COMMENT AND ANALYSIS

A REVIEW OF CONSPIRACY CASES IN CANADA, 1965/66 TO 1987/88

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The prohibition of agreements to fix prices and divide up markets is arguably the heart of any nation's competition policy. Such agreements, if they lessen competition unduly, have been criminal offences in Canada since 1889,[1] one year before the famous *Sherman Act* was enacted in the United States.

Until the mid-1970s, conspiracy prosecutions dominated the competition policy agenda in Canada, but since that time the number of resale price maintenance/refusal to supply cases (hereafter RPM cases) has far outstripped the number of conspiracy cases. For example, Gorecki and Stanbury (1984, Table 2B) report that from 1889 to 1970 some 65 conspiracy cases were prosecuted as compared with five merger and/or monopoly cases, 20 RPM cases,[2] and nine other cases. (These figures, of course, exclude all misleading advertising and deceptive trade practices cases.[3]) In the next decade (1970/71 to 1979/80), the composition of the Bureau of Competition Policy's prosecutorial "output" in terms of completed cases changed markedly. It consisted of the following:

- 36 conspiracy cases;
- 6 merger and/or monopoly cases;
- 62 RPM/refusal to supply cases; and
- 12 other cases (e.g., predatory pricing and cases involving more than one section of the *Act*).

In the 1980s the number of RPM cases continued to grow and amounted to more than four times the number of conspiracy cases. Nevertheless, conspiracy cases continued to be central to the activities of the Bureau of Competition Policy.

This paper was stimulated by the desire to answer several questions:

- Did the dramatic drop in the conviction rate in conspiracy cases from the mid-1970s to the early 1980s reported by Gorecki and Stanbury (1984, Table 5B) continue?
- Has the Crown expanded the use of what Gorecki and Stanbury (1979) called the weaker type of prosecution consisting of an application for a Prohibition Order only under S.30(2) of the *Competition Act*[4]?
- Does crime still pay? Have the fines in conspiracy cases remained low relative to the likely benefits of forming agreements in restraint of trade? (Stanbury, 1976).
- Has the high rate of guilty pleas in conspiracy cases found between 1890 and 1970 continued? (Gorecki and Stanbury, 1979).
- Does "unduly" matter? In what fraction of cases where the accused were acquitted did the judge find an agreement, but hold that it had not lessened competition unduly?

Overview

The basic data on which this paper is based can be found in Appendix 1. The analysis is based on conspiracy cases completed between 1965/66 and 1987/88 and dated by the month in which they were completed.

Of the 109 cases referred by the Bureau of Competition Policy to the Attorney General, 85 were prosecuted: 78 were S.32 cases[5] while 7 were S.32.2 cases.[6] See Table 1. Section 32.2, which makes bid-rigging illegal *per se*, came into effect January 1, 1976.

Of the 85 conspiracy cases prosecuted there were:

- 45 convictions consisting of:
  - 34 guilty pleas (31 S.32 and 3 S.32.2)
  - 11 not guilty Pleas (8 S.32 and 3 S.32.2)
- 15 "P.O. onlys," i.e., an order per S.30(2) (all S.32)
- 25 non-convictions consisting of:
  - 17 acquittals (16 S.32 and 1 S.32.2)
  - 5 discharged at the Preliminary hearing
  - 3 charges dropped/Stay of Proceedings (see #47, 63, 65 in Appendix 1)

The overall "victory rate" (where "P.O. only" cases are counted as a "win" for the Crown[7]) was 60/82 or 73.2%. Gorecki and Stanbury (1984, Table 4B) report that between 1889 and 1964/65 the Crown obtained a conviction (or P.O. only) in 44 of 50 conspiracy cases (88%), measured on the same basis.[8] It appears that the Crown is making more extensive use of S.30(2), application for a Prohibition Order only rather than prosecution which could result in a fine as well as a Prohibition Order.[9] Between 1965/66 and 1987/88, 15 of 78 S.32 cases involved a "P.O. only." They accounted for 28% of all the "victories" by the Crown in S.32 cases. Table 1 indicates that the "P.O. onlys" were concentrated in the periods 1970/71-79/80 and 1985/86-87/88. Appendix 1 reveals that six of the 15 S.30(2) cases involved conspiracies among local gasoline or fuel oil dealers (#21, 22, 38, 43, 49, 73). Fourteen of the 15 S.30(2) cases appeared to involve local conspiracies rather than large regional or national markets. Despite the existence of a written price fixing agreement, the Crown sought a P.O. only in the two local law society cases (#82, 83).[10] However, prosecution would have been complicated by the decision in the *Jabour* case in respect to provincially regulated conduct.[11]

Acquittals

Table 1 indicates that the "victory rate" fluctuated substantially over the 23 year period. It was 93% in the period 1965/66-1969/70 then it fell in the next three five-year periods to 82%, 61% and 59% respectively. In the last three years it recovered to 73% which is still well below the average of 88% for the period 1890-1965. While the 88% rate continued from 1965/66 to 1974/75, it then dropped to 64% for the period 1975/76 to 1987/1988.

What reasons explain the decline in "victory rate" after the mid-70s? Table 1 reveals that if "P.O. only" cases are excluded (they account for one-quarter of all successful cases for the Crown), the frequency of guilty pleas dropped sharply during this period—from 77-78% between 1966 and 1975 to 70-71% between 1976 and 1985. It rose slightly in the next two periods, but remained far below the rate prior to 1970. While the guilty plea rate in conspiracy cases completed between 1890 and 1970 averaged 70% (Gorecki and Stanbury, 1979), for cases completed between 1970/71 and 1987/88 it was only 45%. It seems clear, therefore, that the increasing propensity of the accused to challenge the Crown's allegations of a price-fixing conspiracy has had the effect of reducing the conviction rate, and increasing the fraction of cases prosecuted under S. 30(2), the "P.O. only" route.

It should be noted that the drop in conviction rate and guilty plea rate coincided roughly with the end of the practice of sending conspiracy cases (as well as merger and monopoly cases) to the Restrictive Trade Practices Commission for a hearing and report. The RTPC perfomed this function from 1952 to 1973 although it continued to operate until 1986 when the *Competition Act* came into force. It may be that after an alleged conspiracy case had been fully aired before the RTPC, the prospects of successfully defining the case in the courts were seen by the accused to be poor. Hence, they tended to plead guilty and the Crown obtained a higher conviction rate. Alternatively, it may be that until the mid-1970s the Crown was too "conservative," i.e., it prosecuted only those cases where it had overwhelming evidence

of guilt.[12] In the 1970s, therefore, the Crown may have decided to test the limits of the law by bringing more ambiguous cases. Another possible explanation may be that the nature of conspiracy cases themselves changed. The days of overt, formal agreements passed and in more recent cases the Crown had to persuade judges to convict on the basis of inferences drawn very largely from circumstanttial evidence. A review of the conscious parallelism cases and those involving arrangements to raise the average level of prices shows how difficult that task has been.[13]

A more detailed analysis of the S.32 cases, which had a lower conviction rate than the S.32.2 cases (where the Crown won six of the seven prosecutions), is provided in Appendix 2. Of the 19[14] cases which resulted in an acquittal at trial or appeal or were dismissed at the preliminary hearing:

- in 7 cases the court failed to find an agreement existed among the accused;
- in 10 cases the court found there was an agreement, but held that it did not lessen competition unduly as required in S.32(1); and
- in 2 cases the reasons were unclear or could not be determined from the Bureau of Competition Policy's records.

These data reveal the significance of the word "unduly" in S.32. It was responsible for over one-half the acquittals in Canadian conspiracy cases over the past 23 years. While it has been suggested by the previous Director of Investigation and Research that the Crown's major problem in S.32 acquittals is its inability to convince the courts that the accused had formed an agreement, this impression is incorrect.[15] It should be noted that in six of the 10 cases where an agreement was found to exist but undueness was not proven, the agreement was a formal, overt one (see cases #1, 2, 3, 7, 9, 10 in part B of Appendix 2). In other words, the trial judge did not have to deal with the subtleties of inferring the existence of an agreement from circumstantial evidence.

Appeals

Of the 19 S.32 acquittals reported in Appendix 2, six cases went to appeal, of which three went to the Supreme Court of Canada. In no case were the accused convicted at trial and later acquitted. In other words, the Crown's appeals of acquittals at trial were unsuccessful in every case. In two cases (*Atlantic Sugar, Aetna Insurance*– see Appendix 2) the court of appeal reversed the acquittal at trial, but the SCC subsequently upheld the trial court's decision.

Between 1965/66 and 1987/88 contested convictions were registered in eight S.32 and two S.32.2 cases. Of these, three S.32 cases and both S.32.2 cases were appealed. In all five cases the trial court convicted and the decision was upheld on appeal.[16]

In summary, therefore, appeals very, very seldom alter the decision of the trial court. This is so because such a large part of conspiracy cases hinges on findings of fact made by the trial court. This includes whether or not there is an agreement and, if there is, whether it lessens competition unduly. Further, in none of the handful of cases in which the accused were discharged at the Preliminary hearing (see Appendices 1 and 2) did the Crown proceed by way of direct indictment so that a full trial on the merits could be obtained.

Penalties

If S.30(2) or "P.O. only" cases are excluded, in 36 of 45 S.32 or S.32.2 cases conviction was followed by the imposition of a fine and a Prohibition Order–see Table 1. Four of the nine "fine only" penalties involved S.32.2 bid-rigging cases (#58, 64, 69, 78 in Appendix 1). In only one of the nine cases did the Crown request an order (#3) but the court refused it.

