Cleaning Services": resolved by undertakings; "Septic Tanks": resolved by undertakings; "Taxis": resolved by undertakings); Director of Investigation and Research, Combines Investigation Act, Annual Report for the Year Ended March 31, 1958, at 26 (1958) ("Sand and Gravel": resolved by negotiations leading to termination of agreements); Director of Investigation and Research, Combines Investigation Act, Annual Report for the Year Ended March 31, 1978, at 50 (1978) ("Taxi Cab Services - Chatham, New Brunswick": application for a prohibition order); Director of Investigation and Research, Combines Investigation Act, Annual Report for the Year Ended March 31, 1953, at 19 (1953) ("Winnipeg Bread Report"). *See also* J.A. VanDuzer and G. Paquet, *Anticompetitive Pricing Practices and the Competition Act: Theory, Law and Practice*, Part III at 7 (Oct. 1999), *available at* http://strategis.ic.gc.ca/pics/ct/vdreport.pdf (last visited Mar. 1, 2002).

[17] Some might argue that a further benefit of an impact analysis is the protection of certain efficiency generating conspiracies. Nevertheless, our focus in this part is on "hard core" cartels, rather than conspiracies that offer potential for economic benefits. *See* T. Kennish and T.W. Ross, *Toward a New Canadian Approach to Agreements Between Competitors*, 28 CAN. BUS. L.J. 22, 24 (1997), who argue that Canadian conspiracy law is too restrictive at present and "does not properly take account of the almost endless possibilities for economically efficient co-operation among firms that may happen to be competitors." Yet, Kennish and Ross do not argue that "garden-variety price fixing, bid-rigging and market allocation schemes" ought to be defended on this basis. *Id.* at 27. *See also* F.M. Scherer, *Industrial Market Structure and Economic Performance*, *available in* T.W. DUNFEE AND F.F. GIBSON, ANTITRUST AND TRADE REGULATION 56-58 (1980) ("[I]f pooling indivisible resources or cooperating in research and development is genuinely advantageous, it is usually worth doing without the additional encumbrance of price-fixing or market-sharing agreements. The need for cartelized cooperation is especially small in a market as vast as the United States, where the conflict between scale economies and competition is seldom acute."); R.H. BORK, THE ANTITRUST PARADOX 263 (1978) ("The efficiencies arising from

C. Costs of Impact Analysis

Some of the Present Costs include:

- The cost to Canadian society of an increased number of conspiracies that harm our economy, which would likely be higher in number than under a *per se* standard because of the:
  - ➢ increased uncertainty of the law, which would likely lead some to consummate such conspiracies that otherwise would not;[18]
  - ➢ likely increase in the failure of the Crown to prosecute such conspiracies because they are considered "difficult" cases;[19]
  - ➢ likely increase in the failure of the Crown to prove, or the courts to accept, that the conspiracy would *unduly* lessen or prevent competition *beyond a reasonable doubt*;[20]

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a naked price-fixing or market-division agreement, if any ever do arise, must be so minor that the law is justified in ignoring them."). Note that the Supreme Court of Canada was clear in R. v. Nova Scotia Pharmaceutical Soc'y, 2 S.C.R. 606, 650 (S.C.C. 1992), *aff'g* 36 C.P.R. (3d) 173 (N.S.C.A.), *rev'g* 32 C.P.R. (3d) 259 (N.S.S.C.) [hereinafter PANS] that our present undue inquiry "does not permit a full-blown discussion of the economic advantages and disadvantages of the agreement, like a rule of reason [approach] would."

