

CANADIAN COMPETITION RECORD

FEATURE ARTICLE**PROSECUTING INDIVIDUALS UNDER
CANADIAN COMPETITION LAW***

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1.0 INTRODUCTION

Even though all organizations operate through the directing minds of men and women, Canadian competition law has, until very recently, treated corporations as if they were sentient beings capable of reasoning and even of forming the necessary mental element associated with the commission of a criminal offence (*mens rea*). Thus, judges have never questioned the idea of convicting several corporations for conspiring to fix prices and lessen competition unduly¹ even though no executives were charged. A review of the conspiracy and bid-rigging cases suggests that, until recently, Crown prosecutors have believed that corporations do evil things but the people employed by them do not!

The role of individuals in criminal offences under the *Competition Act* and its predecessors might be described as a little like *Hamlet* without the Prince of Denmark for several reasons. First, until 1991, the Crown rarely charged individuals in such cases with two exceptions: (i) where the firms involved were unincorporated (sole proprietorships or partnerships), thus the owner(s) and/or managers had to be charged; and (ii) where the head of a trade association had been the central figure in organizing firms into a price-fixing conspiracy. Second, in conspiracy cases, the Crown often named managers/executives as unindicted co-conspirators and used their testimony to secure convictions against the corporation for which they worked or against other firms which were party to the agreement. In a few cases, the Crown charged such executives (and their firms) but dropped the charges if their testimony helped convict their employer or other firms. Third, outside of three misleading advertising cases, the Crown almost never requested imprisonment as a penalty only a fine² (this is in sharp contrast to the U.S. particularly since the advent of the guidelines of the U.S. Sentencing Commission). Fourth, until the compressed gases and *Cormie* cases in 1991 and 1992, the Crown has never sought large fines against the (few) individuals convicted of criminal offences under the *Competition Act* or its predecessors. However, in recent policy statements the Director of Investigation and Research has said that he will regularly recommend that individuals be charged (see section 2 below).

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The purpose of this paper is to examine in some detail the Crown's policy with respect to the role of individuals in criminal offences under Canadian competition law and to provide an empirical analysis of the subject. The paper is organized as follows. Section 2 examines the Director of Investigation and Research's policy statements concerning the treatment of individuals involved in competition law offences. Section 3 provides a review of the historical record relating to the prosecution of individuals in conspiracy, price maintenance and misleading advertising cases. Section 4 offers normative arguments why individuals should be held accountable for their illegal anticompetitive acts, despite the problems of adopting a policy of almost always charging individuals directly involved in competition law offences. Finally, section 5 summarizes the important findings and offers some conclusions.

2.0 POLICY CONCERNING THE PROSECUTION OF INDIVIDUALS

A review of the Director's *Annual Report* and other public documents suggests that there have been very few official statements of the Crown's policy with respect to the prosecution of individuals in criminal competition law offences. However, it must be emphasized that it is the Attorney General of Canada and not the Director of Investigation and Research who decides which individuals and/or firms will be charged for offences under the *Competition Act* (and its predecessors). The historical record, described below, suggests that there has been a great reluctance to indict individuals directly involved in the offences unless (i) their businesses are unincorporated enterprises, or (ii) they were very actively involved in organizing a conspiracy through a trade association (i.e., Elliott, Clarke, Badden, Dent). It appears, however, that there has been less reluctance to charge individuals with misleading advertising than either conspiracy/bid-rigging or price maintenance offences. However, additional research is necessary to ascertain if the Crown is charging individuals largely because the firms involved are not incorporated and therefore only individuals could be charged.

In the past two decades, the Director has made only a few policy statements regarding the prosecution of individuals. In his 1975/76 *Annual Report*, he stated

Until recently, only corporations and not the individual directors or officers have been charged with violations of the Act.¹³ The present policy is to recommend the prosecution of the individuals as well.

One very important basis for this policy is that the personal liability of individuals is as important if not more important than the financial penalties imposed on a corporation in terms of effective enforcement of the Act.

Therefore, it will also be recommended that individual directors and officers who breach the Act be sentenced to jail terms as well as fines. The then Minister of Consumer and Corporate Affairs, the Honourable André Ouellet quoted with approval the former U.S. Attorney-General William Saxbe who stated the rationale very succinctly: "Price fixers should go to prison... they are no better than the car thief or the burglar or the robber...".

Unlike the situation in the United States where courts have sent presidents and directors of corporations to jail, Canadians are not yet accustomed to seeing large fines or jail sentences for combines offences. However, it is hoped that the courts will apply this policy and rationale in their sentencing in future prosecutions under the Act.¹

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This was fine rhetoric, but there is little evidence to indicate that either more individuals were charged or that the Crown (the Attorney General of Canada) ever sought a term of imprisonment (see section 3). It should be noted that in some cases in the 1970s and early 1980s the Crown demurred when requested by judges to make representations regarding the sentencing of corporations convicted of competition law offences. This is hardly consistent with the idea of getting fines that would deter such behaviour. (Stanbury (1976), (1992)).

In November 1990 and August 1991, Howard Wetston, who became Director of Investigation and Research in November 1989, gave speeches indicating the Bureau of Competition Policy's policy with respect to prosecuting individuals. He stated that "the Bureau is now conducting its investigations with a view to identifying cases where individual charges would be appropriate, and gathering evidence which would support such action" (Wetston, 1990, p. 10). Deterrence requires that individuals be charged, according to the Director.

Our review of cases over the past several years has led me to conclude that more charges against individuals will be necessary to strengthen deterrence incentives. Among the factors that we take into account in making such a recommendation are the individual's position in the organization, his or her role in initiating, implementing or enforcing the conduct in question, and his or her knowledge of the illegality of the conduct (Wetston, 1991, p. 3).

In August 1991, Mr. Wetston announced a policy designed to provide incentives for individuals who may have committed criminal offences to assist the Crown in prosecuting other individuals and corporations. The Director stated that the Bureau of Competition Policy has

recently begun to develop a program aimed at providing greater incentives for corporations and individuals to voluntarily report their participation in conspiracy and bid-rigging activities before they have come to our attention. Given the covert nature of these offences, they are often difficult to discover or prove without the co-operation of persons who are themselves implicated in the commission of the offence... to encourage firms to come forward as soon as possible after it has come to the attention of senior management that the firm has been involved in collusive conduct contrary to the Act (Wetston, 1991, p. 4).