More important than the high frequency of Prohibition Orders is the fact that they have become much more detailed and much more likely to deter the kind of behaviour that contributed to the horizontal restraint of trade.[17]

Fines remain the primary penalty in conspiracy cases. However, the average fine per firm in S.32 cases (in nominal dollars) was very low prior to the 1970s:

- 1889-1910 $5,000
- 1911-1925 no successful prosecutions
- 1926-1942 $2,774
- 1950-1959 $7,046
- 1960-1969 $7,576[18]

One way to attempt to deter horizontal agreements in restraint of trade is to increase the level of fines to an economic level, i.e., to the point they reflect the expected gains of committing an offence adjusted for the probability of detection and conviction. In general terms, the fine should be approximately the expected economic benefits from the conspiracy divided by the probability of detection and conviction in such conspiracy cases.[19] It is clear that the average fine per corporate conspirator has increased from the 1960s to the early 1980s. The average fine per firm[20] in more recent S.32 cases (see Appendix 1) was as follows:

- 1970/71-74/75 $17,105
- 1974/75-79/80 $42,492
- 1980/81-84/85 $95,977
- 1985/8687/88 $20,762

Several points must be noted, however. First, the figures are in nominal dollars, hence in real terms the increase in fines has been much less. Second, and more importantly, the average fine per company in the 1960s was extremely low, only $7,576. Third, the level of fines in other cases has also been rising. In his *Annual Report* for 1983/84 (p. 23) the Director indicated that the average fine per case in RPM/refusal to deal cases increased dramatically between the 1960s to the early 1980s:

- 1960-69 $ 2,250
- 1970-74 $ 5,841
- 1975-79 $17,845
- 1980-84 $21,625

To put the fines in conspiracy cases in perspective it should be appreciated that the largest single fine imposed in a S.32 case in Canada is $400,000.[21] Moreover, from 1953 through 1975 the courts had the power to impose a potentially unlimited fine. Beginning in 1976 the maximum was set at $1 million in order to "give the judges something to shoot at" according to the Minister of Consumer and Corporate Affairs. Effective June 22, 1986, it was raised to $10 million.[22] Note that the maximum fine for corporate violations of S.1 of the *Sherman Act* was raised to $1 million in 1974. The maximum fine for individuals was raised to $250,000 effective in 1985 (Werden and Simon, 1987).

The average fine per firm in the six successful bid-rigging (S.32.2) cases between 1976 and 1987/88 was $20,588 (see Appendix 1). However, in June, 1988, in the Saskatchewan business forms case four firms were fined an average of $400,000[23] and in the Nova Scotia business forms case the two firms were fined $200,000 each. These cases are of particular note because the volume of business in Saskatchewan subject to bid-rigging was about $433,000 and the amount in Nova Scotia was about $718,000 (Hunter, 1988).

Not only should fines be increased greatly, but Werden and Simon (1987) provide good arguments why individuals in "hard-core" price fixing cases should be imprisoned,[24] despite the arguments of many economists that large fines[25] rather than imprisonment is a more efficient method of deterring price fixing in general. Recently, a senior official of the Bureau of Competition Policy stated:

> In order to increase general deterrence, which after all is the ultimate goal of prosecution, we are considering recommending to the Attorney General's office that more individuals be subject to prosecution in situations of clear criminal conduct and that appropriate periods of incarceration be sought from the courts in successful prosecutions. The *Competition Act* already allows for imprisonment of individuals for up to five years for both conspiracy and bid-rigging offences (Neilsen-Jones, 1988, p. 13).

Reforming the Legislation

In light of the record in conspiracy cases, the case for moving to the U.S. approach which makes "naked" cartel agreements illegal *per se*[26] while applying the "rule of reason"[27] to all other horizontal agreements in restraint of trade, is strong indeed. The toleration of "garden variety" price-fixing and market-sharing agreements undermines the most fundamental tenets of a market economy, namely that sellers will act independently in seeking competitive advantage. To fail to straightforwardly condemn what one former Director of Investigation and Research acknowledged was "a form of stealing,"[28] is to try to maintain an indefensible contradiction.[29] Stanbury and Reschenthaler (1981, p. 424) have argued that:

> ...agreements on prices and market shares are so intrinsically incompatible with the underlying philosophic foundations of a competitive free enterprise economy as to be categorically unacceptable....They are a form of taxation imposed on buyers...they provide no benefits to society as a whole.

Professor Michael Trebilcock (1986, p. 3) (now a lay member of the Competition Tribunal) has described the failure to "render bare cartels (price-fixing or market-division agreements) *per se* illegal" as "an appalling concession to the business community." He went on to say:

> This has been the law under the U.S. *Sherman Act* since the turn of the century. Most U.S. analysts of U.S. anti-trust policy, from conservatives to interventionists, are agreed that it has been its major accomplishment and has generated enormous benefits for consumers both in cartels disbanded and incipient cartels discouraged.

Since 1971 there have been three attempts to eliminate "unduly" from S.32. The first occurred in Bill C-256 which was introduced in mid-1971 as a draft bill for comment. It would have made illegal *per se* 10 types of horizontal agreements.[30] The second attempt was made a decade later by the Minister of Consumer and Corporate Affairs, Andre Ouellet (1981, p. 16). He stated that "the evil of conspiracy is self evident," and proposed that agreements to fix prices, allocate markets or to restrict entry or expansion of a competitor be declared to be illegal *per se*. Other agreements would be deemed to be illegal "where the parties to such agreements [jointly] account for some given percentage of the [relevant] market." It was generally believed that the percentage would be set at 50%. While efforts were made to incorporate these ideas into a bill in 1982, they foundered on the shoals of drafting statutory language that would be broad enough to stop the types of agreements the American courts had long held to be illegal *per se*, but narrow enough not to be open to the criticism that the Crown could attack potentially beneficial agreements or those whose likely adverse effects were *de minimus* (Stanbury, 1987).

The third attempt to eliminate "unduly" from S.32 was made by Andre Ouellet (now an Opposition Party member) during the hearings of the Legislative Committee on Bill C-91 in 1986. His amendment was defeated by a vote of 3 to 2. Opposition to this idea was voiced by L.A.W. Hunter who had recently resigned as Director of Investigation and Research of the Bureau of Competition Policy. He said that conspiracy cases were lost in the past, not because of "unduly," but because of the inability of the Crown to prove agreement. (The data in Appendix 2 disprove this statement.) Hunter said that to his knowledge "no Parliament or legislature has ever enacted a *per se* offence in writing. It has evolved through case-by-case jurisprudence rather than being written down in the statute."[31] This is incorrect as Sullivan (1977, pp. 165-172) makes clear. The text of S.1 of the *Sherman Act* literally condemns all agreements in restraint of trade. It was the courts that read into the language the idea that only unreasonable restraints were to be condemned, excluding naked price-fixing and market-sharing agreements.[32] Hunter's comment begs the obvious question: is it beyond the wit of Canadian legislators and legal draftsmen to put in writing the rules that have evolved under American case law?

Notes

1. See the discussion of the origins of Canada's competition policy legislation in Gorecki and Stanbury (1984, Ch. 2) and Baggaley (1982).

2. Recall that the RPM/refusal to supply provisions, now S.38 of the *Competition Act*, did not come into effect until 1951.

3. Gorecki and Stanbury (1984, Table 3B) report the following figures for misleading advertising and deceptive practices cases:

- 1960/61-1964/65 13
- 1965/66-1969/70 62
- 1970/71-1974/75 416
- 1975/76-1979/80 606

For more recent years, the Director of Investigation and Research's *Annual Report* indicate that the number of completed cases was

- 1980/81-1984/85 798
- 1985/86-1986/87 296

4. In this paper I have continued to use the older, more familiar section numbers in the *Competition Act* rather than the new ones in the Revised Statutes 1985, c. C-34 as amended. Here is a short concordance for all the section numbers mentioned in this paper: S.30(2) is now 32; 32 is 45, 32.2 is 47 and 38 is 61.

5. Several of these also involved charges under other sections of the *Act*, but in describing them I have considered only the charges under S.32.

6. According to a Bureau official, in August, 1988, the Director of Investigation and Research had some 30 inquiries and prosecutions involving conspiracy of bid-rigging or both. This number does not include matters at the preliminary examination stage (Nielsen-Jones, 1988, p. 12).

7. Strictly speaking, the imposition of a Prohibition Order under S.30(2) does not amount to a plea of guilty. In virtually every case where the Crown proceeds by this route a statement of facts is prepared and agreed to by the firms/persons to be subject to the Order. Further, the defendants almost always agree to the draft Order that is presented to the court. Note that in one case (#32, see the Director's *Annual Report* for 1974/75), the defendants successfully objected to the draft order and the trial court's decision was upheld upon appeal.

8. This figure also counts a "P.O. only" as a conviction. By comparison, the conviction rate in RPM/refusal to deal cases between 1951 and 1964/65 was 12 of 13 cases. Between 1965/66 and 1981/83 it was 71 of 95 or 74.7%.

9. The use of S.30(2) prior to the mid-1960s is described in Gorecki and Stanbury (1979). More frequent use of S.30(2) is part of what the present Director, Calvin S. Goldman, calls his compliance-oriented approach to enforcement which emphasizes the use of negotiated settlements. See Goldman (1986).

10. See "Prohibition Orders Issued Against County Law Societies," *Canadian Competition Policy Record*, Vol. 9(1), 1988, pp 8-19.

11. *Waterloo Law Assn.* v. *A.G. Canada* (1986) 580 R. (2s) 275; 35 D.L.R. (4th) 751; 31 C.C.C. (3d) 564 (H.C.).

12. Gorecki and Stanbury (1979, p. 164) suggest that a high guilty plea rate may be a reflection of the record of low fines following conviction.

13. See Stanbury and Reschenthaler (1977) and Stanbury (1988).

14. This figure omits three cases in which charges were dropped or a stay of proceedings was entered (#47, 63, 65 in Appendix 1), one in which an application for a P.O. only was dismissed (#32) and one case in which the court held that the alleged agreement involved a service which was not subject to the *Act* (#8).

