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Canadian Combines Law: A Perspective on the Current Combines Investigation Act and Recent Case Law

by Barry R. Campbell*

I. Historical Background

The anti-trust or anti-combines law of Canada has had a lengthy legislative evolution beginning in the late 1800s. Over the last ninety years, the combines offences have been revised, and the framework for the administration of the various Combines Investigation Acts refined to take into account constitutional challenges and changing economic conditions.

In 1889, predating any U.S. anti-trust legislation, Canada's first Combines Investigation Act, *An Act for the Prevention and Suppression of Combinations Formed in Restraint of Trade*¹ was passed by the Dominion Parliament. In 1892 the provisions of this act were included in the Criminal Code, where they co-existed with the provisions in the various Combines Investigation Acts until all were consolidated into the Combines Investigation Act in 1960.

The Act of 1889 failed to establish a mechanism for the investigation of combines in restraint of trade and therefore, in 1910, an Act to Provide for the Investigation of Combines, Monopolies, Trusts and Mergers² was enacted. This Act expanded the definition of "combine" to include mergers, monopolies and trusts, and provided a mechanism whereby six or more persons could apply to a judge for an order directing an investigation of an alleged combine. If satisfied that there were rea-

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¹ *An Act for the Prevention and Suppression of Combinations Formed in Restraint of Trade*, 1889, 52 Vict., c.41 (Can.). Section 1 of the Act made it an offence to conspire, combine, agree or arrange unlawfully:

(a) To unduly limit the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article or commodity which may be a subject of trade or commerce; or

(b) To restrain or injure trade or commerce in relation to any such article or commodity; or

(c) To unduly prevent, limit, or lessen the manufacture or production of any such article or commodity, or to unreasonably enhance the price thereof; or

(d) To unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply of any such article or commodity, or in the price of insurance upon person or property.

² *The Combines Investigation Act*, 1910, 9 & 10 Edw. 7, c.9 (Can.).

sonable grounds to believe that an injurious combine existed, the judge could order an investigation in the public interest. Investigations were to be conducted by *ad hoc* boards created by the Minister of Labour. The Board could find that a party had committed a combines offence and impose a fine if the violations continued. The Act also provided for special remedies when patents and custom duties were involved.³ The Act of 1910 failed to establish a permanent body to investigate and prosecute combines violations. Consequently, a lengthy struggle began to settle upon an acceptable administrative procedure for the administration of the combines provisions.

In 1919 the Act of 1910 was repealed. The Combines and Fair Prices Act,⁴ which took its place, provided that the recently established Board of Commerce⁵ was to constitute the body which was "directed to restrain and prohibit the formation and the operations of combines."⁶ These two acts were found unconstitutional⁷ however, and a new Combines Investigation Act was passed in 1923.⁸ The new Act provided that a permanent Registrar was to administer the Combines Investigation Act.⁹ On the application of six persons, at the request of the Minister, or on his own initiative, the Registrar could conduct a preliminary inquiry. If necessary, a more formal inquiry would follow.¹⁰ In 1935 the Combines Investigation Act Amendment Act¹¹ placed the administration of the combines provisions in the hands of a Commission.¹² This provision was repealed¹³ in 1937, and administration was placed in a single Commissioner who was given extensive powers of investigation and was required to report to the Minister.¹⁴

At the end of this fifty year evolutionary period, Canada had in place a structure for the investigation of anti-competitive behavior, the possibility of prosecution of combines offences, and available remedies ranging from fines to the restriction of patent privileges and the elimination of tariffs. However, a government committee report¹⁵ led to further refinements. Further amendments¹⁶ to the Combines Investigation Act provided for a division of the functions previously carried on by the

³ See text accompanying notes 55-69 *infra*. These remedies exist in the current Combines Investigation Act.

⁴ The Combines and Fair Prices Act, 1919, 9 & 10 Geo. 5, c.45 (Can.).

⁵ The Board of Commerce Act, 1919, 9 & 10 Geo. 5, c.37 (Can.).

⁶ The Combines and Fair Prices Act, 1919, 9 & 10 Geo. 5, c.45, § 4 (Can.).

⁷ *In re Bd. of Commerce Act, 1919; Combines and Fair Prices Act, 1919*, [1922] 1 A.C. 191.

⁸ The Combines Investigation Act, 1923, 13 & 14 Geo. 5, c.9 (Can.).

⁹ *Id.* §§ 5-6.

¹⁰ *Id.* § 7.

¹¹ The Combines Investigation Act Amendment Act, 1935, 25 & 26 Geo. 5, c.54 (Can.).

¹² *Id.* § 10.

¹³ The Combines Investigation Act Amendment Act, 1937, 1 Geo. 6, c.23, § 4 (Can.).

¹⁴ *Id.* §§ 5-9.

¹⁵ See REPORT OF THE COMMITTEE TO STUDY COMBINES LEGISLATION AND INTERIM REPORT ON RESALE PRICE MAINTENANCE (1952).

¹⁶ Combines Investigation Act, CAN. REV. STAT. c.314 (1952).

Commissioner under the Act.¹⁷ Two separate agencies were created—a Director of Investigation and Research, to conduct investigations and research, and the Restrictive Trade Practices Commission, with the responsibility for appraisal of evidence and report to the Minister. Although the 1952 Amendments left the offence provisions mostly unchanged, they did provide for changes to the remedial provisions of the Act by first, eliminating limits on fines and leaving fines to the discretion of the court, second, providing for judicial prohibition orders¹⁸ and third, empowering the court to dissolve mergers and monopolies.¹⁹ Section 42²⁰ was also added, providing the Director of Investigation and Research with a general power of inquiry into monopolistic situations and restraint of trade.²¹

In 1960 the Criminal Code provisions relating to combines were taken out of the Code and consolidated with the provisions in the Combines Investigation Act.²² The Amendments of 1960 added new provisions exempting from the Act agreements relating to certain matters such as the exchange of statistics, if not used to breach fundamental provisions. Further excluded from the application of the Act were combinations relating to the export of products. Certain other substantive changes adding sections relating to resale price maintenance, promotional allowances and misleading price advertising were made and remain in the Act today.²³

The last full scale review of Canada's competition law began with a special reference by the Canadian Government to the Economic Council of Canada in July 1966. The Economic Council was asked to study and advise regarding combines, mergers, monopolies and restraint of trade in the light of the government's long-term economic objectives.²⁴ Extensive review of the competition law of Canada had not been undertaken for some time, and in the interim fundamental changes to the internal Canadian economy and the external economic environment had taken place. The transfer of the administration of the Act from the Department of Justice to the new Department of Consumer and Corporate Affairs further necessitated a review. In July 1969 the Economic Council completed its report²⁵ which called for substantial revisions in the Combines Investigation Act. In 1971 the government introduced a draft Competi-

¹⁷ *Id.* §§ 5-15.

¹⁸ *Id.* § 31.

¹⁹ *Id.*

²⁰ Section 42 now appears as section 47 in the 1976 amendments.

²¹ See text accompanying notes 66-75 *infra*.

²² An Act to amend the Combines Investigation Act and the Criminal Code, CAN. REV. STAT. c.23 (1960) [hereinafter cited as Combines Investigation Act].

²³ See notes 148-156 and accompanying text *infra*.

²⁴ See Privy Council Office, Press Release, July 22, 1966, reprinted in ECONOMIC COUNCIL OF CANADA, INTERIM REPORT ON COMPETITION POLICY 199-201 app. (1969).

²⁵ ECONOMIC COUNCIL OF CANADA, INTERIM REPORT ON COMPETITION POLICY (1969).

tion Act to replace the Combines Investigation Act.²⁶ After hostile reaction the government decided to split the reform process into two stages. Stage I amendments were introduced in 1973, then reintroduced as Bill C-2 in 1975 and finally came into force on January 1, 1976.²⁷ At the same time numerous studies were ordered by the government.²⁸ In 1977 the Stage II proposals were introduced as Bill C-42.²⁹ The Stage II proposals suggested significant changes in the areas of monopolies, mergers and reviewable matters and further anticipated that procedural changes would include a new class action right. The extensive changes contemplated by the Stage II proposals, and the shuffling of Cabinet portfolios which occurred at the same time, led to the withdrawal of Bill C-42 and the reintroduction of the Stage II amendments as Bill C-13 in November 1977.³⁰ Bill C-13 remained in limbo through the last years of the Liberal Government, at times encouraged as necessary and overdue, but most often criticized as an excessively broad and complex hindrance to the development of the Canadian economy. With the recent change of government, the status of the Stage II amendments remains in doubt.³¹

This paper will examine the Combines Investigation Act, as amended by the Stage I revisions of 1976 and will canvass the proposed Stage II amendments for an indication of the possible direction of future amendments.

II. Policy and Criminal Law Basis of the Combines Investigation Act

The Combines Investigation Act is the "major embodiment of the competition policy of Canada,"³² reflecting "the basic attitude towards competition in the economy."³³ It should be noted that the Combines Investigation Act of Canada has been upheld by the Canadian courts as

²⁶ C-256, 28th Parl., 3d Sess., 19-20 Eliz. II, (1970-71) (Can.) (intro. June 29, 1971).

²⁷ Combines Investigation Act, *supra* note 22, as amended by Act of Dec. 15, 1975, Can. Stat. c.76 (1976).

²⁸ See, e.g., L. SKEOCH & B. McDONALD, DYNAMIC CHANGE AND ACCOUNTABILITY IN A CANADIAN MARKET ECONOMY (1976); STUDIES OF FOREIGN COMPETITION POLICY AND PRACTICE (1976); R. COHEN & J. ZIEGEL, THE POLITICAL AND CONSTITUTIONAL BASIS FOR A NEW TRADE PRACTICES ACT (1976); M. TREBILCOCK, A. DUGGAN, L. ROBINSON, H. WILTON-SIEGEL & C. MASSE, PROPOSED POLICY DIRECTIONS FOR THE REFORM OF THE REGULATION OF UNFAIR TRADE PRACTICES IN CANADA (1976).

²⁹ C-42, 30th Parl., 2d Sess. (1976-77) (Can.).

³⁰ C-13, 30th Parl., 3d Sess. (1977) (Can.).

³¹ For discussion of Stage II proposals see text accompanying notes 168-69 *infra*.

³² Henry, *Anti-Combines Legislation in Canada*, [1971] W.C.J. MEREDITH LECTURES 8, 13 (1971).