Of course the Director pointed out that while the Bureau investigates cases under the *Competition Act*,⁵ it is the decision of the Attorney General as to who will be charged and who will be granted immunity.

Mr. Wetston has outlined the factors that could be relevant in determining whether to recommend immunity from prosecution to the Attorney General in a "first-in" situation:

1. The firm must be the first to approach the Bureau with evidence of the offence in question.
2. The firm must provide full and frank disclosure of the facts at its disposal.
3. The firm must co-operate fully with the Bureau's investigation and with any ensuing prosecution or other legal proceedings.
4. The evidence provided by the firm must be important and valuable in terms of any prosecution or other legal proceedings.

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5. The firm must be prepared to make restitution commensurate with the facts and its responsibility in the matter.
6. The evidence must confirm that the firm took immediate steps to terminate the activity and report it to the Director as soon as it was discovered by its senior executives.
7. A prior record of anti-trust violations by the firm will be a significant factor in deciding whether to recommend immunity to the Attorney General.
8. The firm should usually be prepared to consent to the issuance of an order of prohibition of fixed duration under section 34(2) of the *Competition Act* pursuant to which the commission of an offence is admitted.
9. The role of the firm in the conduct in question will also be considered (Wetston, 1991, pp. 4-5).

It remains to be seen how or whether these factors will be applied in a decision about whether or not to prosecute individuals.

The previous Director (now in private practice) points out that

The Director's immunity policy is similar to the amnesty policy of the Antitrust Division of the U.S. Department of Justice, which has been in effect since 1978. In essence, the U.S. amnesty policy provides immunity to the first person or organization that brings an antitrust violation to the attention of the Department of Justice and assists the Department in the prosecution of the antitrust case (Goldman, 1992, p. 38).

An example of the application of the new policy occurred on November 3, 1992, when the Director announced that Abbott Laboratories was granted immunity from prosecution for conspiracy and bid-rigging while Chemagro Limited was charged with these offences⁶. Promptly after top executives discovered that a lower level employee had engaged in an agreement to share the Canadian market for the biological insecticide "Bt" with Chemagro, they voluntarily reported it to the Director who did not know of the agreement. The conduct was contrary to Abbott's written policies and the firm cooperated fully with the Director in his inquiry. Further Abbott agreed to make restitution of \$2.122 million to the provinces of Ontario and Quebec which had purchased Bt.⁷ It appears that Abbott and its executives met all the criteria established by the Director to obtain immunity from prosecution in a "first-in" situation.

3.0 REVIEW OF THE HISTORICAL RECORD

The purpose of this section is to review the penalties imposed on individuals in three types of competition policy offences: conspiracy and bid-rigging; price maintenance; and misleading advertising. While the *Competition Act* contains a number of other criminal offences (see Figure 1), very few cases have been prosecuted under these sections.

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3.1 Conspiracy and Bid-Rigging Cases

Frequency of Charging Individuals: In the 146 conspiracy or bid-rigging cases completed between 1889 and 1991/92, one or more individuals were involved in 48 or 32.9% of the total cases, i.e., individuals were the only ones charged or both individuals and corporations were charged (See Table 1). The rate at which individuals were charged varied greatly by period. It was highest in the period 1889 to 1949/50 at 76% and lowest in the period 1965/66 to 1975/76 at 16%. In the period 1950/51 to 1964/65, individuals were charged in 27% of the conspiracy cases, while in the period 1975/76 to 1991/92 the rate was 28% (see Table 1).

Beginning in the 1950s and through the 1980s it was apparently the practice of the Crown to charge individuals only if they were the owners of unincorporated enterprises.⁸ Individuals were frequently named as unindicted co-conspirators and were used by the Crown to provide the evidence necessary to convict corporations.

The unwillingness of the Crown to charge individuals, even those who had initiated and maintained the conspiracy, can be seen in the following excerpt from the Director's *Annual Report* for 1968/69:

In the latter part of 1961 senior officials of Burns and Company Limited (now Burns Foods Limited), Canada Packers Limited and Swift Canadian Company, Limited disclosed to the Minister of Defence Production that evidence had been brought to their attention of collusion over a period of five years among the managers of their respective branches in Saint John, New Brunswick to fix prices in respect of meat sold to Department of National Defence establishments in the area. At the same time they offered to make full restitution to the Government. A settlement in restitution acceptable to the Government was subsequently made....

Informations were subsequently laid against the three corporations and four individuals under section 32(1)(c) of the [Combines Investigation] Act for having conspired between January 1, 1957 and December 31, 1961 to prevent or lessen competition unduly in [the supply of beef to the Department of National Defence and to retail stores in New Brunswick]...

On September 24, 1968, Magistrate H.S. Prince in the Magistrate's Court for the County of Saint John ruled that all the co-conspirators named in the Information were to be considered charged with the offence. Crown Counsel objected and the case was adjourned pending adjudication by a higher court. An application for a Writ of Mandamus to compel Magistrate Prince to hear the Information against Burns Foods Limited, Edward R. Coughlan and L.W. MacLeod without the co-conspirators being joined was dismissed on December 3, 1968 by Mr. Justice Pichette of the Supreme Court of New Brunswick. On February 4, 1969 the Informations were withdrawn. Following the preferring of indictments against the above corporations and individuals there was a plea of guilty by all the accused in the Supreme Court of New Brunswick on June 3, 1969. The corporations were fined \$5,000 each and the individuals \$200 each.⁹

Several points should be noted. First, the Crown sought to prevent the magistrate from treating the individuals named as unindicted co-conspirators as being indicted. When the Crown was overruled by the appeal court, it apparently reluctantly charged the two individuals. Second, the individuals who organized the cartel were each fined only \$200 (about \$437 today). At the time, the maximum fine was potentially unlimited (at the discretion of the court). Third, note that the case took almost eight years to complete.

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Surely this is inconsistent with the idea that penalties for offences are more effective if they are both sure and swift. Finally, in this, as in most other conspiracy cases, the logic of convicting a number of corporations while failing to charge the individuals who are the directing minds of these legal, but inanimate, entities is hard to fathom (see section 4 below).

