Penalties and Remedies under the Combines Investigation Act 1889-1976

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A. INTRODUCTION

A recent issue of the *New Yorker* featured a cartoon which epitomizes public reaction to violations of the *Combines Investigation Act*. A middle-aged, portly executive stands before a judge. The judge, gavel in hand, delivers the verdict and pronounces sentence:

Warrington Trently, this court has found you guilty of price-fixing, bribing a government official, and conspiring to act in restraint of trade. I sentence you to six months in jail, suspended. You will now step forward for the ceremonial tapping of the wrist.

During the first eighty-five years following the enactment of the *Combines Investigation Act*, or its predecessor statutes, not one individual was sentenced to jail for an offence in restraint of trade. In fact, few were ever charged. In the past two years, four individuals have been imprisoned; one offender for a term of one year and three others for one day each. All were convicted of misleading advertising rather than for some large-scale, multi-year price fixing scheme.

The central proposition of this article is that, with very few exceptions, the penalties in combines cases have been grossly inadequate for the purpose either of deterring the repetition of the offence or deterring others who may contemplate similar illegal restraints of trade. In fact, a careful review of the fines in such cases would almost certainly result in the conclusion that "crime pays." This proposition is not new, but the purpose of this paper is to document the argument and to suggest some practical reforms which would deter illegal restraints of trade.
In 1956, the fines in combines cases were most aptly described by Rand, J., in *Goodyear Tire and Rubber Co. of Canada Ltd. v. The Queen* where he stated that "the procedure of enforcement by conviction and fine has tended to exhibit a course of things bearing a close likeness to periodic licensing of illegality." He went on to state that unless the sanctions under the Act were made more effective they would enable "self-confessed lawlessness to set the will of Parliament at defiance." This case involved a charge under s. 498(1)(d) of the *Criminal Code* in which the accused pleaded guilty to a nation-wide conspiracy in industrial mechanical rubber goods that extended over seventeen years (1935-1952). For such an offence, a guilty party could only be subject to a maximum fine of $10,000. At the Ontario Court of Appeal, Roach, J.A. stated that the combine "had complete control of the mechanical branch of the trade throughout the Dominion," that it was "exhaustive in its scope" and that "its manipulations were continued even after the indictment down to the opening date of the trial." More recently, Peter C. Newman has observed:

The effectiveness of past combines prosecutions has been fatally weakened by the insignificance of fines imposed. In January, 1958, for instance, eleven shingle manufacturers paid the courts the maximum fine of $10,000 each for having operated a combine in the $30-million-a-year asphalt-roofing industry since 1932. Frank Howard (NDP, Skeena) pointed out that when the Dominion Steel and Coal Corporation was fined $10,000 in 1956, it amounted to three-twentis of one per cent of the net profit of the firm in 1956. "If the fine were spread over the twenty year period of the conspiracy the amount would be even more infinitesimal." He went on to assert that such fines "are nothing more than a licensing fee to operate illegally."

By mid-1976, the largest fine ever levied on a single firm for a single count in a combines case in Canada was $125,000 in *R. v. Armco Canada Ltd.* and *R. v. Ocean Construction Supplies Ltd.* In the latter case, which involved three separate conspiracies, Ocean Construction Supplies paid a total of $220,000 in fines. Following the sentence, the Vancouver Sun editorialized that the public may be less impressed by the size of the fines in the cement price-fixing case than by the fact that none of the persons who operated the illegal ring were charged with the offence, much less convicted.

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5 Id. at 312 (S.C.R.); 13 (D.L.R.); 382 (C.C.C.); 3 (C.P.R.).
9 O.R. (2d) 573 at 580; (1975), 24 C.C.C. (2d) 147 at 153; 19 C.P.R. 273 at 279.
10 (1974), 15 C.P.R. (2d) 224 (sentence) and (1975), 18 C.P.R. (2d) 166 (appeal on sentence), (hereafter referred to as *B.C. Cement*). In *R. v. K. C. Irving* (1974), 22 C.C.C. (2d) 281 the trial court imposed fines totalling $150,000 on the various Irving enterprises. The verdict was reversed on appeal, (1975), 23 C.C.C. (2d) 479, and was given leave to appeal to the Supreme Court of Canada.
George Stigler et al., in their review of the U.S. antitrust laws remarked:

The cutting edge of law is not the abstract statement of a legal duty but the sanction provided for its non-performance, and that is true of the antitrust laws as of other systems of legal obligation.\textsuperscript{12}

In Canada, the cutting edge of the law as it relates to restraints of trade has been dull. Any rational, calculating businessman would not be deterred by the size of the fines (and legal costs) given the benefits of fixing prices, engaging in resale price maintenance or merging with competitors and the low probability of being convicted.

B. REMEDIES OTHER THAN FINES AND IMPRISONMENT

The Combines Investigation Act, its predecessors and the relevant sections of the Criminal Code have provided for a range of penalties and remedies. In order to put the actual penalties, into perspective it may be useful to examine briefly the full spectrum of penalties available to the judiciary in restraint of trade cases in Canada. There are now six formally defined penalties or remedies:

1) fines and/or imprisonment
2) reduction or removal of tariffs
3) voiding or amending a patent or trademark or the terms of a licence of a patent or trademark
4) prohibition orders (conduct remedies)
5) structural remedies with respect to merger and monopoly cases
6) recovery of single damages plus costs in civil actions

In addition, there is one informal penalty/remedy in which the early framers of combines legislations placed great faith — publicity.

1. Publicity

Before looking at the formal penalties/remedies as set out in the Act, it may be useful to recall the emphasis formerly placed on the non-statutory ‘penalty’ of publicity. Mackenzie King, following the approach of his Industrial Disputes Investigation Act,\textsuperscript{13} was a great believer in “the power of informed public opinion.” In introducing the first Combines Investigation Act in 1910 as Minister of Labour (the Department then responsible for its administration) he argued that “light is the sovereign antiseptic and the best of all policemen.”\textsuperscript{14} He went on to state that the Act would provide machinery “which will enable an intelligent public opinion to be formed and focused on a parti-


\textsuperscript{13} R.S.C. 1907, c. 20.

cular evil which you are endeavoring to stamp out. Penalties are frequently of no service toward that end."^{15} Rather than drag business executives before the courts following a regular criminal investigation, King proposed that six citizens be allowed to make application to a judge for an order directing an investigation into the alleged combine, which at that time included mergers, trusts and monopolies as well as the more common horizontal conspiracies. The Report of the Macquarrie Committee in 1952 describes the procedures:

If, after a hearing, the judge found the situation to warrant an inquiry he could issue an order to that effect. The Minister of Labour was then to appoint a board of three commissioners, one selected by the applicants, one by the parties against whom the application was made, and the third, the chairman, who was to be a judge, nominated by the other two members. A board had power to compel the attendance of witnesses, examine them under oath, require the production of documents and general incidental powers to carry out a full inquiry.

A board had wide powers of report; it could make "such findings and recommendations as, in the opinion of the board, are in accordance with the merits and requirements of the case." Reports were to be transmitted to the Minister at the conclusion of an inquiry and to be published in the Canada Gazette.^{16}

This special investigatory procedure for combines offences reflected MacKenzie King's reluctance to brand "as criminals any body of men joined together for commercial purposes before you find out whether or not they have been guilty of a criminal offence ..."^{17} It is important to note that King's reluctance (and that of Parliament) did not extend to car thieves or bank robbers. King went on to state that the Act "does not propose to place those parties in the position of defendants in a criminal court, but treats them as persons whose business for a time being is being examined or a bank to see whether or not it is being carried on in a fair and proper manner."^{18}

The publicity attendant on the investigation and publication of the report of the ad hoc commission was to effect the necessary remedy. The Macquarrie Committee summarizes:

Any person who was found by the board, after inquiry, to have done any of the enumerated acts being the same as those mentioned in section 498 of the Criminal Code, and who did not cease his activities within ten days after the publication of a report to this effect, made himself, under the Act, liable to a per diem penalty up to one thousand dollars for each day he continued to offend.^{19}

Despite the provision of such fines, "the expectation was that, through its provision for public investigation and report, the Act would, in considerable measure, deter harmful activities without resort to prosecution ..."^{20}

The last vestiges of the publicity approach are contained in the present provisions requiring the Minister to publish within 30 days reports made to him by the Restrictive Trade Practices Commission (RTPC). When published, however, the reports are given little publicity. Seldom are more than

^{15} Id.


^{17} Supra, note 14 at 25.

^{18} Id.

^{19} Supra, note 16 at 10.

^{20} Id. at 10-11.
1,000 copies printed. These are sent to federal Members of Parliament, the provincial Attorneys General and to libraries. Occasionally they result in a question in the House, usually by an NDP member. Their overall impact, in terms of publicity which would focus public opinion on the perpetrators of restraints of trade, is very modest indeed.

In their study *Canadian Anti-Combines Administration 1952-1960*, Rosenbluth and Thorburn describe the reports as “detailed and factual . . . written for the serious student and not for the general reader who would find them dry as dust.”\(^{21}\) They point out that while they do “contain material that journalists might use in a popular form . . . their length, dullness, and drab format have served to make them one of the most uninviting of all government publications.”\(^{22}\) For a number of reasons, Rosenbluth and Thorburn point out that “the reports have passed with very little notice in the press.”\(^{23}\)

In recent years, the Director of Investigation and Research has presented few Statements of Evidence to the RTPC; rather he has chosen to submit the results of his investigations directly to the Department of Justice under s. 15 of the Act. Only five reports by the RTPC have been published since 1970 (the last in 1972), while forty-two were published between 1960 and 1969.\(^{24}\) Between 1960 and 1969 the Director launched forty-one cases (excluding misleading advertising prosecutions), but only three were preceded by a report.\(^{25}\) Publicity as a weapon of deterrence and certainly as a remedy has been almost entirely without effect. One of the reasons this is so is due to the public perception of offences in restraint of trade; an issue which will be explored in Section F.

2. **Reductions in the Tariff**

It has long been argued that “the tariff is the mother of the trusts.” The great bulk of the oligopolies in the manufacturing sector exist behind relatively high tariff walls.\(^{26}\) Potentially, the removal or reduction of tariffs where domestic producers have monopolized the Canadian market or conspired to raise prices and block entry, is a most powerful remedy. It first became available in 1897 under the *Customs Tariff Act*.\(^{27}\) The MacQuarrie Committee *Report* pointed out that this remedy was first incorporated in the *Combines Investigation Act* in 1910.


\(^{22}\) *Id.*

\(^{23}\) *Id.*

\(^{24}\) This number excludes the general inquiries or research inquiries, about six in number.

\(^{25}\) These data were derived in the course of a study of the administration and enforcement of the *Combines Investigation Act* conducted by the author and Paul K. Gorecki of the Bureau of Competition Policy.


The Customs Tariff Act of 1897 had given authority for the government to have an investigation held by a judge into the existence of a trust or combination that unduly enhanced prices or promoted the advantage of manufacturers or dealers at the expense of consumers. If such a trust or combination were found to exist, the duty on the commodity or commodities affected could be lowered or removed by executive action. By the Act of 1910 this action could be taken when a board or a court had found such a combination existed.\(^{28}\)

The only time this provision was used followed a complaint by the Canadian Press Association in 1902 about a combine of paper manufacturers and dealers unreasonably enhancing the price of newsprint. Apparently the combine had been in operation, on and off, since 1879. As a result the tariff was reduced from 25 per cent to 15 per cent.\(^{29}\) The tariff remedy is currently contained in s. 28 of the Act, which states:

Whenever, from or as a result of an inquiry under the Act, or from or as a result of a judgment of the Supreme Court or Federal Court of Canada or of any superior, district or county court in Canada, it appears to the satisfaction of the Governor in Council that with regard to any article there has existed any conspiracy, combination agreement, arrangement, merger or monopoly to promote unduly the advantage of manufacturers or dealers at the expense of the public, and if it appears to the Governor in Council that such disadvantage to the public is presently being facilitated by the duties of customs imposed on the article, or on any like article, the Governor in Council may direct either that such article be admitted into Canada free of duty, or that the duty thereon be reduced to such amount or rate as will, in the opinion of the Governor in Council, give the public the benefit of reasonable competition.\(^{30}\)

Since 1947, the RTPC or Reports of the Commissioner in eleven cases have recommended that tariffs be reduced or eliminated. In no cases has the Cabinet taken any action to implement that recommendation.

3. **Patents and Trademarks**

Since 1910, where patents or trademarks have been used to do any of the enumerated acts under the conspiracy section of the Act, the Attorney General of Canada could apply to the Federal Court of Canada (formerly the Exchequer Court) under s. 29 to make one or more of the following orders:

1) declaring void, in whole or in part, any agreement, arrangement or licence relating to such use;

2) restraining any person from carrying out or exercising any or all of the terms or provisions of such agreement, arrangement or licence;

3) directing the grant of licences under any such patent to such persons and on such terms and conditions as the court may deem proper, or if such grant and other remedies under this section would appear insufficient to prevent such use, revoking such patent;

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\(^{28}\) *Supra*, note 16 at 10.


\(^{30}\) This and all subsequent references to the Act, unless otherwise stated, refer to *Combines Investigation Act*, R.S.C. 1970, c. C-23 amended by C.10 (1st Supp.) c. 10 (2nd Supp.) 1974-75-76, c. 76.
4) directing that the registration of a trade mark in the register of trade marks be expunged or amended; and

5) directing that such other acts be done or omitted as the Court may deem necessary to prevent any such use;

This remedy has been used in only three cases to date; because the proceedings were so protracted in each of these cases, they could hardly be described as major victories for the Crown.

a) Optical Goods — subject to a Report by the Commissioner in 1948.

b) Union Carbide — three patents covering the air bubble extrusion process for producing polyethylene.

c) Union Carbide — two patents covering the corona discharge process used for treating polyethylene to make it into adhesive for printing purposes.

4. Prohibition Orders — Conduct Remedies

Following the MacQuarrie Committee Report of 1952, provision was made under s. 31 (s. 30 since 1970) for the Attorney General to obtain an order of prohibition, either in conjunction with other penalties or as the sole remedy. Such orders are designed to “prohibit the continuation or repetition of the offence or the doing of any act or thing by the person convicted or any other person directed toward the continuation or repetition of the offence...”

They can also take the form of injunctive relief in that it may be obtained against a person who “is about to do or is likely to do any act or thing constituting or directed toward the commission of an offence...”

As can be seen from the Tables 3 and 6 in the Appendix, prohibition orders have also been obtained in a high proportion of cases where a fine was imposed. Where the documentary evidence is not as complete, where the evidence is stale due to delays in detection or investigation and prosecution or where the defendant's lawyer has been successful in his pre-trial representations to the Director or the Department of Justice, the Crown has settled for a prohibition order only. In slightly over thirty per cent of the cases (excluding misleading advertising) started and completed between 1960 and 1975 a prohibition order was the only remedy obtained. In such cases the prohibition order operates somewhat like a consent decree in the United States.

Prohibition orders can be relatively brief (“This Court doth hereby prohibit... the offence alleged) or they can be much more detailed in their specification of the conduct prohibited or required of the defendant. Examples of the latter are R. v. Canada Safeway Ltd. and R. v. Electrical Reduction

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81 This case is discussed in Report of the Director of Investigation and Research, Combines Investigation Act, for the year ending March 31, 1950.
84 Supra, note 1 at 530.
85 Id.
The effectiveness of such orders depends on the ability of the Director to follow up and ensure compliance. Because of the frequency with which they are imposed, prohibition orders deserve a comprehensive study. It is necessary to know what impact they actually have on the behaviour of firms and individuals subject to them.

5. Structural Remedies

Since the 1952 amendments to the Act, the courts have had the power, "with respect to a merger or monopoly, [to] direct the person convicted or any other person to do such acts or things as may be necessary to dissolve the merger or monopoly in such a manner as the court directs." Only a handful of merger monopoly cases have been decided in the past two decades, i.e., R. v. Eddy Match Company Ltd., R. v. Canadian Breweries, R. v. British Columbia Sugar Refining Company Ltd., R. v. Electrical Reduction Company of Canada Ltd., R. v. Canada Safeway Ltd. and R. v. Allied Chemical Canada Ltd. and Commico Ltd. In the first, the offences occurred before the penalty was enacted. The second, third and sixth cases resulted in acquittals. In the fourth a conviction was obtained, a fine of $40,000 imposed and a prohibition order made. In the fifth, because of the delay in prosecution, the Crown had to settle for only a prohibition order. At the present time there are two cases in the courts: R. v. K.C. Irving and R. v. Canadian General Electric Company, Westinghouse and GTE Sylvania Canada Ltd. The former is before the Supreme Court of Canada, while the trial judgment of the latter is being awaited.

Dissolution of a merger or a monopoly is obviously a powerful weapon, but it has never been used. If the industrial organization paradigm, that the forces of market structure largely determine the economic and social performance of firms and industries is true then the case for structural remedies is strong. Simply fining firms which have grown by merger and acquisition

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88 Supra, note 1 at 530.
89 (1952), 13 C.R. 217; 104 C.C.C. 39.
92 Supra, note 37.
93 Supra, note 36.
94 Unreported judgment, Supreme Court of British Columbia, Vancouver, August 1, 1975, Bureau of Competition Policy mimeo 231-1.
95 Unreported Supreme Court Judgment, Supreme Court on Ontario, Toronto, September 2, 1976, Bureau of Competition Policy mimeo 253-1.
96 Supra, note 10; (1974), 16 C.C.C. (2d) 49 for Trial Court decision.
into a highly concentrated industry, or issuing an order prohibiting price-fixing, amounts to closing the barn door after the horse has left. Telling oligopolists not to recognize and to act on their interdependence is asking them to fail to behave in a rational, self-interested fashion. Practically, it is impossible for firms in a concentrated industry to ignore each other and to behave independently. If concentration is high enough they need not formally collude to effect agreement upon variables such as price, output, and perhaps even quality. Subject to the constraint of technical efficiency (economics of scale), the only really meaningful remedy is to break up the constituent firms, creating more, less interdependent, competing entities. Because it is difficult, and perhaps socially expensive to ‘unsquare the eggs’, and because the Canadian judiciary is so conservative and trusting of large aggregations of economic power, it is unlikely that the structural remedies will ever be used.

C. FACTORS JUDICALLY CONSIDERED IN ASSESSING FINES IN COMBINES CASES

While not exhaustive, the following is a review in chronological order, of principles set down by the courts in determining the size of the fines in combines cases. A very wide range of factors have been considered.

In one of the earliest combines cases, R. v. Master Plumbers and Steam Fitters Cooperative Association Limited in 1905, Clute J. stated:

A number of hitherto reputable firms, meeting around a table, and under the pretence of sending in invited tenders, deliberately adopt a method by which, apparently without the slightest compunction, they took from the public, that portion of the public who happened to be interested, money to which they had no possible claim, no more claim than any person has when meeting another in the street he by force robs him of his money. Indeed, I think of the two offences the robbery is the less offensive.

After describing the additional mark up put on the fixed tenders to finance the association as a “rake-off” and as “so much plunder”, noting that “for at least the last 2 or 3 years, it was admitted in the box that not one single honest tender had come from the association,” and that on one tender alone the difference between the “the average tender and an outside real tender amounted to nearly $6000,” the judge fined each of the two associations $5,000, one-half the maximum at that time. The approach of Clute, J., to invoking penalties became characteristic in combines cases. First, the restraints of trade are roundly condemned as violating the rights of Canadians to enjoy the “benefits of free competition.” Second, the fines levied are most frequently small compared to the economic benefits associated with the offence. Even when subject to statutory maxima, Canadian judges infrequently

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48 See, Paul K. Gorecki, Economics of Scale and Efficient Plant Size in Canadian Manufacturing Industries (Ottawa: Department of Consumer and Corporate Affairs, 1976).

49 L. A. Skeoch et al., Dynamic Change and Accountability in a Canadian Market Economy (Ottawa: Supply and Services Canada, 1976) see little virtue in structural remedies even in extreme cases. They propose to put mergers and monopoly under the jurisdiction of a specialized adjudicating body. See Chapters 2 and 3 of Part II.

50 (1907), 14 O.L.R. 295 at 304; 12 C.C.C. 371 at 381-82.