³³ *Id.*

The purpose of the Combines Investigation Act is to assist in maintaining effective competition as a prime stimulus to the achievement of maximum production, distribution and employment in a mixed system of public and private enterprise. To this end, the legislation seeks to eliminate certain practices in restraint of trade and to overcome the bad effects of concentration, that tend to prevent the economic resources of Canada from being used more effectively to the advantage of all. The Act also contains provisions against misleading advertising and deceptive marketing practices in order to utilize the investigative capacity of the Act for the protection of the consumer.

a valid exercise of the "criminal law power" which is vested in the Federal Parliament by the British North America Act.³⁴ The criminal law basis for the Combines Investigation Act has had an inhibiting effect upon the enforceability of the Act. Proof of combines offences has had to meet the strict criminal law standard of "proof beyond a reasonable doubt." The absence, until recently, of any statutory action akin to the civil treble damages action available in the United States, has left prosecutions for combines offences solely to the discretion of the Department of Justice in consultation with Competition Bureau officials. This limitation has severely limited prosecutions under the Act. The Government has been forced to undertake cases selectively, to opt for those prosecutions perceived as the most likely to succeed. The clear-cut cases involving little investigation, cases concerning restraints with an important impact on the economy, cases involving new points of law or interpreta-

DIRECTOR OF INVESTIGATION AND RESEARCH, DEP'T OF CONSUMER AND CORPORATE AFFAIRS, ANNUAL REPORT 7, COMBINES INVESTIGATION ACT (1978).

The Economic Council of Canada expressed the philosophical thrust of Canada's competition policy as follows:

The institution and maintenance of a competition policy such as presently exists in Canada may be taken to reflect a belief that, over the greater part of the economy, competitive market forces are potentially capable of allocating resources better and more cheaply, with a less cumbersome administrative overhead, than any alternative arrangement such as wholesale public ownership and control, detailed government regulation of enterprise, or self-regulation by large industrial units within a corporate state. The function of competition policy is not to bring about a textbook regime of "perfect" competition in all the various markets making up the system, but rather to encourage the liberation of the system's maximum competitive potential, "imperfect" though this may be. The resulting competition is valued not for itself, but for what it can accomplish in putting resources to work efficiently and effectively. Thus the market does the job, and the government's main responsibility so far as efficiency in resource allocation is concerned, is to see that the market is free to do the best job of which it is capable. Competition is relied upon as the prime mechanism of social control.

ECONOMIC COUNCIL OF CANADA, *supra* note 25, at 8. And, as the former Director of Investigation and Research, D.H.W. Henry, expressed it:

The legislation postulates the continuing existence of a free enterprise economy, actuated by the profit motive, in which those who wish to compete for economic gain should, to the largest extent possible, be allowed to compete free from artificial restraints imposed upon them by their competitors or other members of trade or industry. What Parliament contemplates, as expressed in this legislation, is the regulation of industry by the forces of competition rather than regulation by members of the industry itself.

Address by D.H.W. Henry to New York State Bar Association, Antitrust Law Section (Jan. 30, 1964).

³⁴ In the case of *Proprietary Articles Trade Ass'n v. A.G. Canada*, [1931] 2 D.L.R. 1, Lord Atkin stated:

The substance of the Act is by section two to define, and by section thirty-two to make criminal, combines which the Legislature in the public interest intends to prohibit. The definition is wide, and may cover activities which have not hitherto been considered to be criminal. But only those combinations are affected 'which have operated or are likely to operate to the detriment or against the interest of the public, whether consumers, producers or others;' and if Parliament genuinely determines that commercial activities which can be so described are to be suppressed in the public interest, their Lordships see no reason why Parliament should not make them crimes.

Id. at 9.

tion, and cases involving highly concentrated industries have of necessity been favoured to best utilize scarce government resources.^{34a}

A limited civil cause of action is now contained in the Act,³⁵ but expansion of the civil law remedy as well as expansion of the federal power to regulate competition will have to await future amendments. A determination that the federal "trade and commerce power" may be used to justify regulation of competition, would also augment the federal jurisdiction in this area. Attempts to further expand the federal power to regulate competition in the marketplace will be met with the constitutional argument that broad federal regulation is an interference with the provincial constitutional jurisdiction over "property and civil rights." While the courts have recognized that the Federal Parliament may use the criminal law power to define new crimes subject to federal regulation, this cannot be used as a method of usurping all provincial power. Overly creative federal regulation of the marketplace is not likely to be accepted by the courts as a valid exercise of the criminal law power. The federal "trade and commerce power" has never been fully developed by the courts, but until it can be established definitively that the federal "trade and commerce power" is a valid basis for the regulation of competition, the Combines Investigation Act will not escape its criminal law straight jacket.³⁶

III. Structure of the Act—An Overview

A. *Application of the Act to Products and Services*

Prior to the most recent amendments to the Combines Investigation Act, the Act did not apply to the bulk of the service industry. The 1976 Amendments replaced the word "article," wherever used in the Act, with the word "product" and defined "product" to include both "articles" and "services." As a result, services now covered by the Act include the professions, financial services,³⁷ other business services³⁸ and consumer services.³⁹ In short, the full spectrum of economic activity is now subject to the provisions of the Combines Investigation Act.

B. *Exemptions from the Act*

The Combines Investigation Act provides that certain activities are exempt from the general application of the statute. Section 4 of the Act exempts collective agreements, the arrangements among fishermen or

^{34a} Henry, *supra* note 32, at 31-32.

³⁵ See text accompanying note 56 *infra*.

³⁶ For a full discussion of this constitutional problem, see R. GOSSE, *THE LAW OF COMPETITION IN CANADA* 226-66 (1962). See also Hogg & Grover, *The Constitutionality of the Competition Bill*, 1 CAN. BUS. L. REV. 197 (1977); S. GRANGE, *THE CONSTITUTIONALITY OF FEDERAL INTERVENTION IN THE MARKETPLACE—THE COMPETITION CASE* (1975).

³⁷ *E.g.*, underwriting and credit reporting.

³⁸ *E.g.*, real estate sales, advertising, construction and maintenance.

³⁹ *E.g.*, laundry, cleaning and repair.

their associations, and the activities of employers associations, so far as these activities relate to the negotiating of collective agreements. Section 4 also exempts agreements relating to amateur sport and provides a limited exemption with respect to the underwriting of securities. With respect to the specific application of section 32, the general conspiracy in restraint of trade provision, the Act provides limited exemptions for the activities of trade associations and for agreements relating to export trade.⁴⁰

The case law has also created an important area of exemption. Where activities are directly regulated by federal or provincial statute, market competition has been deemed superseded by state control, and the Combines Investigation Act has therefore been excluded. In *Regina v. Canadian Breweries*,⁴¹ it was held that where a provincial legislature has conferred on a commission or board the power to regulate an industry, including the power to fix prices (*e.g.*, in a provincial agricultural products marketing scheme) and that power has been exercised, the court must presume that the power has been exercised in the public interest.⁴² In the face of such a situation, successful prosecution of an alleged combine in the regulated market would necessitate proof that the alleged combine was operating to hinder the regulatory body from exercising its power to protect the public interest. Generally, therefore, markets regulated by valid provincial and federal legislation are excluded from attack under the Combines Investigation Act. Of course, activities left unregulated in an otherwise regulated market might still be subject to attack. For instance, if a provincial scheme regulated prices, but not packaging or quality, a combination which had the effect of unduly limiting competition in these areas might be prosecuted.

C. Anti-Competitive Practices

The Combines Investigation Act encompasses two types of anti-competitive practices: the "combines offences," consisting of widely recognized pernicious anti-competitive behavior and the "reviewable practices," less serious behavior which may or may not be justified.

1. Combines Offences

Part V of the Act sets out the combines offences—offences which are punishable with penal consequences.⁴³ It is an indictable offence

⁴⁰ See text accompanying note 124 *infra*.

⁴¹ [1960] O.R. 601.

⁴² *Id.*; see also Reference re Farm Products Marketing Act, 7 D.L.R.2d 257 (1957).

⁴³ These are (a) combinations to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product (§ 32(1)(a)); combinations to prevent, limit or lessen unduly the manufacture or production of a product or to enhance unreasonably the price (§ 32(1)(b)); combinations to prevent or lessen unduly competition in the production, manufacture, purchase, sale, storage, rental, transportation or supply of a product or in the price of insurance (§ 32(1)(c)) or to otherwise restrain or injure competition

to breach any of the substantive provisions of Part V except that prosecutions for breach of the provisions relating to misleading advertising,⁴⁴ testimonials,⁴⁵ pyramid selling,⁴⁶ referral selling,⁴⁷ and promotional contests,⁴⁸ may be conducted using the less formal summary conviction procedure or by indictment. Breach of certain provisions⁴⁹ may be proceeded with only by way of summary proceedings. Several of the more serious combines offences will be discussed in detail.

2. Reviewable Matters

Part IV.1 of the Act creates a category of "matters reviewable by the Restrictive Trade Practices Commission." Subject to review are practices which constitute refusals to deal,⁵⁰ consignment selling,⁵¹ exclusive dealing,⁵² market restriction,⁵³ and tied selling.⁵⁴ The reviewable practices are not offences, but where the Restrictive Trade Practices Commission finds that one of the category of reviewable practices has been present in the market, with an effect which is detrimental to competition, the Commission may act to remedy the situation. The range of remedies available to the Commission will depend upon the specific practice in question.

D. Special Remedies

In addition to the remedies set out above, the Act contains special remedies in sections 28 through 31.

Section 30(1) provides that, regardless of any other penalty imposed upon conviction for breach of one of the combines offences, the court may issue a "prohibition order" which amounts to a perpetual injunction prohibiting the repetition of an offence. With respect to merger or monopoly, dissolution may be ordered. Section 30(2) provides a method

(§ 32(1)(d)); (b) bid rigging (§ 32.2); (c) conspiracies in relation to professional sport (§ 32.3); (d) mergers and monopolies that operate to the public detriment (§ 33); and (e) unfair trade practices, including price discrimination (§ 34(1)(a)), predatory pricing (§ 34(1)(b)-34(1)(c)), misleading advertising (§ 36), resale price maintenance (§ 38), referral selling (§ 36.4), promotional contests (§ 37.2), testimonials (§ 36.1), double ticketing (§ 36.2), pyramid sales (§ 36.3), bait and switch tactics (§ 37(2)) and sales above advertised price (§ 37.1).

⁴⁴ Combines Investigation Act, *supra* note 22, § 36.

⁴⁵ *Id.* § 36.1.

⁴⁶ *Id.* § 36.3.

⁴⁷ *Id.* § 36.4.

⁴⁸ Combines Investigation Act, *supra* note 22, § 31.2.