“Success Rate”, Individuals versus Corporations: Between 1889 and 1991/92 some 146 conspiracy or bid-rigging cases were completed. Of these, 95 resulted in a conviction (Table 2), while 19 resulted in a Prohibition Order Without Conviction (POWC) (Table 1).

Of the 95 cases which resulted in a conviction, corporations only were convicted in 69 while in 18 cases corporations and individuals were convicted, and in eight cases only individuals were convicted. In other words, of the 95 cases resulting in a conviction, only 27.4% of them involved situations where one or more individuals were convicted. With very few exceptions, the individuals convicted were small businessmen operating as unincorporated businesses. For example, in *R. v. McGuire* (1903) 38 plumbing and heating dealers and contractors were convicted, all individuals. Of the 157 men¹⁰ convicted in conspiracy or bid-rigging cases between 1889 and 1991/92, at least 49 were convicted in cases completed between 1889 and 1910 and 59 were convicted in cases completed between 1926 and 1942. In the 60 conspiracy or bid-rigging cases resulting in convictions since 1960, a total of only 17 individuals have been convicted in only six cases. In each of those cases, the individual(s) involved took an active part in the conspiracy to fix prices¹¹ or bid-rigging along with one or more corporations.

Between 1976/77 and 1991/92 the Crown completed 57 conspiracy or bid-rigging cases. In 16 (or 28%) of those cases individuals were charged or were the subject of an application for a POWC. But in only two of those 16 cases did the Crown obtain a conviction and fine. In six cases it obtained the “softer” remedy of a POWC. These cases typically involved five to 17 individuals operating small businesses (i.e., gasoline retailing and taxi cabs).

The overall “success rate” (fine and/or POWC) for cases involving individuals was only 8 out of 16 cases or 50%. By comparison, in cases involving only corporations (or trade associations), the Crown had a “success rate” of 63.4% (26 of 41 cases). In 28% (16 of 57) of the conspiracy and bid-rigging cases completed after the 1975/76 policy statement, individuals were charged as compared to 16% (6 of 38) in the decade before. However, during the period 1950/51 to 1964/65, in 27% (7 of 26) of completed conspiracy cases some one or more individuals were charged. The rate was even higher between 1889 and 1949/50 (76% or 19 of 25), largely because the firms involved were unincorporated businesses and thus it was necessary to indict individuals if a prosecution was to be undertaken. Of the 19 cases in which individuals were charged during this period, seven involved only individuals.

During the four periods covering more than a century, the Crown’s “success” rate (conviction and fine or POWC) for cases where individuals were charged was 79%, 100%, 67% and 50%, respectively. The comparable

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figures for cases in which only corporations were charged are 67%, 100%, 84% and 63%, respectively. Note, however, "success" was defined to include cases where all the individuals charged were acquitted or discharged, but one or more corporations were convicted and fined.

An analysis of the disposition of conspiracy and bid-rigging cases in which individuals were charged is provided in Table 3. In almost all the cases where only one or more corporations were convicted, the Crown dropped the charges against the individual. Of the seven POWCs between 1889 and 1991/92, five were obtained in cases involving only individuals. The data in Table 3 indicate that of the 29 cases in which individuals were charged¹² along with one or more corporations, they suffered the same fate as did the corporations in 22 of those matters. That is, both were convicted and fined or acquitted. Put another way, we can say that in almost one-quarter of the conspiracy cases between 1889 and 1991/92, in which both individuals and corporations were charged, the individuals were either not convicted or had their charges dropped or prosecution stayed while the corporations were subsequently convicted and fined.

Fines Imposed on Individuals: As noted in Table 2, the average fine imposed on individuals in conspiracy cases between 1889 and 1910 was \$360 (or about \$6,300 in current dollars)¹³ for over 49 individuals (but this figure includes the fine of \$4,000 imposed on the president of the Ontario Coal Association in 1903 which was the first conviction under the original legislation). There were no convictions between 1911 and 1925. Between 1926 and 1942, the average fine imposed on 61 individuals was \$851 in nominal terms. In current dollars, this would amount to about \$8,900. Between 1950 and 1959 some 30 individuals were fined an average of \$408 (or about \$2,500 in current dollars).

In Canada, no business executive has been imprisoned for violating the *Competition Act* or its predecessors over the past century with respect to price fixing, bid-rigging, price maintenance, predatory pricing, price discrimination or monopoly.¹⁴ Indeed, it was less common in the 1970s and 1980s to even charge a business executive with a violation of these provisions of the legislation. In earlier times, the Crown sometimes charged the individual believed to be responsible for organizing the conspiracy. For example, in 1905, the president of the Ontario Coal Association was convicted of organizing an extensive price-fixing conspiracy. According to the Court of Appeal, the trial judge "directed that the defendant should enter into a recognizance for \$4,000 to appear and receive sentence when called upon".¹⁵ The maximum fine for an individual was then \$4,000 (about \$68,500 in current dollars). In 1908, the president of the Alberta Retail Lumber Dealers Association was convicted of conspiracy, but he was fined only \$500.¹⁶ In one of the plumbing conspiracy cases in the 1930s, the Crown charged only executives even when there were corporate entities that could have been charged.¹⁷ In this case, a record fine of \$8,000 was imposed in 1931 (about \$83,600 today). In contrast, in *R. v. White* in 1932, 11 plumbing contractors were convicted as individuals, fined \$100 each (the equivalent of approximately \$1,156 today) and given a one year's suspended sentence.

In 1940, H.J. Badden, who helped organize the cartel in the *Container Materials* case, was convicted and fined \$4,000, the maximum monetary penalty at the time (about \$42,887 today). In 1942, Badden was

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convicted again, this time in *R. v. Bathurst Power and Paper*, but only fined \$2,500. Nine individuals were charged in *Imperial Tobacco*, and not because they were owners of unincorporated businesses. Their convictions were subsequently overturned by the Court of Appeal. Two individuals were each fined \$4,000 (now about \$23,240) in the *Howard Smith* case in the mid-1950s (then the maximum fine under the relevant *Criminal Code* section). Both were described as active in the conspiracy by the trial judge. Even though one individual was said to be "the single most active person in furthering the conspiracy," Spence J., in his reasons for sentence, noted that "Counsel for the Crown expressly refrained from asking for any sentence of imprisonment as to the latter two [individuals] and with that view the Court agrees."¹⁸ In 1961, C.W. Dent, as head of the Electrical Contractors Association of Ontario, had organized its members into a conspiracy and was charged separately from the Association, convicted and fined \$7,500 after the Association was convicted of price fixing.¹⁹

In the *Mandarin Orange* case in 1967 an executive was charged but the Crown entered a *nolle prosequi*. The same thing occurred in the *Alberta Plumbing Supplies* case with respect to six executives in 1968 and to one individual in the *Montreal Plumbing Supplies* case in 1968.²⁰ It is not clear why this was done, but in every case the Crown obtained a conviction against the companies involved.