51 Id. at 305 (O.L.R.); 383 (C.C.C).
imposed the largest fines available to them. In a companion case, R. v. McGuire,52 which dealt with the individual members of the Master Plumbers Association, Boyd, D.J., levied fines of $200 to $500 on each of the thirty-eight defendants for a total of $10,000. In doing so, Mr. Justice Boyd stated:

[T]he following considerations and principles have been my guide:
From the material laid before me, it has been evident that the larger firms and the leading master plumbers have controlled the men in smaller business, so that they have been forced into the combination to endeavour to make a living and, in some way, strive to better their condition.
Many of the defendants are hardly able to make headway, having large families and little work.
Many have actually been losers by being driven into the combination.
These classes have been so leniently dealt with as possible.
As to those better off and in a larger way of business, I have scaled or graded so as to impose some fine on those who have received dividends from the illegal prices, but heavier fines are imposed, though far from the maximum of the statute, on those who have made the largest gains from the combination.53

Although he felt Clute, J. had erred on the side of leniency, Boyd, C.J. felt that he could not impose fines totalling more than the $10,000 levied against the two associations.

The general proposition that penalties should be substantial and exemplary, but not vindictive was first enunciated in Canadian combines cases in R. v. Alexander in 1932 where Raney, J. stated that "[T]he penalties ought not to be vindictive, but they should be substantial, and under the circumstances, particularly in view of the Master Plumbers in 1905, and the result of that prosecution, they ought to be exemplary."54 A very similar statement was made by Laliberte, J. in R. v. Canadian Import Co.55 and the principle was followed subsequently in a number of cases.

Hope, J. in the R. v. Container Materials Ltd. case pointed out that all of the accused were in pari delicto. However, he went on to say: "yet it appears to me that some were not as actively engaged in the prosecution of the objects of the combination as others. Therefore in the imposing of penalties I make some slight distinctions."56 He imposed the maximum fine on thirteen corporations ($10,000) and one individual ($4,000), fines of $5,000 on five corporations and $2,500 on one firm.

In the R. v. McGavin Bakeries Ltd. case in which six corporations were convicted for a conspiracy which extended over 17 years, McBride, J. described the $10,000 maximum fine under the Criminal Code as "quite inadequate."57 Yet, in the case of McGavin's he divided the $10,000 fine among three different, but related, legal entities. The judge indicated that he had not overlooked the fact that, "during the depression the baking industry in Western Canada, in common with industry throughout Canada, had to face ad-

52 (1906), 7 O.W.R. 225.
53 (1906), 7 O.W.R. 225 at 229.
54 (1932), 2 D.L.R. 109 at 127; 57 C.C.C. 346 at 365.
55 (1933), 61 C.C.C. 114 at 168.
56 (1940), 4 D.L.R. 293 at 330; 74 C.C.C. 113 at 153.
57 (1952), 101 C.C.C. 88 at 90.
verse conditions and difficulties, nor that during the war-control period shortages, increased cost of materials other than flour, and higher wages, tended to push competitive prices up to the maximum control price.\textsuperscript{58}

In the \textit{Goodyear Tire \\& Rubber Co. of Canada Ltd. v. The Queen} case, five corporations pleaded guilty to a combines conspiracy from 1936 to 1952. Treleaven, J. fined all firms the maximum $10,000 saying "when one considers the duration of time the agreements have been in existence and the deliberation with which the whole area of the mechanical rubber goods sales were brought under control, the maximum penalty is not excessive."\textsuperscript{60}

In \textit{R. v. Firestone Tire and Rubber Co. of Canada Ltd.}, in 1953, Mr. Justice Schroeder summarized his views on sentencing as follows:

\begin{quote}
... the Court must have regard to the magnitude of the aggregate business involved, and the far-reaching evil consequences likely to flow from allowing such schemes to operate unchecked or to go lightly punished. Inherent in these illegal agreements of the accused companies are features so obnoxious to the welfare of the community that if they were extended the effect upon the public might be disastrous.\textsuperscript{60}
\end{quote}

He described the maximum penalty of $10,000 as "wholly inadequate to meet the ends of justice, even as a punishment to the least of these offenders."\textsuperscript{61} He described the actions of the men involved as "cold blooded, calculated and deliberate violations of the law of the land [which] call for as severe a penalty as can be imposed within legal limits both to mark the Court's condemnation of the enormity of the offence from the standpoint of punishment, and for its deterrent effect upon other potential offenders."\textsuperscript{62}

Spence, J. in passing sentence in the \textit{R. v. Howard Smith Paper Mills Ltd.} case specifically rejected the argument put forward by defence counsel that the maximum fine for corporations of $10,000 under the Criminal Code (until November 1952) was to be reserved for only the most reprehensible and inexcusable breaches of the law. He said, "I am of the opinion that it is within the proper jurisdiction of the Court to comment on the propriety and effectiveness of the penalty ..."\textsuperscript{63} He noted that Parliament had since removed the ceiling on fines in such cases, recognizing the point of Schroeder, J. that previous fines were "wholly inadequate." Although he did not feel there had been an "excessively evil breach of the Statute,"\textsuperscript{64} preferring to follow the position of Masten, J.A., (to whom we will refer in Section F), Spence, J. felt he could justly levy the maximum fine. He further held that the court ought not to inquire into the economic results of the lessening of competition in determining sentence. Rather, "the amount of the penalty may be deter-

\textsuperscript{58} Id. at 90.

\textsuperscript{59} [1953] O.R. 856 at 858; 107 C.C.C. 88 at 90; 19 C.P.R. 75 at 76; 17 C.R. 252 at 253; O.W.N. 828.

\textsuperscript{60} [1954] O.W.N. 68; 107 C.C.C. 286 at 293; 20 C.P.R. 8 at 15; 17 C.R. 401 at 407-08.

\textsuperscript{61} Id. at 293 (C.C.C.); 16 (C.P.R.); 408 (C.R.).

\textsuperscript{62} Id.


\textsuperscript{64} Id. at 666 (O.R.); 520 (D.L.R.); 216 (C.C.C.); 245 (C.R.).
mined more accurately considering the duration of the accused’s participation in the conspiracy, the activity with which an accused pursued its intent, the size of the accused’s business and such other factors.”

When this case reached the Supreme Court, Cartwright, J., by way of obiter dictum, suggested that the economic results of the illegal restraint might be taken into account in determining the sentence:

...[T]he court, except I suppose on the question of sentence, is neither required nor permitted to inquire whether in the particular case the intended and actual results of the agreement have in fact benefitted or harmed the public.

This point was considered at some length in *R. v. D.E. Adams Coal Company* and rejected by Williams, C.J. However, the results of the offences do figure in assessing fines in some later cases as we shall see.

In *Regina v. Northern Electric Co. Ltd.*, McRuer, C.J., clearly felt constrained by the $10,000 maximum fine. He paraphrased the words of Rand, J. cited in the Introduction, describing previous fines as “a very trivial licence-fee to commit crime.” He went on to say:

If it were in my power I would impose very heavy fines that would operate as a real deterrent to those who seek to carry on business contrary to the law ... Therefore I impose the maximum fines with the exception of three cases where I think that justice demands that I ameliorate the situation. If the maximum were larger I would probably impose larger fines in the other cases, but I think I must relate the fines in the case of these companies to the total maximum I am permitted to impose ... McRuer, C. J. stressed the moral culpability of the executives, noting that the conspiracy was “carried on by subterfuge, code-letters and such things.” In imposing a fine of only $2000 on one firm the judge stated he did so “for the reason that this company seemed to have a very minor part in the whole scheme of affairs, in the conspiracy, and the company did not take the trouble to destroy its records of what took place as the other companies did, which indicates to my mind that it was more or less drifting along in an organization with which it probably was not entirely sympathetic.” Mr. Justice McRuer’s willingness to assess the differential culpability of members of the conspiracy was not shared by Judson J. as we shall note below.

In the *R. v. Dominion Steel and Coal Corp. Ltd.* case six corporations were convicted of a conspiracy running from 1933 to 1951. In imposing sentence, Judson, J. rejected the argument that the parent firm and its subsidiary ought to be considered as one in setting the fine. He also rejected consideration of degrees, accepting the Crown’s view that “you are either a party to a...
In determining the amount of the fine Judson, J. focused on “the duration of the conspiracy, almost 20 years, and the almost complete control of the industry through the agreement in the matter of price and conditions of sale.” He concluded:

It is quite impossible to regard a conspiracy of this kind as a minor commercial misdemeanour. It is a serious offence against the Criminal Code and I think it calls for the maximum fine, in the case of all the participants, and each company will be fined $10,000 . . .

Batshaw, J., in his decision in the R. v. Abitibi Power & Paper Co. Ltd. case, which was not appealed, set out these criteria for sentence:

As has been observed by others before me, the sentence should not be vindictive, yet it should be substantial and exemplary. As concerns the different accused, moreover, regard should be had to the degree of their participation, bearing in mind such factors as the initiative which they have shown in the conspiracy, the length of time they have participated therein, their share of the market and related factors.

An even more comprehensive set of criteria was considered by Ferguson, J. in R. v. Lyons Fuel Hardware after convicting three firms of a price fixing conspiracy which lasted from May 1952 to April 1959 in the Sault Ste. Marie area. The following points were noted in passing sentence: the willingness and cooperation of the parties to the conspiracy; their refusal to reconsider their identical bids to public institutions when asked to do so; attempts by some of the participants to cover up evidence of the conspiracy — “which would indicate . . . that there was some degree of moral turpitude”; the persistence of the accused; the geographic extent of the business; the lack of evidence of undue enhancing of prices and the difference in the positions of the various companies. With respect to the geographic extent of the conspiracy, Ferguson, J., unlike other judges, emphasized that the fact that it was a local conspiracy “enhances the degree of the offence because the local citizens were necessarily trapped.” He rejected the argument that the ownership of one of the companies had changed and hence the new owners were unaware of what had occurred, stating that the accused was a corporation and its acts and not those of its owners were being judged. After noting that Parliament had some years earlier repealed the limit on fines, he levied fines of $8,000, $4,000 and $3,500.

case and added some points of his own in passing sentence. He noted that the principal organizer of the conspiracy had warned the participants about the meaning, as opposed to the wording, of certain documents and that the accused knew they were breaking the law. "To use a term of common parlance 'they thought they could get away with it.'" He commented that while the Association was unsuccessful in its object, "the intention to create the unlawful restriction in supply was there. "I can only say that this intention was a vicious example of industrial capacity which is not to be condoned." A fine of $7,500 was ordered and a prohibition order granted.

In the companion case, R. v. Dent, after the accused entered a plea of guilty, Ferguson, J described the activities of the directing head and organizer of the conspiracy as verging on "the tactics of the racketeer, or the gangster." He described Dent's efforts at preventing contractors, who refused to participate in the conspiracy, from obtaining labour, as a "mild form of blackmail" and as "an oppressive, coercive system." Dent was also fined $7,500, the largest amount of any individual in a combines case.

In 1966 four pencil companies pleaded guilty to a price-fixing conspiracy in operation for ten years in R. v. Eagle Pencil Company of Canada. Lieff, J. stated that "the sentence should be sufficiently substantial as to be considered exemplary while not being vindictive." He reviewed the discussion with respect to sentence in R. v. Northern Electric Co. Ltd. and referred to the point of McRuer, J., concerning the inadequacy of fines when subject to the $10,000 maximum and the fact that the conspiracy was carried on by subterfuge. He also cited the passage from Abitibi noted above and concluded that the case did not warrant the imposition of vindictive fines.

Three reasons were given "the lack of conspiratorial features," the fact that the accused shared the market in varying degrees, and the fact that the industry involved was not large. Sales of non-mechanical pencils were $2 million in 1951 and rose to $3.2 million in 1960 — the period of the indictment. The firms were fined in proportion of their market shares: $8,000, $4,000, $2,000 and $2,000.

Brooke, J. in R. v. Ryan Builders Supplies (Windsor Limited), also decided in 1966, asserted that the factors to be considered in assessing penalties in combines cases were the same in any criminal case; namely, the gravity of the offence and any mitigating circumstances. "The sentence must be punish-
ment and it must be a deterrent to others that they must not transgress this law.\textsuperscript{91} On the question of the gravity of the offence, Brooke, J. said he “must consider the nature of the agreement ... its scope and its duration in terms of time....”\textsuperscript{92}

Perhaps the most comprehensive list of factors to be considered in determining the appropriate level of fines was given by Schatz, J. in \textit{R. v. St. Lawrence Corporation.}\textsuperscript{93} Seventeen of the twenty firms entered a plea of guilty and the remainder were convicted after trial of participating in a nationwide price-fixing conspiracy in paper board products between 1947 and 1954. Mr. Justice Schatz considered \textit{inter alia}, the following factors:

1) The size of the companies.
2) Their share of the market of both container board and shipping containers.
3) Their position or influence in the conspiracy and the initiative in promoting the agreement.
4) Length of time as a member of the conspiracy.
5) The limit of the penalty during the greater part of the indictment period (as the offence continued after the amendment removing the limitation, the Court is not subject to the previous limitation).
6) The penalties levied in previous cases.
7) The obtaining of and relying upon legal advice from an eminent counsel experienced in combines law which advice approved of the proposed agreement and procedure — but I have not overlooked the evidence in respect to the destroying of certain letters and the effort to disguise the scheme in the beginning.
8) Previous convictions of the accused herein. In my opinion it is not proper to consider the convictions registered since 1954, i.e., after the period to which the indictment herein relates, as such convictions could not be considered as a warning which the accused herein chose to ignore or defy.\textsuperscript{94}

He specifically rejected the argument that in some companies there had been changes in management and ownership since the end of the period of the indictment saying that “[w]e are dealing with corporations — separate legal entities — and are not concerned with the individuals in management or the identity of owners.”\textsuperscript{95} Arguing that “the fines must be of such an amount as will act as a real deterrent and must be very substantial in respect to companies with substantial assets,”\textsuperscript{96} he levied the largest fines in any combines case to that date. Three firms were fined $75,000, one was fined $45,000 and another $35,000. In all, the twenty firms were fined $391,500. This judgment was upheld by the Court of Appeal, where Schroeder, J.A. speaking for the Court said:

Determination of the amount of the monetary penalty to be imposed was pecu-

\textsuperscript{91} Unreported judgment, Supreme Court of Ontario, September 16, 1966, Bureau of Competition Policy, mimeo at 1.
\textsuperscript{92} Id. at 2.
\textsuperscript{93} (1966), 51 C.P.R. 170; [1969] 2 O.R. 305; 5 D.L.R. (3d) 263; 3 C.C.C. 263;
\textsuperscript{94} Id. at 191.
\textsuperscript{95} Id. at 192.
\textsuperscript{96} Id.
After pleading guilty to rigging bids on tenders for asphalt and road paving contracts over a five year period, in *R. v. Deschenes Construction Ltd.*, the accused advanced the argument that the fines ought to be assessed on the "ability to pay" principle. Boucher, J. stated:

... it seems that a principle of sentencing, taking into account only the economical means of a wrong doer cannot be adopted without reservation and qualification. The nature of the offence as well as the circumstances surrounding its commission must enter into consideration.**8**

The judge went on to point out there was a voluntary agreement between the parties to attain a prohibited purpose. "At the time of their adherence to the agreement, none of the participants had the right to expect punishment would be determined on the proposed basis."**9** Each of the six companies was fined $1500.

In *R. v. William E. Coutts Company Limited*, defence counsel J. J. Robinette argued that the one count of resale price maintenance of which the firm was convicted, was a "stale offence, over thirteen years ago now."**10** Grant, J. accepted this point and noted that he had found on the basis of the other counts that the practice had not persisted. He levied a fine of $500 and for the two reasons noted above he refused to grant a prohibition order.**11**

In the *R. v. Philips Appliances Ltd.*, a prosecution under s. 34 of the *Combines Investigation Act* (resale price maintenance and refusal to deal), Fauteux, J. reviewed a number of cases in his reasons for sentence, none of which dealt with offences in restraint of trade. He summarized them by stating that "the protection of society is the main criterion that the Court must follow in pronouncing its sentence ... [t]he 'rehabilitation' criterion becomes of secondary importance"**12** [in the case of corporations]. With respect to the case at hand, the judge concluded:

The sentence must be such that it will prevent the accused from repeating its offence by a means other than the one which it would use with regard to an individual. [i.e., imprisonment] ... a fair sentence in the present case must punish the accused, prevent it from repeating the offence and serve as a warning to any party who might be tempted to imitate its action.**13**

A fine of $3000 on each of two counts was imposed. After quoting the words

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**98** (1967), 51 C.P.R. 255 at 257.

**99** Id. at 257.

**100** (1968), 1 O.R. 549 at 563; 67 D.L.R. (2d) 87 at 101; 2 C.C.C. 221; 54 C.P.R. 60.

**101** Id. at 564 (O.R.); 102 (D.L.R.).

**102** (1969), 57 C.P.R. 41 at 43.

**103** Id. at 43.
of Grant, J. in *Coutts Cards*,104 and adopting them, Fauteux J. also refused to grant a prohibition order to the Crown.105

The matter of the success of a conspiracy and its effect on the public as a factor in sentencing was taken up by Hughes, J. in *R. v. Norman Lathing*. Hughes, J. held:

Although the damage inflicted on the public is a highly relevant consideration, it does not seem, in this case, that the offence is substantially lessened because it was not as comprehensive as it might have been, or because the conspiracy was not as comprehensive as it might have been.106

He granted fines of $2500 to $10,000 as requested by the Crown and prohibition orders.

In *R. v. Electric Reduction Company of Canada Ltd.*, in which the company pleaded guilty to three counts of merger and monopoly, Stark, J. observed that “it is quite true that fines have on the whole been very small, relative to the party’s financial capacity.”107 After quoting the words of Schroeder, J. in the *Firestone*108 case, the judge indicated he did not regard the case at hand as “gross.”109 He levied fines totalling $40,000 which he described as “lenient”, for “there have not been very many of these cases brought before the Court and perhaps it is unfair to endeavour to fall at this time too heavily on this particular offender.”110 Stark, J. described the order of prohibition as “punitive” and indicated that as such it had been taken into account in assessing the fines.111

In 1972, twelve suppliers of ready-mix concrete pleaded guilty to a price-fixing conspiracy between January 1, 1961 and August 31, 1968 covering the Metro Toronto area in *R. v. A.B.C. Ready-Mix Ltd.*112 In considering sentence, Osler, J. refused to recognize that sales of over 15,000 cubic yards were not subject to the agreed price list. He did however recognize to some extent the fact that one of the largest sellers sold about one-half its output to “locked in customers” (affiliated companies or firms which habitually dealt with it) which were not really open to competitors.113 The judge indicated he took into account, where applicable, the factors listed in *R. v. St. Lawrence Corporation*.114 He also observed that the increase in price over the period of the conspiracy was not undue and that profits were not excessive. “Indeed, for certain of the companies, the evidence is that substantial losses

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104 *Supra*, note 100.
105 *Supra*, note 102 at 44 (C.P.R.).
106 Unreported judgment, Supreme Court of Ontario, November 20, 1969, Bureau of Competition Policy, mimeo at 2.
107 *Supra*, note 37 at 237.
108 *Supra*, note 60.
109 *Supra*, note 107 at 237.
110 *Id.* at 238.
111 *Id.* at 238.
112 (1975), 17 C.P.R. (2d) 91.
113 *Id.* at 93-94.
114 *Id.* at 95.
were suffered." In addition, as mitigating factors, he noted that none of the companies had previous convictions, that all had been cooperative in furnishing the Crown with information, and that "very substantial savings to the public purse" resulted from the pleas of guilty.

With the exception of the firm referred to above, Osler, J. levied the fines requested by the Crown which ranged from $7,500 to $35,000 for a total of $245,000.

Rather than decrying the immorality of businessmen and levying a small fine, County Court Judge MacRae, in the R. v. Browning Arms Co. of Canada Ltd. case, described the offence as "very serious", reviewed previous fines and described them as "a mere licence to carry on." He then fined the company $15,000 on each of four counts of resale price maintenance. Not surprisingly, the decision was appealed. Arnup, J.A., speaking for the majority reduced the fines to $2500 per count. In determining the appropriate sentence he indicated the following factors were to be taken into account: protection of the public interest, deterrence to others who might be tempted to commit similar offences, the size of the firm (here the judge dealt briefly with the fact that the American parent was much larger than its Canadian subsidiary), the awareness of the defendant that he was violating the law, the level of fines imposed in previous cases, and the level of sales and net profits of the firm under consideration.

Browning's counsel pointed out, and Arnup J.A. noted, that a fine of $60,000 would have been ten times the largest previous fine for a resale price maintenance offence and three times the total of all reported fines to date.

