

THE ORIGINS OF CANADA'S CARTEL LAWS

Casey W. Halladay¹

McMillan LLP, Toronto

Les dispositions législatives sur les cartels au Canada ont fait l'objet de plusieurs amendements au cours des derniers mois, dont l'établissement d'une responsabilité criminelle en soi et l'alourdissement des peines prévues, un engagement public du Bureau de la concurrence à renvoyer plus d'affaires au Service des poursuites pénales du Canada, et un récent plaidoyer de culpabilité qui place la barre plus haut en matière d'amendes pour l'avenir. Dans le cadre de l'attention rehaussée envers la conduite des cartels chez les autorités de la concurrence, les corporations et les médias, cet article jette un regard sur cette nouvelle ère d'application des dispositions sur les cartels au Canada.

I. Introduction

Recent months have witnessed a sea change in Canada's longstanding cartel laws, with sweeping legislative amendments² establishing *per se* criminal liability and dramatically-increased penalties, a public commitment from the Competition Bureau ("Bureau") to bring more contested cases,³ and a recent guilty plea setting a high bar for fines in future cases.⁴ With attention to cartel conduct seemingly higher than ever among enforcers, companies, and the media,⁵ it is hoped that this brief article on the origins of Canadian cartel law may prove interesting to the readers of this journal.

II. In The Beginning ... There Was Still America

As Canadian commentators are often fond of observing,⁶ our cartel offence is the oldest of its kind in the industrialised world⁷ and predated its more famous cousin — the U.S. *Sherman Act*⁸ — by precisely fourteen months. It would be incorrect, however, to attribute this head start to greater levels of regulatory zeal in Canada than south of the border. Rather, Ottawa's policy in this area, as in so many others, was driven largely by the trust-busting rhetoric which had proven to be so popular with American voters. The Canadian government simply moved faster to capitalise on the legislative opportunity.

In the 1880s, Canadian voters — influenced in large part by the wave of anti-trust media coverage in the United States — were increasingly concerned that the country's manufacturers and distributors of goods were forming "tyrannical, arbitrary and exclusive"⁹ combines and trusts, to the detriment of ordinary consumers. Combines were perceived to be limiting competition

and increasing prices both for major commodities, such as coal and sugar, and niche products such as farmers' bailing twine.¹⁰

Progress towards competition legislation began in 1888, when Conservative Member of Parliament N. Clarke Wallace struck and chaired a Select Committee to investigate Canadian combines.¹¹ After two months of study and interviews, Wallace recommended that Parliament take immediate action. Looking South, he found that the American combines had become so advanced and influential that the government had been slowed in legislating against them. (The ability of "Corporate America" to delay the passage of antitrust legislation is the primary reason why Canadian legislation predates the *Sherman Act*.) Concluding that the Canadian combines "*are yet in their infancy [and] this is the time when they should be strangled*",¹² Wallace seized the moment and introduced a private member's bill, which was largely copied from pending legislation in New York State.¹³ Those early precedents, for private member instigation of competition law reform and US influence on Canadian antitrust policy, have not faded.¹⁴

III. The New Cartel Law — A Political Football

While the governing Conservatives and opposition Liberals both publicly supported the goal of restraining combines, they were sharply divided in their methods. The Liberals accused Wallace of trying to "*chew meal and whistle at the same time*",¹⁵ and argued that the true evil was the Conservatives' protective tariff regime, known as the National Policy. According to the Liberals, Canadian combines thrived because they were protected from foreign competition. The Conservatives responded that many of the industries suffering from a lack of combines control were not subject to tariffs and, in any case, removing the Canadian tariffs would only drive the combines "*jackals*" out of Canada and replace them with "*a horde of American wolves*."¹⁶

The Liberals also took the opportunity to criticise a perceived watering-down of Wallace's bill from the initial to final versions. By the time it reached Second Reading in 1889, the bill had been amended to require that the members of the alleged combine act "unlawfully".¹⁷ As a result, it effectively codified the common law of conspiracy (though providing a lesser maximum penalty), rather than creating a new offence. Liberal Member Louis H. Davies, a future Chief Justice of the Supreme Court of Canada, called the revised bill "*one of the greatest frauds I have ever read*".¹⁸ In defence of the bill, the Conservatives argued that it served a valuable purpose by clarifying the otherwise obscure common law of conspiracy.¹⁹

The bill was further weakened in the Senate, with the upper house adding a requirement that the conspirators collude to "unduly" affect competition,²⁰ or "unreasonably" enhance the price of an article or commodity.²¹ As a result of these amendments, no combine was ever broken by the *Act* in its initial form.²²

It was only in the early 1900s that any successful prosecutions were brought under the *Act*, after a zealous Senator removed the “unlawfully” element of the offence in an attempt to remove “*surplusage*” from the section.²³ (The “unduly” requirement, on the other hand, demonstrated considerable longevity and was not excised from the *Act* until March of 2010.)