15. For example, Lawson Hunter *(Canadian Competition Policy Record*, Vol. 9(1), March 1988, p. 5) states that "the federal government has successfully prosecuted only one conspiracy case through trial since 1976. In most instances where the Crown has lost, they have failed because they did not prove the fundamental element of an agreement or arrangement."

16. In the *Armco* case [(1976) 24 C.P.R. (2D) 145] the Ontario Court of Appeal upheld the convictions of seven of the 10 corporations and lowered the fine of one of the seven.

17. See, for example, "Western Trucking Case Results in Prohibition Order," *Canadian Competition Policy Record*, Vol. 9(2), 1988, pp. 10-12; "Movers Plead Guilty to Price Fixing Count: Get Fines and Tough Prohibition Orders," *Canadian Competition Policy Record*, Vol. 5(1), 1984, pp. 15-19; and *Annual Report* of the Director of Investigation and Research, year ended March 31, 1985, pp. 20-21 re outdoor advertising. See also the discussion in Kaiser and Nielsen-Jones (1986, pp. 422-423).

18. Data from Gorecki and Stanbury (1984, Table 9-B) for calendar years.

19. The U.S. Sentencing Commission (1987, p. 153) argues that "substantial fines are an essential part of the sanction" in conspiracy cases. It notes, however, that the average fine per corporation in such cases in the U.S.

is "approximately $160,000" (versus $27,000 for individuals). The Commission (1987, p.152) clearly takes an economic approach to sentencing in cases involving price-fixing, noting that "it is estimated that the average additional profit attributable to price fixing is 10 percent of the selling price." The Commission recommends "a fine of two to five times that amount be imposed on organizational defendants as a deterrent because of the difficulty in identifying violators." In any event, the U.S. Sentencing Commission (1987, p.151) recommends that firms be fined not less than $100,000.

20. These data exclude fines imposed on individuals, but include those imposed on trade associations.

21. See *Canadian Competition Policy Record*, Vol. 6(1), 1985, pp. 27-29.

22. However, the maximum fine in bid-rigging cases is potentially unlimited while agreements among banks (S.33) are subject to a maximum fine of $5 million.

23. It should be noted that one of the firms' fines included a fine of $40,000 in respect to S.38, price maintenance. See Hunter (1988).

24. The U.S. Sentencing Commission (1987, p.153) states that "currently approximately 39 percent of all individuals convicted of antitrust violations are imprisoned." However, the average time served recently was only 45 days.

25. Block and Sidak (1980) offer four reasons why it is occasionally impossible and usually suboptimal to combine a low level detection and prosecution with very high fines or private damages in price-fixing cases: overinvestment in private enforcement, marginal deterrence, risk bearing, and the possibility of error.

26. See *Addyston Pipe and Steel Co.* v. *U.S.* 175 U.S. 211 (1897); *U.S.* v. *Trenton Potteries* 273 U.S. 392 (1927); *U.S.* v. *Socony-Vacuum Oil Co.* 310 U.S. 159 (1940); *Northern Pacific Railway* v. *U.S.* 1356 U.S. 1 (1958); *Catalano Inc.* v. *Target Sales Inc.* 446 U.S. 643 (1980).

27. See the classic statement in *Standard Oil Co.* v. *U.S.* 221 U.S. 1 (1911). More generally, see Sullivan (1977) and Areeda (1986).

28. Statement by Lawson A.W. Hunter, *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-91*, Issue No. 10, May 1986, p.7:41. In one early combines case the judge described robbery as less offensive than bid-rigging. See *R.* v. *Master Plumbers and Steam Fitters Cooperative Associations Limited et al.* (1907) 14 O.L.R. 195 at p. 304.

29. When competitors are allowed to fix prices in some degree it is an open invitation to impose government regulation to protect the public. Given the success of deregulation over the past few years the tendency toward more direct regulation should be strongly resisted.

30. These included agreements:

(a) to fix prices;
(b) to rig bids;
(c) to divide or allocate markets;
(d) to lessen or limit the production or supply of a commodity or service;
(e) to lessen or limit the quality, grades or kinds of commodity or service;
(f) to lessen or limit the facilities for the production, acquisition, supply or distribution of a commodity or service;
(g) to lessen or limit the channels or methods of acquisition, supply or distribution of a commodity or service;
(h) to prevent or impede entry;
(i) to cause any person to abandon or withdraw from any market; and
(j) to boycott the supplier or acquirers of a commodity or service.

See Bill C-256, 1971.

31. *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-91*, Issue No. 8, May 13, 1986, p. 8:6.

32. This was first done in *Addyston Pipe & Steel Co.* v. *U.S.*, 175 U.S. 211 (1897). See also *U.S.* v. *Trenton Potteries*, 273 U.S. 392 (1927). See Sullivan (1977) and Areeda (1986).

References

Areeda, Phillip E. (1986) *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (Boston: Little Brown & Co.).

CANADIAN COMPETITION POLICY RECORD

Baggaley, Carman D. (1982) "Tariffs, Combines and Politics: The Beginning of Canadian Competition Policy, 1888-1900" (Unpublished study prepared for the Institute on Public Policy, April).

Block, Michael G. and J.G. Sidak (1980) "The Cost of Antitrust Deterrence; Why Not Hang a Price Fixer Now and Then?" *Georgetown Law Journal*, Vol. 68, pp. 1131-1139.

Goldman, Calvin S. (1986) "New Developments in the Enforcement of Canadian Competition Law" (Notes for an Address to the Law Society of Upper Canada and Canadian Bar Association– Ontario Continuing Legal Education Joint Programme, Toronto, September 26, mimeo.

Gorecki, P.K. & W.T. Stanbury (1979) "Canada's Combines Investigation Act: The Record of Public Law Enforcement, 1889-1976" in J.R.S. Prichard et al. (eds) *Canadian Competition Policy: Essays in Law and Economics* (Toronto: Butterworths), pp. 135-193.

Gorecki, P.K. & W.T. Stanbury (1984) *The Objectives of Canadian Competition Policy, 1888-1983* (Montreal: The Institute for Research on Public Policy).

Hunter, L.A.W. (1988) "Bid Rigging Charges Produce Largest Fine," *Canadian Competition Policy Record*, Vol. 9(2), June, pp. 1-3.

Kaiser, Gordon and Ian Nielsen-Jones (1986) "Recent Developments in Canadian Law: Competition Law," *Ottawa Law Review*, Vol. 18(2), pp. 401-517.

Neilsen-Jones, Ian (1988) "Canadian Antitrust Enforcement" (Notes for an address to Criminal Practice and Procedure Committee, American Bar Association– Antitrust Law Section, Toronto, August 8, mimeo).

Ouellet, Hon. Andre (1981) *Proposals for Amending the Combines Investigation Act: A Framework for Discussion* (Ottawa: Department of Consumer and Corporate Affairs, April).

Reschenthaler, G.B. and W.T. Stanbury (1981) "Price Fixing, Market Sharing and the Atlantic Sugar Case," *Canadian Competition Policy Record*, Vol. 2(1), pp. 1-13.

Stanbury, W.T. (1976) "Penalties and Remedies Under the *Combines Investigation Act*, 1889-1976," *Osgoode Hall Law Journal*, Vol. 14(3), December, pp. 571-631.

Stanbury, W.T. (1987) "Horizontal Agreements, Delivered Pricing, Specialization Agreements and Crown Corporations in the New Competition Act," in *Competition Act* (Vancouver: The Continuing Legal Education Society of British Columbia), Chapter 4.

Stanbury, W.T. (1988) "Arrangements to Raise the Average Level of Prices Rather Than To Fix Specific Prices" (Vancouver: Faculty of Commerce and Business Administration, University of B.C., December, mimeo).

Stanbury, W.T. and G.B. Reschenthaler (1977) "Oligopoly and Conscious Parallelism: Theory, Policy and the Canadian Cases," *Osgoode Hall Law Journal*, Vol. 15(3), pp. 617-700.

Stanbury, W.T. and G.B. Reschenthaler (1981) "Reforming Canadian Competition Policy: Once More Unto the Breach," *Canadian Business Law Journal*, Vol. 5(4), pp. 381-437.

Sullivan, L.A. (1977) *Handbook of the Law of Antitrust* (St. Paul, Minn.: West Publishing).

Trebilcock, M.J. (1986) "Bill C-91: What Are the Costs of Closure?" *Canadian Competition Policy Record*, Vol. 7(1), pp. 1-6.

United States Sentencing Commission (1987) *Federal Sentencing Guideline Manual* (St. Paul, Minn.: West Publishing).

Werden, G.J. and M.J. Simon (1987) "Why Price Fixers Should Go to Prison," *Antitrust Bulletin*, Vol. 23(4), Winter, pp. 917-937.

TABLE 1

CONSPIRACY AND BID-RIGGING CASES COMPLETED, 1965/66 TO 1987/88**

Years Ended March 31

Disposition	1966-70	1971-75	1976-80	1981-85	1986-88
* Cases prosecuted, i.e., charges were laid	15	23	27	26	18
* Cases not prosecuted	0	6	8	7	3+**
Results of Prosecutions					
* Non Convictions	1	3	8	9	4
Charges Dropped/ Stay of Proc.	0	0	1	2	0
- Dismissed at Preliminary hearing	0	2	0	2	1
- Acquitted at trial/appeal	1	1	7	5	3
* Convictions	14	14	11	10	11
Prohibition Order only	1	5	4	0	5
- Fine only	2(2)*	1(0)*	0	5(3)*	1(0)*
Fine and Prohibition Order	11(8)*	8(7)*	7(5)*	5(4)*	5(5)*
Conviction rate (excl. cases where charges were dropped)	93%	82%	61%	59%	73%
Guilty plea rate (excluding P.O. only cases and cases where charges were dropped)	71%	58%	37%	41%	50%

* Number in brackets is the number of guilty pleas.
** No data on S.32 or 32.2 cases not prosecuted for 1987/88.

Source: Compiled from data in the *Annual Reports* of the Director of Investigation and Research, Bureau of Competition Policy.