The fines imposed on individuals in cases completed since 1960 have generally been small: \$50 (for four individuals in the *Linen Supply* case); \$200 (for each of 4 individuals in the New Brunswick meat-packing case); \$500 (for each of three bakers in 1975/76); and \$2,000 for an individual in the *Charterways* bid-rigging case in May 1982 (approximately \$3,137 today). The only fines of note were imposed on C.W. Dent in 1961 (\$7,500) and on four executives in the compressed gases case (three at \$75,000 and one at \$50,000).²¹ Dent's fine was the equivalent of about \$41,270 today.

While the three fines of \$75,000 in the compressed gases cases seem large by historical experience, they are smaller in constant dollars than the fine of \$8,000 imposed in 1931 in *R. v. White*. That fine is equivalent to a current sum of about \$83,600.

3.2 Price Maintenance Cases

Resale price maintenance and refusal to deal became offences in the *Combines Investigation Act* (the predecessor to the *Competition Act*) on December 29, 1951.²² Between 1951 and March 31, 1992, some 127 price maintenance cases resulted in a conviction and a fine (see Table 4). In 10 of these cases, an individual was convicted and fined and in six of these cases an individual was the only defendant. In fact, the first prosecution for price maintenance was of an individual and it resulted in a fine of \$5 in 1954. (With a fine like this, it must have been hard for the accused to keep a straight face.) The second conviction registered against an individual did not occur until 1964 when Mr. Cooper-Campbell was fined \$300 in the lengthy surgical supplies case in which the Crown's costs of prosecution amounted to \$11,484 (Stanbury, 1976, p. 628). In the latter half of the 1970s, five individuals (in five cases) were fined between \$1,000

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and \$3,000 each. During the first half of the 1980s, three individuals were fined \$500, \$5,000 and \$10,000 respectively. The record fine imposed on an individual in a price maintenance case occurred in the *Acme Signalisation* case in Montreal on October 1, 1982. The fine of \$10,000 is the equivalent of about \$15,700 today.

In none of the 127 price maintenance cases resulting in a conviction has any individual gone to jail. Indeed, it appears that the Crown has never sought a term of imprisonment for any of the 10 individuals convicted of this offence between 1951 and March 31, 1992.

3.3 Misleading Advertising Cases

The number of prosecutions for misleading advertising and deceptive marketing practices have exceeded those for all other offences under Canadian competition law since the early 1970s. Unfortunately, the summary data provided by the Bureau of Competition Policy does not indicate the number of individuals and corporations charged or convicted of misleading advertising offences.²³ However, research by two of my students covering the 39 months and 159 misleading advertising cases between October 1988, and December 1991, provides some indication of the frequency with which individuals have been convicted of misleading advertising offences (Jensen and Parker, 1992). Table 5 indicates that 45 individuals and 157 corporations were convicted in 159 cases between October 1988, and December 1991. The 45 individuals were convicted on 195 counts (average 4.3 counts per person) while the 157 corporations were convicted on 506 counts or an average of 3.2 counts per corporation. We cannot be sure why individuals were convicted with a higher number of counts than were corporations. It may be because there are often instances where two or three individuals are charged together with only one company for a particular offence.

In terms of the total fines imposed in cases completed between October 1988 and December 1991, it seems that individuals got off much more lightly than did corporations. In fact, they were fined an average of \$7,763 per case versus \$17,811 for corporations. Moreover, the difference appears to be growing. In 1989, the average fine paid by individuals was 49% of that paid by corporations. In 1990, the ratio was 41% and in 1991 it was 22% (see Table 5). Over the period from October 1988, to December 1991, the range of fines per count for individuals went from \$300 to \$25,000. For corporations, the comparable figures were \$125 to \$150,000.

During the 1970s and the 1980s the courts made a practice of imposing smaller fines on individuals convicted of misleading advertising. For the period from 1980/81 to 1988/89, the average fine per conviction (all sections combined) for individuals ranged from 18% (1983/84) to 92% (1988/89) of the average fine imposed on corporations in the same year (Table 6). Typically, the average fines imposed on individuals were 26% to 44% of those imposed on corporations.

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There may be several plausible explanations for the generally large differences. First, when individuals were charged as owners of unincorporated businesses, their firms may have been much smaller, on average, than the corporations convicted of misleading advertising. The amount of commerce adversely affected would have been correspondingly much smaller. Second, most of the individuals convicted may have been employees of corporations which were also convicted. Judges might have felt that the firm should be hit harder than the individual(s) involved as this would more effectively deter such illegal behaviour. Or, judges may have imposed fines on an "ability to pay" basis and concluded that, on average, individuals were less able to pay the larger fines imposed on corporations.

Although the publicly available data for the 1970s is for the average fine on the first charge only, it is clear that the average fine imposed on individuals was less than that imposed on corporations.²⁴ Between 1973 and 1976, the average fine imposed on individuals was 56%, 30%, 15% and 32% of the average fine imposed on corporations.

The record fine for an individual in a misleading advertising case (\$500,000) was imposed on Donald Cormie on January 22, 1992.

Mr. Cormie was convicted on a charge related to the "Chairman's Message" in the Principal Group's Annual Review for 1985, which represented in a false or misleading manner that the Group had been successful in moving out of the real estate market in advance of that market's subsequent collapse. Investors relied on this representation when deciding whether to invest in products offered by the Principal Group.²⁵

By comparison, the largest fine on a corporation for misleading advertising was \$1 million imposed on Simpsons-Sears in 1985.²⁶

The practice of initially charging individuals and then dropping the charges after negotiations to get a guilty plea and "agreement" to a particular fine against the corporation also occurs in misleading advertising cases. For example,

In October 1990, the President of Remington Products (Canada) Inc., Victor Kiam, was charged along with the company under the misleading advertising provisions of the *Act* for a representation made in television advertisements. However, the charges against Mr. Kiam were apparently dropped upon the company pleading guilty and being fined \$75,000 (Goldman, 1992, p. 37).