IV. An Early Indicator of Industrial Policy

Upon closer review, the text of the initial *Combinations in Restraint of Trade Act* reveals much about the policy goals and purpose of cartel regulation in those early years. The opening lines of the offence stated that “[e]very person who conspires, combines, agrees or arranges with any other person, **or with any railway, steamship, steamboat or transportation company, unlawfully**” to restrain competition has committed an offence.²⁴ The highlighted text, unnecessary in light of the much broader “any other person” standard which preceded it, obviously suggests that these sectors were felt to be in the grip of the combines.

Interestingly, unlike the situation under European Community law (and many other countries’ domestic laws) today, from the very beginning the Canadian cartel offence was a penal provision — a person convicted faced a maximum penalty of imprisonment for up to two years.²⁵ (The contemporaneous *Sherman Act* maximum penalty for similar conduct was only one year.²⁶) However, in an effort to safeguard against the overzealous application of the new offence, section 5 of the *Act* provided that an appeal “**shall lie from any conviction under the Act by the judge without the intervention of a jury [...] upon all issues of law and fact [...]**”.²⁷ Having created a potential Frankenstein’s monster, the legislators were clearly concerned about minimising any unintended negative effects of the new offence.

V. An Inauspicious Beginning

Tinkering with the new offence continued. Only three years later, the provision became new section 520 of the *Criminal Code* as part of the latter’s recodification. In 1899, the “unduly” and “unlawfully” requirements were removed, but then restored the following year.²⁸ Political lobbying over the legislation appeared to subside in the following years, in part due to the perceived under-enforcement of the *Act*: in 1908, the Canadian Manufacturer’s Association decided against pursuing further reforms of the offence because “*any agitation [...] may only serve to stir things up and direct attention to a law that officials are lax in enforcing.*”²⁹

In the early 1930s, the cartel offence again came under fire but this time from an unexpected source: the provinces. Ontario and Québec, along with the Proprietary Articles Trade Association, initiated a reference case³⁰ before

the Supreme Court of Canada, and subsequently the Judicial Committee of the Privy Council, contending that the cartel law (both the 1889 offence, then found in the *Criminal Code*, and companion provisions in a new *Combines Investigation Act*) were *ultra vires* the federal government's legislative authority given the provinces' jurisdiction over matters of "property and civil rights" in the Canadian constitution. The Privy Council rejected the provincial claims, noting that the cartel offence fell within the constitutional power of the federal government to legislate in all matters pertaining to "*the criminal law including the procedure in criminal matters*".³¹

VI. Enforcement Takes Off

The authorities finally scored an impressive win with a case against a corrugated and solid fibreboard cartel in the late 1930s, with the Crown³² successfully upholding the convictions in the Supreme Court of Canada. In the *Container Materials*³³ case, a group of box manufacturers representing "the great bulk of the industry"³⁴ founded Container Materials Ltd. as a commonly-controlled supplier — and vehicle for price-fixing — of fibreboard products. Interestingly, the court rejected the defence argument that the Crown must prove, as an element of *mens rea*, that the accused intended their agreement to lessen competition unduly. This argument subsequently reappeared in the *St. Lawrence Cement*,³⁵ *Atlantic Sugar*³⁶ and *Aetna Insurance*³⁷ cases, until finally laid to rest by the "Stage Two" legislative reforms to the cartel offence in 1986.³⁸

While the case represented an important, and high-profile, enforcement victory, the Supreme Court's analysis did not add much clarity to the interpretation of the cartel offence. Speaking on the all-important undue lessening of competition element, the court noted that "*any party to an arrangement, the direct object of which is to impose improper, inordinate, excessive or oppressive restrictions upon that competition, is guilty of an offence*".³⁹ The Chief Justice's concurring opinion did not prove any more illuminating on the issue:

*The lessening of competition agreed upon will, in my opinion, be undue, within the meaning of the statute, if, when carried into effect, it will prejudice the public interest in free competition to a degree that the tribunal of fact finds to be undue [...].*⁴⁰

This pronouncement unfortunately provided little guidance for future cases, beyond a circular suggestion that undueness will exist when a trier of fact finds the effect to be undue.