[18] STANBURY, *supra* note 3, at 96 ("Where the accused have taken an economic approach they take into account such variables as the probability of being caught, convicted and penalized; the likely increase in profits attributable to an agreement with competitors; and the likely lag between the time the benefits are received and the costs are incurred."); BORK, *supra* note 17, at 263 ("The subject of cartels lies at the center of antitrust policy. The law's oldest and, properly qualified, most valuable rule [in the U.S.] states it is illegal *per se* for competitors to agree to limit rivalry among themselves. We have already discussed. . .the great cases that established and elaborated this doctrine. . . .There are, of course, hundreds of other cases in which the doctrine of *per se* illegality for eliminations of rivalry (e.g., price fixing and market division) has been applied, and without doubt thousands have never been broached because of the overhanging threat of this rule. Its contributions to consumer welfare over the decades have been enormous."); *see also* M.K. Block et al, *The Deterrent Effect of Antitrust Enforcement*, 89 J. POL. ECON. 429 (1981); R.M. Feinberg, *Antitrust Enforcement and Subsequent Price Behaviour*, 62 THE REV. OF ECON. AND STAT. 609 (1980); R.D. BLAIR AND D.L. KASERMAN, ANTITRUST ECONOMICS 157-60 (1985); G.J. Stigler, *The Economic Effects of the Antitrust Laws*, 9 J.L. & ECON. 225 (1966).

[19] *See supra* Part III. B.

[20] PANS, *supra* note 17, is an instructive example, where the Crown proved

- "Transactional" costs, such as:
  - the increased cost of advising businesses on the law of conspiracy in Canada, given its complexity and uncertainty;[21]
  - the increased likelihood that such advice will not correspond with international antitrust standards, such as those in the United States and Europe, and the associated cost of restructuring relationships to adhere to such international standards;[22] and

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that the agreement would lessen competition unduly beyond a reasonable doubt, but could not prove that a reasonable business person ought to have known that such an impact would occur beyond a reasonable doubt.

[21] *See* Scherer, *supra* note 17, at 56-58 ("A relatively unimportant cost [using a rule of reason standard] would be the increased uncertainty business firms would face as to which agreements are illegal. At least in borderline areas, it would be impossible to proceed with confidence until the enforcement agencies or judiciary has rendered an opinion. This is not a serious problem, however, for companies could always avoid legal uncertainty by refraining from brinkmanship. In so doing, they would be no worse off than under a *per se* rule prohibiting all clear-cut restrictions."). In our experience, however, these costs are not insignificant. There is no doubt that Canadian businesses have incurred significant expenditures for legal advice directly attributable to the *uncertainty* of our conspiracy law. They have suffered from the inability of counsel to give them clear directions on the treatment under our *Competition Act* of joint ventures, strategic alliances, ancillary restraints and other matters, as well as the cost of retaining counsel to draft and review such agreements so as to ensure that their pro-competitive intentions will be made manifest and obvious to a reader. While some speculated that the decision in PANS, *supra* note 17, helped to clarify the law, we do not share this view. Indeed, it could be argued that Justice Gonthier actually muddied the waters in suggesting that "[a] particularly injurious behaviour may also trigger liability even if market power is not so considerable" and "[p]arties to the agreement need not have the capacity to influence the market[, but rather w]hat is more relevant is the capacity to behave independently of the market, in a passive way." PANS, 2 S.C.R. at 657, 654. We would suggest that those words will be made great use of in the coming years and continue the trend toward more prolonged and complicated court proceedings. In fact, *Clarke Transport*, *supra* note 10, is evidence of such trend. In the past, opinions as to the appropriate level of market share that will be condemned as undue ranged anywhere from 35% to 90%. We tend to think that both ends of the spectrum could be defended on a rational basis, depending on the circumstances, including the judge that hears the case. *See* GREEN, *supra* note 6, at 260 ("[T]he agreeing sellers must account for at least 80 to 90 percent of industry output in the relevant market.").