⁴⁹ These are the provisions relating to double ticketing (§ 36.2), bait and switch selling (§ 37), and sales above advertised price (§ 37.1).

⁵⁰ Combines Investigation Act, *supra* note 22, § 31.2.

⁵¹ *Id.* § 31.3.

⁵² *Id.* § 31.4.

⁵³ *Id.*

⁵⁴ *Id.*

whereby similar orders may be issued without any prosecution having been commenced, when it appears that a person has done, is about to do, or is likely to do anything constituting or directed towards the commission of an offence under Part V. Section 29.1 provides for interim injunctions when a person has done, is about to do, or is likely to do any act constituting or directed towards the commission of a Part V offence and the act, if not restrained, will result in irreparable injury to competition.

Section 29 of the Act also provides that where use has been made of patent or trademark rights to commit any of a broad range of combines offences, the Federal Court of Canada may declare void any licences or agreements relating to the patent or trademark. The Court may further direct the grant of licences, restrain the exercise of rights under agreements, expunge or amend a mark or make any other order deemed necessary to prevent use of the patent in an anti-competitive manner.⁵⁵

Section 28 of the Act provides that where, as the result of an inquiry or of a judgment, it appears that there has existed a conspiracy or arrangement, merger or monopoly to promote unduly the advantage of manufacturers or dealers at the expense of the public, and that such disadvantage has been facilitated by the duties on an article, the Governor in Council may direct that duties on an article be eliminated or reduced to give the public the benefit of reasonable competition.

Section 31.1, added to the Act in 1976, provides the limited civil damage action referred to earlier.⁵⁶ Any action under this section must be taken within two years of the conduct contrary to Part V, within two years from an order of the Commission, or within two years of the disposition of any related criminal proceedings.⁵⁷ In order for section 31.1 to

⁵⁵ Combines Investigation Act, *supra* note 22, § 29(e)-29(i).

⁵⁶ Section 31.1 provides:

- (1) Any person who has suffered loss or damage as a result of
 - (a) conduct that is contrary to any provision of Part V, or
 - (b) the failure of any person to comply with an order of the Commission or a court under this Act,

may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

(2) In any action under subsection (1) against a person, the record of proceedings in any court in which that person was convicted of an offence under Part V or convicted of or punished for failure to comply with an order of the Commission or a court under this Act is, in the absence of any evidence to the contrary, proof that the person against whom the action is brought engaged in conduct that was contrary to a provision of Part V or failed to comply with an order to the Commission or a court under this Act, as the case may be, and any evidence given in those proceedings as to the effect of such acts or omissions on the person bringing the action is evidence thereof in the action.

⁵⁷ *Id.* subsection (4)(a)-4(b).

be applicable, three elements must be satisfied.⁵⁸ First, damage capable of compensation must be proved. As a result, injunctive or declaratory relief is not available. Second, a causal link must be established between the loss suffered and the anti-competitive conduct. This causal link may be difficult to establish in the less clear-cut cases in which there has been injury, but it has not been direct. U.S. courts have looked to "the intended scope of the anti-trust laws as a more reliable guide to standing than the 'directness' of the relationship between the plaintiff and defendant."⁵⁹ The "target area" test, which has evolved in the United States, requires only that injuries suffered from a deprivation of the benefits of competition must be "arguably within the ambit of injuries that the anti-trust laws were intended to prevent."⁶⁰ It is unclear if a similar easing of the directness rule will evolve in Canada. Third, proof must be put forward of a combines breach. The plaintiff will be obliged to establish either that a combines offence has been committed or that the defendant has breached an order of the Restrictive Trade Practices Commission. A conviction for a combines offence is not required prior to a successful civil suit.⁶¹ A successful plaintiff in a civil suit under section 31.1 would likely have to prove his case only on a balance of probabilities, the normal civil standard of proof. Thus, a defendant may be convicted in a civil action for participation in a conspiracy although acquitted in a related criminal proceeding.

Section 31.1 provides that the plaintiff in a civil suit may recover his loss, as well as the cost of investigation in connection with the matter and the cost of proceedings. Unlike in the United States, in many Canadian jurisdictions, lawyers are not permitted to operate on a contingency fee basis. This no doubt would have an inhibiting effect on private anti-trust enforcement even if as broad a civil remedy as is available in the United States were to be made available in Canada. Moreover, Canada is not a very litigious society. It should not be expected that the civil remedy in the Act will lead to a flood of actions. The provision in section 31.1 allowing recovery of the cost of prosecutions in civil actions goes only part way in encouraging private enforcement of the Act.

There is substantial doubt as to the constitutional validity of the provision dealing with civil suits. As discussed earlier,⁶² there is much debate about the appropriateness of the federal "trade and commerce power" as a basis for the regulation of competition. The courts thus far have justified the federal regulation of competition as a valid exercise of

⁵⁸ Rowley, *Civil Suits and Class Actions Under the Combines Investigation Act*, NEW COMBINES LEGISLATION 21 (1977).

⁵⁹ P. AREEDA, ANTITRUST ANALYSIS 76 (2d ed. 1974).

⁶⁰ *Id.*

⁶¹ Rowley, *supra* note 58.

⁶² See text at note 35 *supra*.

the federal "criminal law power."⁶³ But it is unlikely that the civil action, for which a criminal conviction is not a condition precedent, could be justified as a valid exercise of the criminal law power.⁶⁴

Lastly, section 27.1 of the Act provides that the Director may, at the request of a regulatory agency, or on his own initiative or upon direction from the Minister, make representations and call evidence before boards, commissions or other tribunals. This provision was added by the most recent amendments to the Act. In his latest Annual Report,⁶⁵ the Director of Investigation Research set out the policy reasons for such interventions.⁶⁶ The Annual Report indicates that the Director is authorized to make representations before Federal Boards and will also make representations before Provincial Boards, at the request of such boards or on his own initiative, if permitted to do so. It is the expressed view of the Director that excessive regulation of the market leads to a less dynamic economy.⁶⁷ Thus it is not the intention of the Director to be a regulator, but rather to act as "public interest intervenor," providing advice to regulators to enable them to regulate in a manner that is least restrictive of market forces. The Annual Report sets out the considerations and principles which the Director is guided by in raising his interventions.⁶⁸ The Director has intervened in recent years in several significant regulatory proceedings in the communications field, a highly regulated field in Canada.⁶⁹

E. Enforcement of the Act

1. Inquiries by the Director

The Combines Investigation Act is administered by the Director of Investigation and Research, the Restrictive Trade Practices Commission and the courts.

⁶³ See, e.g., *Proprietary Articles Trade Assn. v. A.G. Can.*, [1931] 2 D.L.R. 1 (P.C. 1931); *Goodyear Tire & Rubber Co. of Can. v. Regina*, 2 D.L.R.2d 11 (S.C. 1956).

⁶⁴ For a discussion of the constitutional problem with respect to the civil action, see Rowley, *supra* note 58, at 27.

⁶⁵ See ANNUAL REPORT, *supra* note 33.

⁶⁶ *Id.* at 23.

⁶⁷ In these circumstances, it is vitally important to limit the reach of direct government regulation to situations where it is deemed to be necessary for whatever reason, be it technological or social. In addition, the powers of regulatory boards to replace market mechanisms ought to be limited as far as possible, to those necessary to achieve the defined goal of the regulatory laws. Finally, the regulatory authorities should attempt to regulate in a manner that is least restrictive of competition, consistent with the necessity to attain the primary objectives of the regulatory laws. It is this last consideration that is of direct relevance to the Director's policy respecting interventions before regulatory boards.

Id.

⁶⁸ *Id.* at 24.

⁶⁹ E.g., CNCP Telecommunications Application for Access to Bell Canada System for Telecommunications Traffic; *Challenge Communications, Ltd. v. Bell Canada*; *Telesat Canada, Proposed Agreement with Trans-Canada Telephone System*; *Bell Rate Application*, 1978, reported in ANNUAL REPORT, *supra* note 33, at 36-38.

Inquiries under the Act are usually commenced by the Director when he has reason to believe that there has been a violation of the Act or that grounds exist for the making of an order with respect to one of the reviewable matters.⁷⁰ The Director must commence an inquiry after application in the prescribed form has been made to him by six adult persons resident in Canada.⁷¹ Further, section 8 of the Act provides that the Minister may direct that an inquiry be commenced.

Another form of inquiry may take place under the provisions of section 47, the section dealing with general research inquiries. Section 47 provides that the Director, upon his own initiative, upon direction of the Minister or at the instance of the Commission, shall carry out an inquiry concerning the existence and effect of conditions and practices relating to any product that may be the subject of trade or commerce and which may be effecting monopolistic situations or a restraint of trade.⁷² Section 47(1)(b) provides for a general inquiry into any matter related to the policy and objectives of the Act.

The purpose of inquiries into possible violations of the Act or into matters reviewable is to place the facts complained of in perspective. In the course of his inquiry the Director often will gather evidence concerning not just the practices alleged, but also concerning the nature of a particular industry. It should be recognized that, even though an inquiry may be commenced upon application of six persons, whenever the Director conducts an inquiry, the Director is acting pursuant to a statutory duty. Therefore, the inquiry must be objective and thorough.

The Director has broad evidence gathering powers during the inquiry stage. The Director or his authorized representative may enter premises, remove documents and copy them or retain documents and return copies.⁷³ The Director may, by notice in writing, require evidence upon affidavit.⁷⁴ In both of these instances, the actions of the Director must be authorized by the Commission. Section 17(1) provides that, upon the Director's *ex parte* application to the Commission or upon the Commission's own initiative, witnesses may be summoned to give evidence in the course of an inquiry.

Once evidence has been obtained and assessed, the Director has several choices: First, at any stage of an inquiry, if the Director is of

⁷⁰ Combines Investigation Act, *supra* note 22, § 8, as amended by Act of Dec. 15, 1975, Can. Stat. c.76, § 4 (1976).

⁷¹ *Id.* § 7(1), as amended by Act of Dec. 15, 1975, Can. Stat. c.76, § 3 (1976).

⁷² *Id.* § 47(1)(a), as amended by Act of Dec. 15, 1975, Can. Stat. c.76, § 25 (1976).

⁷³ *Id.* §§ 10, 11.

⁷⁴ *Id.* § 12.

the opinion that no further inquiry is justified, the inquiry may be discontinued. The concurrence of the Commission is required in those cases in which evidence has been brought before the Commission and, in all cases, notice of discontinuance must be given to the Minister who may instruct the Director to make further inquiry.⁷⁵

Second, by virtue of section 18, at any stage of an inquiry, the Director may, if he is of the opinion that evidence discloses an offense under Part V, and the Director shall, if directed by the Minister, prepare a "Statement of Evidence" to be submitted to the Commission. The Statement of Evidence consists of a summary of evidence and allegations. Once the Statement of Evidence has been received by the Commission, a date is fixed for arguments in favour and against the Statement of Evidence.⁷⁶ At the conclusion of the hearing on the Statement of Evidence, a report is made to the Minister suggesting possible remedies.