VII. Conclusion

Following their victory in the *Container Materials* case, successful prosecutions were much the norm for the Bureau and the Crown until the late 1970s.⁴¹ One study has suggested that the Crown obtained a conviction or a prohibition

order in a remarkable 90% of its cases in the period 1924-1975.⁴² That trend, however, did not persist in the 1980s and 1990s. A review of the Bureau's enforcement record in those years is beyond the scope of this paper, and I have written on that subject elsewhere.⁴³ However, as I hope this article has demonstrated, the early years of the cartel offence do offer some interesting observations for today's practitioners, as a new era in Canadian cartel enforcement begins.

Endnotes

¹ B.A. (Hons.), M.A., LL.B., LL.M., of the Bars of Ontario, New York, and England & Wales. The author is a partner in the Competition/Antitrust Group of McMillan LLP (www.mcmillan.ca).

² S.C. 2009, c. 2 (previously Bill C-10, *An Act to implement certain provisions of the budget tabled in Parliament on 27 January, 2009 and related to fiscal measures*, 2nd Sess., 40th Parl., 2009.)

³ See, e.g., Speech of Commissioner of Competition Melanie L. Aitken to the Canadian Bar Association Spring Competition Law Conference (17 May 2010), available online at <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03247.html>>; Speech of Commissioner Melanie L. Aitken to the Canadian Bar Association Competition Law Section Annual Conference (25 September 2009), available online at <<http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03138.html>>.

⁴ In the recent polyurethane foam case, the Bureau obtained the maximum \$10 million fine under the former cartel offence, and a \$2.5 million fine for only five months of illegal conduct (March-July, 2010) under the new offence. On an annualized basis, an application of that average of C\$500,000/month in fines would quickly lead to record-setting cartel penalties in Canada. See Competition Bureau, Background, "Background — Polyurethane Foam" (6 January 2012), available online at <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02585.html>>.

⁵ International media outlets such as Bloomberg, the Wall Street Journal, and Thomson-Reuters have all recently published articles on Bureau investigations, including the ongoing LIBOR inquiry.

⁶ In addition to many scholars and practitioners, the Supreme Court of Canada has highlighted this point: "in fact, the 1889 Act came into force before the American *Sherman Act*, generally seen as the primogenitor of competition law". See *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 at 648.

⁷ *An Act for the Prevention and Suppression of Combinations formed in restraint of Trade*, 52 Vict. c. 41 (1889) [hereinafter the *Combinations in Restraint of Trade Act* or the *Act*.] The *Act* received royal assent and entered into force on 2 May 1889.

⁸ *An act to protect trade and commerce against unlawful restraints and monopolies*, c. 647, 26 Stat. 209 (1890) [hereinafter the *Sherman Act*]. The *Sherman Act* entered into force on 2 July 1890.

⁹ *House of Commons Debates*, (18 May 1888) at 1544 (N. Clarke Wallace).

¹⁰ *House of Commons Debates*, (29 February 1888) at 29 (N. Clarke Wallace).

¹¹ *Ibid.*, at 36.

¹² *Supra* note 9 at 1545.

¹³ Michael Bliss, "Another Anti-Trust Tradition: Canadian Anti-Combines Policy, 1889-1910", (1973) 47:2 *The Business History Review* 177 at 178 [hereinafter *Bliss*].

¹⁴ Many readers will recall the advocacy efforts of former Liberal M.P. Dan McTeague to broaden the scope of the *Competition Act* and increase the Bureau's enforcement powers; see, e.g., Bill C-472, *An Act to amend the Competition Act (conspiracy agreements and right to make private applications), the Competition Tribunal Act (costs and summary dispositions) and the Criminal Code as a consequence*, First Reading 6 April 2000, 2^d Sess., 36th Parl., 48-49 Elizabeth II, 1999-2000, available online, at: <<http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=2330828&Language=e&Mode=1&File=19>>.

Similarly, proponents of the 2009 amendments to the cartel laws had advocated that reforms were necessary to bring the *Competition Act* into closer alignment with American laws: see, e.g., Competition Bureau, *Submission to the Competition Policy Review Panel* (11 January 2008), at 6-7, available online at <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02555.html>>.