APPENDIX 1

CONSPIRACY CASES, S.32 AND 32.2, COMPLETED BETWEEN 1965/66 AND 1987/88*

	Case	Date	Level	Plea	No.	Result	Footnote
1	Pencils	Mar '66	T	G	4	$16,000. + P.O.	
2	Street/road paving, Hull	Mar '67	T	G	4	$6,000 + P.O.	
3	Ready-mix, Windsor	Sept '66	T	G	4	$13,500	1
4	Dump trucks, Brantford	Sept '66	T	NG	1	$1000 + P.O.	3
5	Paperboard cartons	Dec '66	T	G	20	$391,500+P.O.	4
6	Linen supply, Montréal	Mar '67	T	NG	22	$17,500 + P.O.	2
7	Eastern sugar	July '67	A	G	3	$75,000+P.O.	6
8	Road surfacing, Ont.	67/68	SCC	NG	13	Acquitted	
9	Plumbing supplies, Alta.	Apr '68	T	G	8	$64,000 +P.O.	5
10	Laminated beams	May '68	T	G	4	$12,500 +P.O.	
11	Mandarin oranges, Vancouver	May '68	T	NG	10	$98,500 +P.O.	
12	Plumbing supplies, Montréal	Oct '68	T	G	14	$57,500 +P.O.	7
13	Meat packing, N.B.	June '69	T	G	7	$15,800	8
14	Lathing & plastering, Toronto	Nov '69	T	G	11	$75,000 +P.O.	
15	French lang. books, Québec	Jan '70	T	PO	32	P.O. only	9
16	Dairies, Montreal	Apr '70	T	PO	11	P.O. only	
17	Resilient flooring, Toronto	Apr '70	T	G	12	$20,400 +P.O.	
18	J.W. Mills et al.	June '70	SCC	NG	3	$20,000 +P.O.	
19	B.C . pharmacists	Nov '70	T	NG	2	$10,000	10
20	Roofing contr., Vancouver	May '71	T	PO	12	P.O. only	11
21	Retail gasoline dealers assoc., Nova Scotia	June '71	T	PO	1	P.O. only	
22	Stove oil, Salmon Arm	May '71	T	PO	6	P.O. only	12
23	Ready mix concrete, Toronto	April '72	T	G	12	$245,000+P.O.	
24	Building supplies, Toronto	June '72	T	PO	14	P.O. only	
25	Canada Cement Lafarge Ltd. et al.	Sept '73	Prel	NG	4	Discharged	
26	Québec tavern assoc.	Dec '73	T	G	1	$250 +P.O.	
27	Dairies, Sudbury	Feb '74	Prel	NG	4	Discharged	
28	Lumber, Toronto	June '74	T	G	13	$144,700+P.O.	
29	Cement, Vancouver	Dec '74	T	G	3	$250,000+P.O.	
30	Ready mix, Vancouver	Dec '74	T	G	4	$137,000+P.O.	
31	Ready mix, Vancouver	Dec '74	T	G	2	$45,000 +P.O.	
32	Medical gases	Mar '75	A	NG	4	Dismissed applic. for P.O. only	13
33	Auto body parts, Nfld.	June '75	T	G	7	$32,000 +P.O.	
34	Fur dressing industry	Feb '76	T	G	6	$5200 +P.O.	
35	Bread, Québec	Mar '76	T	G	4	$2000 +P.O.	14
36	Allied Chemical & Cominco	Mar '76	A	NG	2	Acquitted	18
37	Armco et al. (culverts)	Apr '76	A	NG	10	$447,000+P.O.	16
38	Alcan et al. (extruded alum.)	Nov '76	T	NG	5	Acquitted	
39	Gasoline, Moncton	Dec '76	T	PO	6	P.O. only	31
40	Anthes Business Forms et al.	Feb '77	A	NG	14	Acquitted	27
41	Large Lamps	Apr '77	T	NG	3	$550,000+P.O.	

CANADIAN COMPETITION POLICY RECORD

	Case	Date	Level	Plea	No.	Result	Footnote
42	Aetna Insurance et al.	Apr '77	SCC	NG	73	Acquitted	
43	Gasoline, Castlegar	Oct '77	T	PO	13	P.O. only	24
44	Taxi cabs, Chatham NB	Apr '78	T	PO	5	P.O. only	24
45	Domtar et al. (wallboard)	May '78	T	G	3	$275,000+P.O.	
46	Barton Tubes et al.	Oct '78	T	G	6	$220,000+P.O.	17
47	Concrete Blocks, Lethbridge	Dec '78	Prel	NG	2	Stay of proceedings	33
48	Ready-mix, Lethbridge	June '79	T	NG	2	Acquitted	
49	Gasoline, Sydney	Nov '79	T	PO	4	P.O. only	24
50	Cominco et al., fertilizer	Jan '80	T	NG	6	Acquitted	
51	Autoparts, Port Alberni	Mar '80	SCC	NG	5	Acquitted	
52	Golf Equipment	June '80	T	G	2	$50,000	29
53	BCTV et al.	July '80	T	NG	16	Acquitted	28
54	Atlantic Sugar et al.	July '80	SCC	NG	4	Acquitted	
55	Acme Sanitation et al.	Oct '80	T	NG	3	Acquitted	
56	Paradichlorbenzene	Jan '81	Prel	NG	3	Discharged	
57	Insurance fees, Québec	Mar '82	A	NG	2	Acquitted	32
58	Travelways et al. (S.32.2)	May '82	A	NG	4	$52,000	
59	Goodwill Bottling et al.	May '82	T	G	3	$100,000+P.O.	18
60	Conference interpreters, Québec	June '82	Prel	NG	6	Discharged	24
61	Québec concrete	Feb '83	T	G	4	$465,000+P.O.	19
62	Albany Felt et al.	Feb '83	A	NG	6	$545,000+P.O.	20
63	VW parts, Vancouver	1982/83	Prel	NG	6	Stay of proceedings	33
64	Heating equip., Alta. (S.32.2)	Sept '83	A	NG	3	$21,000	
65	Uranium marketing	Dec '83	Prel	NG	6	Stay of proceedings	34
66	Household moving cos.	Dec '83	T	G	6	$250,000+P.O.	21
67	Hogs, Alberta	Dec '83	T	G	3	$375,000	25
68	Thomson Newspapers et al.	Feb '84	T	NG	3	Acquitted	22
69	Diesal gen. units (S.32.2)	Dec '84	T	G	2	$32,500	
70	Outdoor advertising	Feb '85	T	G	3	$700,000+P.O.	26
71	Steel, Québec (S.32.2)	June '85	T	G	5	$42,000 +P.O.	
72	Fruit Growers, B.C.	June '85	T	NG	14	Acquitted	23
73	Gasoline, Rouyn	Oct '85	T	PO	17	P.O. only	
74	Pharmacists, Toronto	1985/86	T	NG	8	Acquitted	36
75	Fencing, Alta. (S.32.2)	Jan '86	T	NG	2	Acquitted	
76	Autobody Shops, Ft. Erie	Apr '86	Prel	NG	4	Discharged	
77	Driving Schools, Sherbrooke	Oct '86	T	G	4	$5000 +P.O.	
78	Coastal Galss et al. (S.32.2)	Oct '86	A	NG	3	$85,000	35
79	Reprographic services (S.32.2)	Nov '86	T	G	3	$120,000+P.O.	
80	Hotels, Ottawa	Apr '87	T	G	6	$420,000+P.O.	27
81	Aluminum siding	May '87	T	PO	10	P.O. only	
82	Waterloo Law Assoc.	Jan '88	T	PO	1	P.O. only	
83	Kent County Law Assoc.	Jan '88	T	PO	1	P.O. only	
84	Gaspe cure, fish	1987/88	T	G	11	$11,000 +P.O.	
85	Trucking, Western Can.	Mar '88	T	PO	31	P.O. only	30

Notes for Appendix 1

1. Prohibition Order refused by the court.
2. Includes 4 individuals and 1 trade association.
3. Originally charged 6 individuals and 1 trade association; two individuals acquitted; Crown did not offer evidence against the other four so they were dismissed.
4. Two firms pleaded not guilty, were convicted and appealed. The Crown appealed the fines and P.O.; both appeals were unsuccessful in March 1969.
5. Plus 6 individuals charged but *nolle prosequi* entered; then a P.O. was obtained against 2 individuals in 1968/69.
6. Three sugar refiners pleaded guilty and were fined $25,000 each in March, 1963. A P.O. was also imposed. Atlantic appealed the P.O. and it was allowed on technical grounds in July, 1964. The Crown applied for another P.O. which was granted in December, 1965. Atlantic appealed unsuccessfully.
7. There were 2 conspiracies, 5 firms in the "industrial" one and 12 in the "wholesale" one. Three firms were in both. Charges against 3 individuals and firms were stayed.
8. 4 individuals and 3 firms.
9. Two P.O.s were granted, one against sellers of French language books generally and the other re textbooks.
10. One pharmaceutical association acquitted and one convicted.
11. Includes a trade association.
12. Includes 4 individuals and 1 association.
13. The Crown's request for a P.O. was refused. The Québec Court of Appeal dismissed the appeal 2:1.
14. Includes 3 individuals.
15. Also charged under S.33 monopoly and acquitted.
16. Leave to appeal to SCC denied.
17. An individual and 1 company were discharged at the Preliminary hearing.
18. Charges against an individual were dropped.
19. S.33 (monopoly) charge was dropped
20. Leave to appeal to SCC denied.
21. Charge against Cdn. Warehousing Assoc. withdrawn; the Canadian Household Goods Carriers' Tariff Bureau Assoc. was convicted. Only the 5 firms were fined.
22. Also charged under S.33 (merger and monopoly); also acquitted on those charges.
23. Includes 7 growers' co-ops/associations and 6 individuals.
24. All charged were individuals.
25. 1 other company pleaded guilty on June 26, 1986, and was fined $100,000 in February, 1988; another was acquitted in January, 1988.
26. Including a fine of $400,000, the largest in any S.32 case.
27. Includes 1 individual.
28. Including 6 individuals.
29. Two associations of professional golfers.
30. 20 trucking companies; 11 individuals in original indictment which was quashed.
31. Managing director and executive officers of the Maritime Retail Gasoline Assoc. (exact number not given).
32. Both were associations of insurance agents.
33. Ordered to stand trial at the Preliminary hearing but Dept. of Justice decided not to prosecute.
34. The two Crown corporations sought an order prohibiting a provincial court from proceeding with a preliminary inquiry. The Supreme Court of Canada upheld the lower courts' decisions prohibiting the Attorney General from proceeding against the crown corporations as they had Crown immunity in this case. The Crown stayed proceddings against the private firms
35. Only 1 firm convicted.
36. 7 individuals and 1 association.