In two misleading advertising cases, individuals have been sentenced to one day in prison. In another case, a term of one year was imposed²⁷ and in another, a term of six months was imposed for failure to pay a fine of \$30,000.²⁸

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4.0 HOLDING INDIVIDUALS ACCOUNTABLE

The purpose of this section is to discuss the case for consistently prosecuting individuals directly involved in committing competition law offences. Note that between 1950/51 and 1991/92 in only 29 of 121 conspiracy and bid-rigging cases were individuals charged or made subject to an application for a Prohibition Order Without Conviction. The positive and normative bases for regularly prosecuting individuals can be summarized as follows:

1. Only people are capable of forming *mens rea* and have the capacity to commit crimes. While corporations are often convicted of criminal offences, they can only act through individuals (employees, officers, or at the behest of directors).²⁹

2. Since individuals make the decisions which result in offences, they should be held accountable for their actions. Recall Woodrow Wilson's words in support of the *Clayton* and *FTC Acts* in 1914:

(W)e ought to see to it... that penalties and punishments should not fall upon the business itself, to its confusion and interruption, but upon the individuals who use the instrumentalities of business to do things which public policy and sound business practice condemn. Every act of business is done at the command or upon the initiative of some ascertainable person or group of persons. These should be held individually responsible, and the punishment should fall upon them, not upon the business organization of which they make illegal use.

3. Failure to hold individuals accountable for their unlawful acts in the context of their roles as employees or directors of a corporation brings the law into disrepute because perpetrators, enforcers, judges and ordinary citizens are aware that specific individuals "made the crime happen" and that they are "getting away with it" — usually because the Crown has failed to prosecute them. An editorial in the *Financial Post* noted that "it's not a simple matter to pierce the corporate veil and root out the individuals who directed the corporation's unlawful activity. But it has to be done. And if the practice became more common, it is likely the need for elaborate new corporate sanctions would lessen as corporate officials faced the possibility of jail sentences and personal fines."³⁰

4. White collar individuals operating within corporations are more likely to be deterred from committing illegal acts by suitable fines and/or terms of imprisonment than are corporations. Only individuals can suffer stigma. They are usually completely dependent upon employment income and thus fairly modest fines are likely to deter illegal behaviour than much larger ones imposed on corporations. More importantly, "corporate behaviour" is a polite fiction which blurs the reality that corporations do what their employees, officers and directors have them do. The Crown should not be party to the continuation of this fiction.

Based on two decades of study of hundreds of competition law cases in Canada, I believe that the "economic man" (or woman) model best describes the behaviour of those who are likely to violate the criminal law in this area. In a speech in 1974, U.S. Attorney General William Saxbe put the matter this way:

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Antitrust violations are not casual crimes. Business tycoons are not seized by a fit of passion that compels them to rig bids. Corporate executives do not gather in the boardroom to fix prices because they are in the throes of a joint irresistible impulse. They violate the antitrust laws deliberately because they want to and because they feel it's good for business.

Even if public policy seeks to hold individuals responsible for their anti-competitive behaviour and seeks to ensure that corporations do not obtain any economic benefit from their "ill-gotten gains" through an economic approach to fines (see Stanbury, 1976; 1992), there are a number of issues which arise in connection with holding individuals accountable for competition law offences.

1. How can the Crown identify the individuals who are the "directing minds" of the offence in the context of large corporate organizations in which decision-making responsibility is shared? It may be impossible to ascertain the different degrees of culpability of the executives involved in the decisions to commit the offence and in carrying it out.³¹ Some individuals may have resisted contributing to the offence, but had to "go along" in order to retain their job and continue to be able to support their family. "Whistle blowers" are usually punished directly or indirectly for their efforts. Even if the executive "leaves quietly," he/she may find it extremely difficult to obtain employment in the industry. In other industries the executive may be shunned as a potential "fink," rather than respected as an honourable person who refused to violate the law.
2. There is often an evidentiary problem in competition law cases. For example, the Crown frequently needs the testimony of executives to convict the firm for which they work and/or other firms. However, this may lead to procedural difficulties as two trials could be required if individuals exercise their right to trial by jury.
3. Virtually all of the benefits of the competition law offence may have accrued to others, namely shareholders (higher profits, dividends, share prices) and/or employees (higher wages/benefits, greater job security).³² Of course, where the executive's compensation is heavily dependent on incremental profits (or reduced variability of profits), he or she may benefit directly.
4. While corporations may have indefinite economic lives and be little affected by a conviction for price fixing, individuals face a different situation. The greatest penalty may be the "informal" one exacted by being charged with a criminal offence. Such informal, but very real, penalties include (i) the stigma attached to being charged with a criminal offence; (ii) the costs of mounting a defence (while legal fees are tax deductible for a corporation, this is not the case for an individual); (iii) the possibility of termination: top management may feel that they can protect themselves or the firm by being seen to cast out the evil doers; and (iv) the potential loss of future income due to reduced career prospects.
5. Should we alter the criteria for conviction of individuals in competition policy cases? For example, should we make mere knowledge of any violation within a company an offence? Should we presume

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that the officer of the company authorized and ordered the act? Should we amend the legislation to require that charges be laid against all corporate executives who had knowledge of the illegal acts or who had reason to know of a violation and authority to stop it but failed to do so?