[22] Canada's conspiracy law enables our business community to adopt structures and arrangements that are not permitted outside our borders, which may have the impact of stifling economic expansion because of the cost of reshaping

- The additional cost of litigating conspiracy cases because of the increased complexity of the adjudication process.[23]

Naturally, these costs are difficult to quantify, but we believe that they would exceed the Gray Costs referred to in Part III. B.[24]

IV. Macleod Dixon LLP's Recommendations to the Commissioner

Accordingly, Macleod Dixon LLP recommended that Canada's law of conspiracy be reformed by making *per se* illegal[25]

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such structures and agreements to suit foreign laws. *See* International Antitrust Draft Code Working Group, *Draft International Antitrust Draft Code as a GATT-MTO-Plurilateral Trade Agreement*, 65 ANTITRUST & TRADE REGULATION REP., at S-3 ("In the globalized economy the law of many nations applies to the same transaction and the law of each nation has somewhat different requirements and standards. The disharmonies are sand in the gears of smooth and efficient market transactions. They increase the costs of business and deter some salutary transactions.").

[23] *See* Scherer, *supra* note 17, at 56-58 ("If the expanded rule of reason approach required to implement this policy were itself costless, it should be adopted. But it is not costless. There are definite costs in the form of added uncertainty, more complex adjudication, and an enhanced probability of irrational and erroneous choices. . . .A thorough investigation of this sort conducted under traditional antitrust procedures would be so costly in terms of money and, more important, high-level talent that the enforcement agencies would find the number of cases they could initiate sharply limited."); HOVENKAMP, *supra* note 13, at 193; GREEN, *supra* note 6, at 262. Note that the number of days of trial in a conspiracy case can be enormous. In R. v. Ash-Temple Co., O.R. 315 (Ont. C.A. 1949), the trial lasted 55 days; Howard Smith Paper Mills, Ltd. v. The Queen, 8 D.L.R. (2d) 449 (S.C.C. 1957), *aff'g* 4 D.L.R. 225 (Ont. C.A. 1955), *aff'g* 4 D.L.R. 161 (Ont. Ct. Just. 1954), R. v. Can. Packers Inc., 19 C.P.R. (3d) 133 (Alta. Q.B. 1988) and *Clarke Transport*, *supra* note 10, the trial days were over 6 months, 95 days, 1.5 years and 40 days, respectively. In the latter case, the Crown was criticized for not presenting more evidence with regard to the relevant market.

[24] *See also infra* note 36.

[25] We note that the concept of *per se* illegality in the Canadian competition law context is nothing new. For example, the *Competition Act* makes it *per se* illegal to set prices in response to a bid tender (section 47), to agree (as between or among financial institutions) on interest rates and certain other things (section 49) and to discriminate in pricing in certain instances (section 50(1)(a)). A somewhat harsh *per se* provision is section 61, which makes it an offence for any person "to attempt to upwardly influence" the price charged by any other person, which could have vertical and horizontal application.

"hard core" cartels.[26] We believe that the legislative model ought to capture those types of conspiracies that offer little chance of offsetting efficiency benefits, while "releasing" from the net those cooperative agreements and arrangements that have potential for efficiency generating or other benefits. We further believe that "hard core" cartels should not be treated using a *rule of reason,*[27] *shifted*

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[26] *See* HOVENKAMP, *supra* note 13, at 83, 88-89, who describes the classic "hard core" cartels as follows:

> The simplest cartel is an agreement among perfect competitors to sell all their output at the same, agreed upon price. . . .[S]ome industries may be more conducive to output restriction agreements, in which the members decide how much each should produce and sell, but the market itself determines the price. . . .An alternative to the output reduction agreement is the agreement on market share, with penalties for firms that exceed their assigned shares. . . .Such an agreement can be far more flexible than a strict output reduction agreement, because it enables the parties to deal with sudden changes in demand for the product without consulting each other (which can be dangerous!). . . .Horizontal territorial division can be an effective method of cartelization, although it works in relatively few markets. . . .One problem with such territorial division, however, is that outsiders can often see what is happening.