Source: Compiled from *Annual Reports* of the Director of Investigation and Research, Bureau of Competition Policy.

REASONS FOR ACQUITTAL (OR DISCHARGE AT PRELIMINARY HEARING) IN S.32 CONSPIRACY CASES COMPLETED 1965/66 TO 1987/88[1]

A. NO AGREEMENT FOUND TO EXIST

1. *R.* v. *Canada Cement Lafarge Ltd. et al.*, (1973) 12 C.P.R. (2d) 12

   The prices were held to have been "set as a result of conscious parallelism." The judge quoted extensively from a speech of the Director of Investigation and Research which included the words "conscious parallelism, if conducted without collusion,...is not an offence." The matter of undueness was not addressed. The judge found there was a basing point pricing system "which did not come about by mere coincidence."

2. *R.* v. *Aluminum Co. of Canada Ltd. et al.* (1976) 29 C.P.R. (2d) 183

   Held that there was no agreement, but if there had been one competition would have been lessened unduly. An Alcan executive had an "exchange of views" with rivals re price increases for aluminum extrusions following an increase in the cost of ingot (raw material) of 1.2 cents per lb. Held that common price increases after ingot prices went up could result from independent decisions to cover cost increases (ingot cost amounts to 50% of total cost). Held there must be "evidence of mutual consent to a common design or purpose and there must be an agreement by both parties to carry the design into effect."

3. *R.* v. *Atlantic Sugar Refiners Co. Ltd. et al.* (1975) 26 C.P.R. (2d) 14 (Trial); (1978) 41 C.C.C. (2d) 209 (Appeal); (1981) 54 C.C.C. (2d) 373 (SCC)

   The trial judge found there was a tacit agreement on market shares (but not prices), but that it was not "arrived at with the intention of unduly preventing or lessening competition." The Court of Appeal reversed saying that it was an error of law to require the Crown to establish that the accused by their agreement intended to lessen competition unduly. The Supreme Court of Canada (6:1) allowed the three sugar refiners' appeal and restored the acquittal at trial. The Majority held that "as was stressed in *Aetna* [see B2 below], the offence lies in the agreement made with the intention to lessen competition unduly...." It also held that a "tacit agreement" resulting from the expected adoption of a similar policy by competitors did not amount to a conspiracy per S.32. The Majority equated tacit agreement with conscious parallelism which does not violate S.32.

4. *R.* v. *Cominco Ltd. et al.* (1980) 46 C.P.R. (2d) 154

   No agreement was found despite evidence of very similar list prices for a homogeneous good (fertilizer) after all discounts, bonuses, etc. were taken into account. The trial judge said there was much evidence of secret discounts and other sales incentives. The accused did not generally adhere to listed retail prices. The judge concluded that the evidence disclosed a highly competitive climate in the industry.

5. *R.* v. *Lethbridge Concrete Products and Revelstoke Companies Ltd.* (1981) 52 C.P.R. (2d) 85

   The judge at the Preliminary hearing found there was no agreement despite extensive efforts by an executive in one firm to coordinate price fixing. Held that simulated participation in a

conspiracy for lawful reasons and other than the attainment of its stated objects will not support a conviction.

6. *R.* v. *Thomson Newspapers Ltd. et al.* (Unreported decision of the Supreme Court of Ontario, Toronto, December 9, 1983)

The trial judge held that F.P. Publications decided to close the Montreal *Star* following a long strike before the agreement in which Southam acquired an option to buy the *Star's* press and F.P. acquired an option to buy one-third of the Montreal *Gazette* (owned by Southam).

The trial judge held that the several decisions taken within a period of 29 hours on August 26 and 27, 1979 were the result of independent business decisions not an agreement: Thomson closed the Ottawa *Journal*, Southam closed the Winnipeg *Tribune*, the *Tribune's* assets were sold to Thomson (who owned the Winnipeg *Free Press*), Thomson sold its 50% interest in Pacific Press (publisher of the two Vancouver dailies) to Southam, and Thomson sold its one-third interest in the Montreal *Gazette* to Southam. The judge concluded that the two papers were closed (both of which were losing money) on the same day for reasons of expediency. There were "hot" documents outlining the series of actions/deals. However, the judge said that putting all four deals in one document made them easier to understand if done in one fell swoop. He concluded that Thomson and Southam only agreed on the timing of the closing of the papers.

7. *R.* v. *Dave Spear Limited et al.* (Unreported Preliminary hearing, Supreme Court of Ontario, April 30, 1986; Bureau of Competition Policy mimeo 478-2)

One auto body shop proposed to increase the hourly rate for labour by about 10% on two occasions. In each case an employee called all rivals to advise them of the proposed increase and to ask if they wanted their names included in the letter which was sent to all insurers and adjusters. The judge concluded that the initiator's decision to increase the labour rate "was made in the ordinary course of business" and merely followed by the others as all were affected by the same economic factors, notably rising costs. Held there was no agreement and, in any event, competition had not been lessened unduly if an agreement was assumed to exist. The judge failed to take S.32(1.1) into account.

B. AGREEMENT FOUND, BUT HELD THAT COMPETITION WAS NOT LESSENED UNDULY

1. *R.* v. *Anthes Business Forms Limited et al.* (1974) 16 C.P.R. (2d) 216 (Trial); (1975) 20 C.P.R. (2d) 1 (Appeal); (1977) 28 C.P.R. (2d) 33 (SCC)

The trial judge found there was a formal agreement that operated over many years through the trade association to operate an "open price" policy under which prices were reported *ex post* and pricing manuals were exchanged. Found that price cutters were not coerced and that active competition prevailed, hence competition was not lessened unduly. The acquittal was upheld upon appeal. The Crown's appeal to the SCC was dismissed for want of jurisdiction.

2. *R.* v. *Aetna Insurance Company et al.* (1974) 16 C.P.R. (2d) 116 (Trial); (1975) 23 C.P.R. (2d) 231 (Appeal); (1977) 30 C.P.R. (2d) 193 (SCC)

The trial judge held that there had been an agreement among the 73 companies, but it did not lessen competition unduly. The Court of Appeal reversed this decision and entered a conviction on the basis of an error in the legal meaning of unduly. The Supreme Court of Canada upheld

the appeal and restored the trial court's acquittal. The SCC defined unduly as "an agreement that is intended to lessen competition improperly, inordinately, excessively, oppressively or one intended to have the effect of virtually relieving the conspirators from the influence of free competition."

3. *R.* v. *Allied Chemical Canada Ltd. & Cominco Ltd.* (1975) 24 C.P.R. (2d) 22 (Trial); (1976) 73 D.L.R. (3d) 767 (Appeal)

   The trial judge found there was a 20-year formal agreement under which Allied shut its plant and became the sole agent for Cominco's surplus sulphuric acid. Held that the agreement did not lessen competition unduly. The trial judge also found there was no agreement to limit production facilities. The Crown's appeal was quashed.

4. *R.* v. *Chatwin Motors Limited et al.* (1978) 37 C.P.R. (2d) 156 (Trial); (1978) 7 B.C.L.R. 171 (Appeal); (1980) 2 S.C.R. 64 (SCC)

   The trial judge found there was an agreement on all three counts which involved a 3% freight charge, a 10% surcharge, and a rebate schedule for auto body parts returned to dealers. However, he held that there was no undue lessening of competition. He followed *Alcan* (1976), i.e., an agreement to pass on a bare increase in cost does not violate S.32(1)(c). The trial judge found there was no effect on real (transaction) prices, although no evidence was reviewed in the judgment.

   The Court of Appeal (2:1) rejected the Crown's appeal, but held that Rothman J. in *Alcan* "was not stating and did not purport to be stating it would be wrong in law to find an agreement to pass on a bare increase in cost can constitute a breach of S.32(1)(c)." The SCC upheld the Court of Appeal, but said Rothman J.'s words that were quoted in the case were "perhaps, unfortunate."

5. *R.* v. *La Federation des Courtiers D'Assurance de Québec*, Unreported decision of the Québec Superior Court, District of Saguenay, April 20, 1979; Bureau of Competition Policy mimeo 229-1 (unofficial translation); Unreported judgment of the Québec Court of Appeal March 30, 1982.

   Found there was an agreement among insurance agents re minimum commissions. However, because the accused did not have 50% of the market, competition was not lessened unduly. The Crown's appeal was dismissed.

6. *R.* v. *Browning-Ferris Industries of Winnipeg (1974) Ltd. et al.* (1981) 56 C.P.R. (2d) 257 (Man. Q.B.).

   Found there was an agreement, but not an undue lessening of competition. The judge found that "the parties met; they considered rates by the company holding the largest percentage of the market [Browning-Ferris] and in order to bring some order out of chaos [sic]. While this may have resulted in conscious parallelism of prices, it is not evidence to establish undue limitation of competition. Not enough of the market was involved" (less than one-half). Held also that the case involved a service, not then subject to the *Act*.