¹⁵ *Supra* note 10, at 31 (Mr. Lister).

¹⁶ *House of Commons Debates*, (8 April 1889) at 1115 (Guillet).

¹⁷ This requirement recalls the current U.K. cartel offence (section 188 of the *Enterprise Act 2002*), which provides that "[a]n individual is guilty of an offence if he dishonestly agrees with one or more other persons to make or implement" one of the impugned agreements (emphasis added).

¹⁸ *House of Commons Debates*, (22 April 1889) at 1439 (Louis H. Davies).

¹⁹ *Ibid.*, at 1440 (N. Clarke Wallace).

²⁰ *Supra* note 7, ss. 1(a), (c), (d).

²¹ *Ibid.*, s. 1(c).

²² *Bliss, supra* note 13 at 183.

²³ *Ibid.*, at 184.

²⁴ *Supra* note 7, s. 1 (emphasis added).

²⁵ *Ibid.* This remained the maximum penalty until 1976, when it was increased to five years' imprisonment: see *Combines Investigations Act and Bank Act amendment and an Act to repeal an Act to amend the Combines Investigation Act and the Criminal Code*, S.C. 1974-75-76, c. 76. After 12 March 2010, the maximum penalty became fourteen years' imprisonment, the highest of any anti-cartel regime in the world. See S.C. 2009, c. 2, s. 444.

²⁶ *Supra* note 8, s. 1.

²⁷ *Supra* note 7, s. 5 (emphasis added). Typically, granting leave to appeal would be discretionary to the reviewing court, and would be limited to a review of issues of law, not fact.

²⁸ See the general discussion in *Reference Re: The Combines Investigation Act*, [1931] A.C. 310 at paragraph 9 (J.C.P.C.) [hereinafter the *Combines Reference*].

²⁹ See *Bliss, supra* note 13 at 184.

³⁰ *Supra* note 28.

³¹ *Ibid.*, at paragraph 16.

³² Offences under the *Competition Act* (and its predecessor statutes) are investigated by the Competition Bureau and, if necessary, prosecuted by an independent arm of the federal Department of Justice, which is today known as the Public Prosecution

Service of Canada ("PPSC").

³³ *Container Materials Ltd. et al. v. The King*, [1942] S.C.R. 147 (S.C.C.) [hereinafter *Container Materials*].

³⁴ *Ibid.*, at 157.

³⁵ *R. v. St. Lawrence Cement Corp.*, [1969] 2 O.R. 305 (Ont. C.A.) [hereinafter *St. Lawrence Cement*].

³⁶ *Atlantic Sugar et al. v. Attorney General of Canada* (1976), 26 C.P.R. (2d) 14 (Que. S.C.), rev'd (1978), 41 C.C.C. (2d) 209 (C.A.), rev'd [1980] 2 S.C.R. 644 (S.C.C.) [hereinafter *Atlantic Sugar*].

³⁷ *Aetna Insurance Co. and others v. The Queen*, [1978] 1 S.C.R. 731 [hereinafter *Aetna Insurance*].

³⁸ The 1986 reforms created section 45(2.2), which stipulated that "it is not necessary to prove that the parties intended that the conspiracy, combination, agreement or arrangement have an effect set out in subsection (1)", *i.e.*, the undue effect.

³⁹ *Container Materials*, *supra* note 33 at 159.

⁴⁰ *Ibid.*, at 152.

⁴¹ See, *e.g.*, *R. v. J.W. Mills & Son Ltd.*, [1968] 2 Ex. C.R. 275, aff'd [1971] S.C.R. 63; *R. v. Armco Canada Ltd.* (1974), 17 C.P.R. (2d) 211 (Ont. H.C.J.), aff'd 24 C.P.R. (2d) 145 (Ont. C.A.); *R. v. Canadian General Electric Co. Ltd.* (1976), 29 C.P.R. (2d) 1 (Ont. H.C.J.).

⁴² See W.T. Stanbury and G.B. Reschenthaler, "Reforming Canadian Competition Policy: Once More Unto the Breach", (1981) 5:4 Can. Bus. L.J. 381 at 422.

⁴³ See, *e.g.*, "Redesigning a Criminal Cartel Regime: The Canadian Conversion", in C. Beaton-Wells & A. Ezrachi, eds., *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Oxford: Hart Publishing, 2010), Chapter 12.