Brooke, J.A., dissenting in part, set the total fine at $25,000 for the four counts. He argued that one had to look beyond the Canadian subsidiary which had sales of $3.5 million to the U.S. parent (to whom "the net profit will logically pass") which had sales of over $55 million. He also indicated that it is net and not gross profit that should be considered. By net profit he appeared to mean the profits solely attributable to the illegal trade practice as he stated that "it was no doubt true that the profits earned are in part the result of the excellence of the product...."

Perhaps the most interesting aspect of the judgment of Brooke, J.A. is the fact that he recognized that penalties have to be related to the benefits or potential benefits of the illegal act.

If crime is not to pay ... a fine should be in a sum sufficient to assure that there

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116 Id.
117 Id.
118 Unreported judgment, Court of the General Sessions, Toronto, September 26, 1973, Bureau of Competition Policy, mimeo at 1.
119 (1974), 18 C.C.C. (2d) 298 at 303-05; 15 C.P.R. (2d) 97 at 102-05. We should note that the judge, except for the first two factors, did not list the factors as we have done, but they may be properly inferred from his discussion.
120 Id. at 302 (C.C.C.); 101 (C.P.R.).
121 Id. at 300 (C.C.C.); 100 (C.P.R.).
is no profit in the criminal conduct in question ... the Court must do its best to see to it that the fine is of sufficient quantum to take away any profit earned by reason of the criminal marketing scheme and, in addition, and of importance, to be a strong deterrent.\textsuperscript{122}

While recognizing the desirability of uniformity of sentence, Brooke, J. A. argued that [t]his does not mean that there will be such certainty of the probable penalty for this crime against the consuming public that a would-be offender could estimate the cost to him as he would an insurance risk.\textsuperscript{123}

Following a plea of guilty in \textit{R. v. Alpa Industries}, a conspiracy of lumber dealers in the Metro Toronto area, Grant J. took the following factors into consideration in levying fines: "the area to which the business of each accused extended and the number of customers affected by their illegal arrangements;" "the steps taken to make the conspiracy effective," including arrangements with co-conspirators; the joint power of the accused to carry out the conspiracy; the fact that the agreement related to minimum retail prices, the system of protected accounts over which there was no competition, the trade (credit) association was used to enforce the agreement; and the fact that the association kept no records and its meetings were clandestine.\textsuperscript{124} In summary, the judge concluded that the objective in setting penalties is deterrence of similarly-minded businessmen. In mitigation of the offence, Grant, J. noted that the conspiracy ceased when the investigation began, it had "only" lasted three and one-half years and that the accused had pleaded guilty ("a matter of great assistance in the administration of justice ... ").\textsuperscript{125} Fines of $2500 to $25,000 were levied and a prohibition order granted.

In October 1974, Petrofina Canada Ltd. pleaded guilty to one count of resale price maintenance. In handing down sentence Loukidelis D.C.J. was urged by defence counsel to take into account the fact the company was a first offender, that the act complained of was a solitary incident and that the company was small relative to the total oil industry.\textsuperscript{126} The judge asserted that he did not see the offence as an isolated act, but rather as part of a company policy to maintain prices. After citing the words of Arnup, J. A., that the protection of the public interest and deterrence of other firms were the principal factors in setting the fine, the judge said:

\textit{... I have taken into consideration not only the deterrent role that it must play with the accused but on other companies in this business. Another factor is that the product [gasoline] is of crucial importance in our economy and these companies must be discouraged from regulating and manipulating their prices to the detriment of Canadians.}\textsuperscript{127}

A fine of $15,000 was imposed and a prohibition order granted.

\textsuperscript{122} Id. at 300-01.
\textsuperscript{123} Id. at 301.
\textsuperscript{124} Unreported Judgment, Supreme Court of Ontario, June 26, 1974, Bureau of Competition Policy, mimeo at 2-3.
\textsuperscript{125} Id. at 3.
\textsuperscript{126} \textit{R. v. Petrofina Canada Ltd.} (1975), 21 C.C.C. (2d) 315 at 317; 20 C.P.R. 83 at 84-85.
\textsuperscript{127} Id. at 319 (C.C.C.); 86 (C.P.R.).
In the *B.C. Cement* case, McKay, J. stated that in fixing the fines, he considered, "among other things:

1) The period of the conspiracy, and the length of time each company was a member of it;
2) The geographic area involved, and the consumption of the product in the area;
3) The share of the market enjoyed by each of the conspirators;
4) The size of the companies involved;
5) The need to impose a penalty that will provide a real deterrent and will be more than a minor cost of doing business.\(^\text{128}\)

McKay J. continued "To a lesser extent I have also considered penalties imposed in other cases, the pleas of guilty entered on behalf of the conspirators, and the fact that each is without previous conviction."\(^\text{129}\)

The factors cited above refer to *R. v. Ocean Construction Suppliers Ltd.*\(^\text{130}\)

With respect to the ready-mix conspiracy in the Greater Victoria area two additional factors were considered. The destruction of documents by the conspirators and in the case of one firm, the expression of remorse by the president of the company.\(^\text{131}\) The imputed value of remorse is hard to determine. Over the period of the conspiracy, Ocean Construction's volume averaged twice that of Butler. The fines were in exactly that proportion.

Both the Crown and the accused appealed the size of the fines and the terms of the prohibition order. Seaton, J. A., speaking for all three judges, made reference to the Crown's "rather complex computation based on the conspirator's income [which arrived] at fines of many millions of dollars."\(^\text{132}\)

He said, "[i]ncome and ability to pay may be factors, but there are a great many other factors to be taken into account in sentencing ... [s]entencing cannot be approached as an arithmetic problem."\(^\text{133}\)

The judge specifically rejected defence arguments that the large size of the fines imposed were not foreseeable. "The complaint seems to be that the price of a permit to commit the crime has been raised without notice and that is unfair to the conspirators. That argument must fail."\(^\text{134}\) Seaton, J.A. specifically endorsed the argument of MacKay, J. that "the fine imposed must be such as to bring home to certain members of the business community the message that the combines legislation is to be obeyed and cannot be flouted with impunity."\(^\text{135}\) The Court also noted the factors taken into account by the trial judge and concluded that there was no error in principle.\(^\text{136}\) The appeal and cross appeal were dismissed.

\(^{128}\) *Supra*, note 10 at 229.
\(^{129}\) *Id.* at 229.
\(^{130}\) *Supra*, note 10.
\(^{131}\) *Id.* at 231.
\(^{132}\) (1975), 22 C.C.C. 340 at 342; 18 C.P.R. (2d) 166 at 169.
\(^{133}\) *Id.* at 342 (C.C.C.); 169 (C.P.R.).
\(^{134}\) *Id.* at 342 (C.C.C.); 169 (C.P.R.).
\(^{135}\) *Id.* at 169 (C.P.R.); 343 (C.C.C.).
\(^{136}\) *Id.* at 343 (C.C.C.); 170 (C.P.R.).
In *R. v. Armco Canada Ltd.*, Lemer, J. indicated he took into consideration the following factors in assessing penalties:

1. The length of time that the total conspiracy was active,
2. the period of the time of involvement of any particular defendant,
3. the share of the market of a defendant,
4. the relative size of the business or business operation of the defendant,
5. the influence of each defendant on the conspiracy,
6. previous convictions under this or a similar statute, and
7. whether there should be an order of prohibition pursuant to section 30(1) of the *Combines Investigation Act*.

In his general remarks the judge asserted that the penalties must be sufficient to deter the defendants from ever attempting to engage in a similar conspiracy in the future and also sufficient to deter others who might venture into arrangements similar to those employed by the culvert manufacturers. He went on to say that “to fine a large, faceless corporation can hardly be said to be punishment unless the fine is substantial.”

Upon appeal the convictions against two of the accused were quashed and the fine of one participant reduced from $10,000 to $2,000. The final result was that three firms were fined $100,000 or more, one was fined $85,000, and three others were fined $15,000 or less.

Certainly the most comprehensive review of the authorities on the principles of sentencing in combines cases was undertaken by Macdonald, J.A. in a unanimous decision of the Court of Appeal, after reversing the acquittal of seventy-three insurance companies for price-fixing in *R. v. Aetna Insurance Company*. As the case is before the Supreme Court we will not review the judge’s analysis at any length. On the basis of the duration of the agreement, market area covered, scope of the agreement and size of the companies, the Crown proposed fines of $10,000 to $200,000 for a total of $8,235,000. Macdonald, J.A. levied fines of $300 to $15,000 for a total of $340,700.

Like Seaton, J.A. in the *B.C. Cement* case, whom he quoted, Macdonald, J.A. said that “the size and ability to pay of the various companies is a factor to be considered, but in my opinion is but one factor.” He noted that if the fines were based on the total size of the companies (as the Crown pro-
posed) rather than on the business done under the conspiracy the largest companies would be assessed the largest fines even if they wrote little insurance in the area affected. In addition to the amount of insurance premiums earned by the various participants, Macdonald, J.A. stressed the earlier opinion of the majority which did not attribute any moral turpitude to the accused.\textsuperscript{144}

D. FINES IN COMBINES CASES: 1889-1975

1. Overview

Fines and prohibition orders (the latter only since 1952) have been virtually the only penalties invoked upon conviction under the \textit{Combines Investigation Act} or the relevant sections of the \textit{Criminal Code}. Only in misleading advertising cases, as we noted, has the imprisonment penalty been used. In two cases the term was one day and in \textit{R. v. James O'Brien Ltd.} case, the owner was sentenced to two years for a conviction under Section 37(1).\textsuperscript{146} There, the accused had a previous criminal record; upon appeal the sentence was reduced to twelve months. Columnist Maurice Western was critical of the Bureau of Competition Policy regarding this case. He asked, "How were consumers harmed by this inaccurate representation?"; he found the attitude of the department "very puzzling." He continued:

In respect of misleading advertising, it combines the microscopic approach with the zeal of the Spanish Inquisition. But in regard to competition generally, it is not much in favor of punitive actions (or even of definitions), tending instead to the view that economic offences should be dealt with by regulating Tribunals.\textsuperscript{146}

This proposition shall be examined in some detail. Table I in the appendix sets out the statutory provisions for the maximum fine or term of imprisonment from 1889 to 1975. Table 2 sets out the penalties as of January 1, 1976 incorporating the Stage I amendments to the \textit{Combines Investigation Act}. An analysis of Table I shows that for the period of time when Canada's restraint of trade laws were incorporated in both the \textit{Criminal Code} and the \textit{Combines Act} (1910-1952) the maximum fines under the Code were less than one-half those under the Act. As can be seen in Table 3, virtually all combines cases were brought under the \textit{Criminal Code} sections, hence limiting the maximum fine on corporations during this period to $10,000. From November 1952 until the end of 1975, there was no limit on the fine that could be imposed under the Code or the Act in conspiracy cases. Since November 1952 there has been no limit on the fines in merger, monopoly, price discrimination and resale price maintenance cases. Yet, is was not until 1960 that the largest fine imposed on a single firm was $25,000. In 1966 the largest fine for a single firm was $75,000 and in 1974 it became $125,000. (See Table 3.) There is some evidence that at least some judges chafed under the $10,000 maximum under the \textit{Criminal Code} prior to 1952. In the three

\textsuperscript{144} Id.
\textsuperscript{145} Supra, note 3 at 40-41.
\textsuperscript{146} Maurice Western, "Government zealous about misleading ads," Ottawa \textit{Journal}, March 8, 1975 at 36.
rubber cases decided in 1953, but for which the $10,000 maximum applied, each firm (a total of twenty-two) was fined the maximum. In *R. v. Firestone Tire & Rubber Co. of Canada Ltd.*, Schroeder, J., as we have noted, described the maximum penalty as "wholly inadequate to meet the ends of justice." In *R. v. Northern Electric Co. Ltd.*, McRuer, C.J.H.C., as we have seen, made the same point. These judges may have felt constrained by the statutory limits before 1952, but most judges did not. The maximum fine was levied on one or more defendants in only 36 per cent of all conspiracy cases during the period in which the ceiling existed.

As of January 1, 1976, the maximum penalties for misleading advertising have been increased, but only in the case of proceedings by summary conviction (Table 2). The ceiling on fines is increased to $25,000 from $10,000 (except in the case of double ticketing) and to one year imprisonment from six months. For proceedings by indictment the penalties are unchanged — a fine at the discretion of the court or five years imprisonment or both.

Although the Stage I amendments were hailed as increasing the penalties, in the case of conspiracies (s. 32) a limit of $1,000,000 was substituted for a fine at the discretion of the court *i.e.*, a potentially unlimited fine. Note that the fines remain unlimited in the case of mergers and monopolies and with respect to bid-rigging, price maintenance and price discrimination. Apparently the thinking behind the $1,000,000 figure was that it would indicate to the judges the seriousness with which Parliament viewed the crime. It would represent "a figure for the judge to shoot at" in imposing sentence. If this argument has merit one could suggest that $2,000,000 is an even better figure to shoot at. Yet pressures from business interested in the elimination of the provision for a maximum fine of $2,000,000 and/or imprisonment for up to five years for second or subsequent Section 32 convictions from the amendments as finally enacted, Bill C-256 (the *Competition Act*) had also provided that previous convictions under s. 32 or ss. 411 or 498 of the *Criminal Code* would count in determining the application of the higher maximum fine for the second or subsequent convictions.

As a final comment on Table 2 it is suggested that there appear to be major inconsistencies in the maximum penalties for misleading advertising (by indictment), representations as to tests and testimonials, pyramid selling, referral selling, promotional contests, and double ticketing and sales above advertised prices.

2. Fines in Merger and Monopoly Cases

Table 4 sets out the fines in the three merger and monopoly cases in which the Crown was able to obtain convictions. The number of cases here is

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147 *Supra*, note 60 at 293 (C.C.C.); 16 (C.P.R.); 48 (C.R.).
148 *Supra*, note 87 at 99 (C.C.C.); 202 (C.R.).
149 "The reasons for increasing fines is to clearly indicate to the courts that offences under the Act are a serious matter and to prevent the courts as they have sometimes done in the past, to give low penalties for serious offences." From Bureau of Competition Policy, "Background Papers, Stage 1 Competition Policy" (Ottawa, April 1976) at 34.
so small, and the most important one (K.C. Irving)\textsuperscript{150} is under appeal, that it is difficult to draw any strong conclusions. It would appear from the Eddy Match\textsuperscript{151} case that when the Crown did lay charges under the Act rather than the \textit{Criminal Code}, it was able to receive the benefit of the higher maximum under the Act. But relative to the duration of the combine (twenty-three years) and probable economic benefits enjoyed by Eddy Match and its subsidiaries, the fines seem insignificant. As we noted in Section III, the size of the fine in the ERCO\textsuperscript{152} case was reduced in face of the detailed prohibition order put forward by the Crown. In the \textit{K.C. Irving} case the costs of prosecution have already exceeded the fine imposed and the case has yet to come before the Supreme Court of Canada. More important than the fines totalling $150,000, is the order to divest the two Moncton newspapers.\textsuperscript{153}

3. \textit{Fines in Conspiracy Cases}

Table 3 sets out information on the fines in conspiracy cases since the first "Act for the Prevention and Suppression of Combinations formed in Restraint of Trade" was passed in 1889. It provides some historical perspective and to support our contention that the fines in combines cases have, almost without exception, been small relative to the potential benefits arising from conspiracies in restraint of trade.

Fines in conspiracy cases (for a single firm) have ranged from $1.00 in \textit{R. v. Morrey}\textsuperscript{154} to $220,000 in the recent B.C. cement and ready-mix case where Ocean Construction Supplies was involved in all three separate indictments in the same trial. The data of Tables 3 and 4 is summarized in Table 5; it shows the average fine for individuals and for corporations separately for five time periods. Between 1889 and 1910 there was only one conviction involving corporations and each was fined $5,000 in 1905. There were no additional successful prosecutions until 1926. Between 1926 and 1942 the average fine per firm was $2,774. No successful prosecutions occurred between 1943 and 1949. Between 1950 and 1959 the average fine per corporation increased to $7,046. During this period 147 firms were fined in seventeen cases. Over the next decade (1960 - 1969) the average increased only marginally to $7,576 even though all the cases were in the period when the maximum fine was unlimited. The great bulk of the cases decided in the 1950 - 1959 period were, in fact, subject to the $10,000 maximum. Over the last six years (1970 - 1975 inclusive) the average fine per firm almost doubled to $13,758. This last figure is significantly influenced by the large fines imposed in the Armco\textsuperscript{155} and B.C. Cement\textsuperscript{156} cases. If either of these is removed the average falls to $10,700; if both are removed it falls to $8,149 — only slightly higher than the average for 1960 - 1969.

\begin{itemize}
\item \textsuperscript{150} \textit{Supra}, note 10.
\item \textsuperscript{151} \textit{Supra}, note 39.
\item \textsuperscript{152} \textit{Supra}, note 37.
\item \textsuperscript{153} \textit{Supra}, note 10 at 294-96.
\item \textsuperscript{154} (1956), 24 C.R. 319; W.W.R. 299: 115 C.C.C. 337; (1957), 6 D.L.R. (2d) 114 (Appeal).
\item \textsuperscript{155} \textit{Supra}, note 9.
\item \textsuperscript{156} \textit{Supra}, note 10.
\end{itemize}
Between 1890 and 1955 the maximum fine in the United States for violations of the Sherman Act was $5,000. In 1955 it was raised to $50,000 for individuals and corporations. Green reports that between 1946 and 1953 the average fine, like Canada, was well below the maximum; the average fine was $2,600. During the period 1955 to 1965 the average fine was $13,420 for corporations and $3,365 for individuals. From 1955 to 1960 the maximum fine was never imposed on an individual and in only four of 130 Sherman Act cases was the maximum fine imposed on a corporation. He notes that in only one of the 150 sentences handed down in the “Great Electrical Conspiracy,” was the maximum fine imposed. “The average corporate fines per count in these cases was $16,500, although the commerce affected totaled some $7 billion (or an overcharge of approximately $840 million based on a modest 12 per cent estimated inflated price). . . .”

From July 1966 to December 1969 the maximum fine was levied in only nine of forty-four cases. In December 1974, the maximum fine for Sherman Act offences was increased to $100,000 for individuals and/or up to three years imprisonment, while the maximum fine for corporations was increased to $1,000,000.

Returning to the Canadian data we find that despite the removal of the ceiling in 1952, the average fine per corporation in conspiracy cases has only increased by 175 per cent in seven decades. During the same period consumer prices increased about 4.5 times and wholesale prices by 7.2 times (Table 9). If we take the average for 1926-1942 as our benchmark, then the average fine per corporation has increased by slightly under five times. Between 1931 and 1975 consumer prices increased by 2.6 times and wholesale prices by 5.2 times. By the consumer price index average fines in the 1970's were larger in constant dollars than those between 1926 and 1942, while according to the wholesale price index such fines decreased in real terms. In any event, the calculations are based on the idea that the average for the period 1926-1942 represents the “appropriate” level of fines in conspiracy cases. It is this writer's contention that they were far too small to act as a deterrent to price-fixing. The legal costs of defending a combines case are probably greater than the fine.

As an additional measure of the inadequacy of the fines in conspiracy cases, we have set out, where the data were available, the cost of prosecution in the cases listed in Table 3. These amounts do not include the costs of investigation, but only payments to outside Crown counsel and associated expenses. No account is taken of the value of time of the permanent officials in the Office of the Director of Investigation and Research or his predecessors. Of the forty-three “cases” (for accounting purposes some cases were combined) for which we have data, in thirteen the total amount of the fines levied was less than the costs of prosecution. In R. v. McGavin Bakeries Ltd.168 prosecution costs exceeded $111,000 while the fines totalled $20,000. In the Belt Mfg.169 case the fine was $300 while the costs exceeded $5,000 and in

159 As yet unreported.
R. v. Morrey$^{100}$ some $27,676 was expended and the fine was $1.00 However, a review of Table 3 does indicate a significant number of cases in which the fines did cover the costs of prosecution several times over. Yet, when the total costs of investigation, including those of the RTPC, if the case was brought before that body, are added to the costs of prosecution, it is doubtful that in many of the cases the fines covered the costs involved.