7. *R.* v. *B.C. Television Broadcasting System Ltd. et al.* (1981) 52 C.P.R. (2d) 47 (BCSC)

   Found there was an agreement not to grant the 15% discount to advertising agencies not accredited to the Canadian Association of Broadcasters. Held that the object of the agreement was not to lessen competition unduly per the SCC in *Aetna*, rather, it was to impose a creditworthiness condition. The effect was found to be minimal.

8. *R.* v. *Simone Tanner et al.* (Unreported judgment at a Preliminary hearing in Montreal, June 17, 1982)

   The defence admitted there was an agreement among the six conference interpreters. However, the judge found it did not lessen competition unduly.

9. *R.* v. *Metropolitan Toronto Pharmacists Association et al.* (1984) 3 C.P.R. (3d) 222 (Ont HCJ)

   Found there was an agreement by virtually all of the area's pharmacies not to accept the terms proposed by Green Shield, a drug plan insurer. The Association insisted that Green Shield pay the local customary fee for filling its subscribers' prescriptions plus pay the cost of ingredients specified in the Comparative Drug Index or by the Drug Trading Com. which was owned by pharmacists. Held that the Association was "not attempting to set a fixed price to the customer," rather to let each pharmacy set its own price as it did for cash customers. However, the court held that competition was not lessened unduly because such a small percentage of the market (as the judge defined it) was involved.

10. *R.* v. *British Columbia Fruit Growers Association* (1985) 11 C.P.R. (3d) 183 (BCSC)

    Found there was a formal agreement organized by the growers cooperative to prevent fruit packers from accepting tree fruits except from Association members (n=2,000). While no packing houses were available to non-members (n=200) between 1975 to 1980, several which had gone out of business were available for purchase or lease. Storage facilities were available, however. Held that the agreement "did not stifle competition." The growers' marketing system "was required for the efficient operation of the industry. I do not consider that such an agreement has harmed the public interest." Held that it did not lessen competition unduly.

C. OTHER

1. Dairies, Sudbury (Unreported judgment of a Preliminary hearing, Sudbury, February, 1974)

   The court found that prices were not unreasonably enhanced per S.32(1)(b). From the Bureau of Competition Policy it was unclear on what basis the S.32(1)(c) charges were dismissed.

2. *R.* v. *Chemicals Refineries Corporation et al.* (Unreported judgment at a Preliminary hearing, Montreal, January 21, 1981).

   From the records of the Bureau of Competition Policy it was unclear why the two makers of paradichlorbenzene were discharged.

FINES IN S.32 CASES COMPLETED BETWEEN 1965/66 TO 1987/88

Average Fine Period	Per Firm	No. of Firms	No. of Cases
1965/66-1969/70	$ 8,087	104	13
1970/71-1974/75	$17,105	51	9
1975/76 -1979/80	$42,492	36	7
1980/81-1984/85	$95,977	26	7
1985/86-1987/88	$20,762	21	3
1960/61-1964/65	$ 6,470	48	8

ANTITRUST IMPLICATIONS OF THE CANADA-UNITED STATES FREE TRADE AGREEMENT

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This article originally appeared in the Antitrust Law Journal, Vol. 57, 1988, and was presented as a speech to the American Bar Assocation in Toronto prior to the enactment of the Canada-U.S. Free Trade Agreement.

This is a time bright with promise for Toronto and North America. The *Free Trade Agreement (FTA)* between Canada and the United States is in the home stretch. If it stumbles and falls, a great opportunity will have been lost; for the *FTA* is much more than a smorgasbord of sectoral trade concessions made and accepted– though that feature can be found in such provisions as reduced discriminatory markups on distilled spirits and the commitment to modify Canadian evaluations of trademarked U.S. plywood with exterior glue.

But the *FTA* is a grander compact than that. It is nothing less than a long-term commitment to promote competition, market access, business efficiency, and consumer welfare within and between our two countries. Its implementation should do as much to promote these antitrust goals as has been accomplished under the two oldest sets of statutory antitrust laws in the world during the almost one hundred years since their enactment.

The *FTA* is not a common market agreement, like the Rome Treaty of 1958, nor can it be compared to the ambitious projections for EC barrier-free trade in 1992. But it does constitute a direct and broad attack on significant tariff and non-tariff barriers between our two nations which, once launched, will deal protectionism a palpable blow. For example, under the *FTA*, not only are all tariffs on all goods to be totally eliminated within 10 years, but significant new disciplines have been undertaken involving government procurement, agriculture, and energy. The parties are obligated by this *Agreement* to work toward non-discriminatory access to enhanced telecommunications services, and to assure that any provider of monopoly services is not able to benefit from unreasonable cross-subsidization from other businesses. It commits the parties to further liberalize the rules governing financial markets, to facilitate the access of business persons across borders, without unreasonable immigration restrictions, and to make a long-term commitment to increasingly free flows of investment capital.

The *Agreement* expresses the hope, the confidence, the mutual respect and esteem, the generosity of spirit of our two peoples, an openness and receptivity to economic freedom rarely realized in the international community since the rise of the nation state.

As this is written, the Canadian people may yet reject the *FTA* in the Fall election. With the optimism which led to the *Agreement's* successful negotiation, and recognizing that its pro-competitive thrust will probably be lost for generations if Canada says "No," I must assume that the *FTA* will be approved and will be effected at the beginning of 1989.

The *Agreement* is not a static legal product, the output of a negotiation. Built into it are new forces that will propel further change and progress yet uncharted. The most immediately recognized expression of this dynamic element is the *FTA's* establishment of a bilateral panel for dispute settlement in antidumping and countervailing duty cases. This panel will replace existing national appellate tribunals in the judicial review of judgments by trade adjudication authorities applying

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antidumping and countervailing duty laws of their respective state under the *GATT*. This is a remarkable commitment to internationalism and to international law. It would be wrong to view the *FTA* as hostile to the further development of multilateral trade institutions: it does not establish a fortress North America. On the contrary, it is a commitment to reason and order which can provide a model, a testing ground, and a source of renewed energy for extending and improving both the work of the *GATT* in the Uruguay Round and other bilateral economic relationships.

But, in my view, what is even more significant, the *Agreement* commits the United States and Canada to establish a Working Group, with the mandate to use its best effort to create and put in place within the next five to seven years a new legal regime to resolve or even avoid future U.S.-Canadian trade disputes concerning claims of unfair trade and government subsidization.

Last year, the Antitrust Section sponsored a program at the ABA Annual Meeting in San Francisco on "The Interface of Trade/Competition Law and Policy."[1] Here, I will develop two themes sounded in that stimulating discussion. The first was that not enough attention is given to the reconciliation of national trade and competition laws so that they fit sensibly into a larger international economic policy framework. The second was that such a reconciliation is difficult because of an inherent conflict between trade law and antitrust law: the former protects competitors; the latter protects competition. Under trade law, a domestic monopolist with a 96 percent share of the domestic market may be entitled to relief from a foreign dumper or beneficiary of a foreign governmental subsidy, even if (1) the importer has barely established a 4 percent market share foothold, (2) it has realized a profit in the U.S. market even though it has priced there below the price it commands in the home market, and (3) the dumping is merely one factor among many contributing to the domestic industry's difficulties. No relief would be forthcoming in these circumstances under antitrust law. Antitrust law will sanction a foreign dumper only if (1) its host country market share is substantial, (2) its price in the market is below some measure of its average variable cost of production, and (3) the domestic industry's injury from the below-cost pricing is direct and can be demonstrated by a preponderance of evidence showing the injury to have been proximately caused by the pricing, not where the pricing is merely one among several injurious factors.[2]

When U.S. color TV manufacturers sued the Japanese color television industry under U.S. antidumping law, they won a judgment.[3] When two members of the industry sued the same defendants for predatory pricing under U.S. antitrust law in the *Matsushita* case, they lost.[4] Trade law provided relief in the first case because Japanese industry was hurting U.S. firms as competitors and because the protectionist antidumping law is skewed toward granting relief when such injury is alleged. Antitrust law denied them relief in the second case because the Supreme Court found that consumers had benefited from the entry of Japanese televisions into the United States market, and because antitrust law is skewed against relief for competitors when consumer welfare is not adversely affected.

If the plaintiffs had been able to show that by having severely damaged otherwise healthy firms in the U.S. color TV industry, the Japanese manufacturers were thereby raising prices in the U.S. market to monopoly levels, an antitrust remedy would have been available. In that situation, protection of competitors and protection of consumers would have been a common goal. However, 15 years after the antitrust case was brought, the price of color televisions in the United States remains low and competitive, thanks in no small measure to the Korean and Taiwanese television industries which have entered the U.S. market on Japanese heels. U.S. television manufacturers are relatively less important, although not insignificant, players in today's market, but the market is competitive, and that is good for the consumer.

Today, I would like to carry forward last year's discussion by suggesting that the *Free Trade Agreement* (and the Working Group it creates) provides an extraordinary opportunity for melding the concerns of trade and competition law. It is no longer utopian to contemplate the possibility that Canadian and American trade and antitrust laws, which are substantially congruent, can be applied in a manner that is substantially harmonious.

There are two principal obstacles to realizing that objective. First, the "protecting consumers vs. protecting competition" conflict keeps trade and antitrust law in both nations at cross purposes. Second, there is a continuing problem between the two nations about how each deals with perceived unfair state trading practices—both subsidies and anticompetitive state action. The United States often seeks to prevent, as a matter of national law enforcement, what is perceived to be unjustifiable foreign anticompetitive and trade-distorting acts, concededly monitored and approved by foreign governments. Many other nations, including Canada, share the conviction that one nation's courts are not suitable fora, and that one nation's laws do not provide suitable standards, for the resolution of such differences of sovereign policy. Rather, they believe that these differences generally require diplomatic resolution, albeit principled diplomacy. If we can reduce these conflicts between our two countries—and I will suggest that we can without sacrificing basic principles and interests—then the *FTA* Working Group may address constructively the task of a comprehensive and coherent North American trade/antitrust law and policy.