> In the United States, "The Department of Justice prosecutes participants in hard-core cartel agreements criminally" and the "[t]ypes of agreements that have been held *per se* illegal include agreements among competitors to fix prices or output, rig bids, or share or divide markets by allocating customers, suppliers, territories or lines of commerce." While the concept of a "hard core cartel" is not defined with vivid lines, it appears to rest on whether or not the parties can point to an "efficiency-enhancing integration of economic activity" for which the challenged agreement is "reasonably related" and "reasonably necessary to achieve its procompetitive benefits"; if not, and if the challenged conduct is of a type otherwise subject to traditional *per se* standards, it is deemed a "naked" restraint subject to criminal prosecution.
> U.S. Department of Justice and Federal Trade Commission, *Antitrust Guidelines for Collaborations Among Competitors*, § 3.2 (Apr. 2000), *at* http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf.

[27] Under a *rule of reason* analysis, "the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect." W.C. HOLMES, ANTITRUST LAW HANDBOOK 304-05 n.7 (1999) (citing State Oil Co. v. Khan, 522 U.S. 3, 10 (1997), citing Bd. of Trade of Chi. v. U.S., 246 U.S. 231, 238 (1918)). *See also* PANS, 2 S.C.R. at 650. Holmes points out that "[t]he distinction between practices deemed *per se* illegal, and those that are instead to be judged by the rule of reason or by some intermediate standard, is anything but immutable. These have not been easy categories for the courts to define, let alone to apply. As a result, practices that have at one time been analyzed under one test have later been brought under an

burden impact analysis,[28] or any other sort of system requiring an economic analysis because we are of the view that many of the costs identified in Part III. C would not be avoided using any such standard.

We proposed a detailed code ("Draft Code") to try to accomplish this goal. Without going into the details of the Draft Code, our basic proposition is that the net that ought to catch agreements and arrangements of interest and possible criminal prosecution are those that attempt[29] to fix, stabilize or affect prices, eliminate or restrict capacity, output or supply,[30] impede expansion or

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altogether different standard." HOLMES, *supra*, at 305-06.

[28] Scherer, *supra* note 17, at 58-59 ("A second proposal is credited to Professor S. Chesterfield Oppenheim. He has suggested that instead of holding price-fixing agreements *per se* illegal, they be considered *prima facie* illegal. In order to escape censure, price fixers would then bear the burden of proving that their agreements do not constitute an unreasonable restraint of trade. This approach has the merit of forcing the parties with the closest knowledge of internal industry workings to carry forward most of the positive economic analysis. If there is information that might vindicate their conduct, the members of an industry are in a position to supply it. Conversely, it is much more difficult for a government enforcement agency to obtain evidence needed to prove an agreement's unreasonableness. Yet despite its advantages from an enforcement standpoint, a *prima facie* rule does not solve the problem of continuing surveillance, nor does it overcome the judiciary's inability to deal analytically with the evidence, once it has been assembled.") (emphasis added).

[29] The Draft Code would render *per se* illegal all those agreements or arrangements having the purpose or effect of fixing pricing or otherwise harming competition. As such, the scope of our legislative model would be somewhat broader than existing law, which would not make criminal those poorly designed agreements that, while intended to unduly impact on competition, failed to do so. *See, e.g., Clarke Transport*, *supra* note 10. Under the Treaty of Rome, *supra* note 3, it has been held that the "object" of the agreement "is to be found by an objective assessment of the aims of the agreement in question, and it is unnecessary to investigate the parties' subjective intentions." BELLAMY & CHILD: COMMON MARKET LAW OF COMPETITION 90-91 (V. Rose ed., 4th ed. 1993). Subsequent to PANS, *supra* note 17, we would expect Canadian courts to look to the wording of the agreement, along with other indicia, as objective evidence of the subjective intent of the parties, but would not anticipate the courts avoiding the exercise of determining such intent altogether. An interesting case would be one in which the clear intention of one of the parties to the agreement was to harm competition, while the clear intention of all other parties was completely different.