Third, at any stage of an inquiry and in addition to or in lieu of continuing the inquiry, the Director may remit all evidence to the Attorney General of Canada for consideration as to whether a combines offence has been committed and for such action as may be considered necessary.⁷⁷ The Attorney General may institute an action, seek a prohibition order, or both, or he may choose to do nothing.

In recent years, the practice of the Director of Investigation and Research has been to refer matters directly to the Attorney General to avoid the substantial delays inherent in proceeding by way of statement of evidence and report to the Minister.⁷⁸ There have been fewer successful prosecutions for violations of the Act than one would expect, and the consequences flowing from breach of the Act are ultimately less significant than is the case in the United States.⁷⁹

2. *The Restrictive Trade Practices Commission*

The Restrictive Trade Practices Commission, which has been referred to only briefly, regulates the conduct by the Director of inquiries into combines offences and also monitors the less serious "reviewable practices."⁸⁰

⁷⁵ *Id.* § 14.

⁷⁶ *Id.* § 18, as amended by Act of Dec. 15, 1975, Can. Stat. c.76, § 6 (1976).

⁷⁷ *Id.* § 15.

⁷⁸ In the past, several criteria were used by the Director of Investigation and Research in deciding whether to prepare a "statement of evidence" for the Commission with respect to a combines offence, or whether to turn over the evidence obtained to the Attorney General for possible prosecution. See Henry, *supra* note 32, at 31-32.

⁷⁹ A civil cause of action has only recently been added to the Act and there is no treble damages provision. See text accompanying notes 56-64 *supra*.

⁸⁰ See text at note 158 *infra*.

The Commission is charged with supervision of the Director and his agents in their evidence-gathering activities⁸¹ relating to possible offences or reviewable practices. The Commission is charged with the conduct of hearings on "Statements of Evidence" which have been submitted to the Commission pursuant to section 18, though this procedure is seldom used. If a hearing on a "Statement of Evidence" is conducted, at the conclusion of the hearing, the Commission is required by section 19 to report to the Minister.⁸² The report to the Minister is made public,⁸³ unless the Commission indicates that the public interest would be better served by prohibiting publication. The report has no binding effect but is informative and suggestive, and may bring pressure to bear upon certain parties or upon the Director to institute further steps. In the normal situation, the report is published and also referred to the Attorney General so that appropriate proceedings may be considered.⁸⁴

The Commission has broad powers enabling it to remedy situations relating to refusals to deal, consignment selling, exclusive dealing and market restriction, including tied selling.⁸⁵ Remedies available to the Commission in these situations may consist of cease and desist orders, orders to a supplier to make a product available, recommendations to the Minister with respect to customs duties and orders with respect to any other matter which the Commission considers necessary to overcome the effects of the practice.⁸⁶

3. *Procedural Matters*

With respect to the rights of persons involved in a combines inquiry, it should be noted that a person who is being examined under oath, in the course of an inquiry, has the right to be represented by counsel. Others, whose conduct is being inquired into may, at the discretion of the Commission, be represented by counsel when evidence is taken from witnesses.⁸⁷ However, no person is excused from attending and giving evidence on the grounds of self-incrimination. No oral evidence given may be used in any criminal proceedings

⁸¹ See text at notes 73 and 74 *supra*.

⁸² Section 19(2) of the Combines Investigation Act provides:

The report under subsection (1) shall review the evidence and material, appraise the effect on the public interest of arrangements and practices disclosed in the evidence and contain recommendations as to the application of remedies provided in this Act or other remedies.

⁸³ *Id.* § 19(5).

⁸⁴ *Id.* § 15.

⁸⁵ These are the "reviewable practices."

⁸⁶ See text accompanying notes 158-168 *infra*.

⁸⁷ *Id.* § 20(1).

thereafter instituted against the witness.⁸⁸ The Director's inquiry and his examination of witnesses are a fact gathering process, and no one is required to make a defence, though counsel present when evidence is taken may be given the opportunity to cross-examine, or at least to ask further questions.

The Attorney General may institute court proceedings with respect to a combines offence, when evidence of the offence has been referred directly to him by the Director or when, after a Statement of Evidence has been argued upon and a report provided to the Minister, evidence of an offence is provided to the Attorney General.⁸⁹ Carriage of proceedings is with the Attorney General, and depending upon the events in question, proceedings may be by way of indictment or by the less formal summary conviction procedure. In some instances, the Attorney General has a choice of proceeding by indictment, with its more formal procedure and more serious penalties, or by summary conviction procedure. Trial of an individual may be before judge alone or judge and jury; however, trials of corporate offenders may only be conducted before a judge alone.⁹⁰ Section 46 of the Act provides that non-jury actions may be instituted in the Federal Court of Canada with the permission of the accused. The Act contains several special provisions with respect to the admissibility of evidence in combines trials. One remarkable section, with respect to written documents proved to have been in the possession of a participant,⁹¹ provides that the written document is *prima facie* proof that the participant had knowledge of the document and its contents, that anything recorded in the document as having been done, said or agreed upon by any participant was done, said or agreed upon, and that the document where it appears to have been written by a participant was written by the participant.⁹²

IV. Interpretation of the Act—An Examination of the Interpretation by the Courts of the Leading Provisions of the Act

A. Conspiracies in Restraint of Trade

Section 32,⁹³ dealing generally with combinations and conspiracies in restraint of trade, is the basic anti-trust section of the Combines Inves-

⁸⁸ *Id.* § 20(2), as amended by Act of Dec. 15, 1975, c.76, § 8 (1976).

⁸⁹ CAN. REV. STAT. c.23, §§ 15(1), 19(4) (1970).

⁹⁰ *Id.* § 44(3).

⁹¹ Defined to mean an accused, a co-conspirator or any person otherwise party or privy to the offense, *id.* § 45(1).

⁹² *Id.* § 45(2)(c)(i)-45(2)(c)(iii).

⁹³ CAN. REV. STAT. c.23, § 32 (1970), as amended by Act of Dec. 15, 1975, Can. Stat. c.76 § 14(1) (1975). Section 32 provides:

(1) Every one who conspires, combines, agrees or arranges with another person

tigation Act. If one disregards cases of misleading advertising, it is pursuant to section 32 that most combines cases evolve. Section 32(1) now relates to dealings in a "product," defined to include an "article" and a "service." Service means a service of any description,⁹⁴ including industrial, trade, and professional services, and "article" is given an extensive definition to include real and personal property of every kind and description.

Section 32(1) provides that everyone who conspires, combines, agrees or arranges with another person to do any of the enumerated acts is guilty of an offence and liable to imprisonment.⁹⁵ Lawyers are well aware that agreements may be express or implied, but the Act also speaks of one who "arranges" with another to do an enumerated act. The word "arrangement" has evaded precise definition. However, in the case of *British Basic Slag Ltd. v. Registrar of Restrictive Trading Agreements*,⁹⁶ quoted in *Regina v. Armco Canada Ltd.*,⁹⁷ a definition was framed as follows:

No necessary or useful purpose would be served by attempting an expanded and comprehensive definition of the word "arrangement" in subs. 6(3) of the Act. "As I see it, all that is required," said Cross J., L.R. 3 R.P. 178, 196 "to constitute an arrangement not enforceable in law is that the parties to it shall have communicated with one another in some way, and that as a result of the communication each has intentionally aroused in the other an expectation that he will act in a certain way." I think that I am only expressing the same concept in slightly different terms if I say without attempting an exhaustive definition, for there are many ways in which arrangements may be made, that it is sufficient to constitute an arrangement between A and B, if (1) A makes a representation as to his future conduct with the expectation and intention that such conduct on his part will operate as an inducement to B to act in a particular way, (2) such representation is communicated to B, who has knowledge that A so expected and intended, and (3) such representation or A's conduct in fulfillment of it operates as an inducement, whether among other inducements or not, to B to act in that particular way.⁹⁸

Canadian judges, like their American counterparts, have had to

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- (a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product,
 - (b) to prevent, limit or lessen, unduly, the manufacture or production of a product, or to enhance unreasonably the price thereof,
 - (c) to prevent, or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance upon persons or property, or
 - (d) to otherwise restrain or injure competition unduly,

is guilty of an indictable offence and is liable to imprisonment for five years or a fine of one million dollars or to both.

⁹⁴ CAN. REV. STAT. c.23, § 32 (1970), as amended by Act of Dec. 15, 1975, Can. Stat. c.76, § 1 (1975).

⁹⁵ "The essence of the offence is the agreement, and the offence is complete when the agreement is entered into notwithstanding that the parties may not in fact have carried it out." Henry, *supra* note 32, at 37. See also Weidman v. Schragge, 2 D.L.R. 734, 761 (1912).

⁹⁶ [1963] 2 All E.R. 807.

⁹⁷ 70 D.L.R.3d 287 (1974).

⁹⁸ [1963] 2 All E.R. at 819.

struggle with the problem of "conscious parallelism," that situation which may occur in an oligopolistic market when each firm consciously follows a parallel course of conduct. The problem has been in determining when such behaviour, which may be the natural outcome of an oligopolistic market, has not arisen of itself, but has been encouraged. Parallel behaviour will have pernicious anti-competitive effects, whether of natural development or otherwise, but the Act would seem to embrace only those situations in which some element of collusion may be evidenced.⁹⁹ Oligopolists are aware that their actions will be mimicked in the market, but oligopolistic behaviour itself is not prohibited.