Why is the trade/antitrust conflict so intense and why does consumer welfare so quickly give way in a head-on conflict with demands for industry relief in particular trade disputes? When a domestic industry is finding it difficult to compete with foreign products in its home community, the intensity of the pain is deep: workers are laid off, local economies are depressed, and shareholder equity and income are reduced. When trade relief is granted, consumers pay more for a product, but the loss is less immediate and less intense, and it is shared more broadly throughout the population. There is also a foreign scapegoat whose conduct (except in Escape Clause proceedings) has been determined as a matter of law to be unfair. The additional cost of clothing resulting from the Multifiber Arrangement, for example, rarely threatens family security as does a job layoff. I suspect there is also a strong component of Judeo-Christian ethics in play: there is the sense that it would be self-indulgent to focus excessively on consumer interest when the basic well-being of established enterprises, their employees, and their surrounding towns, is at stake. Even if protected industries almost invariably take advantage of that protection to slacken off in their competitiveness, and even if, arguably, such protectionism only postpones and even intensifies longer-term dislocation and obsolescence, the rationality of the market mechanism is not more important to most of us than dealing compassionately with painful social dislocation. That is one reason why the recently enacted U.S. legislation on prior notice of plant closings has received such overwhelming public support.[5]

How then can we find a common ground between these two legal regimes which undercut each other—as in the case of Japanese color televisions imports? One answer is to focus on what is going on in the foreign market that permits its industry to sell in the United States or Canada at a lower price than it can sell in its own market. The United States antitrust laws can in some instances apply to restrictions of United States exports by a cartel in foreign countries. For example, in the Japanese color television antitrust case, there was some evidence of the existence of a price-fixing cartel of Japanese manufacturers in the Japanese market, which arguably enabled participants to charge monopoly prices to Japanese consumers.[6] This may have received the benign acquiescence of the Japanese Ministry of Trade and Industry, although it probably did not rise to the level of "state action." MITI did not appear to have statutory authority to promote a color television cartel in Japan, and indeed the cartel was the subject of a Japanese Fair Trade Commission antitrust investigation. When I talk about "state action" in the balance of this article, I mean regulated conduct that meets something like the *Midcal*[7] standard—requiring both a political mandate to displace competition and effective public supervision of the private conduct.[8] Thus, I am not referring to antitrust immunity for private conduct which essentially involves non-responsible, governmental encouragement short of an articulated policy, pursuant to regulatory authority. Immunity for such informal cheerleading by bureaucratic volunteers was flatly rejected in the landmark *Socony-Vacuum* case held a century ago and has been a central tenet of U.S. antitrust jurisprudence.[9]

Furthermore, in *Matsushita* there was some evidence that the Japanese domestic market was effectively insulated from American television manufacturer competition by (1) exclusionary private

collusion, (2) licensing standards crafted by Japanese officials to discriminate against foreign color televisions, (3) cultural predispositions by Japanese industry to cartelize.[10] This was, obviously, denied. Instead, it was suggested that Japanese consumers failed to buy foreign televisions because they were not as well made. Of course, even if there is some truth to that reply, as noted in *Standard Sanitary*,[11] a conspiracy to exclude inferior products is still anticompetitive because it denies the opportunity to purchase inferior goods to those who would be willing to take them for a lower price.

The United States television manufacturer-plaintiffs in the *Matsushita* case did not pursue an antitrust theory seeking damages for their exclusion from the Japanese market. If they had done so, as a United States wood chip cooperative did successfully in the *Daishowa* case in 1981, they might have obtained antitrust relief.[12] If that relief were supported by strong, consistent, and persistent U.S. governmental pressure on the Japanese government to remove its import restraints, admittedly a tall order, it might have increased Japanese demand for U.S. products, U.S. profits available for research and development, and U.S. manufacturer economies of scale, and might also have increased the ability of U.S. firms to compete with Japanese manufacturers in U.S. markets without requiring as much trade law relief.

If this were at lease in some part realized, i.e., if American televisions were available in the Japanese market at substantially lower prices than those fixed by the purported Japanese television cartel, the cartel might have been broken and the dumping margins for Japanese televisions might have been significantly reduced. This application of antitrust law is not incompatible with trade policy. Financing low cost exports with protected domestic monopoly rents is a form of predation which, although perhaps difficult to prove, does suggest a situation where what harms producers could also harm consumers (in the longer run). If the Japanese television industry had not been pressed by price competition from Korean and Taiwanese television exporters to the United States, might they not have raised television prices in the United States market eventually? Might it not have been appropriate in that situation, as Justice White thought it was on the appellate record in *Matsushita*, to let the plaintiffs put their case to the jury?

Contrary to Justice White, I consider this aspect of the *Matsushita* decision probably correct, because there wasn't meaningful evidence of predation, notwithstanding the plausibility of the theory supporting it. It would, however, be troubling if the holding were overbroadly applied to different fact situations. One other aspect of the *Matsushita* decision is also potentially troubling: plaintiffs alleged that the Japanese manufacturers had established a market allocation agreement among themselves, a so-called "five-company rule," where each agreed to refrain from competing against the other Japanese suppliers in dealing with important U.S. customers each had previously cultivated. Justice White, in reviewing the record, found enough evidence to withstand a motion for summary judgment, quoting from plaintiffs' expert's report:

> Each Japanese company had targeted customers which it could service with reasonable assurance that its fellow Japanese cartel member would not become involved. But just as importantly, each Japanese firm would be assured that what was already a low price level for Japanese television receivers in the United States market would not be further depressed by the actions of its Japanese associates.[13]

Why was this market allocation scheme not submitted to adjudication? The answer is clear. The U.S. manufacturer-plaintiffs lacked standing under *Brunswick*[14] to advance this claim since they would benefit from a floor price agreement among competitors which set the floor above a predation level.[15] Since naked price-fixing is still *per se* illegal, I presume that the Court would have permitted a Justice Department criminal challenge to go forward even without predation, as the U.S. Government need not prove injury in such cases. Similarly, color television customers would have standing to sue if they could prove that, absent the agreement, retail prices would have been even lower.

In any event, careful antitrust enforcement which attacks cartels foreclosing United States exports, along with Section 301 unfair trade actions,[16] and antitrust analyses which look more carefully at customer allocation arrangements and predation, albeit subtle and easily overlooked forms,[17] can begin to build a reconciliation of competition and trade policy. This assumes, of course, that jurisdiction can be established (analogous to Section 301 actions).

This suggests that one task for the *FTA* Working Group could be to see whether some relatively modest tinkering with U.S. and Canadian predatory pricing and price discrimination laws might not permit a scaling-down of the almost total disregard for consumer interest in the current antidumping laws. This exploration should be aided by the increasing openness of each national market to producers in the other, which the *FTA* ought to promote. The more closely the *FTA* goal of open markets is approached, the less likely it will be that either a U.S. or a Canadian industry will be capable of realizing higher protected home market prices— absent collusion, which can be stopped under national antitrust laws. The less serious dumping becomes as a trade problem between Canada and the United States, the less it threatens domestic social dislocation, the easier it should be to build some competition concerns into the antidumping laws as applied in trade between those two countries.

Thus, the Working Group should explore the drafting of new legislation to add a "meeting competition" defense in dumping actions involving Canadian and U.S. trade. This defense is presently a key part of United States price discrimination law,[18] an incomplete analog to antidumping laws. Why not also strengthen the standard for proving injury, bringing it closer to the standard applied in United States and Canadian price discrimination laws? Why permit monopolists to have standing to bring antidumping actions? If progress can be made in making antidumping laws less protectionist and competition laws more sensitive to allegations of predation, why do Canada and the United States require separate antidumping laws adjudicated at the fact-finding stage by national tribunals? Why not, perhaps, replace the bi-national Canada-U.S. judicial review panels with a bi-national fact-finding tribunal applying a shared body of antidumping/price discrimination law? That would be considerable progress, and it would benefit competitors and competition in both national markets.

Of course, every solution creates new problems. One new problem created by a scaling down of antidumping enforcement between the United States and Canada would be the need to deal with third-country dumping. To illustrate, a third country could export to Canada a product not produced in Canada, at sufficiently lower prices than the product is sold for in the protected third country market. The imports easily could be transshipped into the United States, injuring U.S. firms competing with the third country's exporters. One can conceive of possible solutions to that problem, and it would be a happy day if tackling it were to become a significant concern of the Working Group.

If the Working Group tables these kinds of issues, the *Free Trade Agreement* can become a major instrument for substantial progress in reconciling United States and Canadian trade and competition law. The prospect for progress is enchanced by the fact that these laws have already developed to a point of considerable symmetry as to principles and policies of application.[19]

What about distortion of competition and free trade by governmental action? What about subsidies? What about state-sanctioned cartel behavior? The *FTA* expresses a commitment to reducing state subsidies and to developing a legal regime for better resolving subsidy disputes than do existing national countervailing duty laws. Nonetheless, because our nations are democracies and because powerful interests, such as U.S. uranium producers, can sometimes obtain special treatment within our democratic systems, the problem of discriminatory state action will remain.[20] I need hardly dwell on the truism that one of the main sources of conflict in the Canada-United States relationship over the past 40 years has been the phenomenon of U.S. antitrust law being enforced from time to time in a way which disregards and overrides legitimate sovereign Canadian state actions, actions undertaken in Canada to protect clearly articulated and actively monitored Canadian policy interests.[21] The private U.S. uranium cartel case is the most obvious and important illustration of this.[22]

The *Free Trade Agreement* does not address the problem caused by the use of one nation's antitrust law to find illegal conduct within the territory of a foreign state that was approved or ratified by the foreign government. I submit that this is a significant impediment to further economic collaboration between our two nations, and it is therefore appropriate to add it to the agenda of the Working Group.