6. What is the deterrent impact of imprisonment of business executives? Does it prevent repetition of the conduct by the defendants and serve as a "lesson" to other potential violators? Is deterrence reduced if executives do "soft time," i.e., short sentence in "country club" prisons?
7. Should companies be allowed to compensate officers who are convicted and imprisoned for antitrust violations? This is the moral hazard issue: shareholders get the higher profits from, e.g., collusion, but executives "take the fall."
8. How do we apprehend executives who flee the jurisdiction?³³ What if the directing minds of corporations normally reside outside Canada, i.e., as in the case of the multinational enterprise.
9. Should there be minimum sentencing provisions for individuals so judges cannot "defeat" the purposes of the statute by being lenient with white collar offenders?³⁴

5.0 CONCLUSIONS

- For individuals involved in competition law offences in Canada, the evidence strongly suggests that "crime pays", although currently it probably pays less well than it has in the past.
- In only 24% of 121 conspiracy or bid-rigging cases between 1950/51 and 1991/92 did the Crown charge individuals or seek to make them subject to a Prohibition Order Without Conviction.
- Prior to 1991, no individual convicted in a conspiracy or bid-rigging case paid a fine greater than \$8,000 (although this fine was imposed in 1931 and is the equivalent of approximately \$83,600 in 1992). In 1991 and 1992, three executives were each fined \$75,000 and one was fined \$50,000 in the compressed gases case (while five firms were fined a total of \$6 million, all record amounts).
- Since 1951, in only 10 of 127 (8%) price maintenance cases which resulted in a conviction and fine was an individual involved either as the sole defendant or along with a corporation. The fines imposed on individuals ranged from \$5 to \$10,000, but in only two of those cases did the fine exceed \$3,000 (\$5,000 in one case and \$10,000 in the other).
- Between October 1988 and December 1991, individuals were convicted in 28% of the 701 counts in 159 misleading advertising cases involving convictions. Individuals were involved in about one-quarter of the cases during this 39-month period. From the mid-1970s to date, the courts have almost always

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imposed substantially lower fines on individuals in misleading advertising cases. Typically, the average fine imposed on individuals has been one-third to one-half those imposed on corporations convicted of violating the same section of the *Competition Act* (or its predecessors).

- It is too early to say whether the Director's new (1991) policy with respect to charging individuals in conspiracy cases will move Canada's enforcement efforts closer to those in the U.S.³⁵

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Table 1

Disposition of Conspiracy and Bid-Rigging Cases Involving Individuals
and Those Involving Only Corporations, 1889 to 1991/92

Outcome/ Disposition	1889 to 1949/50		1950/51 to 1964/65		1965/66 to 1975/76		1976/77 to 1991/92	
	Corp. only ¹	Indiv. Involved	Corp. Only ¹	Indiv. Involved	Corp. Only ¹	Indiv. Involved	Corp. Only ¹	Indiv. Involved
Conviction and Fine (and possibly a Prohibition Order ⁴)	4	15 ²	18	7 ³	21	3	21	2
Prohibition Order Without Conviction	not applicable		1	0	6	1	5	6
Acquitted/ Discharged	2	4	0	0	5	1	12	7 ⁵
Charges Dropped	0	0	0	0	0	0	0	1
Stay of Proceedings	0	0	0	0	0	1 ⁶	3	0
Total	6	19	19	7	32	6	41	16

1. Includes trade associations.
2. Includes 1 case in which the trial judge "directed that the defendant should enter into a recognizance for \$4000 to appear and receive sentence when called upon" (*R. v. Elliott* (1905) 9 C.C.C. 505 at p. 507); 1 case in which 11 individuals were sentenced to 1 year imprisonment but it was suspended; and 1 case (*Simington*) in which the accused were convicted under the *Secret Commissions Act* after the charges under competition law were dropped.
3. Includes *R. v. Morrey* in which the individuals were acquitted, but the trade association was convicted and fined \$1.
4. At least 1 defendant was convicted and fined. Thus it is possible in a case involving individuals and corporations that only one or the other is convicted and fined. Where this occurs it is almost always the case that the charges against individuals were dropped or they were acquitted.
5. In one case, 4 other individuals had the charges dropped.
6. Two of the 6 individuals were later made subject to a POWC in 1968/69.

Source: Derived from Stanbury (1992, Tables 1 to 3).

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Table 2
Convictions of Individuals and Fines in Conspiracy and Bid-rigging Cases, 1889-1992
(excluding POWC cases)

Period (fiscal year ending March 31)	No. of Cases Resulting in Conviction	Firms Only	Firms and Individuals	Individuals Only	Total No. of Individuals Convicted	Average Fine ¹³ Per Individual Convicted
1889-1910	7	1	2	4	49+	\$ 360 ¹
1911-1925	0 ²	0	0	0	0	0
1926-1942 (to May)	11 ⁹	3	5	3	61 ⁹	\$ 851 ¹¹
1943-1949	0 ³	0	0	0	0	0
1950-1959	17	11	6	0	30 ⁴	\$ 408
1960-1969	20	18	1	1	5 ⁵	\$1540
1970-1974 ⁶	7	6	1	0	4 ⁸	\$200
1975-1979 ⁷	11	10	1	0	3	\$ 500
1980-1984	7	6	1	0	1	\$ 2000 ¹⁰
1985-1989	13	13	0	0	0	0
1990-1992	2	1	1	0	4	\$68,750 ¹²
Total	95	69	18	8	157+	

POWC = Prohibition Order Without Conviction

1. Includes *R. v. Elliott* in which, according to the Court of Appeal, the trial judge "directed that the defendant should enter into a recognizance for \$4000 to appear and receive sentence when called upon" (1905) 9 CCC 505 at p. 507. Note that \$4000 was then the maximum under the *Criminal Code*.
2. Only 1 prosecution, but it resulted in an acquittal.
3. Only 1 prosecution, but it resulted in an acquittal.
4. 3 partnerships involving 10 individuals counted as 10 individuals.
5. Includes *R. v. C.W. Dent*, an individual was fined \$7,500; he was tried separately but was part of *Electrical Contractors* case.
6. Dated by date of final proceedings; in earlier periods dated by trial judgment or date of sentence.
7. Between 1970 and 1979 a total of 7 Prohibition Orders Without Conviction were obtained; 5 were against a total of more than 30 individuals.
8. Four individuals each fined \$200 in NB meatpacking case.
9. Excludes *R. v. Simington et al.* in which some 50 defendants were convicted under other sections under the *Criminal Code* after conspiracy charges were dropped. See (1926) 45 C.C.C. 249.
10. *Travelways* bid-rigging case; firm fined \$50,000.
11. In *Singer* 5 individuals were fined a total of \$17,600 including \$8000 for one person. However, in the *Basket Pool* case, 15 individuals were each fined \$100.
12. Two executives of Liquid Carbonic Inc. were each fined \$75,000. Two executives of Canadian Liquid Air were fined \$75,000 and \$50,000 respectively.
13. In nominal dollars.