In general, individuals have not been charged in conspiracy cases if a corporate entity exists. Only if individuals have been carrying on business in their own names (or as unincorporated entities) or they were the “guiding hand” in a trade association engaged in price fixing, has the Crown proceeded against them. With very few exceptions, the fines have been small. In the earliest cases (circa 1906) the average fine was only $269. In the period 1926-1942 the average increased to $843, including the maximum fine of $4,000 to the organizer of the Container Materials cartel. In the 1950’s fewer individuals were convicted and the average fine declined to $564. Even fewer were convicted in the 1960’s (as Table 5 shows) and the average fine was $944 — primarily due to the fine of $7,500 on the organizer of the Electrical Contractors Association conspiracy. Individuals, like corporations, have, on the basis of the historical record, little to fear in combines cases.

We shall now examine in more detail five price-fixing cases in the 1960’s and 1970’s.

(a) R. v. Ocean Construction Supplies Ltd.$^{161}$

This case, in which the largest fine to date ($125,000) for a single count was imposed, involved three separate conspiracies. One was province-wide and involving cement and two were regional conspiracies involving ready-mix concrete. This discussion will concentrate on the two firms (three entities because of corporate organizations) involved in the cement prosecution. The two firms accounted for 90 per cent of the cement sold in B.C. over the 10 year period of the offence (1962 through 1971). Canada Cement Lafarge Ltd. is the largest cement company in Canada operating in all 10 provinces. As of Dec. 31, 1972 its total assets were $345.5 million and its net profits for 1972 amounted to $17.2 million. As the Crown pointed out, a fine of $150,000 as a proportion of 1972 net earnings, compares to a fine of $131 to a man earning $15,000 per year.

A memorandum prepared by the Department of Justice stated:

It is proposed to show, also, that a $150,000 fine is not excessive by relating it to the costs attributable to the conspiracies. For example, in this connection, in 1970, British Columbia cement customers of Lafarge paid 43¢ per ton, or about $101,000 more than the estimates of production cost increases for that year. This extra cost was imposed on the consumer because Lafarge agreed with Ocean to increase the base price of cement in B.C. to $1.13, notwithstanding that their internal estimate of a production cost increase was only 70¢. When this unsupported price increase of 43¢ a ton is applied to Lafarge’s 1970 cement sales of 236,257

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$^{100}$ Supra, note 154.

$^{161}$ Supra, note 10; the case was reported extensively in the Vancouver Sun, February 19, 20, 21, 22, and 23, 1974 and on March 11 and 13, 1974.
tons, the extra cost to the consumer is approximately $101,000. This estimate is
for only one year of a price-fixing combine that lasted nine (sic) years.162

With respect to Ocean Construction Supplies (now owned by Genstar) its
assets totalled $43.9 million at October 31, 1971 and had sales of $34.9
million and net profit of $2.5 million for the ten months ended October 31,
1971. Pro-rated on an annual basis a fine of $150,000 would represent 5.01
per cent of net profits (for one year only). This would be equivalent to $751
for an individual with an annual salary of $15,000. While the judge during
the course of the argument on sentence suggested that the "fines would not
come out of petty cash", in fact they could be paid easily out of the firm's
cash balances. The Crown calculated that a fine of $150,000 would absorb 8
per cent of Ocean Construction's cash and short term investments but only
0.5 per cent of Canada Cement Lafarge's.

The defendants appealed the sentences unsuccessfully. Seaton J.A.
stated: "As to the shock at the size of the fines I say, 'Good' I hope that some
people are sufficiently shocked that they will reject this sort of conduct in the
future."163

Given the duration of the conspiracy, and the volume of trade involved, the
fines, which totalled $250,000 in the cement case and $137,000 and $45,000 in
the Vancouver and Victoria ready-mix cases respectively, do not appear to con-
stitute a strong deterrent or an example to other potential offenders. The
counsel for Ocean Construction supplies argued that there was no evidence
of price gouging and that the conspiracy was "self-preservative or defensive"
in nature. He said, "there was no evidence of any consequences detrimental
to the public flowing from the arrangement." To this point, Mr. Justice
McKay replied, "If one accepts that, one wonders why they bothered to make
the agreement. I presume they had some intention in mind. It wasn't done to
hurt themselves."164

(b) R. v. Armco Canada Ltd.165

Ten firms were charged and seven convicted of a price-fixing conspiracy
between November 1962 and August 1967 covering Ontario and Quebec.
The selling value at the plant (national totals) ranged from $19.3 million in
1963 to $27.8 million in 1965 to $25.8 million in 1967.166

Apparently the conspiracy was successful in increasing several of the
firms' profits. Between 1963 (before the conspiracy) and 1966, Armco's
profits almost doubled to approximately $1.5 million. The profits of one of the
unindicted co-conspirators increased six-fold over the same period. Armco
was fined $125,000, which would appear to suggest that "crime pays." In his

162 March 1, 1974.
163 Supra, note 10 (appeal on sentence) at 169.
164 As quoted in the Vancouver Sun, February 22, 1974 at 13.
165 Supra, note 9.
Relating to the Production, Manufacture, Sale and Supply of Corrugated Metal Pipe
and Related Products (Ottawa: Queen's Printer, 1970) at 2.
reasons for sentence, Lerner J. focused on the sales of culverts to the Department of Highways of Ontario over the period of almost identical bidding between December 1963 and August 1967. Data in the Crown's submission indicated that such sales totalled $7.3 million. Citing sales for the individual firms, Lerner J. stated they were "sufficient for the purpose of fixing fines."  

Regrettably, the judge appears to have significantly underestimated, primarily on the basis of the Crown’s submission on sentence, the total amount of trade effected. Between 1964 and 1967 total sales of metal culverts in Canada amounted to $103.5 million. The indictment specified Quebec and Ontario and was not limited to culverts supplied to Provincial Departments of Highways. Therefore, it appears that perhaps $50 million in sales were involved over the four years the conspiracy was effective. If prices were raised by only 1 per cent the benefits would exceed the total amount of the fines levied ($447,000 after appeal). Since the fines will be paid more than eight years after the end of the conspiracy their real impact, recognizing the time value of money, will be very small. Most assuredly, the legal fees will exceed the cost of the fines. While the latter are tax deductible, the fines are not. Perhaps it should be pointed out that five of the seven firms convicted in 1974 pleaded guilty in November 1959 to a national pricefixing conspiracy carried on between February 1925 and July 1957. The firms were fined a total of $65,000 and Armco received the largest fine, $20,000. The deterrent effect of such fines is hard to find.

(c) The Resilient Flooring Case

This price-fixing conspiracy occurred in Metro-Toronto between 1960 and 1963. The eleven conspirators accounted for 70 to 95 per cent of the value of all resilient flooring contracts for commercial or industrial installations. Over the four years the value of the contracts completed by the eleven firms was $9,943,000. Between April and September 1963 the markup on contracts averaged 33 per cent when the “fair rate” (as given by those in the trade) was 12 per cent. Even if prices were increased by one per cent (a very low figure) the benefits to the conspirators amounted to $100,000. Yet the Crown only requested maximum fines of $2,500 per firm. Altogether, the fines totalled $20,000, which would seem to be a most modest tax on the benefits of the conspiracy. The one individual charged (in addition to the eleven firms) was fined $400.

(d) R. v. Alpa Industries

In this case some thirteen lumber dealers pleaded guilty to a price-fixing agreement which lasted between February 1965 and October 1968. These firms had two-thirds of the market in the Metro-Toronto area (3-50 mile radius of the city). Their sales in 1968 totalled $15.5 million. The fines totalled (levied in 1974) $144,700, ranging from $2,500 to $25,000. The fines

107 (1975), 24 C.C.C. (2d) 147 at 151.
110 See, Report of the Director, supra, note 3, March 31, 1970 at 44.
amounted to from 0.14 per cent to 0.42 per cent of sales in 1968 alone. Since
the conspiracy was conducted over three years, the fines could only be de-
scribed as a minute toll on the firms' revenues.

(e) R. v. Burrows\textsuperscript{172}

This conspiracy case involved an agreement among the three major im-
porters and seven major distributors of Japanese oranges over an eighteen
year period (1947 through 1964). The total landed value of imports over
the period was between $45 million and $50 million; in 1964 the amount
was $4.8 million. About 90 per cent of the oranges were sold in Western
Canada. The three brokers accounted for 100 per cent at the import level
while the seven distributors accounted for close to 80 per cent of the volume
sold in Western Canada. The judge imposed fines of $98,500, the largest
being $18,000 on a firm previously convicted of a combines offence. The total
of the fines amounted to 0.22 per cent of the landed value of the oranges.
As a 'business tax' it could hardly be expected to change the behaviour of
the firms involved.

4. Fines in Resale Price Maintenance Cases

Table 6 sets out the fines in every resale price maintenance/refusal to
supply case since the section was incorporated in the \textit{Combines Investigation
Act} in 1952. For the thirty cases decided between 1954 and July 1975 (in-
cluding subsequent appeals) the total fines levied amounted to $97,805.
However, only four cases accounted for $50,000 of this total. The median
fine was only $1,500 and in 40 per cent of the cases the fine was $1,000 or
less. In only one-fifth of the cases did the fine amount to $4,000 or more.
Data summarized in Table 5 indicates that the average fine for the three cases
in the 1950's was $502. For the 1960's the average fine tripled to $1,550.
Between 1970 and 1975 the average increased to $4,953. This increase was
almost entirely accounted for by the imposition of two $10,000 fines and
two of $15,000. If these are removed, the average for 1970-75 is only $2,438.
As Table 6 indicates, for virtually all of the cases for which we have data,
the costs of prosecution outweigh the fine.

An analysis of the resale price maintenance (RPM) refusal to supply
cases since 1960 makes it clear that the majority involve distribution schemes
which are effectively national in scope. However, in reading the summary of
the cases in the Director's \textit{Annual Report} one might get the impression that
because the count or counts in the indictment are often localized that the
practice is merely local in nature. With this in mind, the average fine in RPM
cases is seen to be small indeed. The case of R. v. \textit{Black & Decker Manu-
factoring Co. Ltd.}\textsuperscript{173} provides a good illustration.

In December 1974 Black & Decker was convicted of RPM and refusal
to supply on two counts over the period September 30, 1966 to September 1,
1970. Evidence was presented indicating that the firm enjoyed 38 per cent of

\textsuperscript{172} (1968), 54 C.P.R. 95.
\textsuperscript{173} [1975] 1 S.C.R. 411; (1974), 15 C.C.C. (2d) 193; 13 C.P.R. (2d) 97; 43 D.L.R.
(3d) 393.
the Canadian market for power tools for home and construction industry use in 1967. Upon a plea of guilty, Boland, J. fined the firm $5,000 on each of the two counts and issued a prohibition order. The judge described the fine as, "a substantial penalty", and in setting it he stated that in establishing the penalty, "the protection of the public must be paramount." Given the millions of dollars of sales involved it is hard to agree with the judge. Surely the total fine in this case, the second largest on record, cannot serve as a deterrent to Black & Decker. The potential benefits of RPM are simply too great to expect rational, profit-maximizing managers not to take the risk again.

In the R. v. Browning Arms Co. of Canada Ltd. case the trial judge levied a fine of $15,000 on each of four counts of RPM for a total of $60,000. In doing so he stated, "This price fixing business by large companies is an iniquitous part of the commercial life of Canada...." In the appeal court, Arnup, J.A. (Kelly, J.A. concurring) pointed out that the company anticipated sales of $3.5 million in 1973 and gross profits of $140,000. The offences covered the years 1968 to 1971. The net profits in 1970, 1969 and 1968 were $43,500, $66,000 and $63,500 respectively. Although the Crown brought thirteen counts the firm pleaded guilty to only four. The appeal judge stated, "I think it appropriate to view the appropriate fine in this case in global terms," and he reduced the total fine from $60,000 to $10,000.

Since the trial decision in R. v. Browning Arms Co. of Canada Ltd. in September 1973, total fines of $15,000 have been awarded in two cases (R. v. Hartz Mountain Pet Supplies Ltd. and R. v. Petrofina Canada Ltd.) and, as we have noted, the fine was $10,000 in the Black & Decker case. Perhaps the example of even the reduced fines in R. v. Browning Arms Co. of Canada Ltd. encouraged later judges to set their sights higher. Certainly the Crown raised its sights when it appealed the total fine of $2,500 in the Kito carpet sweepers case and it was increased to $6,000.

5. Fines in Misleading Advertising Cases

In terms of the volume of cases misleading advertising cases outnumber conspiracy, merger, and RPM cases combined by a six to one ratio. Between April, 1960 and March, 1975 only ninety-one conspiracy, merger or RPM cases were launched compared with 572 misleading advertising cases. In the last five fiscal years (1970/71 to 1974/75) in some 482 misleading ad-

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176 Id.
178 Supra, note 117 at 1.
177 (1974), 15 C.P.R. 97 at 104.
179 Report of the Director, supra, note 3, March 31, 1974 at 44.
179 Supra, note 126.
180 Supra, note 173.
183 Supra, note 177.
188 Supra, note 25.
vertising cases charges were brought. There has been an explosion of activity in this area in the past eight years. In the three fiscal years (1966/67-1968/69) only ninety files were opened in respect of misleading advertising complaints. In 1969/70 the number was 412\(^{184}\) (effective July 15, 1969, s. 306 of the *Criminal Code* became s. 36 of the *Combines Investigation Act*). In 1970/71 the number of files opened had increased to 2,250 and in 1974/75 this number had doubled again to 5,068. The number of completed investigations increased from 753 in 1971/72 to 1,047 in 1974/75.\(^{185}\)

While the level of activity by the Bureau of Competition Policy in the area of misleading advertising has obviously been increasing very rapidly, the level of fines imposed in such cases has, with a handful of exceptions, been very low.

Table 7 provides data for three, twelve-month periods between late 1970 and early 1975. Throughout the period the fine in about two-thirds of the Section 36 cases was $200 or less. In 1970/71 the fine in 63.4 per cent of the Section 37 cases was $400 or less. In 1972/73 this proportion has declined slightly to 53.1 per cent and by 1974/75, in 45.3 per cent of the s. 37 cases the fine was in the range of $401 to $1,000. If we combine the three periods, we note that in not one s. 36 case has a fine of over $1,000 been levied. In only 16.9 per cent of the 154 s. 37 cases did the fine exceed $1,000.

In Table 8 a more detailed analysis is presented of fines in cases decided in calendar years 1973 and 1974. The average fine per s. 36 case increased from $229 to $262. This increase is most notable for individuals in terms of the first count in each case. The increase was from $44 in 1973 to $212 in 1974. The average fine per Section 37 case decreased between 1973 and 1974. This is due to the fact that the fine in one case (*Benson & Hedges*\(^{186}\) $27,500 on two counts) increased the average in 1973 from $838 to $1,347. On a first count basis, the average fine levied on corporations increased from $888 to $1,124.

A few larger fines were reported in 1974/75, all under s. 37. For example, Robert Simpson Ltd., S. C. Johnson (fabric softener) and Ameublement Leger Inc. (furniture) and Capital Sewing Centres were each fined $5,000 for one count. I.P.S. (Handicrafts) Ltd. was fined $10,000 on each of two counts. Dominion Stores was fined $8,000 on one count. The largest fine to date was imposed in Benson and Hedges in March, 1973 when the firm was fined $2,500 on the first count and $25,000 on the second under s. 37 on a plea of guilty. Previously, the largest fine was $10,000 in the Shoppers Drug Mart case in November 1972, for one count under s. 37.

In comparison to the fines levied in the great majority of misleading advertising cases, these fines seem rather large. In comparison to the potential benefits of violating the law they are small.


In *R. v. S. C. Johnson and Son Ltd.*\(^{187}\) the firm advertised that it had reduced the price of “New Formula Rain Barrel Fabric Softener.” In fact it had *not* reduced the price, but more importantly the “new formula” had so watered down the fabric softener that the instructions indicated that twice as much had to be employed as compared with the “old” formula. Pilutik, J. rejected the defendant’s contention it was all an honest mistake. He said it was coolly calculated, “and a great deal of thought was put into the plan.” He went on to say that it was “important that an example be set”\(^{188}\) — yet he imposed a fine of only $5,000 upon a plea of guilty. How can it be expected that the firm takes this small toll on its total advertising and promotion budget seriously? Such fines simply confirm that the costs of violating the law are very small relative to the benefits.

As noted, the largest fine levied to date was against Benson and Hedges Tobacco Company. The case involved a promotion for Belvedere cigarettes in 1969 and 1970 promising “instant cash certificates of $2,500 to $25,000 right out of the blue.” The Crown showed that no $25,000 certificates could have been found in 1970 although three of that amount and 39 of $2,500 were found in 1969. Mackay, J. said, “Although there were no winners in connection with this count, the Court is going to declare one winner — the Crown”\(^{189}\) and fined the firm $2,500 on the first count and $25,000 on the second. The $27,500 should be put in perspective. Between September, 1969 and June, 1970 the total advertising budget for the Belvedere promotion was $1,474,885. Therefore the fines simply increased the cost of the promotion by 1.86 per cent. If the firm had distributed the same number of $25,000 certificates in 1970 as it had in 1969 the net profit of violating the law, assuming a tax rate of 50 per cent, was some $10,500 (*i.e.*, \(0.5(25,000 \times 3) - 27,500\)). It is naive to suggest that the morality or social stigma of the offence will overcome the net economic benefits of violating the law in respect of misleading advertising.

Contrast these ‘large’ fines to the judgment in a case brought in Quebec against Koscot Interplanetary of Canada Limited. The firm was fined $175,000 or faced seizure of all its assets in Canada for its pyramid selling scheme.\(^{190}\) In the Figure Magic case involving a weight reduction scheme, the Department of Justice, following the investigation of the Bureau of Competition Policy, obtained summary convictions of the principals involved in publishing an advertisement, attesting to the benefits of the slimming scheme without adequate testing. The three men were fined a total of $1,300. In the related fraud charge, Figure Magic is alleged to have defrauded its customers of $1,414,228.\(^{191}\)

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188 Montreal *Gazette*, March 5, 1975 at 41.
E. THE NEW REMEDY — CIVIL ACTIONS

The Stage I amendments to the Combines Investigation Act (effective January 1, 1976) provide for an entirely new remedy — the right of private individuals or firms who have suffered financial damages as a result of conduct contrary to the Act to sue for single damages plus the costs of bringing the action under s. 31.1. It also provides this right for those damaged by the failure of a firm to obey an order of prohibition of either a court or the Restrictive Trade Practices Commission. The significance of this section is that it allows for the first time a breach of the statute to be the cause of a civil action. In the Transport Oil v. Imperial Oil Ltd. and the Direct Lumber Co. Ltd. v. Western Plywood Co. Ltd. cases the courts had previously ruled that a civil action could not ensue from a violation of the Act. An important element of s. 31.1 is subsection (2) which facilitates private enforcement of the Act in that the record of successful criminal proceedings by the Department of Justice and any evidence given in such proceedings is evidence in the civil suit for damages. In such cases the plaintiff's energy will be directed toward establishing the amount of damage suffered and not as to whether the Act was violated. In order that legal proceedings be undertaken fairly promptly, s. 31.1(4) provides that the civil suits must begin within two years of the time the conduct occurred or whenever criminal proceedings were completed, whichever is later.

Before attempting to appraise the potential impact of s. 31.1 we should note that it represents a substantial retreat from what was proposed in the Competition Act of June 1971. Section 55 of Bill C-256 (civil damages) provided that persons who suffered loss or damage as a result of a violation of the Act or a failure to obey an order of the Competitive Practices Tribunal would sue for an amount equal to double the damage proved to have been suffered by them. At the same time, s. 80 of the Competition Act permitted the court to award double damages, upon application of those injured, in addition to the usual criminal penalties. Pressure by business resulted in s. 31.1 of the amended Combines Investigation Act which provides for single damages plus costs in civil actions only.

What might be the potential impact of s. 31.1? First it creates a multiplicity

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of interested parties with the power to enforce the Act. This is in contrast to the ‘single policeman’ in the form of the Director of Investigation and Research. Since the Act does not require that a criminal violation be proved before a civil action is launched it seems reasonable that those most affected by restraints of trade will both bring it to the attention of the Director and begin civil actions of their own.

Secondly, s. 31.1 moves toward a restitution approach in that those damaged by restraints of trade now stand to recoup amounts wrongfully extracted from them. Criminal fines take money from the offenders but transfer it to the State — not to the victims.