Until now, the problem has been one-sided. The United States has taken action against what it regarded as anticompetitive Canadian state action. Canada has generally refrained from taking action under trade or antitrust laws when, for example, U.S. uranium producers successfully lobbied the

United States Congress to pass legislation authorizing an embargo on the sale of enriched uranium from Canada to U.S. power companies.[23]

In recently published draft Antitrust Guidelines,[24] the Antitrust Division of the United States Department of Justice has taken the position that neither the *Parker* doctrine[25] nor the *Act of State* doctrine[26] should necessarily apply in private U.S. foreign commerce antitrust actions.[27] The Guidelines further announce that these defenses certainly do not apply to cases brought by federal law enforcement authorities.[28] The Antitrust Division also expresses the view that petitioning a foreign legislature (in a manner lawful under foreign law) to pass anticompetitive legislation adversely affecting competition in U.S. commerce, does not raise a defense to subsequent U.S. antitrust enforcement under the so-called *Noerr-Pennington* doctrine.[29] I wonder whether that means that if U.S. uranium producers were to lobby Congress successfully in the passage of new legislation renewing restrictions on sales of Canadian uranium to U.S. power companies (in some way that was not nullified by the *FTA*), the U.S. Government would have no problem with Canada's adopting and applying the same legal principles to find the U.S. uranium producers guilty of non-exempt collusion under Canadian antitrust law.

Historically, Canada has not favored applying Canadian antitrust law extraterritorially. Perhaps Canada should now reconsider that long-standing view.[30] The Canadian Government might be influenced by the recent advisory opinion of Advocate General Darmon to the European Court of Justice in the *Wood Pulp* case.[31] This opinion explicitly accepts, for the first time at this judicial level, the validity of extraterritorial enforcement by the Competition Directorate of the European Community, pursuant to the effects doctrine as recognized in U.S. law at least since the *Alcoa* case.[32]

State action and act of state defenses, as well as the *Noerr-Pennington* doctrine, are appropriately recognized in adjudications involving international commerce where the state action or lobbying is open, visible, and clear, because there is no equivalent in antitrust law to the international consensus on trade standards expressed in the *GATT*. For one nation to apply its antitrust law in a way which embarrasses and frustrates another nation's transparent regulatory regime within its territory may be macho, but it is not in accord with principles of international law. I sometimes wonder whether the only way to have this understood by Americans isn't for other nations to start enforcing their antitrust laws extraterritorially in a manner that would deny these well-founded defenses to American interests.

The Working Group of the *Free Trade Agreement* gives Canada and the United States an institutional setting conducive to establishing rules and standards to avoid this problem in the future. Even though some progress has been made in recent years, most notably in the 1984 adoption of the Memorandum of Understanding Between the Government of the United States of America and the Government of Canada as to Notification, Consultation and Cooperation with Respect to the Application of National Antitrust Laws,[33] the progress is insufficient. This is evidenced by the current enforcement policy of the Antitrust Division as expressed in the draft Antitrust Guidelines. It is also reflected in the fact that in at least one recent merger case (involving the proposed sale by Versatile to John Deere of a Canadian plant producing four-wheel drive tractors), two private companies were faced with concurrent and potentially conflicting views as to which nation's law should properly apply to a proposed transaction with predominantly Canadian, but some American, contacts and effects, and with the possibility of each nation's officials reaching a different conclusion on the proper outcome, applying similar standards, but drawing different conclusions about the relevant facts. Choice of jurisdiction rules, based perhaps on traditional choice of law principles, could be agreed to as the proper rules for deciding which nation's competition law and which enforcement agency should handle a particular matter where concurrent jurisdiction lies.

Both Canada and the United States are committed in the *Free Trade Agreement* to reducing anticompetitive private arrangements, anticompetitive state subsidies and, *pari passu*, other forms of trade-distorting state actions. This sweeping commitment, in an agreement which provides for relatively few anticompetitive exceptions, provides the best opportunity yet, outside of a common market, to end the possibility of effective dumping between the two states, to end the need for

anticompetitive antidumping protection between those two states, and to reduce conflicts in antitrust enforcement based on common standards and coordinated applications administered under separate, but congruent, national laws—even if the *Versatile* case suggests that occasional differences will inevitably occur. With this common ground, it should be possible to develop an intergovernmental mechanism for resolving state action disputes, on a principled basis, which does not require or permit the unseemly and inappropriate airing of these disputes in private adjudication as if they were really about private conduct.

In every election in both countries, the party in power is attacked for failing to develop and implement a coherent foreign economic policy. As I have tried to indicate, the way the trade and competition laws are presently structured in both countries, it is absolutely impossible to develop such a coherent policy. Perhaps now, with the *FTA*, at least between these two good neighbors, we can begin to achieve that to which we have so far only been willing to pay lip service.

Notes

1. 56 *Antitrust L.J.* 395 (1987).
2. See generally Applebaum, *The Interface of Trade/Competition Law: An Antitrust Perspective*, 56 *Antitrust L.J.* 409 (1987).
3. Color Picture Tubes from Japan, USITC Pub. 367, Inv. No. 731, TA 367-370 (1971).
4. *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986).
5. *Worker Adjustment and Retraining Notification Act*, Pub. L. No. 100-379, 102 Stat. 890 (1988).
6. See, e.g., *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 601 (1986) (White, J., dissenting).
7. *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminium, Inc.*, 445 U.S. 97 (1980). Compare *Continental Ore Co.* v. *Union Carbide and Carbon Corp.*, 370 U.S. 690 (1962).
8. See *Patrick* v. *Burget*, 108 S. Ct. 1658, 1662 (1988) (applying the "rigorous two-pronged test [of *Midcal*]").
9. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 226-27 (1940).
10. See *Zenith Radio Corp.*. v. *Matsushita Elec. Indus. Co.*, 513 F. Supp. 1100, 1184-85 (E.D. Pa. 1981), aff'd in part, rev'd in part, In re Japanese Elec. Prod. Antitrust Litigation, 723 F.2d 238 (3d Cir. 1983), rev'd, 475 U.S. 574 (1986).
11. *Standard Sanitary Mfg. Co.* v. *United States*, 226 U.S. 20 (1912).
12. *Daishowa Int'l* v. *North Coast Exp. Co.*, 1982-2 Trade Cas. (CCH) ¶ 64,774 (N.D. Cal. 1982).
13. *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 603 n.3 (1986) (White, J., dissenting).
14. *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).
15. *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 582-83 (1986).
16. 19 U.S.C. § 2411.
17. See, e.g., Williamson, *Delimiting Antitrust*, 76 GEO. L.J. 271, 289 (1988).
18. 15 U.S.C. § 13(b).
19. Gillen, Hunter, Rosenthal & Miller, *Canadian and U.S. Antitrust Law-Areas of Overlap Between Antitrust and Import Relief Laws*, 12 *Canada-U.S. L.J.* 39 (1987).
20. See Baker, *The Proper Role for Antitrust in a Not-Yet Global Economy*, 9 *Cardozo L. Rev.* 1135 (1988).
21. *See* Rosenthal, *Jurisdictional Conflicts Between Sovereign Nations*, 19 *Int'l Lawyer* 487 (1985); Baker, *Antitrust Conflicts Between Friends: Canada and the United States in the Mid-1970's*, 11 *Cornell Int'l L.J.* 165 (1978); Stanford, *The Application of the Sherman Act to Conduct Outside the United States: A View from Abroad*, 11 *Cornell Int'l L.J.* 195 (1978).
22. In re *Uranium Antitrust Litigation*, 617 F.2d 1248 (7th Cir. 1980).
23. *Private Ownership of Special Nuclear Materials Act* of 1864, Pub. L. No. 88-489, 78 Stat. 602 (1964) (codified in scattered sections of 42 U.S.C.).
24. U.S. Dep't of Justice, Draft Antitrust Guidelines for International Operations, 53 Fed. Reg. 21, 584 (1988) [hereinafter International Guidelines].
25. *Parker* v. *Brown*, 317 U.S. 341 (1943). Under this doctrine, anticompetitive restraints of trade are immune from antitrust attack if imposed in some fashion by a state. For the state regulation to shield the conduct, a "clearly

articulated and affirmatively expressed...state policy," and active supervision by the state is required. *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminium, Inc.*, 445 U.S. 97 105-06 (1980).

26. The *Act of State* doctrine is similar to the *Parker* doctrine in that it is premised on principles of separation of power, but it is also based on principles of international comity and is applied in an international setting. In *Underhill* v. *Hernandez*, 168 U.S. 250, 252 (1897), the doctrine was stated as: "[e]very sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory," See also *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964).

27. See, e.g., International Guidelines, *supra* note 24, at 21,596 col. 3.

28. See id. at 21,596 col. 1 & n. 118.

29. See *id.* at 21,597 & 21,615. This doctrine holds that collective conduct to seek action by governmental bodies, even though done with an anticompetitive motive and resulting in an anticompetitive restraint, is immune from antitrust attack. The doctrine is based on two Supreme Court cases, *Eastern R.R. President Conf.* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers of Am.* v. *Pennington*, 381 U.S. 657 (1965).

30. This is not the first time such a suggestion has been made. See *Baker*, *supra* note 21, at 193-94.

31. Opinion of Mr. Advocate General Darmon in cases 89, 104, 114, 116, 117, 125/85 (May 25, 1988) (Advocate General for the European Community (EC) urged, for the first time by a judicial authority under community law, an effects test as a jurisdictional basis for EC competition cases).

32. *United States* v. *Aluminium Co. of America*, 148 F.2d 416 444 (2d Cir. 1945).

33. 23 *Int'l Legal Mat.* 275 (1984).

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VOL.10 , NO. 2 JUNE 1989

CANADIAN COMPETITION POLICY RECORD

Suite 1201-180 Elgin St.
Ottawa, Ontario, Canada
K2P 2K7

Published by Fraser & Beatty Legal Publications Inc.

Second Class Mail Registration Number 5150
Return Postage Guaranteed

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