Source: Tabulated from the *Annual Reports* of the Director of Investigation and Research and case reports.

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Table 3

**Analysis of the Disposition of Conspiracy and Bid-Rigging
Cases in which Individuals Were Involved,¹ 1889 to 1991/92**

Disposition	1889 to 1949/50	1950/51 to 1964/65	1965/66 to 1975/76	1976/77 to 1991/92
Conviction and Fine				
• Individuals only	7	1	3	0
• Corporations only	1 ²	1 ²	2 ³	3 ³
• Both	7	5	0	2
Prohibition Order Without Conviction	nap	0	1 ⁵	6 ⁶
Acquitted/discharged				
• Individuals only	0	0	0	1
• Corporations only	0	0	0	0
• Both	4	0	0	4
Total	19	7	6	16

nap = not applicable

1. Individuals were charged or subject to an order for a Prohibition Order Without Conviction.
2. [get explanation]
3. In 1 case the individuals were acquitted; in the other the Crown used the *nolle prosequi* procedure (terminated proceedings).
4. In two cases the charges against the individuals were dropped and/or discharged at the preliminary hearing.
5. Both individuals and corporations.
6. 5 cases involving only individuals; 1 case involving both.

Sources: Derived from Stanbury (1992, Tables 1-3).

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Table 4

**Fines in Price Maintenance Cases in Canada,
1950/51 to 1991/92
(nominal dollars)**

Period ending March 31	No. of Cases in which a fine was imposed ¹	Average Fine Per Case ⁶	No. of Cases in Which Individuals Were Convicted	Fine per Individual
1951 ² to 1955	2	\$503	1 ³	\$5
1956 to 1960	1	500	0	--
1961 to 1965	2	900	1 ³	\$300
1966 to 1970	7	2,179	0	--
1971 to 1975	11	4,750	0	--
1976 to 1980	30	17,233	5 ⁴	\$1000 (2), 2500, 3000 (2)
1981 to 1985	36	23,361	3 ⁵	\$500; 5000; 10,000
1986 to 1990	35	36,610	0	--
1991	2	57,500	0	--
1992	1	190,000	0	--

1. Omits POWC cases.
2. Legislation enacted December 29, 1951.
3. The individual was the sole defendant.
4. In 4 cases the individual was the only one convicted; in 1 case a firm was also convicted.
5. In all 3 instances a firm was also convicted in the same case.
6. In nominal dollars; includes all firms and individuals in each case.

Source: Derived from the Director of Investigation and Research's *Annual Reports*.

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Table 5
Fines for Misleading Advertising Under the Competition Act, October 1988 to December 1991

Period	Convictions		Number of Counts		Average Fine Per Case (nominal \$)			Range of Fines Per Count				
	Total Cases	Indiv.	Corp.	Indiv.	Corp.	Total	Individuals		Corporations			
							Low	High	Low	High		
Oct.-Dec. 1988	18	3	16	11	40	\$4,333	\$6,517	\$7,239	\$600	\$833	\$500	\$10,000
1989	42	7	45	8	149	9,357	18,939	21,851	500	25,000	125	10,000
1990	47	17	45	125	207	7,921	19,557	21,589	300	20,000	200	150,000
1991	52	18	49	51	110	4,230	19,321	19,671	500	1,460	500	150,000
Total	159	45	157	195	506	7,763	17,811	17,807				

Source: Derived from Jensen and Parker (1992, Appendices).

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Table 6

Average Fine Per Accused Convicted in Misleading Advertising Cases,
1980/81 to 1988/89
(nominal \$)

	Corporations ¹	Individuals ¹ %	Average Fine per Case	No. of Corporations and Individuals Convicted
1980/81	\$3,487	\$1,301 37% ²	\$3,457	123
1981/82	2,424	1,058 44%	2,395	103
1982/83	5,541	1,531 28%	5,047	136
1983/84	13,435	2,424 18%	11,679	156
1984/85	4,369	3,145 72%	5,679	130
1985/86	7,454	1,929 26%	6,384	128
1986/87	6,717	2,853 42%	7,120	131
1987/88	7,004	2,211 32%	10,430	125
1988/89	9,001	8,261 92%	12,406	99

1. Average fine per conviction, all sections.
2. Fines for individuals as a percentage of fines for corporations.

Sources: Bureau of Competition Policy, *Misleading Advertising Bulletin*, No. 1, 1990; No. 1, 1989; No. 3, 1983; No. 1, 1985; No. 1, 1986; No. 4, 1986. I am indebted to Chris Martin of the Bureau of Competition Policy for assistance in finding some of these figures.

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Notes

* Revised version of a paper presented at the conference, "Corporate Crime: Ethics, Law and the State," Queen's University, November 12-14, 1992.

¹ A detailed analysis of the conspiracy provisions and its enforcement can be found in Stanbury (1991) (1992). A description of the amendments resulting in the *Competition Act* effective June 19, 1986 can be found in Stanbury (1986).

² There are two exceptions. In *R. v. White* (unreported Ontario Supreme Court decision, April 1, 1932), 11 individuals were convicted and each fined \$100 each and given "one year's suspended sentence." In the *Imperial Tobacco* case (unreported Supreme Court of Ontario decision, July 28, 1941) nine individuals (along with 27 corporations) were convicted and fined from \$250 to \$10,000 or 60 days in prison (4 months in the case of the \$10,000 fine). All individuals were acquitted upon appeal.

³ As the data in Table 1 and the discussion in Section 3 make clear, this statement is not true, strictly speaking.

⁴ Director of Investigation and Research, *Annual Report* 1976/76 at 15.

⁵ In criminal cases, the Director submits a "Summary of Evidence" to the Attorney General in which he recommends prosecution and suggests which corporations and/or individuals should be charged. If the Director believes that prosecution is not warranted he discontinues the inquiry and reports this fact to the Minister of Consumer and Corporate Affairs. See sections 23 and 22 of the *Competition Act*.

⁶ See (1992) 13:4 Can. Comp. Rec. 5.

⁷ Consumer and Corporate Affairs Canada, "News Release" NR-10898/93-32 November 3, 1992 and "Agreed Statement of Facts" Federal Court of Canada (T.D.), October 27, 1992.