[30] Some would argue that the only sure way of affecting prices in a market is to address output. Accordingly, it is imperative that output limitations be captured in the *per se* net.

entry,[31] or allocate, cease to supply or purchase, or otherwise effect relations with customers or suppliers.[32] Now obviously that is a very broad net and it would include, in some cases, charging a premium, eliminating discounts, production quotas, group boycotts, and certainly price fixing. It might also catch price information exchanges that were made for the purpose of effecting prices, or agreements to published recommended prices, like catalogue prices, and perhaps even marketing joint ventures. There is some resemblance between our Draft Code and Article 81.1 of the Treaty of Rome, particularly with the combined purpose or effect test.

The Draft Code then goes about the business of mitigation – trying to release from the net agreements that ought to be considered under a civil standard or automatically released.[33] First, there is an ancillary restraint exemption.[34] Should the Draft Code be adopted, we would be left with literally no litigation, no case law, no basis on which to assume there is an ancillary restraint exemption. This exemption would essentially ensure that any agreement that was not principally aimed at harming competition and did not have a substantial impact on competition, was released from the net. So if a marketing joint venture was part of a general expiration and development agreement, perhaps in an oil and gas market or mining context, the fact that the marketing arrangement was peripheral to the

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[31] Agreements by competitors to deny a market participant entry into a market, or impede another participant's ability to expand in a market, are forms of output restrictions that ought to be similarly caught within the *per se* net.

[32] It is trite that the allocation of customers as between or among competitors falls within the classic description of a "hard core" cartel. The Draft Code would also capture as *prima facie per se* illegal all those agreements or arrangements between or among competitors relating to a refusal to deal with a customer, supplier or class of customers or suppliers, as well as agreements or arrangements otherwise affecting relations of either or any of them with one or more of any of their customers or suppliers.

[33] We would also expect the Crown to continue to exercise some judgment (i.e., prosecutorial discretion) in determining those cases that did or did not merit the expenditure of government resources to litigate. Further, the decision in PANS, *supra* note 17, would continue to stand for the proposition that no conviction can be entered against an accused who could not reasonably have known the anti-competitive effect of the agreement or arrangement. *See supra* note 16.

[34] An ancillary restraint is a restraint or limitation on competition that is ancillary to an otherwise lawful or unobjectionable agreement or arrangement. To be viewed as ancillary, clearly the agreement, arrangement or effect must be subordinate in importance to the main object of the transaction. *See* BELLAMY & CHILD, *supra* note 29, at 346.

main object of the agreement, such an arrangement would be released under this exemption provided it did not have a substantial impact on competition.

Another exemption that we carved up was a case-by-case exemption that is the proposed section 46(1)[35] and a block exemption power for the Commissioner under the proposed section 46(6). With regard to block exemptions, we were very cognizant of the fact that to replace the competition conspiracy law in Canada would leave us with literally no case law. It was very important that the Commissioner be able to bring Canada up to speed with Europe and the United States, in terms of current economic and legal thinking. The only way to do that, in our view, is to enable the Commissioner

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[35] One of the difficulties in formulating a *per se* category of offence is the potential for capturing conduct that was not contemplated or wanted. Given the myriad of ways in which, *inter alia*, prices can be affected, supply can be restricted, expansion can be impeded and relations with customers or suppliers can be affected as a result of agreements and arrangements between or among competitors, it is essential that the Commissioner be given the ability to consider, on a case-by-case basis, those transactions that ought to be exempt from the *per se* net. We believe that a clearance process would work well in Canada, provided the following principles were adhered to:

(1) *Timing of Notification*: The right to seek clearance certificates for agreements and arrangements at any period of time, including post-execution or implementation;

(2) *Flexibility in Approving Modified Agreements*: The ability to seek guidance from the Commissioner as to how the agreement or arrangement might be modified to eliminate concerns about its effect;