Thirdly, should a significant number of civil suits be successful the effect would be to increase the costs of perpetrating illegal restraints of trade and/or increasing the probability of criminal connections since criminal actions may follow civil actions for damages. Under the previously existing state of affairs a dispassionate observer is hard put not to conclude that “crime pays,” with respect to restraints prohibited by the Combines Act. Civil suits may make the benefit/cost ratio less favourable, if not less than one.

Now for the ‘bad news’. Private civil actions resulting from violations of the Combines Act will only be undertaken by business firms and public agencies whose individual losses as a result of such restraints of trade are large in absolute terms. Where the transfers from purchasers effected by the restraint of trade are broadly distributed and individually small (as is the case for consumer goods subject to resale price maintenance) the opportunity to collect damages in civil actions is but an empty promise. This is true even if the aggregate of the individually small claims is large indeed. It is for this reason that class actions represent a much more practical remedy for final consumers.195

Examining the case of the “big losers’ and the calculus of their willingness to launch single-damage civil actions, it can be seen that, in general, they will not undertake such action unless the likely discounted real costs of such action are less than the likely discounted real benefits. More formally this can be expressed in the following inequality:

\[
\sum_{t=0}^{n} \frac{C_t}{(1+r)^t} \leq P_w \left[ \frac{L_t + D_t}{(1+r)^t} \right]
\]

where:
- \( C_t \) = costs to the firm of investigation and legal action at period \( t \)
- \( P_w \) = probability of winning a civil suit
- \( D_t \) = damages awarded by the court at period \( t \)
- \( L_t \) = investigation and legal costs awarded by the court at period \( t \)
- \( r \) = rate of discount of future costs and revenues accruing to the firm i.e. the firm’s cost of capital

Several things should be noted about this problem. At all times \( D_t \leq D_t^{*} \), where \( D_t^{*} \) represents the true amount of damage suffered by the firm as a result of the illegal restraint of trade. By definition, in s. 31.1(1) it can be said that \( L_t \leq L_t^{*} \) where \( L_t^{*} \) is the true total amount of investigation and legal costs incurred by the firm. In other words, the plaintiff firm can never be fully compensated for the loss it suffers and for the costs of obtaining re-dress. Next, even when such compensation is received it is always received some time after the losses/costs were actually incurred. Since “time is money,” even an apparent full recovery, when it is delayed, is in present value terms, a loss. Suppose a firm suffers $100,000 in damages today and recoups the same amount four years later. Ignoring legal costs and their possible recovery, and applying a discount rate of 12 per cent, the present value of the recovery is only $63,552.

Returning to the inequality, note that any legal costs, in our civil suit are a certainty and are incurred well before the date of reimbursement. More importantly, it must be realized that the size of \( L_t \) and \( D_t \) is uncertain as is the fact of whether he wins the case, i.e., \( P_w \). Finally, the inequality does not take into account the firm’s risk propensity. As it is expressed, the inequality is based on expected values and assumes risk neutrality. An example will illustrate this point as well as the others discussed above.

Suppose a firm suffers a loss of $200,000 today as a result of an illegal restraint of trade. The firm investigates and launches a legal action and incurs costs of $15,000 at the end of years 1, 2 and 3. If the firm’s suit succeeds (probability = .7) the firm is awarded $70,000 in damages and $30,000 in costs at the end of the fourth year. Assuming a discount rate of 12 per cent, these facts can be represented diagrammatically:

\[
\begin{align*}
D^* & \quad C_1 & \quad C_2 & \quad C_3 & \quad +70,000 = D_4 \\
-100,000 & \quad -15000 & \quad -15000 & \quad -15000 & \quad +30,000 = L_4 \\
n & = 0 & \quad 1 & \quad 2 & \quad 3 & \quad 4
\end{align*}
\]

The firm’s decision situation and net position can be seen in the following diagram.

\[
\begin{align*}
\text{Decision} & & & \text{Firm’s net position}^{196} \\
*\text{not sue} & & \rightarrow & = -$100,000^{197} \\
\leftrightarrow & \text{win case} \quad P_w = .7 & \rightarrow & = -$72,475^{198} \\
*\text{sue} & \quad \rightarrow & \text{lose case} \quad P_L = .3 & \rightarrow & = -$136,027^{199}
\end{align*}
\]

\[^{196}\] The firm's net position recognizes the original loss of $100,000 due to the legal restraint of trade, i.e. \( D^* = -$100,000\).

\[^{197}\] \(-$100,000 = 1.0 \times (-$100,000)\).

\[^{198}\] \(-$72,475 = -100,000 - 15,000(2.4018) \div (70,000 + 30,000) (0.63552)\).

\[^{199}\] \(-$136,027 = -$100,000 - 15,000(2.4018)\).
If the firm does not sue it suffers a certain loss of $100,000. If it sues and
wins, the firm's net loss in present value terms will be $72,475, so by winning
the case the firm is $27,525 better off. However, if the suit is unsuccessful
the firm is out the original $100,000 plus an additional $36,027. The total
expected value of taking the action to sue is

\[ 0.7(-72,475) + 0.3(-136,027) \] = $91,541.

If the firm's decision makers are risk neutral, they will elect to sue because
the expected value of not suing is $100,000. In terms of the example, it is
obvious that if the decision maker is only slightly risk averse he will not
undertake the civil suit.

Some tentative conclusions can be stated. The propensity of private par-
ties to begin civil actions will be strongly dependent on three variables:

1) their degree of risk aversion

2) the probability of winning a suit, which will depend very much
whether it has been preceded by a successful criminal action

3) the willingness of the courts to award full damages and costs and to
recognize the time-value of money in calculating the amounts they
award.

All of these variables would be much less important if the courts could award
double or treble damages as was proposed in C-256 and is the practice in the
U.S. Without such multiple damages the defendants in civil actions will say,
"Oh civil suit where is thy sting."

F. REFORMING THE PENALTIES AND REMEDIES

We have seen that a fairly wide range of potentially powerful penalties/
remedies exist with which to combat illegal restraints of trade in Canada. We
have also seen that a number of these penalties/remedies have never been
used at all or only rarely in the entire history of the legislation (changes in
tariffs, changes in patents or trademarks or their licences, structural remedies,
imprisonment). It also seems apparent that the formal penalties which have
been invoked (fines and prohibition orders), have been small relative to the
economic benefits of violating the law in respect of restraint of trade.

Our review of the fines in Canadian combines cases can only serve to
reinforce the idea that the fines have not been sufficiently large, in the words
of Brooke, J.A., "[T]o assure that there is no profit in the criminal conduct
in question." Since the morality and social stigma elements of combines of-
fences do not appear to offer non-monetary penalties, and since the other
remedies available under the Act are rarely invoked, society is dependent

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200 Erickson, supra note 153 at 117, argues that even the availability of treble
damages in the U.S. is not an adequate deterrent when the probability of getting caught,
the proportion of sales and profits actually included in the treble damage calculation, the
time lag between violation and recovery and the size of damages likely to be assessed by
the judge are all taken into account. His analysis indicates "the violations will be found
profitable under virtually all reasonably realistic assumptions."
upon fines as its method of deterrence, punishment and remedy. The historical record clearly indicates that society's reliance on such a weapon is misplaced. Criminal fines have not deterred, they have not punished and they have not provided a remedy — particularly to those directly affected by the illegal restraints of trade.

Partly because of public perceptions of white collar crimes in general, and restraint of trade offences in particular, and also because the economic benefits of violating the law are usually so great, the informal weapon of publicity has also had no apparent impact on violators or potential violators of the anti-combines laws. We have also argued that the new remedy of single-damage civil actions will be of no benefit to consumers adversely affected by illegal restraints of trade. Such actions may be of modest benefit to larger public and private entities whose absolute losses from restraints of trade will encourage them to attempt to recoup part or all of their losses, including the costs of bringing the action.

1. Public Attitudes Toward Restraint of Trade Offences — A Barrier to Reform

Perhaps the most significant barrier to the reform of the penalties and remedies in respect of illegal restraints of trade is the public perception of white collar crime in general. Although the costs imposed on consumers of illegal restraints of trade (and other white collar crimes) probably far exceed those resulting from conventional criminal behaviour, the society does not take the former offences seriously if we look at our behaviour (as opposed to rhetoric) toward them. Speaking to his private member's bill, which would require the imprisonment of the executives of firms which were repeated offenders of the Combines Investigation Act, David Orlikow (NDP — Winnipeg North) correctly characterized the situation when he said:

How different is the treatment we mete out in this country to individuals, most of them quite wealthy and important, who direct some of the largest companies in Canada and who have consistently ignored the laws of Canada prohibiting combines not once but three or more times. These people have been prosecuted and convicted and have got off scotfree, the companies they direct being given a fine of a few thousand dollars, an amount which is insignificant when compared with the business done or the profits made.

This differential approach to white collar crime in the form of combines offences has been noted by at least one judge. In R. v. Electric Reduction Company of Canada Ltd., Stark, J. pointed out that the penalty of imprisonment had never been imposed up to that time, and said "the comparative smallness of the fines I suppose can only be explained in terms of a kind of implicit judicial view which regarded anti-combines violation as being of somewhat lesser order of gravity than the commission of one of the so-called common crimes. That was reflected in the earlier state of this law when the maximum permissible fine was $10,000 in respect of a company."
Although offences against the *Combines Investigation Act* have always been *criminal* offences, they carry little of the social stigma associated with the notion of a crime as a morally blameworthy act. When it comes to crimes such as murder, rape and arson, most people have no qualms about the social reprehensibility of such acts and the fact that specific individuals should be held responsible and suffer penal consequences, *i.e.*, imprisonment. But what about the man who arranges with other men to fix prices, prevent entry of a potential rival or acquire a competitor? Are not businessmen, like lovers, inherently monopolists?\(^{204}\) Is price-fixing (even if done by elaborate overt arrangements resulting in high prices and excessive profits) morally equivalent to theft? It is apparent that most people simply do not equate the two. Yet because of the constitutional problem in Canada, anti-combines legislation results only in criminal proceedings.\(^{205}\)

Like other white collar or corporate crimes, offences in restraint of trade are simply not taken as seriously, and hence not penalized as severely, as breaking and entering or common assault. As we have seen, the state's sanctions, almost entirely in the form of fines, have been small and ineffective. Private social sanctions have been of a similar nature. For example, the conviction of a firm for a combines offence has probably never resulted in its executives being requested to leave their clubs, shunned by polite society, going on to being on the board of governors of a university or sitting in the Senate of Canada. As Rosenbluth and Thorburn point out, the criminal nature of our competition policy (until 1960 a number of the important legislative provisions were in the *Criminal Code* itself) results in a cops and robbers' approach by making crimes (for which a businessman can go to prison) out of economic acts not ordinarily considered to be crimes, either by businessmen, or by the majority of the general public.\(^{206}\) One result is that when the evidence is sufficiently overwhelming (*e.g.*, minutes of meetings at which prices have been fixed and markets carved-up) Canadian judges have convicted the defendants. However, they often do so most reluctantly, pointing out the "technical" nature of the offence and the fact that the executives involved are clearly upstanding and respected members of the community who have unwittingly gone astray.

Masten, J.A. in *R. v. Container Materials Ltd.* exemplified the judicial reasoning which failed to condemn price-fixing conspiracies as morally blameworthy acts when he said:

> I think it would be a mistake for this Court to look upon the appellants as guilty of moral turpitude or of a wicked intention. Their directors are honourable men desirous of conducting successfully the affairs of their respective companies, and if in their efforts they have by mistake over-stepped the line set by Parliament and have *unduly* lessened competition they are responsible for their unlawful act. ... Breach of the statute is one thing, moral turpitude is quite another.\(^{207}\)

\(^{204}\) This phrase is attributable to the late Professor Sumner Slichter.

\(^{205}\) As of January 1, 1976 civil procedures with respect to refusal to supply, consignment selling, exclusive dealing, tied selling and market restrictions were incorporated into the *Combines Investigation Act* under Sections 31.2 to 31.4. It is expected that the Stage II amendments will enlarge the scope of civil procedures.

\(^{206}\) *Supra*, note 21 at 9.

\(^{207}\) (1941), 3 D.L.R. 145 at 183; 76 C.C.C. 18 at 61.
In the previous paragraph the judge had asserted that "stabilization of widespread industry is no doubt lawful, and for that purpose some degree of control may be essential even though it involves a lessening of competition to a certain extent." 208 In other words, controlling the industry via price-fixing and market sharing are not morally reprehensible acts, and only become technical infractions of the law when they cross over the line between due and undue restraints of trade. Masten, J.A. seemed oblivious to the fact that this was a most elaborate and comprehensive price-fixing, market sharing cartel, in operation for at least eight years. New entrants and rogue members who threatened the price structure of the cartel were bought up at inflated prices (reflecting both the potential monopoly profits and their nuisance value). The cartel's success was manifest. In 1931 the 16 companies showed a net loss as a group. By 1937 the average rate of return on invested capital was 16.7 per cent; from 1934 through 1937 no manufacturing firm incurred any losses. The cartel made it profitable for firms not to produce. One received almost $60,000 over two years for refraining from producing when its plant was valued at less than half that amount.

In the same vein (businessmen as pillars of the community), Conservative M.P. Bill Kempling (Hamilton-Wentworth) obviously finds it hard to imagine businessmen as criminals:

In my business experience I have met businessmen from all walks of life. The vast majority are honest, sincere, law-abiding people. They contribute greatly to the economic and cultural life of Canada. They are proud of their achievements in business and the part they play in the life of the community. You will find them at various times of the week at Rotary, Lions, Optimists or Kinsmen clubs performing a public service to their community. 209

More recently, Conservative M.P. Sinclair Stevens asserted that, "[N]inety-nine per cent of the businessmen are honest and never get into criminal situations." 210 This type of reasoning recalls Ralph Nader's retort, "Do you give credit to a burglar, because he doesn't burglarize 99 per cent of the time?" The preservation of this mythology is at least partly dependent upon the reluctance of public officials to prosecute 'reputable' businessmen.

The diffidence with which the federal Department of Justice pursues combines offences is illustrated by the fact that as a matter of policy the Crown has not laid charges under the Criminal Code or Combines Investigation Act against an individual except when that person was carrying on business in his own name. 211 The result is the ludicrous spectacle of corporations (legal, not natural persons) being convicted for conspiring to fix prices while the agents of the corporation who make the decisions and carry out the legal

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208 Id. at 183 (D.L.R.); 60-61 (C.C.C.).
209 Canada: House of Commons, Debates, 1974 at 714 (March 20, 1974).
211 On occasion the Crown has prosecuted individuals closely associated with price-fixing conspiracies as well as the corporate entities involved. In such cases, the individuals were usually the organizers of the trade association which facilitated the conspiracy.
In fairness it should be pointed out that the policy of the Crown to charge legal rather than natural persons is a fairly general one for other criminal offenses involving corporations.

Even the judges recognize the lack of social stigma associated with convictions for restraint of trade. The words of Lerner, J. in the Armco case are instructive:

Realistically it cannot be said that the stigma of conviction and penalty to a large corporation, or even some smaller corporations, will reflect unfavourably on their corporate images in the business world or with the consumer public which, in the final analysis, this whole process is designed to protect. However, on occasion, unfortunately, relatively unimportant personal offenders or small businessmen operating as one shareholder corporations may suffer consequences out of all proportion to those suffered by the large impersonal corporations whose executive officers and guiding personalities are relatively anonymous. It is a sad commentary on our society that leadership and morality cannot come with some consistency from those most capable of exemplifying same. The non-violent offender, such as the thief, the embezzler, the fraudulent operator, the shoplifter, to name a few, can understandably take a cynical view of his or her condemnation by society when the institutionalized virtuosity of “big business” can engage in painstaking, time-consuming, devious schemes which give the appearance of legality to that which they must know is not only contrary to the law but at the expense of the too often unsuspecting public.

In his recent study, Deterring Corporate Crime, Gilbert Geis outlines a number of prerequisites to imposing heavier sanctions on corporate offenders. The first “involves the development of a deepening sense of moral outrage on the part of the public.” This is inhibited by the fact that the costs of corporate crime are highly diffused over a large number of victims. Most price fixing conspiracies are rarely noticed by the victims as thousands of consumers each pay a small absolute amount more. It is precisely this fact, that makes the organization of an effective consumer interest group impossible without external assistance. On the unlikely chance that corporate officials are charged there is the problem of getting a conviction and a significant sentence. Geis points out that “the judge who tries and sentences the . . . official was probably brought up in the same social class as the offender, and often shares the same economic views.” White collar criminals also benefit from two prevalent but contradictory community beliefs. “Neighbors of the corporate criminal often regard him as upright and steadfast . . . at the same time there is a cynicism among others about white-collar crime in general, a cynicism rooted in beliefs that the practices are so pervasive and endemic that reformative efforts are helpless.”

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212 There are a number of problems associated with charging individuals. If all the culpable individuals were charged in a conspiracy case, the Crown, being unable to call them as witnesses, might find it impossible to prove the offence beyond a reasonable doubt from the documentary evidence. If some conspirators are charged and others are not because they assist the Crown by testifying the matter of equity is obvious — should only singing birds be rewarded?

213 Supra, note 9 at 149-50.


215 Id. at 186.

216 Id. at 186-87.
The growing willingness to hold individual executives responsible for their actions as corporate officials may signify a change in the public's attitude toward white collar/corporate crime. This idea will be explored in more detail below.

In all, we have painted a gloomy picture of the existing state of affairs. What could be offered by way of a more positive approach to the problem of effective penalties and remedies for offences in restraint of trade?

2. Holding Individuals Responsible

The reason that the organizers of illegal restraints of trade in Canada have not gone to jail is that very few have been charged. And where they have been convicted, the Crown has not asked that businessmen convicted be put in jail. For example, in R. v. Howard Smith Paper Mills Ltd., in his reasons for sentence, Spence, J. notes:

Counsel for the Crown expressly refrained from asking for any sentence of imprisonment as to [the two individuals charged] and with that view the Court agrees.217

Yet later in his judgment Mr. Justice Spence described Mr. Turgeon as "very active in the conspiracy and had supported it enthusiastically and with considerable vigour ..."218 He went on to say,

Mr. Ivan Moffitt, the other individual accused was perhaps the most active single person in furthering the conspiracy, at any rate at the merchant level, and indeed its management must have taken a very considerable portion of his time and its fees must have supplied a considerable part of his income.219

Both men were fined the maximum amount at that time for individuals under the Criminal Code — $4,000.

The Department of Justice can begin by taking off its kid gloves and laying charges against individual executive officers of corporations involved in combines offences. This will require a change in the Department's general policy of not charging individuals for offences involving corporate entities, except under unusual circumstances. The corporate veil must be torn away and recognition given to the fact that men, not legal entities, fix prices, divide markets, negotiate mergers and administer resale price maintenance schemes. The time has come to stop the denial of individual responsibility.

At least one judge has recognized the anomaly of charging corporations and not individuals. McBride, J. noted that corporations are "artificial legal entities" and that "each one acts through human agency, officers, directors and others, men who direct the corporation's course of conduct and see that it is carried into effect."220 He went on to issue a warning to corporate executives involved in combines offences:

The officers of the accused ... and any others like-minded who may be operating in a similar manner ... need a blunt and stern warning. The operation of s. 498

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218 Id. at 219-20.
219 Id. at 220.
220 (1951), 3 W.W.R. (N.S.) 289 at 319; 13 C.R. 63 at 95; 101 C.C.C. 22 at 56.
of the Code is not confined to corporations; under it individuals may be and have been charged and convicted in the past. These men will do well to mend their ways. They need not feel comfortably secure behind their corporations. The arm of the law is long enough to reach out to them. If there be a conviction of any individual the punishment is not necessarily a fine, each convicted individual stands in the shadow of a jail sentence... let them pay regard hereafter to the rules laid down by Parliament for the regulation of their corporations.\footnote{Id. at 320.}

Recently, the Bureau of Competition Policy has been paying more than lip-service to the notion that individual executives should be held accountable for combines crimes.\footnote{On June 23, 1976 in Toronto an Information was laid against Barton Tubes Ltd. \textit{et al} and Bruce C. McLeod, General Manager of Barton Tubes in respect of Section 32 (1) (c).} As a general policy, Bureau officials now intend to proceed against individuals where the evidence is sufficient and may suggest the imposition of prison sentences where appropriate.