This issue has most recently arisen in the case of *Regina v. Canadian General Electric Co.*¹⁰⁰ (the large lamps case). The defendants in that case were three independent Canadian corporations. The Crown alleged:

that the accused conspired to lessen unduly competition by an agreement or arrangement to adopt simultaneously and follow religiously a virtually identical sales plan for the distribution and pricing of electric large lamps through the medium of consignment agents, inter alia, and the practice of inducing distributors to maintain sales prices¹⁰¹

The three defendants had introduced similar sales plans including schemes of consignment selling and discounts to various segments of the market. A later plan, eliminating discounts and instituting net pricing, was subsequently introduced by one of the manufacturers and followed by the others. By way of defence, the accused argued that there was no agreement among them to follow an industry sales plan, that their behavior amounted to no more than, ". . . rational individual decisions in the light of relevant economic facts; that this industry is an oligopoly . . . that natural oligopolistic pricing does not violate the Act; . . . and that the actions of the accused were based on pure, non-collusive, oligopolistic parallelism of action" ¹⁰²

The Court was faced with the task of deciding if conscious parallelism is or is not a combines offence and held:

. . . that the theory of oligopoly pricing is irrelevant to the determination of whether or not the accused have offended the proscription on them under the conspiracy section of the Act. As stated in *R. v. J.W. Mills & Son Ltd. et al.* (1968) [citations omitted]:

The fact that under the theory of oligopoly prices would have been the same in the long run is irrelevant. No persons are entitled to engage in anti-competitive trade practices or policies because this result may obtain in any event if all things are equal.¹⁰³

The court held that proof of parallel business behaviour does not conclusively establish an agreement contrary to the provisions of the Combines Investigation Act, but that all the evidence must be examined. The evi-

⁹⁹ CAN. REV. STAT. c.23, § 32(1) (1970), as amended by Act of Dec. 15, 1975, Can. Stat. c.76, § 14(1) (1975).

¹⁰⁰ 75 D.L.R.3d 664 (1977).

¹⁰¹ *Id.* at 673.

¹⁰² *Id.* at 674.

¹⁰³ *Id.* at 693.

dence in this case led to the inference that an agreement existed, and hence the behaviour in this market amounted to a violation of the Act.¹⁰⁴

It is only those agreements or arrangements which limit, prevent or lessen competition "unduly" which are prohibited by section 32. As the former Director of Investigation and Research has stated,¹⁰⁵ it is this requirement of "undueness" which tempers the severity of section 32 with a "rule of reason." The former Director of Investigation and Research has identified two tests of "undueness" which have evolved from the jurisprudence: first, "the manner and degree of limitation of competition" test and second, "the share of the market accounted for by the conspirators" test.¹⁰⁶

With respect to the test based on manner and degree, the court in *Rex v. Elliot*¹⁰⁷ held that under the Combines Investigation Act "competition is not to be prevented or lessened unduly, that is to say in an undue manner or degree, wrongly, improperly, excessively, inordinately" ¹⁰⁸ Subsequent decisions all but ignored this test, but in the recent case of *Aetna Insurance Co. v. The Queen*,¹⁰⁹ the court spoke of the design and plan of the agreement in question and of the intent to lessen competition improperly, inordinately, and excessively. But it has been the second test, "the share of the market accounted for by the conspirators" which has been most frequently relied upon by the courts as a measure of the requisite "undueness." It cannot be accurately predicted what degree of the market must be potentially affected in order for conspirators to have been attempting to limit, prevent or lessen competition unduly. It is clear that an agreement having as one of its objectives the establishment of a virtual monopoly in a product would be characterized as undue.¹¹⁰ In other cases, however, courts have found attempts to limit competition unduly when the market share affected was far less than a virtual monopoly.¹¹¹

On the question of "undueness," the judgment of Cartwright, J., in the case of *Howard Smith Paper Mills Ltd. v. The Queen*,¹¹² created much

¹⁰⁴ *Id.* at 699.

¹⁰⁵ Henry, *supra* note 32, at 38.

¹⁰⁶ *Id.*

¹⁰⁷ 9 Ont. L.R. 648 (C.A. 1905).

¹⁰⁸ *Id.* at 662.

¹⁰⁹ 75 D.L.R.3d 322 (1977).

¹¹⁰ *Weidman v. Schragge*, 2 D.L.R. 734, 761 (1912).

¹¹¹ *Regina v. Abitibi Power and Paper Co.*, 131 C.C.C. 201 (1960).

¹¹² 8 D.L.R.2d 449 (1957). In *Howard Smith Paper Mills*, Cartwright, J. held that:

In essence the decisions referred to appear to me to hold that an agreement to prevent or lessen competition in commercial activities of the sort described in the section becomes criminal when the prevention or lessening agreed upon reaches the point at which the participants in the agreement become free to carry on those activities virtually unaffected by the influences of competition, which influence Parliament is taken to regard as an indispensable protection of the public interest; that it is the arrogation to the members of the combination of the power to carry on their activities without competition which is rendered unlawful; that the question whether the power so obtained is in fact misused is treated as irrele-

controversy. Cartwright, J. held that in order for competition to be restrained unduly, the conspirators must have achieved a virtual monopoly.¹¹³ This view was rejected by the Director of Investigation and Research¹¹⁴ and eventually was tempered in several cases.¹¹⁵

Finally, as part of the 1976 amendments to the Combines Investigation Act, a change was made in section 32. Section 32(1.1) was added to the Act to instruct the courts that, whatever "unduly" might mean, in order to establish that a conspiracy, combination, agreement or arrangement is in violation of section 32, it was not necessary to prove that the conspiracy or combination, if carried into effect, would eliminate completely or virtually competition in the market in question. At present, then, it is clear what "unduly" does *not* mean—it does not mean a virtual monopoly—but it is not clear exactly what "unduly" does mean. Whether or not competition has been lessened "unduly" is really a question of fact in each case.¹¹⁶

According to the Director of Investigation and Research, the recent case of *Aetna Insurance Co. v. The Queen*¹¹⁷ "raises questions concerning the future enforcement and administration of the conspiracy provision of the Act."¹¹⁸ In the *Aetna* case, the appellant companies, all members of the Nova Scotia Board of Insurance Underwriters, were charged with conspiracy to lessen unduly competition in the price of fire insurance. The accused companies accounted for a minimum of sixty percent of the fire

vant; and that the court, except I suppose on the question of sentence, is neither required nor permitted to inquire whether in the particular case the intended and actual results of the agreement have in fact benefited or harmed the public.

In other words, once it is established that there is an agreement to carry the prevention or lessening of competition to the point mentioned, injury to the public interest is conclusively presumed, and the parties to the agreement are liable to be convicted of the offence described in para. 498(1)(d). The relevant question thus becomes the extent to which the prevention and limitation of competition are agreed to be carried and not the economic effect of the carrying out of the agreement. In each case which arises under the section the question whether the point described has been reached becomes one of fact.

Id. at 426.

¹¹³ *Id.* at 473.

¹¹⁴ Henry, *supra* note 32, at 39.

¹¹⁵ In the case of *Regina v. Anthes Business Forms Ltd.*, Houlden, J.A. stated:

The extent of the control of the market by the respondents is an important and material element in deciding the question of fact whether or not the preventing or lessening of competition is undue, but it is not decisive. Rather, the Court must conclude from a consideration of all the evidence, including the portion of the market controlled by the respondents, whether the agreement would prevent or lessen competition unduly.

¹¹⁶ 10 O.R.2d 153, 181 (C.A. 1975).

¹¹⁷ As Chief Justice Duff stated:

The lessening or prevention agreed upon would, in my opinion, be undue, within the meaning of the statute, if, when carried into effect, it will prejudice the public interest in free competition to a degree that the tribunal of fact finds to be undue, and an agreement to prevent or lessen competition to such an extent is accordingly an offence

Container Materials v. The King, [1942] 1 D.L.R. 529, 533.

¹¹⁸ 75 D.L.R.3d 332 (1977).

¹¹⁹ ANNUAL REPORT, *supra* note 33, at 16.

insurance placed in the province at any time. The accused had all adhered to the premium rates for fire insurance which had been set by the Board. At trial, the accused were acquitted. On appeal to the Appeal Division of the Nova Scotia Supreme Court, it was successfully argued that the trial judge had erred in admitting evidence designed to establish "public benefit" in what the accused had conspired to do.¹¹⁹ The Appeal Division imposed fines under the Act, and the accused appealed to the Supreme Court of Canada. In the Supreme Court of Canada the acquittal of the insurance companies was restored, the court holding that the trial judge had acted properly when he looked at evidence establishing the benefits to the public from the agreements in question. The Supreme Court found that evidence of public benefit had been offered not by way of defence or justification, but rather as relevant to the question of the design of the agreement.¹²⁰

With respect to the question of undueness, the trial judge found that the agreement did not lessen competition unduly. The trial judge relied upon the "manner and degree test," finding that the arrangements in question had not affected competition in any manner that could be said to be undue, inordinate, or excessive. The majority of the Supreme Court of Canada agreed with the trial judge as the trier of fact in this regard. The Director of Investigation and Research has stated, however, that the majority in the Supreme Court was requiring a virtual monopoly to be established in order to convict on a conspiracy charge, despite a trend away from such a requirement.¹²¹

With respect to mens rea, it should be noted that to establish an accused's guilt under section 32, the onus is upon the Crown to prove "beyond a reasonable doubt" that the accused intended to enter into a conspiracy, combination, agreement or arrangement and that the conspiracy, etc., if carried into effect, would prevent, limit or lessen competition unduly.¹²² Therefore, there is no onus upon the Crown in a

¹¹⁹ In the often cited case of *Howard Smith Paper Mills Ltd. v. The Queen*, 8 D.L.R.2d 449 (1957), it was stated that the public is entitled to the benefit of free competition and that good motives are not a defence to a prosecution for a combines offense. *Id.* at 452.

¹²⁰ The Director of Investigation and Research is of the opinion that proof of "public benefit" has traditionally been irrelevant and should not be admitted to defeat a conspiracy charge. The offense is in the agreement, not in the result, and to admit evidence of "public benefit" for the purpose of determining whether the object of the agreement is to lessen competition unduly, could have an absurd result. "Applying the . . . test, depending upon the point in time when a conspiracy was charged, it would be possible for different verdicts in respect of an agreement to result." ANNUAL REPORT, *supra* note 33, at 19.

¹²¹ More precisely, the Director stated:

[I]t would appear that Richie, J., speaking for the majority, was adopting a virtual monopoly concept in stating that the charge covered the whole industry in the Province and that an offence was not established by proving that a single group accounting for a large portion of the industry agreed upon common premium rates.

Id. at 17.