⁸ An obvious exception occurred in the *Barton Tubes* case. The executive who was charged was discharged at the preliminary hearing. See *Annual Report of the Director of Investigation and Research* for the year ended March 31, 1979 (Ottawa: Minister of Supply and Services, 1979), at 98. Also a vice-president of a firm under investigation was prosecuted for destroying documents left by a Bureau officer in a sealed package in the firm's offices. Upon conviction for impeding an inquiry, the individual was fined \$1750 plus costs "rather than imprisonment, [because] the magistrate who tried the case stated that he was taking into consideration the poor health and age of the convicted man" (Director of Investigation and Research, *Annual Report*, 1954/55, at 35).

⁹ Director of Investigation and Research, *Annual Report*, 1968/69 at 38-39.

¹⁰ No women have ever been convicted of a conspiracy or bid-rigging or price maintenance offence under the *Competition Act*. Note that the figure of 157 omits two early cases in which the number of individuals convicted was not reported.

¹¹ Although C.W. Dent was tried separately from the firms in the Ontario *Electrical Contractors* cases, he was the president of the trade association and helped to organize the conspiracy.

¹² Thus the 29 cases exclude (i) POWC cases, and (ii) cases in which only individuals were charged.

¹³ The Consumer Price Index was used for the period 1913 to 1992. It was "pushed back" to 1889 by using the rate of change in the Wholesale Price Index. Dollar amounts are approximate.

¹⁴ In *R. v. Simington* (1926), 45 C.C.C. 249 (B.C.S.C.) (which began as a combines case, but charges were dropped in favour of prosecution for fraud under the *Criminal Code* and the *Secret Commissions Act*) the four individuals were each fined \$25,000 and sentenced to one day in prison. In December 1974 an individual was imprisoned for two years with respect to a charge of misleading advertising. The accused had a criminal record. The sentence was later reduced to one year. See *Annual Report of the Director of Investigation and Research* for the year ended March 31, 1975 (Ottawa: Information Canada, 1975), at 40-41; and the 1975/76 *Annual Report*, at 67. In two other misleading advertising cases a prison sentence of only one day was imposed (see *infra*).

¹⁵ *R. v. Elliott* (1905), 9 O.L.R. 648; 9 C.C.C. 505 at 507 (C.A.).

¹⁶ *R. v. Clarke* (1907), 14 C.C.C. 46 (Alta. T.D.), aff'd 1 A.L.R. 358 (C.A.).

¹⁷ *R. v. Singer*, [1931] O.R. 202; aff'd [1931] O.R. 699 (C.A.); aff'd [1932] S.C.R. 279.

¹⁸ (1954), 109 C.C.C. 213 at 214.

¹⁹ See Director of Investigation and Research, *Annual Report*, 1960-61, at 15; 1961/62, at 13. Both Dent and the Association were also made subject to a Prohibition Order.

²⁰ Information obtained from the Bureau of Competition Policy.

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²¹ In mid-October 1991, the two top executives of Liquid Carbonic Inc. were each fined \$75,000 after pleading guilty to assisting in a price-fixing scheme among companies supplying 97% of the compressed gases sold in Canada. The Bureau of Competition Policy concluded that the firms had conspired to rig bids for six months. The Crown's lawyer said "we think it's important for individuals to know they can't hide behind corporate coat tails." See "Pair fined \$75,000 each for price-fixing role", *Globe and Mail*, October 19, 1991, at B3; "Big fine warns executives not to fix prices", *Vancouver Sun*, October 19, 1991, at C4. In July 1992, two senior executives of Canadian Liquid Air Ltd. were fined \$75,000 and \$50,000 respectively.

²² Resale price maintenance, now called price maintenance, was common at the time the original anti-combines legislation was enacted in 1889 and was widespread in certain sectors of the economy until it was made illegal *per se* in 1951.

²³ Until 1990/91, it was possible to ascertain this from a case-by-case review of the summaries in the *Annual Report* and the quarterly *Misleading Advertising Bulletin* published by the Bureau of Competition Policy.

²⁴ Derived from Bureau of Competition Policy, *Misleading Advertising Bulletin*, July/September 1977, at 4-5; and July/September 1978, at 5.

²⁵ Consumer and Corporate Affairs Canada, "Donald Cormie Fined Record \$500,000 for Misleading Advertising in Principal Group Case", News Release, NR-10610/92-01, 1992.

²⁶ *R. v. Simpsons-Sears Ltd.* [1985] C.C.L. 11437 (Ont. Co. Ct.).

²⁷ See *R. v. O'Brien* (1975), 11 N.S.R. (2d) 629; 25 C.P.R. (2d) 143 (C.A.).

²⁸ See Addy (1991, p. 463). It is common to impose jail sentences in default of payment of a fine.

²⁹ See Drew Fagan, "Getting off with a nod and a wink," *Globe and Mail*, December 17, 1990, at B1, B2.

³⁰ August 27, 1983, at 9.

³¹ Braithwaite (1985, p. 7) contends that "it is not difficult for powerful actors to structure their affairs so that all of the pressures to break the law surface at a lower level of their own organization or in a subordinate organization" (e.g., a contractor). Further, organizations are able to "manufacture an impression of confused accountability for wrongdoing" (p. 7).

³² Fining corporations (or imposing other economic penalties on them) raises the question of the true "incidence" of such fines. In theory, such fines, like the corporate income tax, may be borne by three sets of individuals: the shareholders, the firm's customers (in the form of higher prices) and/or by employees (in the form of lower wages and/or benefits).

³³ Bench warrants can and have been issued against the individuals which would result in the arrest of the individual if they attempted to re-enter Canada (eg., the *Remington* misleading advertising case involving Victor Kiam). Extradition is possible for certain specific indictable offences, one of which is conspiracy.

³⁴ The U.S. Sentencing Commission *Guidelines* of November 1, 1987 provided for a minimum jail term of eight months for individuals convicted of price-fixing, market allocation or bid-rigging. In addition, effective November 1, 1991, a mandatory minimum fine of \$20,000 is to be imposed on these individuals. See CCH, *Trade Regulation Reports*, November 15, 1991, at 13, 041-3; 13,036.

³⁵ *Ibid.*

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