A few Opposition M.P.'s have called for the prosecution and jailing of individuals involved in combines offences. Arguing that fines of $25,000 or $5,000 were not effective punishment to deter corporations from combines offences, Real Caouette, Leader of the Creditistes, stated in 1963:

... there is a way to prevent trusts and cartels from exploiting the Canadian people. When we are confronted with the man responsible for a trust on sugar or some other commodity — let us amend the legislation so as to put him behind bars for 10 years.\footnote{Canada: House of Commons, Debates, 1963 at 5842, (December 13, 1963).}

David Orlikow, has every year since 1963, introduced a private members bill proposing stronger penalties. In 1964 he likened combines offences to stealing from a super-market and went on to say, "I suggest that the same kind of treatment [imprisonment] should be meted out to the company directors, to the members of the Rideau Club or the Manitoba Club in Winnipeg, who are among the most respected people in the country ... as is meted out to poor people who find it necessary to commit much smaller crimes."\footnote{Canada: House of Commons, Debates, 1964 at 4012, (June 5, 1964).}

In a message to Congress in 1914, in which he proposed what was to become the \textit{Clayton Act}, President Woodrow Wilson advocated that, "the penalties and punishments should fall not upon business itself, to its confusion and interruption, but upon the individuals who use the instrumentalties 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."\footnote{Congressional Record, Vol. 51, 1914 at 1963.}

There are a number of arguments in support of the prosecution of individuals for illegal restraints of trade. First, as we have noted, corporations are purely legal entities which can only operate through natural persons. By proceeding only against legal entities we maintain the artificiality of the face-
less corporate organization. Second, only individuals can properly be regarded as culpable and as such subject to criminal sanctions. Third, fines, particularly of the size levied in combines cases to date, do not deter corporate crime. Charging individuals, particularly high status individuals, will increase the personal cost of engaging in illegal restraints of trade. Fourth, the failure to prosecute the businessmen/organizers of corporate crime engenders disrespect for the whole system of criminal justice. In the U.S., the President's Commission on Law Enforcement and Administration of Justice put it this way:

White-collar crime affects the whole moral climate of our society. Derelictions by corporations and their managers, who usually occupy leadership positions in their communities, establish an example which tend to erode the moral base of the law . . . 226

This emphasis on individual responsibility is part of a much more widespread phenomenon of holding accountable individual decision-makers. As a recent article in Business Week put it, "the shield that protects [corporate managers] from individual accountability for corporate acts of negligence and lawlessness seems far less impregnable than it used to be." 227

U.S. Attorney-General William Saxbe has remarked, "Executives are not in the throes of an irresistible impulse when they fix prices ... they violate the law deliberately." 228 The U.S. Assistant Attorney-General for the Antitrust Division, Thomas E. Kauper has stated, "I tend to view [price-fixing] as a crime ... and I don't think we have a lot of discretion when we're dealing with crime." 229 In other words, individuals should be charged with restraint of trade offences.

The next logical step is that when individuals are found guilty in such cases the Crown should recommend jail sentences as well as fines. 230 They should not recommend fines in lieu of prison sentences. As a Vancouver Sun editorial put it after the fines were imposed in R. v. Ocean Construction Supplies Ltd. 231 cases, "why the Department of Justice should stay its hand in this regard is difficult to understand. If the objective of prosecution is to deter other possible conspirators, then jail is obviously more effective than a monetary penalty. 232

In early 1976 the U.S. Department of Justice had at least ninety price-fixing cases before grand juries. Kauper is quoted as saying, "[W]e have

226 Supra, note 214 at 183.
228 Time, November 11, 1974 at 65.
229 Quoted in "Price-Fixing: Crackdown underway", Business Week, June 2, 1974 at 42.
230 We make this recommendation recognizing the fact that imprisonment is a socially costly undertaking. Gary Becker has argued that because of these costs, and because less socially expensive penalty-deterrents are available, imprisonment should be used only very rarely for any criminal offence. See his Crime and Punishment: An Economic Approach (1968), 76 Journal of Political Economy 169.
231 Supra, note 10.
232 "Don't do it again", Vancouver Sun, March 13, 1974 at 4.
every intention of seeking felony indictments and recommending prison sentences for individuals convicted of price-fixing violations.”

Geis has emphasized the effectiveness of imprisonment as a deterrent in this context:

Jail terms have a self-evident deterrent impact on corporate officials, who belong to a social group that is exquisitely sensitive to status deprivation and censure. The white collar offender and his business colleagues, more than the narcotic addict or the ghetto mugger, are apt to learn well the lesson intended by a prison term.

Given the conservative nature of the Canadian judiciary, it is entirely possible that the judges will be unwilling to put businessmen in jail. Should this be the result, Parliament will have to legislate mandatory prison sentences for executives convicted of violations of the Combines Investigation Act. As the Vancouver Sun argued in an editorial on combines penalties, “The law must be written in a manner that leaves no option, as it does now, for less than ‘equal’ punishment of the guilty corporate officer.”

In reply to David Orlikow’s proposal to impose mandatory jail sentences on individuals convicted of combines offences, Liberal M.P. Robert Stanbury (York-Scarborough) objected on the grounds that they restricted the court’s discretion and were “inconsistent with the whole trend of current philosophy relating to minimum penalties in criminal law.” Speaking to the 1968 version of Mr. Orlikow’s private members bill, Liberal M.P. H. E. Stafford (Elgin) seemed incapable of viewing businessmen involved in illegal constraints of trade as criminals. He said that Orlikow’s bill “violates the whole philosophy of the anti-combines legislation . . . one would be inclined to think that businessmen and individuals . . . are potential criminals and that they should be dealt with severely, because the companies they manage [violate] the laws relating to combines and monopolies.”

Until recently, the jailing of business executives for antitrust violations in the U.S. has been a rare occurrence. Hamilton and Till point out that in the first five decades of the Sherman Act, only one “respectable man of business [went] to jail.” It was not until the late 1950’s that the first jail sentence was imposed in a pure price fixing case. During the 1950’s in the U.S. corporate officials were named as defendants in 39 per cent of all criminal antitrust suits. Thirty-nine received jail sentences and twelve served terms of one to six months. Green reports that between 1890 and 1970, 461 individual defendants were sentenced to prison under the U.S. antitrust laws.

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233 Quoted in Business Week, May 10, 1976 at 112.
234 Supra, note 214 at 182-83.
235 “That double standard”, Vancouver Sun, October 9, 1974 at 4.
238 Walton Hamilton and Irene Till, Antitrust in Action, TNEC Monograph No. 16, 1941 at 79.
240 Supra, note 157 at 167.
Posner indicates that in all but twenty-six criminal cases between 1890 and 1969 the sentences were immediately suspended. Only three of the men going to jail were involved in pure price-fixing arrangements, i.e., their offences did not involve labour racketeering violence. Green states that the total amount of time spent in jail by all businessmen who have violated the antitrust laws is a little under two years. Yet the electrical conspiracy alone robbed the public more than all other robberies and thefts in 1961 combined. In that case, the longest sentence was thirty days.

The U.S. judges have shown some imagination in sentencing business executives.

In a case involving price-fixing by nine paper-label companies decided in San Francisco in the Fall of 1974, U.S. District Judge Charles B. Renfrew sentenced the firms to pay fines of $10,000 to $50,000 each and eight executives were fined from $4,000 to $15,000. In addition, the executives were required to make speeches before twelve public and business groups each on the evils of price-fixing. One of the executives involved is quoted as saying "We never had any thoughts of ourselves as being thieves . . . we simply said we would not use our prices against competitors." When asked whether he thought this was illegal he replied, "Of course, I always knew I was placing myself in jeopardy. But I felt the possibility of getting caught was so small it was worth the risk."

Jailing business executives would sharply increase the personal cost of committing restraint of trade offences. In designing the penalties we do not recommend jail sentences for reason of moral righteousness, but because it would thereby increase the cost to the individuals who participate in illegal restraints of trade and should reduce their willingness to perpetrate the offence.

With remarkable frankness, some price-fixers admit they consciously flout the law, balancing the risk of discovery against a dependable gain in sales or profits. Others rationalize their actions on the grounds that their enterprises or jobs would be in mortal danger without anti-competitive price agreements.

Exhortation is commendable, but placing the responsibility for restraints of trade directly upon those who carry them out will be more effective. There seems to be a desire in other situations to hold individual executives

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241 Supra, note 157 at 167.
242 Supra, note 157 at 169. By late 1975 the U.S. Department of Justice indicated that 46 individuals had served jail terms, about one-half in the previous three years. Current policy requires the investigating officials to justify not indicting individuals suspected of knowingly violating the law on per se offences.
243 The executives were originally sentenced to jail, but the sentence was suspended in return for their appearances on the lecture circuit. "How to avoid antitrust", Business Week, January 27, 1975 at 84.
244 Business Week, June 2, 1975 at 48.
245 Id. at 42.
246 For a superb example see the editorial, "What happened to integrity?" Financial Post, March 22, 1975.
personally responsible for their acts on behalf of the enterprise. Our proposal is consistent with this more general attitude.

3. Increasing the Level of Fines

Fines levied upon corporations for restraint of trade offences must be raised to the point where it becomes unprofitable to break the law. The Economic Council in its Interim Report on Competition Policy put the matter this way: "Fines to be meaningful, should be large enough to hurt, having regard to the size of the enterprise or enterprises involved."

Stigler et al. point out that a purely remedial sanction does not provide deterrence... "that is why punishment by fine or imprisonment is an appropriate sanction for illegal price-fixing it provides deterrence." The Task Force recommended that the U.S. Department of Justice seek an upward revision in fines. Because many anti-trust offences are concealable, the Task Force argued,

...the fines must be increased to a point where they will give even the large corporation considerable pause before participating in (or condoning its officers' individual participation) an illegal conspiracy.

The appropriate level of fines must take into account five factors. The first involves an assessment of the increase in net profits (or other benefits resulting from the illegal restraint of trade. Secondly, one must consider the probability of detection, prosecution, and conviction. Fines, on average, must significantly exceed the incremental benefit of the offence to account for the odds of not getting caught. Third, in economic terms, even though the point is not recognized in most criminal cases, the size of the fines should take into account the fact they are paid some time after the benefits have been received. The economic benefits of illegal restraints of trade must not take on the character of interest free loans. Fourth, in addition to the part of the fine designed to tax off the benefits of the illegal acts, there should be a provision for a puni-

247 Very recently in Minneapolis a judge fined a roofing company $300 for a pollution offence and then ordered the firm to produce one of its officers to serve a 30-day jail sentence. "The judge said he didn't care which officer it was, since he considered all of them legally responsible for the firm's activities."

248 Ottawa, Queen's Printer, 1969 at 191.


250 Id. at 33.
tive component, at the discretion of the court, to ensure that the net financial position of the corporation is worsened as a result of its violation of the law. Only with such fines is it possible to talk of deterrence in a practical sense. Shareholders, who would otherwise be the putative beneficiaries of an illegal restraint of trade, should be penalized when their firm is involved in an offence. The responsibilities of ownership should be made apparent. Finally, we must recognize the element of risk aversion in the decision making of business executives. The greater the degree of risk aversion, ceteris paribus, the smaller the potential fine need be to deter illegal behaviour. This essentially economic approach to antitrust penalties is somewhat different from that inherent in the factors considered by Canadian judges in combines cases outlined supra. Their focus on deterrence and the protection of the public interest must be combined with the recognition that the behaviour we wish to deter is economic behaviour. The decision to engage in price-fixing resale price-maintenance or other illegal restraint of trade is not one of impulse, moral failure, or deprived socio-economic conditions. It is, by and large, one based on an implicit calculation of costs and benefits and the associated risks. We must change the relative size of the expected payoffs to deter socially undesirable business behaviour.

        Green proposes to increase corporate fines “so that up to 10 per cent of the corporations sales receipts for the years of the indictment could be assessed. A minimum fine of 1 per cent or $100,000, whichever is higher, would be levied, so as to strip judges of some of their historic abuse of discretion. The minimum would increase to 5 per cent or $500,000 for a corporation convicted of a second offence within a five-year period.”

        Breit and Elzinga offer a different proposal to determine the appropriate size of corporate fines in antitrust cases. They argue that given that executives are generally risk averse and that imprisonment and private “reparations” suits consume too much in the way of society's scarce resources, “that antitrust violations be penalized exclusively by a mandatory fine of 25 per cent of the firm’s pre-tax profits for every year of anti-competitive activity.” They continue, “The 25 per cent figure would ... not seem so high as to cause violators to go out of business, and not so onerous as to offend society's sense of absolute equity.”

        Breit and Elzinga's proposal is much more attractive in terms of the simplicity criterion and also in terms of the ease with which the fines could be calculated. We would not, however, go so far as to substitute it for all

        251 Supra, note 126 at 175. He also proposes a mandatory minimum prison term of four months for individuals on the first offence and one year for the second. But his proposals for penalties and remedies go far beyond these two points — at 174-77. If Green's proposals seem severe consider what was proposed in the Hart-Scott antitrust bill: “it mandates forfeiture to the federal government of all property involved in [an antitrust] violation.” Business Week, June 14, 1976 at 44.

other penalties for restraint of trade violations as they wish to do.\textsuperscript{253} As a practical legislative proposal we would be quite happy to endorse it in conjunction with fines and jail terms for executives found guilty of combines offences.

4. More Effort on Enforcement

A substantial increase in the effort devoted to the detection and prosecution of restraint of trade cases should be made. The objective of such an effort is to increase the probability of conviction, \textit{ceteris paribus}, and hence reduce the expected pay-off of engaging in illegal trade practices. Breit and Elzinga demonstrate that if business decision-makers are risk averters the deterrent effect of a policy of a low probability of conviction with high mandatory fines is greater than a policy of a higher probability of conviction with lower mandatory fines. This is true, it has been proved, even when the expected value of the two policies is identical.\textsuperscript{254} While Breit and Elzinga are technically correct, the practical significance of their policy recommendation is greatly exaggerated. It can be shown that even if there is a ten-fold difference in the probability of conviction, the maximum mandatory fine is equal to the additional profits from committing the offence, and that decision-makers are highly risk averse, the difference in the expected utilities under either policy is very small. In other words, the government can increase its antitrust deterrent by \textit{either} raising fines or by increasing the probability of conviction, \textit{ceteris paribus}.

The Economic Council argued that publicity and the program of compliance must be "supported by the widespread belief that infractions of the law stand a heavy risk of being detected and proceeded against and for this to exist there must be a credibly vigorous and comprehensive program of enforcement."\textsuperscript{255} The Report continued, "From the points of view of both deterrence and equity, it is not good for people to think that either they or others have a considerable chance of getting away with it."\textsuperscript{256}

To increase the probability of conviction the Bureau of Competition Policy will have to develop more sophisticated methods of detecting illegal restraints of trade. By and large, the agency has begun its investigations in response to complaints from individuals and firms affected by the alleged offence. The Director has regularly monitored the business environment through newspapers, the trade press, and the program of compliance. This must be supplemented by a more theoretically-based, \textit{active} search for violations of the Act. In recent years both the manpower and complementary resources of the Bureau have been considerably expanded. However, the total number of cases brought before the courts (excluding those for misleading advertising)

\begin{itemize}
\item \textsuperscript{253} Breit and Elzinga would substitute their mandatory fine of 25 percent of profits for all of the following: imprisonment or fines levied upon executives, private treble damage actions, and increased resources for antitrust enforcement designed to increase the probability of conviction.
\item \textsuperscript{254} \textit{Supra}, note 235 at 699-703.
\item \textsuperscript{255} Economic Council of Canada, \textit{Interim Report on Competition Policy} (Ottawa: Queen's Printer, 1969) at 190.
\item \textsuperscript{256} \textit{Id.} at 190-91.
\end{itemize}
has been small — some 91 between April 1960 and March 1975. The number of cases in recent years has not kept up with the increase in the Bureau's manpower. Perhaps the quality of the personnel needs to be upgraded or improvements made in the management of investigations and prosecutions.

5. **Class Actions and Treble Damages**

As they were enacted effective January 1, 1976, the provisions for civil damage actions, we have argued, will be ineffective in seeing that customers will be paid "reparations" for illegal restraints of trade. The remedy for this seems obvious. Permit class actions. This is precisely what is advocated by Williams in his study for the Stage II amendments to the *Combines Investigation Act*. Recently the U.S. House of Representatives passed a *parses patriae* bill permitting states to bring class actions on behalf of consumers and other groups affected by antitrust violations. "A more sweeping bill will be approved soon by the Senate Judiciary Committee."

We also argued that even for "big losers", single damage civil suits may not provide much benefit to those hurt by restraints of trade or much deterrent to those who commit them. The difficulties with such suits could be most easily overcome by allowing the courts to award double or *treble* damages. In the U.S., civil suits have been possible since the passage of the *Sherman Act* in 1890, and treble damages since the *Clayton Act* of 1914. The latter are only possible following a criminal conviction, and not following *nolo contendere* pleas or consent orders. In any event, there has been an explosion of civil suits for treble damages as the following data show:

<table>
<thead>
<tr>
<th>Period</th>
<th>Number of Private Antitrust Cases Filed</th>
<th>Average Number Per Year</th>
</tr>
</thead>
<tbody>
<tr>
<td>1890-1914</td>
<td>46</td>
<td>2</td>
</tr>
<tr>
<td>1915-1940</td>
<td>129</td>
<td>5</td>
</tr>
<tr>
<td>1942-1948</td>
<td>397</td>
<td>57</td>
</tr>
<tr>
<td>1942-1955</td>
<td>1373</td>
<td>196</td>
</tr>
<tr>
<td>1956-1961</td>
<td>1541</td>
<td>257</td>
</tr>
<tr>
<td>1963</td>
<td>1700</td>
<td>1700 (Electrical equipment cases)</td>
</tr>
<tr>
<td>1969</td>
<td>740</td>
<td>740</td>
</tr>
<tr>
<td>1972</td>
<td>1299</td>
<td>1299</td>
</tr>
<tr>
<td>1973</td>
<td>1152</td>
<td>1152</td>
</tr>
</tbody>
</table>

Currently, the number of private suits outnumber those filed by the Antitrust Division by a ratio of twenty to one. One U.S. attorney specializing in private antitrust suits argues, "Private antitrust decisions are the last bastion of

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257 *Supra*, note 25.
258 Williams, *supra*, note 195.
hope against a completely managed economy ... Today, it is private legislation rather than government legislation that constitutes the most effective deterrent.261 He attributes the rise in private suits to the failure of the government to act and "the private sector has filled the vacuum." Business attitudes are different. "Management is now result-oriented rather than concerned about being accepted at the club."262 Similar reasons are described by *Business Week*:

Dr. Irwin M. Stelzer, president of National Economic Research Associates, Inc., a large antitrust-oriented consulting firm, explains that private suits began to increase markedly following the electrical equipment price-fixing conspiracy cases in the early 1960s. State public utility commissions said, in effect, that if utilities had a remedy for overcharges as a result of antitrust violations but failed to bring suit to recover, the commission would not approve rate increases to cover the losses. The same principle applied to all corporations: Failure to pursue antitrust remedies could subject them to stockholder derivative suits. So, according to Stelzer, what had seemed to the big names in the antitrust bar as seamy litigation far beneath their notice, like chasing ambulances, suddenly became necessary and glamorous.263

Whatever the reason, private suits are paying off for something like one-half the plaintiffs. Some large awards are being made. Bane indicates that by April 1964 General Electric had settled 90 per cent of the private suits against it for $160 million. Since G.E. was able to persuade the government to allow it to deduct the full amount for tax purposes its net earnings in 1964 were reduced from $312 million to $237.3 million or from $3.44 to $2.62 per share.264 *Business Week* indicates that "city and state hospitals have collected more than $100-million from tetracycline manufacturers for claimed overcharges stemming from an alleged conspiracy among drug companies." In the plumbing fixture industry private claimants received more than $25 million.265 In the *International Telephone and Telegraph Corp. v. General Telephone & Electronics Corporations and Hawaiian Telephone Company* case, Attorney Maxwell Blecher was able to obtain divestiture relief for a private plaintiff for the first time in U.S. history.266

All of this suggests that if the amount of damages in civil suits is increased to the U.S. level, then civil enforcement of the *Combines Investigation Act* may become a most significant remedy and deterrent.267 If this nation's record on combines matters is any guide one should not be sanguine about the prospects of getting legislation allowing private treble-damage suits.