¹²² See *Regina v. Anthes Business Forms Ltd.*, 10 O.R.2d 153 (1975); *Container Materials Ltd. v. The King*, [1942] 1 D.L.R. 529.

prosecution under section 32 to establish that the parties had the intention to lessen competition unduly. The Crown must show only that they had the intention to enter into an agreement, whether or not carried into effect, which would prevent or lessen competition unduly.¹²³

Subsection 32(2) of the Combines Investigation Act, provides a limited exemption from the conspiracy provisions of section 32(1) for agreements or arrangements relating to typical trade association activities, e.g. agreements providing for the exchange of statistics, standards and credit information. However, subsection 32(3) provides that the exemption is inoperative if the agreement or arrangement in question has lessened or is likely to lessen competition unduly in respect of prices, quantity, or quality of production, markets or customers, channels or methods of distribution, or if the activities in question create a barrier to market entry. American lawyers are quite familiar with the potential problems created by the activities of trade associations, but Canadian jurisprudence is not as developed in this area.¹²⁴

The other principal exemption to section 32 is the export exemption set out in subsection 32(4), which provides that the court shall not convict if a conspiracy, combination, agreement or arrangement relates only to the export of products from Canada. This subsection has been added to the Act in order to allow Canadian companies to combine and compete effectively on the world market. However, combinations or arrangements in the export trade are not acceptable¹²⁵ if they reduce or limit the volume of exports of a product, restrain or injure the export business of a domestic competitor not a party to the arrangement, restrict market entry or lessen competition unduly in relation to a product in the domestic market. The Competition Bureau will scrutinize export agreements to ensure that they do not mask an arrangement with respect to the domestic market and to ensure that the arrangement falls squarely within one of the exceptions in the Act.

Finally, subsection 32(7) provides an exemption for combinations among affiliated companies.

B. Bid Rigging

The offence of "bid rigging," the sole "per se offence" under the Combines Investigation Act, was added to the Act by the Stage I Amendments in 1976. While bid rigging activities were within the ambit of subsection 32(1), the specific provision was added to the Act to elimi-

¹²³ The recent case of *Regina v. Atlantic Sugar Refineries Co.*, [1976] Que. C.S. 421, has reaffirmed the above.

¹²⁴ See *Regina v. St. Lawrence Corp.*, 51 C.P.R. 170 (1966). It may be that the list of exempt activities in subsection 32(2) is not limitative, that there may be other activities which may be engaged in by competitors and which would not constitute an offence under subsection 32(1), e.g., common representations to the government or the courts or educational programmes. See Clarry, *Criminal Offences*, NEW COMBINES LEGISLATION 1, 9 (1977).

¹²⁵ Combines Investigation Act, *supra* note 22, at §§ 32(5)(a)-32(5)(d).

nate the need to prove an undue lessening of competition, which would be required in any prosecution of bid rigging under subsection 32(1). As indicated in *Proposals For a New Competition Policy for Canada*,¹²⁶ the new section makes bid rigging an offence, recognizing that it is a dishonest practice and that prolonged inquiry into effects on the market and market shares would be irrelevant. The provision with respect to bid rigging does not preclude joint bids, if openly described as such, or arrangements with respect to the bids of affiliates. It is interesting to note that in a prosecution of almost the entire Canadian dredging industry for bid rigging, the Crown prosecuted under sections of the Criminal Code relating to defrauding the public, rather than proceeding under the Combines Investigation Act. At the time charges were laid, the separate bid rigging offence had not yet become part of the Act, and the Crown wished to avoid the need to prove that the bid rigging activities, which could have been attacked under section 32(1), had resulted in an "undue" lessening of competition.¹²⁷

C. *Merger and Monopoly*

Section 33 of the Act provides that every person who is a party or privy to or knowingly assists in the formation of a merger or monopoly, is guilty of an indictable offence and liable to imprisonment for two years.¹²⁸ The definition of merger is broad, and includes both vertical and horizontal mergers, but the definition is qualified by the requirement that the merger must lessen or be likely to lessen competition "to the detriment or against the interest of the public." Although the number of mergers in Canada continues to grow, few have been attacked, and the government has never obtained a conviction in this area. This is less a comment upon the benign effect of Canadian mergers than it is a comment upon the difficulties of proof and the unworkability of the statute provisions in this regard.

¹²⁶ DEP'T OF CONSUMER AND CORPORATE AFFAIRS, SUPPLY AND SERVICES, CANADA, PROPOSALS FOR A NEW COMPETITION POLICY FOR CANADA, FIRST STAGE 1975 (1977).

¹²⁷ *Regina v. McNamara*, [unreported], Supreme Court of Ontario, verdict rendered May 5, 1979 (currently under appeal to the Court of Appeal for Ontario). For a full discussion of bid rigging under the Combines Investigation Act see *Regina v. J.J. Beamish Construction Co.*, 65 D.L.R.2d 260 (1967). In that case, the accused were acquitted because they were providing a service, and services were not, at that time, covered by the Act. However, the Court commented extensively about bid rigging and business ethics.

¹²⁸ The Act defines merger as follows:

'[M]erger' means the acquisition by one or more persons, whether by purchase or lease of shares or assets or otherwise, of any control over or interest in the whole or part of the business of a competitor, supplier, customer or any other person, whereby competition

- (a) in a trade, industry or profession,
- (b) among the sources of supply of a trade, industry or profession,
- (c) among the outlets for sales of a trade, industry or profession, or
- (d) otherwise than in paragraphs (a), (b), and (c),

is or is likely to be lessened to the detriment or against the interest of the public whether consumers, producers or others.

Combines Investigation Act, *supra* note 22, § 33.

There have been only three court decisions of significance. In *Regina v. Canadian Breweries Ltd.*,¹²⁹ the court grappled with the meaning of "detriment to the public" in the merger definition and determined that, for there to be "detriment to the public," control of a substantial segment of the market must result from the merger. The court thus applied to the merger provision the "share of the market" test which had evolved in the conspiracy cases under section 32. In *Regina v. British Columbia Sugar Refining Co.*¹³⁰ even though the accused had a virtual monopoly, there was an acquittal on the grounds that the Crown had failed to establish beyond a reasonable doubt that the merger had operated or was likely to operate to the detriment of the public.¹³¹ The Supreme Court of Canada finally had a chance to consider the merger question in the *K.C. Irving*¹³² case, and "that decision disposed of whatever hopes may have remained that the present criminal prohibition of mergers would be an effective instrument."¹³³

The *K.C. Irving* case arose from the takeover by K.C. Irving Ltd. of virtually all of the English language newspapers in the Province of New Brunswick. The Supreme Court of Canada held that there was no doubt that K.C. Irving Ltd. had such control in the market to satisfy the introductory portions of the merger and monopoly definitions. However, two questions remained in relation to the definition of merger: first, "whether by reason of the acquisition of that control, 'competition is or is likely to be lessened to the detriment or against the interest of the public,'"¹³⁴ and, second, in relation to the definition of monopoly, "whether the person or persons having such control 'have operated or are likely to operate [the controlled business] to the detriment or against the interest of the public.'"¹³⁵ The Supreme Court took the view that the arguments of Crown counsel had been based upon, "a mistaken application to the present case of the law governing unlawful conspiracies or agreements unduly to prevent or lessen competition."¹³⁶ The court rejected the view that a presumption of detriment to the public arises from the fact that one person has gained complete or substantial control of a particular market. The court held that it was not open for the Crown to rely upon a presumption in a criminal case, unless that presumption is set out in the legislation. The onus, therefore, remained with the Crown to prove detriment to the public arising from the activities in question. The

¹²⁹ [1960] O.R. 601.

¹³⁰ 38 C.P.R. 177 (1962).

¹³¹ "[O]n the basis of these two decisions we are left in the position that a very high degree of concentration is required (a virtual monopoly or virtual stifling of competition) before the courts will strike down a merger as being to the detriment of the public." Henry, *supra* note 32, at 69.

¹³² *Regina v. K.C. Irving, Ltd.*, 72 D.L.R.3d 82 (1976).

¹³³ ANNUAL REPORT, *supra* note 33, at 14.

¹³⁴ 72 D.L.R.3d at 90.

¹³⁵ *Id.*

¹³⁶ *Id.*

Crown had offered no evidence of detriment, while the defence had tendered evidence that the public had benefited from the takeover. Circulation had increased, staff had enlarged and editorial autonomy had been maintained.¹³⁷ It is unlikely that, without amendments to the Combines Investigation Act, a successful prosecution of a merger will be possible.

2. Monopoly

"Monopoly" is defined in section 2 of the Act.¹³⁸ Monopoly per se is not unlawful. The offence consists in the abuse of monopoly position.¹³⁹

Until quite recently, the leading monopoly case was that of *Rex v. Eddy Match Limited*.¹⁴⁰ Practically though, that case is of little assistance because it concerned the most blatant form of monopolization. A more recent case is that of *Regina v. Canadian General Electric Company Ltd.*¹⁴¹ In that case, Pennell, J. of the Ontario High Court of Justice, held that: "... in order to make out the crime of monopolization it is necessary to prove these two things: (1) control on the part of one or more persons and (2) detriment or the likelihood of it."¹⁴² With respect to "detriment or the likelihood of it" the court rejected the notion that the detriment must be "undue" in order for the activity to be enjoined. The court was of the view that the insertion of the word "undue," borrowed from the section 32 conspiracy provision, before the word detriment was not warranted.¹⁴³ The court held that the

¹³⁷ The court stated:

In the light of the definition of "merger" in the present Combines Investigations Act it is impossible to say that acquisition of entire control over a business in a market area (as contrasted with acquisition of some control) must mean without more not only that competition therein was or was likely to be lessened but that by reason of such control the lessening or likely lessening is to the detriment or against the interest of the public. Even if the acquisition of entire control would be enough to support an inference of lessening or likely lessening of competition, that inference cannot be drawn here, in the face of the evidence and the findings thereon by the trial Judge and by the Court of Appeal that the pre-existing competition where it existed, remained and was to some degree intensified by the take-over of the newspapers.

Id. at 94.

¹³⁸ '[M]onopoly' means a situation where one or more persons either substantially or completely control throughout Canada or any area thereof the class or species of business in which they are engaged and have operated such business or are likely to operate it to the detriment or against the interest of the public, whether consumers, producers, or others, but a situation shall not be deemed a monopoly within the meaning of this definition by reason only of the exercise of any right or enjoyment of any interest derived under the Patent Act, or any other Act of the Parliament of Canada.

Combines Investigation Act, *supra* note 22, § 2.

¹³⁹ See *Regina v. Canadian General Electric Co.*, 75 D.L.R.3d 664 (1976).

¹⁴⁰ 109 C.C.C. 1 (1953).

¹⁴¹ 75 D.L.R.3d 664 (1976).

¹⁴² *Id.* at 710.

¹⁴³ 75 D.L.R.3d 664 (Ont. 1976). The court stated that "[t]he standard in each instance

concept of public interest required the court, “. . . to weigh the proven benefits against the proven evils to determine if detriment has resulted Whether the acts of those who control the market may be considered detrimental is a question of fact for the court to determine.”¹⁴⁴ Thus, the court rejected the view that market share could be determinative of detriment to the public. Shortly after the decision in *Regina v. Canadian General Electric Company Ltd.*, the Supreme Court of Canada decided the *K.C. Irving, Ltd.* case,¹⁴⁵ which conclusively held that market share is just one of several factors to consider in the prosecution of a monopoly.