(3) *Timing of Clearance Response*: The right to receive a response within a limited period of time;

(4) *Factors to be Considered*: The ability of the Commissioner and Tribunal to consider the net overall effect of the transaction on the economy, including efficiencies and pro-competitive results;

(5) *Appeal*: The right to have a full hearing before an impartial tribunal on proposed agreements or arrangements that are not approved by the Commissioner;

(6) *Costs*: The cost of the exemption application ought to be sufficient in size as to discourage perfunctory notifications, yet not so large as to impede or discourage transactions;

(7) *Effect*: The issuance of a certificate ought to exempt parties from both criminal and civil liability; and

(8) *Confidentiality*: The obligation of the Commissioner and his or her staff to maintain in confidence both the fact of a notification and all materials provided in support of a certificate request.

to carve specific exemptions. Ultimately, the Draft Code was designed to ensure that pro-competitive strategic alliances, joint ventures and possibly even industry restructurings would be permitted, provided the object was not to harm competition and the effect was not substantial.

V. Summary and Conclusions

The Canadian record in the enforcement of conspiracies is not impressive. The total number of cases in which the Crown has advanced proceedings does not significantly exceed the number of years in which the law has been available for prosecution, while the total number of cases in which the Crown has *successfully* litigated a conspiracy case is less than thirty. Moreover, during the last twenty-five years, the Crown lost all seven litigated cases that did not involve a monopoly or "virtual monopoly." While the expenditure of resources on conspiracies that do not materially harm our economy is of concern in any effort to reform the law,[36] on balance the economic thinking tends to support a *per se* approach to "hard core" cartel behavior.

Accordingly, we believe that amendments to the law of conspiracy are necessary and we would make certain types of conspiratorial conduct *per se* illegal. We have attempted to outline a workable model for legislative reform in this report, which we have termed the Draft Code, which features the following basic structural components:

(1) A *per se* net capturing only a limited category of agreements and arrangements having the object or effect of affecting prices, output, expansion, entry, customers or suppliers in respect of a market;

(2) A broader civil net enabling the Commissioner to take action against all agreements or arrangements having the effect of substantially affecting competition, regardless of whether or not such agreement or arrangement falls within the *per se* net;

(3) An automatic release from the *per se* net of certain types of agreements and arrangements arising from transactions that

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[36] While one could argue that the resources are not completely wasted, since the litigation process itself is a deterrent, the offsetting factor is the impact on the behavior of the business community of the unsuccessful prosecution. The net effect is difficult to assess in the abstract.

are not aimed at harming competition and could not be reasonably foreseen to harm competition; and

(4) A clearance mechanism enabling the Commissioner to develop block exemptions reflecting current economic and legal thinking with regard to conspiracies, as well as release specifically notified and socially desirable agreements or arrangements from the *per se* net.

So where is Canada going? After our report was tabled, along with two others, the Commissioner indicated that the debate should begin. He first sponsored a conference where competition lawyers were asked for their views. Secondly, he indicated that conspiracy reform would be considered at the top of the legislative reform priority. All this points to an active policy agenda for conspiracy reform in 2002, and it is likely that there will be legislation tabled in the House of Commons before 2004. Unlike previous attempts to modify section 45, and there have been a few to create a *per se* offence[37] for hard-core cartels, the mood in Canada has shifted. It shifted along with an increasing American export focus, and an increasing ownership of Canadian companies by American interests. The trend and the need for convergence is both high and beneficial.

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[37] Calls for reforming Canadian conspiracy laws have gone unheeded from as far back as 1969 when the Economic Council of Canada recommended a *per se* prohibition in respect of certain collusive arrangements. In 1971, Bill C-256, which again advocated adopting a *per se* approach for enumerated categories, was withdrawn after being attacked by the business community. More recently, Bill C-472 proposed certain changes to section 45 through a Private Members' Bill that was part of the Public Policy Forum consultation process in 2000.