261 "The antitrust specialist and dragon slayer", *Business Week*, May 12, 1973 at 120.
264 Charles A. Bane, *supra*, note 192 at 250-51.
265 Aug. 12, 1972 at 52.
266 *Business Week*, May 12, 1973 at 120.
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>- Conspiracy, e.g. price fixing</td>
<td>(a) <em>Criminal Code</em>, S. 520 (as of 1892) Indiv.: $200-$4,000 or 2 years</td>
<td></td>
<td>(a) <em>Criminal Code</em>, S. 498 Indiv.: $200-$4,000 or 2 years</td>
<td>Both the <em>Criminal Code</em> and the <em>Combines Act</em> were changed to provide for the same penalties: Indiv.: fine at discretion of court or 2 years or both</td>
<td>Indiv.: fine at discretion of the court or 2 years</td>
</tr>
<tr>
<td>- Merger</td>
<td>Corp.: $1,000-$10,000</td>
<td></td>
<td>Corp.: $1,000-$10,000</td>
<td>Cor.: fine at discretion of the court</td>
<td>Cor.: fine at discretion of the court</td>
</tr>
<tr>
<td>- Monopoly</td>
<td>(b) <em>Combines Act</em> Indiv.: fine up to $1,000 per day Cor.: fine up to $1,000 per day</td>
<td></td>
<td>(b) <em>Combines Act</em> S. 32 Indiv.: $10,000 or 2 years Cor.: ≤ $25,000</td>
<td>Same as conspiracy, merger, monopoly</td>
<td>Same as conspiracy, merger, monopoly</td>
</tr>
<tr>
<td></td>
<td>(b) <em>Combines Act</em> not in existence</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Price discrimination/ Predatory pricing</td>
<td>not an offence</td>
<td>not an offence</td>
<td></td>
<td>(1935-1952, S. 498A of C.C.) Indiv.: ≤ $1,000 or 1 month Cor.: ≤ $5,000</td>
<td>Same as conspiracy, merger, monopoly</td>
</tr>
<tr>
<td>RPM/Refusal to supply</td>
<td>not an offence</td>
<td>not an offence</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Misleading Advertising</td>
<td>not an offence</td>
<td>not an offence</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>- Sec. 36, misrepresentation as to price</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>- Sec. 37, false and misleading advertising</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

1 Omits the period of the *Board of Commerce Act* and *Combines and Fair Prices Act*, 1919-1923.
3 Formerly Sec. 306 of the *Criminal Code*, transferred to the *Combines Investigation Act* effective July 15, 1969.
4 Sec. 722 of the *Criminal Code* provides that an individual may be fined up to $500 and imprisoned for 6 months. Sec. 647 provides that a corporation may be fined up to $1,000.
### Table 2

*Combines Investigation Act* Maximum Fines and Prison Terms as of Jan. 1, 1976

<table>
<thead>
<tr>
<th>Offence</th>
<th>Penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td>horizontal conspiracies (Sec. 32)</td>
<td>Indiv: $1,000,000 or 5 years or both Corp: $1,000,000</td>
</tr>
<tr>
<td>foreign directives (32.1)</td>
<td>Corp: fine at the discretion of the court (only)</td>
</tr>
<tr>
<td>bid rigging (32.2)</td>
<td>Indiv: fine at the discretion of the court or 5 years or both Corp: fine at the discretion of the court</td>
</tr>
<tr>
<td>conspiracy relating to professional sport (32.3)</td>
<td>Same as Sec. 32.2</td>
</tr>
<tr>
<td>mergers and monopoly (33)</td>
<td>Indiv: fine at discretion of court or 2 years Corp: fine at discretion of court</td>
</tr>
<tr>
<td>Price discrimination/Predatory pricing (34)</td>
<td>Same as Sec. 33</td>
</tr>
<tr>
<td>Misleading advertising (36 - includes materially misleading representations and those as to price)</td>
<td>(a) Conviction on indictment: Indiv: fine at discretion of court or 5 years or both Corp: fine at discretion of court (b) summary conviction Indiv: $25,000 or 1 year or both Corp: $25,000</td>
</tr>
<tr>
<td>Representations as to tests and testimonials (36.1)</td>
<td>same as Sec. 36</td>
</tr>
<tr>
<td>Double ticketing (36.2)</td>
<td>summary conviction: Indiv: $10,000 or 1 year or both Corp: $10,000</td>
</tr>
<tr>
<td>Pyramid selling (36.3)</td>
<td>same as Sec. 36</td>
</tr>
<tr>
<td>Referral selling (36.4)</td>
<td>same as Sec. 36</td>
</tr>
<tr>
<td>Sales above advertised prices (37.1)</td>
<td>summary conviction: Indiv: $25,000 or 1 year or both Corp: $25,000</td>
</tr>
<tr>
<td>Promotional contests (37.2)</td>
<td>same as Sec. 36</td>
</tr>
<tr>
<td>RPM/Refusal to supply (38)</td>
<td>same as Sec. 32.2</td>
</tr>
</tbody>
</table>
## Table 3
Size of Fines in Conspiracy Cases
1889-1975

<table>
<thead>
<tr>
<th>Case</th>
<th>Section</th>
<th>Date</th>
<th>Total fines</th>
<th>Largest fine</th>
<th>No. of Firms/Indiv. Convicted</th>
<th>Cost of Prosecution</th>
</tr>
</thead>
<tbody>
<tr>
<td>R. v. Elliott (Pres. of Ontario Coal Assoc.)</td>
<td>520</td>
<td>April 1903</td>
<td>$4,000 suspended</td>
<td>$4,000 suspended</td>
<td>0/1</td>
<td>n.a.</td>
</tr>
<tr>
<td>R. v. Master Plumbers and Steam Fitters Cooperative Assoc. et al.</td>
<td>520</td>
<td>Dec. 1903</td>
<td>10,000</td>
<td>5,000</td>
<td>2/0</td>
<td>n.a.</td>
</tr>
<tr>
<td>R. v. McGuire et al. (Ontario plumbing and heating)</td>
<td>520</td>
<td>Jan. 1906</td>
<td>10,000</td>
<td>500</td>
<td>0/38</td>
<td>n.a.</td>
</tr>
<tr>
<td>R. v. McMichael</td>
<td>520</td>
<td>June 1907</td>
<td>250</td>
<td>250</td>
<td>0/1</td>
<td>n.a.</td>
</tr>
<tr>
<td>R. v. Clarke (Pres. of Alberta Retail Lumber Dealers Assoc.)</td>
<td>498</td>
<td>Nov. 1907</td>
<td>500</td>
<td>500</td>
<td>0/1</td>
<td>n.a.</td>
</tr>
<tr>
<td>R. v. Stinson-Reeb Builders' Supply Co. Ltd. et al. (gypsum products, plasterers assoc.)</td>
<td>498</td>
<td>Jan. 1926</td>
<td>6,000</td>
<td>2,000</td>
<td>3/0</td>
<td>n.a.</td>
</tr>
<tr>
<td>Amalgamated Builders' Council (plumbing supplies)</td>
<td>498</td>
<td>May &amp; June 1930</td>
<td>26,500</td>
<td>10,000</td>
<td>1/13</td>
<td></td>
</tr>
<tr>
<td>R. v. Singer et al. (plumbing supplies includes Belyea and Weintraub)</td>
<td>498 &amp; Sec. 2 of CIA</td>
<td>Mar. &amp; April &amp; June 1931</td>
<td>17,600</td>
<td>8,000</td>
<td>0/5</td>
<td>$39,527</td>
</tr>
<tr>
<td>R. v. White et al. (plumbing supplies)</td>
<td>498 &amp; Sec. 2 of CIA</td>
<td>April 1932</td>
<td>1,100</td>
<td>100</td>
<td>0/11</td>
<td></td>
</tr>
<tr>
<td>Electrical Estimators Assoc. (Toronto electrical contractors, i.e. R. v. Alexander et al.)</td>
<td>498</td>
<td>Jan. 1932</td>
<td>26,200 (Later reduced by Order in Council in Nov. 1936 to $20,000)</td>
<td>2,500</td>
<td>7/15</td>
<td>n.a.</td>
</tr>
<tr>
<td>Canadian Basket Pool</td>
<td>498</td>
<td>Jan. 1933</td>
<td>1,500</td>
<td>100</td>
<td>0/15</td>
<td>Justice</td>
</tr>
<tr>
<td>Anthracite Coal Importers (R. v. Canadian Import Co. et al)</td>
<td>498</td>
<td>Dec. 1933</td>
<td>30,000</td>
<td>7,000</td>
<td>5/0</td>
<td>n.a.</td>
</tr>
<tr>
<td>Container Materials</td>
<td>498</td>
<td>Sept. 6 1940</td>
<td>159,000</td>
<td>10,000</td>
<td>19/1</td>
<td>47,095</td>
</tr>
<tr>
<td>W. C. Macdonald Inc. (Tobacco mfg. &amp; wholesalers, part Imperial Tobacco case)</td>
<td>32</td>
<td>Jul. 26 1941</td>
<td>15,000</td>
<td>15,000</td>
<td>1/0</td>
<td>42,034</td>
</tr>
<tr>
<td>H. J. Badden, Bathurst Power &amp; Paper (Shipping Material Assoc.)</td>
<td>498</td>
<td>Mar. 1942</td>
<td>17,000</td>
<td>5,000</td>
<td>4/1</td>
<td>See Container Materials</td>
</tr>
<tr>
<td>Hobbs Glass</td>
<td>498</td>
<td>Oct. 6 1950</td>
<td>44,000</td>
<td>10,000</td>
<td>8/1</td>
<td>17,825</td>
</tr>
<tr>
<td>McGavin Bakeries</td>
<td>498</td>
<td>Oct. 2 1951</td>
<td>20,000</td>
<td>10,000</td>
<td>6/0</td>
<td>111,156</td>
</tr>
<tr>
<td>Goodyear Tire &amp; Rubber (mechanical rubber goods)</td>
<td>498</td>
<td>Sept. 24 1953</td>
<td>50,000*</td>
<td>10,000</td>
<td>5/0</td>
<td>34,927</td>
</tr>
<tr>
<td>Dominion Rubber (rubber footwear)</td>
<td>498</td>
<td>Nov. 23 1953</td>
<td>80,000*</td>
<td>10,000</td>
<td>8/0</td>
<td>5,834</td>
</tr>
</tbody>
</table>
Table 3 (continued)

<table>
<thead>
<tr>
<th>Case</th>
<th>Section</th>
<th>Date</th>
<th>Total fines</th>
<th>Largest fine</th>
<th>No. of Firms/Indiv. Convicted</th>
<th>Cost of Prosecution</th>
</tr>
</thead>
<tbody>
<tr>
<td>Firestone Tire &amp; Rubber (rubber tires)</td>
<td>498</td>
<td>Nov. 23 1953</td>
<td>90,000*</td>
<td>10,000</td>
<td>9/0</td>
<td>13,187*</td>
</tr>
<tr>
<td>Howard Smith (fine papers)</td>
<td>498</td>
<td>June 22 1954</td>
<td>242,000*</td>
<td>10,000</td>
<td>28/1</td>
<td>100,919*</td>
</tr>
<tr>
<td>Crown Zellerbach</td>
<td>498</td>
<td>May 6 1955</td>
<td>58,000*</td>
<td>8,000</td>
<td>10/0</td>
<td>63,520*</td>
</tr>
<tr>
<td>R. v. Morrey et al. (Retail Merchants Assoc. of Canada)</td>
<td>2(1)(e)</td>
<td>Oct. 24 1955</td>
<td>1.00</td>
<td>1.00</td>
<td>1/0</td>
<td>27,576*</td>
</tr>
<tr>
<td>John W. Fogg Ltd. (Timmins Coal)</td>
<td>498</td>
<td>Mar. 13 1956</td>
<td>3,650*</td>
<td>1,000</td>
<td>2/6</td>
<td>7,869*</td>
</tr>
<tr>
<td>Northern Electric (cable)</td>
<td>498</td>
<td>Apr. 30 1956</td>
<td>82,000*</td>
<td>10,000</td>
<td>10/0</td>
<td>35,617*</td>
</tr>
<tr>
<td>Dominion Steel &amp; Coal (wire fencing)</td>
<td>498</td>
<td>May 23 1956</td>
<td>60,000*</td>
<td>10,000</td>
<td>6/0</td>
<td>43,218*</td>
</tr>
<tr>
<td>Quilting Case</td>
<td>498</td>
<td>Oct. 3 1957</td>
<td>6,000*</td>
<td>1,000</td>
<td>6/3</td>
<td>7,047*</td>
</tr>
<tr>
<td>D.R. Adams (Winnipeg Coal Case)</td>
<td>498</td>
<td>Nov. 12 1957</td>
<td>20,000*</td>
<td>2,500</td>
<td>11/11</td>
<td>20,985*</td>
</tr>
<tr>
<td>Link Belt Limited (conveyor equipment)</td>
<td>498</td>
<td>Nov. 22 1957</td>
<td>52,000*</td>
<td>10,000</td>
<td>7/0</td>
<td>40,648*</td>
</tr>
<tr>
<td>Johns Manville (asphalt roofing)</td>
<td>498</td>
<td>Jan. 7 1958</td>
<td>110,000*</td>
<td>10,000</td>
<td>11/0</td>
<td>40,500*</td>
</tr>
<tr>
<td>R. v. Gair et al. and R. v. Bathurst Pulp and Paper et al. (boxboard case)</td>
<td>498</td>
<td>Nov. 10 1958</td>
<td>65,000*</td>
<td>10,000</td>
<td>14/0</td>
<td>17,796*</td>
</tr>
<tr>
<td>Armco (metal culverts)</td>
<td>411</td>
<td>Nov. 13 1959</td>
<td>65,000*</td>
<td>20,000</td>
<td>5/0</td>
<td>25,878*</td>
</tr>
<tr>
<td>Ablibi (pulpwood)</td>
<td>498</td>
<td>Jun 15 1960</td>
<td>240,000</td>
<td>25,000</td>
<td>17/0</td>
<td>62,854*</td>
</tr>
<tr>
<td>Electrical Contractors Assoc. of Ontario</td>
<td>498</td>
<td>Jun. 15 1960</td>
<td>7,500*</td>
<td>7,500</td>
<td>1/0</td>
<td>21,155*</td>
</tr>
<tr>
<td>R. v. C.W. Dent</td>
<td>411</td>
<td>Nov. 28 1961</td>
<td>7,500*</td>
<td>7,500</td>
<td>0/1</td>
<td></td>
</tr>
<tr>
<td>Coal — Sault Ste. Marie</td>
<td>411</td>
<td>Sept. 6 1961</td>
<td>15,000*</td>
<td>8,000</td>
<td>3/0</td>
<td>7,850*</td>
</tr>
<tr>
<td>Eastern Sugar</td>
<td>498</td>
<td>Mar. 18 1963</td>
<td>75,000*</td>
<td>25,000</td>
<td>3/0</td>
<td>26,008*</td>
</tr>
<tr>
<td>Belt Mfg. Assoc. of Montreal</td>
<td>411</td>
<td>Sept. 16 1963</td>
<td>300*</td>
<td>300</td>
<td>1/0</td>
<td>5,224*</td>
</tr>
<tr>
<td>R. v. Civil Const. et al. (sewers and water mains)</td>
<td>32(1)(c)</td>
<td>Nov. 27 1964</td>
<td>3,000*</td>
<td>1,000</td>
<td>5/0</td>
<td>4,890*</td>
</tr>
<tr>
<td>Eagle Pencil</td>
<td>32(1)(c)</td>
<td>Mar. 28 1966</td>
<td>16,000*</td>
<td>8,000</td>
<td>4/0</td>
<td>14,960*</td>
</tr>
<tr>
<td>Brantford Trucking</td>
<td>32(1)(c)</td>
<td>Sep. 20 1966</td>
<td>1,000*</td>
<td>1,000</td>
<td>1/0</td>
<td>12,749*</td>
</tr>
<tr>
<td>Windsor Ready-Mix Concrete</td>
<td>32(1)(c)</td>
<td>Sept. 15 1966</td>
<td>13,500*</td>
<td>4,000</td>
<td>4/0</td>
<td>7,215*</td>
</tr>
<tr>
<td>Paperboard Shipping Containers</td>
<td>498(1)(d)</td>
<td>Nov. 24 1956</td>
<td>391,500*</td>
<td>75,000</td>
<td>20/0</td>
<td>107,220*</td>
</tr>
<tr>
<td>Montreal Linen Supply</td>
<td>32(1)(c)</td>
<td>Mar. 9 1967</td>
<td>17,500*</td>
<td>5,000</td>
<td>18/4</td>
<td>28,745*</td>
</tr>
<tr>
<td>Deschenes Const. et al. (Hull street paving)</td>
<td>32(1)(c)</td>
<td>Mar. 20 1967</td>
<td>9,000*</td>
<td>1,500</td>
<td>7/0</td>
<td>2,501*</td>
</tr>
<tr>
<td>Case</td>
<td>Section Date</td>
<td>Total Fines</td>
<td>Largest fine</td>
<td>No. of Firms/ Indiv. Convicted</td>
<td>Cost of Prosecution</td>
<td></td>
</tr>
<tr>
<td>-------------------------------------------</td>
<td>--------------------</td>
<td>-------------</td>
<td>--------------</td>
<td>---------------------------------</td>
<td>---------------------</td>
<td></td>
</tr>
<tr>
<td>Mandarin Oranges</td>
<td>32(1)(c) Nov. 20</td>
<td>98,500*</td>
<td>18,000</td>
<td>10/0</td>
<td>90,917*</td>
<td></td>
</tr>
<tr>
<td>Import Pool Cars (J. W. Mills)</td>
<td>32(1)(c) Apr. 1</td>
<td>20,000*</td>
<td>10,000</td>
<td>3/0</td>
<td>37,171*</td>
<td></td>
</tr>
<tr>
<td>Alberta Plumbing Supplies</td>
<td>411(1)(c) Feb. 26</td>
<td>64,000*</td>
<td>15,000</td>
<td>8/0</td>
<td>33,731*</td>
<td></td>
</tr>
<tr>
<td>Laminated Beams</td>
<td>32(1)(c) Apr. 26</td>
<td>12,500*</td>
<td>4,000</td>
<td>5/0</td>
<td>3,177*</td>
<td></td>
</tr>
<tr>
<td>Montreal Plumbing Supplies (wholesale group)</td>
<td>32(1)(c) Oct. 18</td>
<td>32,500*</td>
<td>5,000</td>
<td>12/0</td>
<td>13,701*</td>
<td></td>
</tr>
<tr>
<td>Montreal Plumbing Supplies (industrial group)</td>
<td>32(1)(c) Oct. 18</td>
<td>25,000*</td>
<td>5,000</td>
<td>5/0</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Burns Foods</td>
<td>32(1)(c) June 3</td>
<td>15,800</td>
<td>5,000</td>
<td>3/4</td>
<td>11,589*</td>
<td></td>
</tr>
<tr>
<td>Resilient Flooring</td>
<td>32(1)(c) Sept. 8</td>
<td>20,000*</td>
<td>2,500</td>
<td>11/0</td>
<td>7,637*</td>
<td></td>
</tr>
<tr>
<td>Lathing &amp; Plastering (Toronto)</td>
<td>32(1)(c) Nov. 20</td>
<td>75,000*</td>
<td>10,000</td>
<td>11/0</td>
<td>18,896*</td>
<td></td>
</tr>
<tr>
<td>B.C. Pharmacists</td>
<td>32(1)(c) Nov. 27</td>
<td>10,000</td>
<td>10,000</td>
<td>1/0</td>
<td>3,067*</td>
<td></td>
</tr>
<tr>
<td>Toronto Ready Mix Concrete</td>
<td>32(1)(c) Apr. 17</td>
<td>245,000*</td>
<td>35,000</td>
<td>12/0</td>
<td>Justice</td>
<td></td>
</tr>
<tr>
<td>Quebec Tavern Keepers</td>
<td>32(1)(c) Dec. 3</td>
<td>250*</td>
<td>250</td>
<td>1/0</td>
<td>n.a.</td>
<td></td>
</tr>
<tr>
<td>Ocean Const. Supplies&lt;sup&gt;g&lt;/sup&gt; (Vancouver, ready mix)</td>
<td>32(1)(c) Mar. 11</td>
<td>137,000*</td>
<td>65,000</td>
<td>4/0</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Victoria, (ready mix)</td>
<td>32(1)(c) &quot;</td>
<td>45,000*</td>
<td>30,000</td>
<td>2/0</td>
<td></td>
<td></td>
</tr>
<tr>
<td>B.C. cement</td>
<td>32(1)(c) &quot;</td>
<td>250,000*</td>
<td>125,000</td>
<td>5/0</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Toronto Lumber dealers (Alpa)</td>
<td>32(1)(c) June 26</td>
<td>144,000*</td>
<td>25,000</td>
<td>13/0</td>
<td>Justice</td>
<td></td>
</tr>
<tr>
<td>Armo (metal culverts)</td>
<td>32(1)(c) Sept. 25</td>
<td>447,000*</td>
<td>125,000</td>
<td>7/0</td>
<td>n.a.</td>
<td></td>
</tr>
<tr>
<td>Newfoundland Auto Parts</td>
<td>32(1)(c) June 16</td>
<td>32,000*</td>
<td>6,500</td>
<td>7/0</td>
<td>15,346*</td>
<td></td>
</tr>
<tr>
<td>Nova Scotia Fire Insurance&lt;sup&gt;h&lt;/sup&gt;</td>
<td>32(1)(c) Dec. 18</td>
<td>340,700*</td>
<td>15,000</td>
<td>73/0</td>
<td>41,212*</td>
<td></td>
</tr>
</tbody>
</table>

<sup>1</sup> Includes legal fees, witness fees, court reporters fees, disbursements, and travel for non-permanent staff for prosecution only, not investigation.