D. Price Discrimination and Predatory Pricing

The price discrimination section¹⁴⁶ is designed to prevent a “practise of discrimination” carried out by a supplier against competitors of a purchaser of products from the supplier. Any discount, rebate, allowance, price concession or other advantage available to one purchaser must be available to his competitors with respect to a sale of articles of like quality and quantity. Predatory pricing provisions, contained in subsections 34(1)(b) and (c), are concerned with the large national corporation which might use its deep pocket to destroy smaller competitors in particular geographic locations and with policies of selling products at unreasonably low prices which have the effect of eliminating competition. As in the case of the price discrimination provision, an isolated lowering of price to meet spot competition would be permissible. It is conduct with the effect or tendency of substantially lessening competition or eliminating it or conduct designed to have such an effect which is of concern.

E. Price Maintenance

Section 38(1)(a) of the Act, deals with price maintenance. The provision has been amended so that it will include attempts to influence prices upwards or downwards, by any means whatsoever. It is not just the producer or supplier of a product who will be caught in an attempt to influence prices, but also any one engaged in a business that relates to credit cards or who has exclusive rights conferred by trademark or copyright. The provision dealing with suggested retail prices¹⁴⁷ has been amended so that a suggestion of a resale price will be proof of an attempt to influence prices unless the producer or supplier, who suggested the resale price, also made it clear to the person to whom the suggestion was

has been set by the definition of the offence. To require the detriment be undue would alter the standard provided by the statute.” *Id.* at 714.

¹⁴⁴ *Id.*

¹⁴⁵ 72 D.L.R.3d 82 (1976).

¹⁴⁶ CAN. REV. STAT. c.23, § 34(1)(a) (1970).

¹⁴⁷ Combines Investigation Act, *supra* note 22, as amended by Act of Dec. 15, 1976, Can. Stat. c.76, § 38(3) (1976).

made that he was not under any obligation to accept the suggestion and would not suffer in his business relations if he failed to do so. The resale price prohibition does not apply with respect to a price affixed to a product or its packaging. Subsection 38(1)(b), makes it an offence to refuse to supply a product or otherwise discriminate against a person in business because of the low pricing policy of that person. However, subsection 38(9) provides that it is a defence to a charge under subsection 38(1)(b) if the refusal to supply was because of loss-leadering by the purchaser.

F. Other Combines Offences

The Combines Investigation Act contains provisions more in the nature of consumer protection legislation than anti-trust legislation. These provisions cannot be effectively discussed in a paper of this length. However, certain points should be noted. Misleading advertising provisions,¹⁴⁸ which formerly dealt with misleading price representations, misleading advertising and unsubstantiated claims, have been augmented by the recent amendments to the Act and now include provisions dealing with misleading warranties, guarantees and promises with respect to repairs. The Act now embraces representations made "by any means whatsoever" which are false or misleading in a material respect. It is now an offence to make a representation to the public, in the form of a statement, guarantee, or warranty, of the performance, efficacy or life of a product if such a representation is not based on an adequate test. The onus is on the person making the representation to establish that the testing was adequate. A new section¹⁴⁹ creates offences with respect to testimonials about a product and representations with respect to tests of a product. The burden is upon the person making the representation or publishing the testimonial to establish that the test in question was made or the testimonial in question was given. The Act now contains a provision¹⁵⁰ dealing with bait and switch selling—the practice whereby a product is advertised at a bargain price, and the seller does not have on hand sufficient quantities. If a bargain price is advertised, a "reasonable quantity" of the product must be available. If a supplier has taken reasonable steps to ensure that such reasonable quantities are on hand, he will not be liable under the Act. Sales above advertised price are covered by the Act.¹⁵¹ The Act mandates the method of conducting promotional contests¹⁵² and attacks deceptive marketing practices such as double ticketing,¹⁵³ pyramid selling¹⁵⁴ and referral selling.¹⁵⁵ A "due diligence" de-

¹⁴⁸ *Id.* § 36.

¹⁴⁹ *Id.* § 36.1.

¹⁵⁰ *Id.* § 37.

¹⁵¹ *Id.* § 37.1. This section makes it an offence to supply a product at a price higher than the price advertised in the market. *Id.*

¹⁵² *Id.* § 37.2.

¹⁵³ *Id.* § 36.2.

¹⁵⁴ *Id.* § 36.3.

¹⁵⁵ *Id.* § 36.4.

fence is available in the case of misleading advertising and the provisions relating to testimonials.¹⁵⁶ Lastly, the Act contains an offence with respect to conspiracy in relation to professional sport. It is an offence to limit unreasonably the opportunity for a person to participate as player or competitor in professional sport, to impose unreasonable conditions upon such participation or to limit unreasonably the opportunity for any person to negotiate and play for the club of his choice.¹⁵⁷ The Act provides, however, that in determining if an agreement violates the provision, regard should be had to whether or not the sport in question is organized on an international basis. For that reason conditions should be accepted in Canada and, as well, the court should consider the desirability of maintaining a balance among teams in the same league.

*G. Reviewable Practices*¹⁵⁸

The 1976 amendments to the Combines Investigation Act created a category of "matters reviewable by the Restrictive Trade Practices Commission."¹⁵⁹ The "reviewable practices," refusals to deal, consignment selling, exclusive dealing, tied selling and market restriction,¹⁶⁰ are not offences leading to criminal prosecution before the courts, but may result in civil proceedings before the Restrictive Trade Practices Commission. Because the "reviewable practices" are practices which may or may not have an anti-competitive effect, they are treated in this manner rather than as offences. However, for the same reasons indicated earlier¹⁶¹ there is doubt about the constitutional validity of this part of the Act. In dealing with reviewable matters, the Commission has at its disposal a range of remedies depending upon the specific practice in question. Remedies may consist of an order to a supplier to make a product available, recommendations to the Minister of Finance that customs duties on products be removed or remitted to place competitors on an equal footing, cease and desist orders or orders containing any other requirement the Commission considers necessary to overcome the effects of a practice on the market and to restore and stimulate competition.¹⁶² The Director of Investigation and Research initiates the application to the Commission

¹⁵⁶ *Id.* § 37.3(2).

¹⁵⁷ *Id.* § 32.3.

¹⁵⁸ For a full discussion see Kaiser, *Reviewable Marketing Practices: The New Jurisdiction of the Restrictive Trade Practices Commission*, NEW COMBINES LEGISLATION 155-76 (1977).

¹⁵⁹ The reviewable practices consist of three categories of practices, "those restricting distribution of a product" (restrictions on distribution), "those excluding or foreclosing competing firms" (exclusionary practices), and those relating to foreign judgments, law and directives. *Id.* at 159. The jurisdiction of the Restrictive Trade Practices Commission with regard to reviewable practices is new and there have been few matters referred to the Commission.

¹⁶⁰ Combines Investigation Act, *supra* note 22, as amended by Act of Dec. 15, 1976, Can. Stat. c.76, §§ 31.2-31.9.

¹⁶¹ See text accompanying notes 32-36 *supra*.

¹⁶² See text accompanying notes 158-168.

with respect to reviewable matters. The Restrictive Trade Practice Commission may not act on its own initiative or upon the application of the public. Before the Director applies to the Commission for review he will already have completed his own inquiry. The Director is required to make such an inquiry whenever he has reason to believe that grounds exist for the making of an order under Part IV.1, the reviewable practices provisions, or upon the application of six persons or upon the direction of the Minister.¹⁶³ The Director's application to the Restrictive Trade Practices Commission will contain a precise statement of the facts alleged and the grounds of the application, a reference to the section of the Act under which the application is made, particulars of the order applied for and the list of relative pages of transcript from the Director's inquiry. The application is served on the respondent. The respondent must reply with a statement of the grounds upon which he opposes the application. The Director has the burden of proof in hearings before the Commission. Orders of the Commission are not subject to appeal, but judicial review is possible. It is a criminal offence to fail to comply with an order of the Commission, and a breach of an order of the Commission may give rise to civil damages.

1. Exclusionary Practices

a. Refusals to Deal

Prior to the addition of section 31.2 to the Act, there was no prohibition against a refusal to supply which was unrelated to an attempt to influence prices. Section 31.2 now provides that where a person is substantially affected in his business or precluded in carrying on his business due to inability to obtain adequate supplies of a product anywhere in the market on usual trade terms, and the problem is the result of insufficient competition among suppliers, the Commission may act. The Commission may order a supplier to accept a person as a customer or recommend to the Minister of Finance that any customs duties on the product be altered so as to place all persons dealing in that product on an equal footing. Subsection 31.2(2) indicates that one cannot demand supply of a particular brand of a product, unless the brand occupies such a dominant position in the market that the ability of a person to carry on his business in a class of articles will be substantially affected unless he has access to that particular brand.

b. Refusal to Sell by Foreigners

Section 31.7 now enables the Commission to act in a situation in

¹⁶³ *Id.* §§ 7-8.

which a foreign supplier has refused to supply a product or otherwise discriminated in the supply of a product to a person in Canada because of the exertion of buying power outside Canada by another person. This section would apply to a situation in which a powerful foreign parent might attempt to compel a foreign supplier to withhold a product from a Canadian buyer in competition with a subsidiary of the foreign parent.

*c. Tied Sale*¹⁶⁴

Tied selling is reviewable under subsection 31.4(2) when the Commission finds that tied selling, because it is widespread in a market or engaged in by a major supplier, is likely to impede market entry, impede introduction of a product or have other exclusionary effect with the result that competition is lessened or likely to be lessened substantially. The tied selling must constitute a practice. The difficult question will be to determine when competition has been substantially lessened as a result of tied selling. The Act sets out situations in which tied selling would be acceptable.¹⁶⁵

d. Exclusive Dealing

Section 31.4 defines "exclusive dealing" as any practice whereby a supplier of a product, as a condition of supplying a product to a customer, requires that customer to deal only or primarily in products supplied or designated by the supplier or refrain from dealing in a specified product. It also encompasses any practice whereby a supplier offers a product on more favourable terms if the customer agrees to take a specified product or refrain from dealing in other products. When exclusive dealing impedes entry into a market because it is widespread or engaged in by a major supplier or has any other exclusionary effect, causing competition to be substantially lessened, the Commission may make certain orders to overcome the effects on competition. Again the problem will be in determining when the practice results in a substantial lessening of competition. Exceptions are provided under the Act. It is not an offence to engage in exclusive dealing when done for a reasonable period of time to facilitate entry of a new supplier of a product into the market or when done between and

¹⁶⁴ The statute defines tied selling as the practice whereby a supplier requires a customer to acquire another product or refrain from using another product as a condition of sale. *Id.* § 31.4.