<sup>2</sup> Same as 1 but also includes travel expenses of regular employees of Director of Investigation and research.

<sup>3</sup> Includes professional fees and expenses and travel expenses of regular employees. n.a. — Data not available.

Justice — Prosecution handled by Department of Justice, no data available.

<sup>4</sup> Includes trade associations.

<sup>5</sup> Includes two partnerships and one individual.

<sup>6</sup> Counted as one case involving six separate companies.

<sup>*</sup> Order of Prohibition also issued.

Notes

Sources: Data provided by Miss B. Dench, Bureau of Competition Policy, Department of Consumer and Corporate Affairs, Ottawa.
Table 4
Size of Fines in Merger and Monopoly Cases, Combines Investigation Act

<table>
<thead>
<tr>
<th>Section</th>
<th>Date</th>
<th>Total Fine</th>
<th>Largest Fine</th>
<th>No. of Firms Convicted</th>
<th>Cost of Prosecution</th>
</tr>
</thead>
<tbody>
<tr>
<td>R. v. Eddy Match et al.</td>
<td>Oct. 29, 1951</td>
<td>$85,000</td>
<td>$25,000</td>
<td>5</td>
<td>$22,245</td>
</tr>
<tr>
<td>R. v. Electric Reduction Company of Canada (pleaded guilty)</td>
<td>Jan 12, 1970</td>
<td>40,000^2</td>
<td>40,000</td>
<td>1</td>
<td>38,535</td>
</tr>
</tbody>
</table>

Notes
1 Date of trial judgment or sentence. There were no successful prosecutions before 1951.
2 Order of Prohibition issued.
Source: See Table 5.
### Table 5

Average Fine per Firm in Combines Cases
1889-1975

<table>
<thead>
<tr>
<th>Period, cases dated by date of sentence</th>
<th>Conspiracy Cases</th>
<th>Merger &amp; Monopoly Maintenance Cases</th>
<th>Resale Price Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>individuals</td>
<td>firms</td>
<td>firms</td>
</tr>
<tr>
<td>1889-1910</td>
<td>$269</td>
<td>$5,000</td>
<td>no</td>
</tr>
<tr>
<td></td>
<td>3 cases,</td>
<td>1 case,</td>
<td></td>
</tr>
<tr>
<td></td>
<td>40 indiv.</td>
<td>2 firms</td>
<td></td>
</tr>
<tr>
<td>1911-1925</td>
<td>no successful</td>
<td>no</td>
<td>not applicable</td>
</tr>
<tr>
<td></td>
<td>prosecutions</td>
<td>cases</td>
<td>did not become</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>an offence</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>until 1952</td>
</tr>
<tr>
<td>1926-1942</td>
<td>$843</td>
<td>$2,774</td>
<td>no</td>
</tr>
<tr>
<td></td>
<td>7 cases,</td>
<td>7 cases,</td>
<td>convic-</td>
</tr>
<tr>
<td></td>
<td>61 indiv.</td>
<td>42 firms</td>
<td>tions</td>
</tr>
<tr>
<td>1943-1949</td>
<td>no successful</td>
<td>no</td>
<td></td>
</tr>
<tr>
<td></td>
<td>prosecutions</td>
<td>cases</td>
<td></td>
</tr>
<tr>
<td>1950-1959</td>
<td>$5647</td>
<td>$7,046</td>
<td>$17,000</td>
</tr>
<tr>
<td></td>
<td>5 cases,</td>
<td>17 cases,</td>
<td>3 cases</td>
</tr>
<tr>
<td></td>
<td>21 indiv.</td>
<td>147 firms</td>
<td>3 firms</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1960-1969</td>
<td>$9441</td>
<td>$7,576</td>
<td>no</td>
</tr>
<tr>
<td></td>
<td>3 cases,</td>
<td>21 cases,</td>
<td>11 cases,</td>
</tr>
<tr>
<td></td>
<td>9 indiv.</td>
<td>152 firms</td>
<td>11 firms,</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1970-1975</td>
<td>none</td>
<td>$13,758</td>
<td>$40,000</td>
</tr>
<tr>
<td></td>
<td>convicted</td>
<td>8 cases,</td>
<td>16 cases,</td>
</tr>
<tr>
<td></td>
<td>120 firms,</td>
<td>5 firms</td>
<td>16 firms,</td>
</tr>
</tbody>
</table>

**Notes**

1. In one case, *R. v. C. W. Dent*, the individual was fined $7,500.
2. Includes the Nova Scotia fire insurance case in which 73 firms were fined a total of $340,700. This case is under appeal to the Supreme Court.
3. Three cases involved, both individuals and firms.
4. Includes refusal to supply cases.
5. In both the *Canadian Breweries* and *B.C. Sugar* cases, decided in 1960, the accused were acquitted.
7. Three partnerships involving 10 persons were counted as three individuals.
8. If we eliminate the Armco case the average falls to $10,654. If we eliminate the B.C. cement case it falls to $10,693, and if both are removed from the calculation the average fine is $8,149.
9. Includes K. C. Irving case under appeal to the Supreme Court of Canada, four firms fined $150,000.
11. To July 10, 1975. If the two cases involving fines of $10,000 and the two resulting in fines of $15,000 each are excluded, the average falls to $2,438.
12. In the B.C. cement case there were three separate indictments involving seven legal entities. One company was the same firm under a different name due to corporate reorganization. One company was charged in all three indictments. This has been counted as one case involving six firms.

**Sources:** Reported and unreported judgments and unpublished data provided by Miss B. Dench, Bureau of Competition Policy, Dept. of Consumer and Corporate Affairs, Ottawa.
Table 6

RPM/Refusal to Supply Cases: Fines Imposed 1954 to 1975

<table>
<thead>
<tr>
<th>Cases</th>
<th>Section</th>
<th>Date Fine Imposed</th>
<th>Total Fine</th>
<th>No. of Firms/Indiv. convicted</th>
<th>Costs of Prosecution</th>
</tr>
</thead>
<tbody>
<tr>
<td>Joseph Menard (Chicoutimi household supplies)</td>
<td>34</td>
<td>Nov. 18/54</td>
<td>$5.00</td>
<td>0/1</td>
<td>$376^1</td>
</tr>
<tr>
<td>Parmati-Steiner (Royal Doulton China)</td>
<td>34</td>
<td>Nov. 17/54</td>
<td>$1,000</td>
<td>1/0</td>
<td>1,288^1</td>
</tr>
<tr>
<td>Moffats Ltd. (large appliances)</td>
<td>34</td>
<td>Sept. 21/56</td>
<td>$500*</td>
<td>1/0</td>
<td>8,207^2</td>
</tr>
<tr>
<td>Kralinator (oil filters)</td>
<td>34(2)(b)</td>
<td>Nov. 21/62</td>
<td>$1,500</td>
<td>1/0</td>
<td>4,180^2</td>
</tr>
<tr>
<td>Cooper-Campbell (surgical supplies)</td>
<td>34(2)(b)</td>
<td>May 25/64</td>
<td>$300</td>
<td>0/1</td>
<td>11,484^3</td>
</tr>
<tr>
<td>Sunbeam (small appliances)</td>
<td>34(2)(b)</td>
<td>Mar. 18/66</td>
<td>$2,000*</td>
<td>1/0</td>
<td>22,278^3</td>
</tr>
<tr>
<td>Phillips Appliances Ltd.</td>
<td>34(2)(a)</td>
<td>Sept. 26/66</td>
<td>$1,000*</td>
<td>1/0</td>
<td>See below</td>
</tr>
<tr>
<td>Coutts Cards</td>
<td>34(2)(a)</td>
<td>Oct. 17/66</td>
<td>$500</td>
<td>1/0</td>
<td>7,323^2</td>
</tr>
<tr>
<td>Phillips Electronic Industries</td>
<td>34(2)(a)</td>
<td>Jan. 29/68</td>
<td>$500</td>
<td>1/0</td>
<td></td>
</tr>
<tr>
<td>Phillips Industries</td>
<td>34(2)(a)</td>
<td></td>
<td>$500</td>
<td>1/0</td>
<td>29,774^4+</td>
</tr>
<tr>
<td>Phillips Appliances</td>
<td>34(2)(a)</td>
<td></td>
<td>$6,000</td>
<td>1/0</td>
<td></td>
</tr>
<tr>
<td>John Huston (Leatheric cosmetics)</td>
<td>34(2)(b)</td>
<td>Jan. 28/69</td>
<td>$1,200*</td>
<td>1/0</td>
<td>Justice</td>
</tr>
<tr>
<td>Head Ski</td>
<td>34(2)(a)</td>
<td>June 19/69</td>
<td>$2,800*</td>
<td>1/0</td>
<td>Justice</td>
</tr>
<tr>
<td>Thomas Products (cosmetics)</td>
<td>34(2)(b)</td>
<td>Aug. 27/69</td>
<td>$750*</td>
<td>1/0</td>
<td>631^2</td>
</tr>
<tr>
<td>Herdt &amp; Charton (cosmetics)</td>
<td>34(2)(a)</td>
<td>May 1/70</td>
<td>$1,000*</td>
<td>1/0</td>
<td>Justice</td>
</tr>
<tr>
<td>Magnasonic (stereo &amp; hi-fi equipment)</td>
<td>34(2)(a)</td>
<td>March 2/72</td>
<td>$2,000*</td>
<td>1/0</td>
<td>Justice</td>
</tr>
<tr>
<td>Arrow Petroleum</td>
<td>38(2)(a)</td>
<td>June 21/72</td>
<td>$1,500</td>
<td>1/0</td>
<td>1,383^3</td>
</tr>
<tr>
<td>Corning Glass</td>
<td>34(2)(a)</td>
<td>Dec. 6/72</td>
<td>$3,250</td>
<td>1/0</td>
<td></td>
</tr>
<tr>
<td>Pfizer (soil fumigant)</td>
<td>38(2)(a)</td>
<td>April 19/73</td>
<td>$1,500*</td>
<td>1/0</td>
<td></td>
</tr>
<tr>
<td>Browning Arms (guns and ammunition)</td>
<td>38(2)(b)</td>
<td>Sept. 19/73</td>
<td>$10,000*</td>
<td>1/0</td>
<td></td>
</tr>
<tr>
<td>Croydon Mfg. (garments)</td>
<td>38(3)(b)(i)</td>
<td>May 3/74</td>
<td>$1,000</td>
<td>1/0</td>
<td></td>
</tr>
<tr>
<td>Rubbermaid</td>
<td>38(2)(a)</td>
<td>Oct. 7/74</td>
<td>$3,000*</td>
<td>1/0</td>
<td></td>
</tr>
<tr>
<td>Hartz Mountain (pet supplies)</td>
<td>38(2)(a)</td>
<td>Oct. 15/74</td>
<td>$15,000*</td>
<td>1/0</td>
<td></td>
</tr>
<tr>
<td>Petrofina</td>
<td>34(2)</td>
<td>Sept. 24/74</td>
<td>$15,000*</td>
<td>1/0</td>
<td>2,493^4</td>
</tr>
<tr>
<td>Lepages (waterproofing compound)</td>
<td>38(2)</td>
<td>Dec. 16/74</td>
<td>$4,000*</td>
<td>1/0</td>
<td></td>
</tr>
<tr>
<td>Black &amp; Decker (power tools)</td>
<td>38(2)(b)</td>
<td>Dec. 17/74</td>
<td>$10,000*</td>
<td>1/0</td>
<td></td>
</tr>
<tr>
<td>C. E. Springer (dist. of Rubbermaid products)</td>
<td>38(2)(a)</td>
<td>April 18/75</td>
<td>$3,000*</td>
<td>1/0</td>
<td></td>
</tr>
<tr>
<td>Burlington Ind. (pantyhose)</td>
<td>38(3)(b)(i)</td>
<td>June 16/75</td>
<td>$2,000</td>
<td>1/0</td>
<td></td>
</tr>
<tr>
<td>A. T. Radies (carpet sweepers)</td>
<td>38(2)</td>
<td>April 15/75</td>
<td>$1,000*</td>
<td>0/1</td>
<td></td>
</tr>
<tr>
<td>Kito Canada (carpet sweepers)</td>
<td>38(2)</td>
<td>July 10/75</td>
<td>$6,000*</td>
<td>1/0</td>
<td></td>
</tr>
</tbody>
</table>

Notes

* Order of Prohibition also imposed.

^ Increased from $2,500 on appeal.

Reduced on appeal from $60,000 for four counts.

For definitions of 1, 2, 3 see Table 3; Justice = handled by Dept. of Justice staff.

Source: See Table 5.
### Table 7

**Fines in Misleading Advertising Cases**

<table>
<thead>
<tr>
<th>Total fine, all counts</th>
<th>Oct. 13/70 to Oct. 15/71 (Sec. 33C, later S. 36)</th>
<th>Oct. 15/71 to Feb. 9/72 (Sec. 33D, later S. 37)</th>
<th>Feb. 9/72 to Feb. 9/73 (Sec. 36)</th>
<th>April 1/74 to May 31/75 (Sec. 36)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Under $100</td>
<td>6</td>
<td>15</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>$101 - 200</td>
<td>12</td>
<td>15</td>
<td>3</td>
<td>9</td>
</tr>
<tr>
<td>$201 - 400</td>
<td>4</td>
<td>5</td>
<td>10</td>
<td>4</td>
</tr>
<tr>
<td>$401 - 1000</td>
<td>3</td>
<td>3</td>
<td>14</td>
<td>2</td>
</tr>
<tr>
<td>$1001 - 3000</td>
<td>—</td>
<td>—</td>
<td>7</td>
<td>9</td>
</tr>
<tr>
<td>Over $3000</td>
<td>—</td>
<td>—</td>
<td>2¹</td>
<td>—</td>
</tr>
<tr>
<td>Total Number</td>
<td>25</td>
<td>24</td>
<td>49</td>
<td>17</td>
</tr>
</tbody>
</table>

**Notes:**

¹ One fine of $5,000 and one of $10,000.
² Four fines of $5,000, one of $8,000, and one of $20,000.

**Sources:** Reply to House of Commons question 1860, Mr. Orlikow, Oct. 13, 1971 and to question 871, Mr. Orlikow, Feb. 12, 1973; Tabulation by author from *Report of the Director of Investigation and Research, Combines Investigation Act*, for the year ended March 31, 1975, Ottawa, Queen's Printer, 1975, Appendix II.
## Table 8
Disposition of Misleading Advertising Cases
Calendar 1973 and 1974

<table>
<thead>
<tr>
<th></th>
<th>Section 36 1973</th>
<th>1974</th>
<th>Section 37 1973</th>
<th>1974</th>
</tr>
</thead>
<tbody>
<tr>
<td>Charges Laid</td>
<td>26</td>
<td>40</td>
<td>69</td>
<td>102</td>
</tr>
<tr>
<td>Acquittals</td>
<td>6</td>
<td>10</td>
<td>15</td>
<td>30</td>
</tr>
<tr>
<td>Convictions</td>
<td>20</td>
<td>30</td>
<td>54</td>
<td>72</td>
</tr>
<tr>
<td>Average Fine - per case¹</td>
<td>$229</td>
<td>$262</td>
<td>$1,347²</td>
<td>$1,160</td>
</tr>
<tr>
<td>Average Fine/All counts</td>
<td>$191</td>
<td>$207</td>
<td>$836³</td>
<td>$739</td>
</tr>
</tbody>
</table>
| Average Fine/1st count only  
  – corporations     | $247           | $293 | $888          | $1,124|
|                     | $44            | $212 | $532          | $316  |
|                     | $204³          | $242⁴ | $711⁵       | $890⁶ |
| Total Fines in the Year | $4,575      | $7,852 | $72,725   | $83,525|
| Prohibition Orders  | 2              | 2    | 11             | 5     |
| Other (jail only, discharge, restitution) | —           | 3    | —             | 3     |

### Notes

¹ Incorporates multiple counts and both individuals and corporations.
² In the Benson & Hedges case the firm was fined $2,500 on the first count and $25,000 on the second.
³ Based on 19 first count convictions.
⁴ In 3 cases sentences were suspended, hence there were no fines.
⁵ Fines imposed in lump sum against 4 accused have been averaged to determine fines by count. i.e. $500 total on 4 counts has been treated as $125 fine 1st count, etc.
⁶ Based on 69 first count convictions in three of which no fine was imposed.

**Source:** Ms. Tandy Muir-Warden, Bureau of Competition Policy, Dept. of Consumer and Corporate Affairs, Ottawa.
Combines Investigation

Table 9
Price Indices 1889-1975

<table>
<thead>
<tr>
<th>Year</th>
<th>Consumer Price Index 1949 = 100</th>
<th>Wholesale Price Index 1935-39 = 100</th>
</tr>
</thead>
<tbody>
<tr>
<td>1889</td>
<td>n.a.</td>
<td>65.8</td>
</tr>
<tr>
<td>1900</td>
<td>34.5</td>
<td>62.1</td>
</tr>
<tr>
<td>1903</td>
<td>n.a.</td>
<td>67.1</td>
</tr>
<tr>
<td>1910</td>
<td>45.1</td>
<td>77.8</td>
</tr>
<tr>
<td>1926</td>
<td>75.8</td>
<td>128.5</td>
</tr>
<tr>
<td>1931</td>
<td>67.8</td>
<td>93.2</td>
</tr>
<tr>
<td>1942</td>
<td>72.9</td>
<td>123.0</td>
</tr>
<tr>
<td>1950</td>
<td>102.9</td>
<td>211.2</td>
</tr>
<tr>
<td>1955</td>
<td>116.4</td>
<td>218.9</td>
</tr>
<tr>
<td>1961</td>
<td>129.2</td>
<td>233.3</td>
</tr>
<tr>
<td>1967</td>
<td>149.0</td>
<td>266.8</td>
</tr>
<tr>
<td>1970</td>
<td>167.6</td>
<td>286.4</td>
</tr>
<tr>
<td>June 1975</td>
<td>178.2</td>
<td>483.9</td>
</tr>
</tbody>
</table>


G. POSTSCRIPT

On November 16, 1976 the Supreme Court of Canada, in a unanimous decision written by Chief Justice Bora Laskin, upheld the decision of the New Brunswick Court of Appeal which acquitted K. C. Irving Ltd. et al. of several counts of merger and monopoly violations of the Combines Investigation Act. The essence of the decision was that while the Irving interest's ownership of all five English-language daily newspapers in New Brunswick amounted to monopoly control, the Crown had not established that the monopoly had been operated “to the detriment or against the interest of the public...” Consequently the entry for *R. v. K. C. Irving* in Table 4 should be deleted and in Table 5 the entry for the period 1970-1975 in the “Merger and Monopoly” column should be changed to $40,000 for one case and one firm (the ERCO case). This decision along with the acquittal in *R. v. Allied Chemical* (in which leave to appeal was denied) and the acquittal on the monopoly charge of Canadian General Electric, Westinghouse and GTE-Sylvania in the large lamp case all point to the necessity to reform Canadian competition policy as it relates to the monopoly/dominant firm problem. Much rides on the effectiveness of the Stage II amendments to the Combines Investigation Act expected in December 1976.

268 As yet unreported.
269 Supra, note 44.