¹⁶⁵ A supplier of a product may engage in tied selling in order to facilitate new supplier or product entry when a technological relationship exists between the tied product and the tying product and when engaged in by a person in the business of lending money for the purpose of better servicing loans and when reasonably necessary for such a purpose. Also, affiliated companies may engage in tied sales. *Id.* § 31.4.

among companies, partnerships or sole proprietorships that are affiliated.¹⁶⁶ Further, subsection 31.4(5)(c), provides an exception to cover voluntary buying groups. When one party grants to another the right to use a trademark to identify the business of the grantee, e.g., a franchise arrangement, an exception exists.

2. *Restrictions of Distribution*

a. *Consignment Selling*

Consignment selling might be used as a method of maintaining prices. Therefore, by virtue of section 31.3, consignment selling is a reviewable matter. If it is found that the practice was undertaken to control prices or in order to discriminate between consignees or between dealers, a cease and desist order may issue.

b. *Territorial or Customer Restriction*

Territorial or customer restrictions called "market restrictions"¹⁶⁷ in the Canadian Act are reviewable matters, not offences, and will result in only cease and desist or other similar orders. As in the cases of tied selling and exclusive dealing, the Commission may intervene when a practice of market restriction is engaged in by a major supplier or is widespread in a market with the result that the practice is likely to impede entry of a firm into the market, impede the introduction of a product or have some other exclusionary effect resulting in reduced competition. Again, market restriction is excusable if engaged in for a limited period of time in order to facilitate entry of a new supplier of a product into the market.

3. *Foreign Judgments, Laws and Directives*

New provisions added to the Combines Investigation Act in 1976 give the Restrictive Trade Practices Commission jurisdiction with respect to the implementation of foreign judgments in Canada and the implementation of foreign laws and government directives in Canada.

Section 31.5 is concerned with foreign judgments, decrees, orders or other process. When the Commission finds that a foreign judgment or other process can be implemented in Canada by persons or

¹⁶⁶ *Id.* §§ 31.4(4)-31.4(5).

¹⁶⁷ Section 31.4 defines market restriction as:

any practice whereby a supplier of a product as a condition of supplying a product to a customer requires that customer to supply any product only in a defined market or exacts a penalty of any kind from the customer if he supplies any product outside a defined market.

corporations and that the implementation of the judgment, decree, order or other process would adversely affect competition and adversely affect the efficiency of trade or industry in Canada, without bringing about increases in competition, the Commission may order that no steps be taken in Canada to implement the foreign judgment.

Section 31.6 is concerned with actions by companies incorporated in Canada, where such actions are the result of foreign laws, or a direction, instruction, intimation of policy or other communication from a foreign government or person in a position to influence the actions of the Canadian company. The section is also concerned with directives which have the purpose of giving effect to a conspiracy entered into outside of Canada which, if entered into in Canada, would be a violation of section 32. The Commission will intervene if the actions of a Canadian company, if implemented, would have any of the adverse results indicated above with respect to foreign judgments. The Commission may order that no actions be taken in Canada to implement foreign directives in any manner other than stipulated by the Commission. Sections 31.5 and 31.6 were added to the Act in an attempt to thwart the extraterritorial reach of U.S. anti-trust laws, without claiming for Canada an extraterritorial jurisdiction, and to provide Canadian combines authorities with the power to prevent foreign entities from implementing anti-competitive schemes in Canada.

V. The Proposed Stage II Amendments¹⁶⁸

As indicated earlier, the status of the Stage II amendments to the Combines Investigation Act is uncertain. At this date it is impossible to predict if, when, and in what form those changes might be reintroduced. However, a brief glance at the proposed changes which were dropped will highlight some possible directions.

Under the proposed bill, the jurisdiction of the Restrictive Trade Practices Commission was to be expanded and vested in a new body called the "Competition Board." The Director of Investigation and Research was to be renamed the "Competition Policy Advocate" and to be given broadened responsibilities. Procedural changes provided that the Governor in Council was to be empowered to set aside orders of the Competition Board when they conflicted with government economic and social goals. Class action suits were provided for, and provision was made for the signing of consent decrees with respect to reviewable practices referred to the Board for an order. Lastly, provision was made for the Competition Policy Advocate to issue interpretive bulletins.

¹⁶⁸ See generally COMPETITION POLICY IN CANADA: STAGE II, BILL C-13 (J. Rowley & W. Stanbury ed. 1978).

Not unexpectedly, the new bill proposed to completely revamp the merger provisions of the present Act. The criminal prohibition against merger was to be repealed, and the civil review of mergers to be provided for. The Competition Policy Advocate would still have to establish that a merger would lead to a "substantial lessening of competition." But the accused would be able to argue, by way of defence, that the merger would bring about a clear probability of substantial gains in efficiency. The Competition Board was to prohibit only those mergers which would result in a substantial lessening of competition with no redeeming virtues. With respect to horizontal mergers, only those accounting for twenty percent or more of a market were to be subject to review. The Competition Policy Advocate was to be given the ability to preclear mergers, and the Advocate was to have only a limited period of time during which to attack a pending merger. One year after the receipt by the Advocate of a notice of merger provided by the merging parties, the Advocate was to become powerless to stop the merger. The proposed Act provided that the Advocate might notify the Foreign Investment Review Agency that he intended to review the merger aspects of a takeover, in which case the Foreign Investment Review Agency would refrain from reviewing that aspect of the takeover, thereby eliminating duplicative proceedings. In addition to retaining the current criminal prohibition against monopolies, the new bill proposed a civil monopoly jurisdiction. The Restrictive Trade Practices Commission was to be given power to review single entity monopoly as well as "joint monopolization." However, in all cases it was to be a defence if the conduct under review reflected superior efficiency or superior economic performance.

With respect to specialization agreements, provision was made for the bringing of such agreements before the Competition Board in order that an exemption from the conspiracy provisions of section 32 might be obtained. A specialization agreement is one whereby a party undertakes to discontinue production of a particular article, on the condition that another party discontinues production of another article and includes an agreement that each party will make purchases of their now discontinued product from the other. Though it might approve a specialization agreement, the Board was to be under an obligation to reject an agreement likely to totally eliminate competition.

As had been suggested by many, the bill proposed changes with respect to price discrimination. While leaving intact the criminal prohibition against price discrimination, the Board was to be given power to review "price differentiation." A defence was to be available where volume discounts could be justified by cost savings. Further changes were suggested with respect to the actions of multinational enterprises. The Board was to be empowered to issue prohibition orders when restrictions imposed by multinational enterprises or their affiliates were designed to protect price levels in Canada from the influence of lower priced prod-

ucts from abroad, or to protect price levels in a market outside Canada, from lower priced products available from Canada. A new section was to provide that the criminal provision dealing with cartel agreements would not apply to a cartel authorized by an act of the Parliament. The new bill also set out the circumstances in which regulated industries were to be exempted from the provisions of the Combines Investigation Act and provided the Competition Policy Advocate with increased powers with respect to interventions in the regulatory process.

Question and Answer Period

Mr. Campbell: I was given two questions asking that I elaborate on the interplay of the Foreign Investment Review Act and the Canadian Combines Investigation Act. For those of you who are unfamiliar with the Foreign Investment Review Act, the Act provides review jurisdiction for the government when a foreign company proposes to take over a Canadian business or expand its own operations in Canada. There is an overlap between the two statutes presently. The Director of Investigation and Research under the Combines Investigation Act has the possibility of intervening in a hearing before the Foreign Investment Review Agency (FIRA), but there is definitely an overlap. Approval by FIRA today will not insulate against Combines Investigation Act problems tomorrow. However, it is not likely that a foreign company would have trouble once it obtained FIRA approval. I should point out that the proposed changes to the Combines Investigation Act contain a provision whereby the Competition Policy Advocate may notify the Foreign Investment Review Agency that the competition people intend to review the merger aspects of the takeover. Once that notice has been given to the Foreign Investment Review Agency, FIRA will not then review the merger aspects of the takeover, but they will examine the other aspects in their jurisdiction. For example, FIRA will require foreign companies to provide information concerning the impact of the takeover on Canadian employees, management, etc.

Question: Do the provinces retain any relevant power impugning directly or indirectly in antitrust matters?

Mr. Campbell: I think the simple answer is no. The regulation of anticompetitive practices is exclusively with the federal government. However, the provinces do have a broad degree of consumer protection legislation which will overlap with some of the federal regulation.

Question: Please comment upon bid rigging and define it.

Mr. Campbell: Bid rigging means an agreement or arrangement between or among two or more persons whereby one or more of them agree to undertake not to submit a bid in response to a call or request for bids or tenders. For example, Canada's longest jury trial has recently ended; the trial concerned bid rigging. Interestingly, the prosecution did not

occur under the Combines Investigation Act since the Act did not encompass bid rigging at the time charges were brought. If the Crown had proceeded under the Combines Investigation Act it would have had to proceed under Section 32; thus, the Government would have had to prove an undue restraint.

Question: What should be the title of a retail price list published by the supplier for use by dealers?

Mr. Campbell: I don't suppose the title really matters, but it is not enough to state that prices are suggested only. A supplier should state both that prices are suggested only and that the dealer or supplier is under no obligation to charge those prices and will not suffer in his business relation with the manufacturer or any other person if he does not adhere to those prices. That's the sort of advice we're giving clients today with respect to suggested resale prices.

Question: Is English common law of any use with respect to monopolies and restraints in trade in Canada?

Mr. Campbell: Yes, but since things are hopelessly muddled at this point, I don't know if it would give us any real help.

Question: Under Canadian law is the U.S. manufacturer responsible for assuring that his Canadian distributor allocates the funds on a proportional basis?

Mr. Campbell: Allowances have to be offered on a proportional basis. They have to be available. Now, of course, there is a debate about whether a supplier must phone everybody up and say that an allowance is available.

Question: You mentioned that Canadian law usually does not have an extraterritorial application. Suppose the American manufacturer has only one customer in Canada and that customer has its own customers. The monies are channeled through that distributor to the distributor's customers. In the United States the manufacturer is usually responsible for assuring that the customer's customers get the money. Is that the case in Canada?

Mr. Campbell: I don't think that the Canadian authorities would go after the U.S. manufacturer as a matter of choice. I think they would go after the dealer in that situation. That's typically been the response to avoid all the problems created by the whole extraterritoriality issue and go after the one in Canada who has implemented the offence.