INTRA-CORPORATE CONSPIRACIES OF MULTINATIONALS, EXPORT RESTRICTIONS AND CANADIAN ANTITRUST LAW

BY

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LIST OF ABBREVIATIONS

A.L.J. : Antitrust Law Journal

B.L. : Business Lawyer

Boston U.L.R.: Boston University Law Review

C.B.R. : Canadian Bar Review

C.C.C. : Canadian Criminal Cases

C.P.R. : Canadian Patent Reporter

COMM. MKT. REP. : Common Market Reports

Crim. L. Q. : Criminal Law Quaterly

F. Supp. : Federal Supplement

F. (2d) : Federal Reporter, Second Series

E.C.R. : European Community Reports

Ill. L.R. : Illinois Law Review

I. O. : International Organisation

J. of B. : Journal of Business

J.I.L.E. : Journal of International Law and Economics

L. Ed. : Lawyers' Edition, U.S. Supreme Court Reports

McGill L.J. : McGill Law Journal

Mich. L.R. : Michigan Law Review

Miss. L. J. : Mississipi Law Journal

NY. U. J. : New York University Journal

O.E.C.D. : Organization for Economic Co-operation and Development

Queen's L. J. : Queen's Law Journal

R. J. T. : Revue juridique Thémis

R.S.C. : Revised Statutes of Canada

S.C. : Statutes of Canada

S. CT. : Supreme Court

U.S.C.A. : United States Code Annotated

TABLE OF CONTENTS

INTRODUCTION

To a large extent, multinational enterprises have, by their enormous development, rendered obsolete antitrust and most other laws. It thus becomes necessary to deal with such enterprises from a new, more realistic perspective.

International as well as domestic measures are required in order to achieve efficient control over corporations which have acquired such stature. But since, in the immediate future, solutions will have to be found in national actions, this paper will focus on domestic laws. More precisely we will attempt to demonstrate that the doctrine known as the intra-corporate conspiracy doctrine can serve as an effective tool in trying to control multinationals.

We think that Canadian antitrust laws should prohibit agreements or arrangements reached between component units of the same multinational enterprise when the aims of such agreements are to allocate territories between the said units and to prevent Canadian components from exporting manufactured goods.

We will first look at the Canadian economy and discover some of the structural problems of the manufacturing industry. We will conclude this first chapter by underlining the need for antitrust laws to be oriented, among other things, toward developing international competitiveness.

Chapter II will then focus on export restrictions imposed on Canadian units of multinationals.

We will then try to locate these intra-corporate arrangements in the perspective of antitrust laws. As an aid to our understanding we will look at the way they are treated in Europe and in the United States before focusing on how Canadian antitrust laws currently deal with the problem.

In Chapter IV we will defend the desirability of the intra-corporate conspiracy doctrine from a practival point of view. We will first discuss the conceivability of competition between affiliates and we will then try to assess what are the costs and the benefits involved with a limited adoption of the intra-corporate conspiracy doctrine.

The next chapter will deal with various problems raised by the intra corporate conspiracy doctrine including those related to the legal form of organization of the enterprise ant its vertical integration.

Finally, we will look at what the future promises and we will suggest the adoption of specific dispositions in the relevant statute.

CHAPTER I

THE DEVELOPMENT OF INTERNATIONAL COMPETITIVENESS AS A GOAL FOR ANTITRUST LEGISLATION

A) Some Features of the Canadian Economy

As noted in the "Working Paper on Patent Law Revision" (1), although Canada certainly can be classified as a developed country, many features of its economy are those of a developing one; it relies extensively on natural resource industries; in other sectors its production runs are abnormally short by modern standards; it lacks product specialization and it depends heavily on importation of new technology. Moreover, foreign ownership of Canadian industry is exceptionally high.

Let us focus for a moment on the importance of this foreign ownership.

Montreal itself was founded three hundred years ago by a multinational corporation: The Sulpicien Order. (2)

In 1975, Statistics Canada estimated the book value of capital invested in non-financial industries subject to foreign

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1. Working paper on patent Law revision (Department of consumer and corporate affairs), Ottawa, Government of Canada, 1976, p.8.
2. H. ROSS, An attempted summing-up, in H.R. HAHLO, J.G. SMITH and R.W. RIGHT (ed.), Nationalism and the Multinational Enterprise, New York, Ocean Pub., 1973, p. 331.

control at $35.6 billion, while the total capital employed in Canadian industry stood at $105 billion (3).

A study made ten years before (4) had shown that residents of the United States owned 44% of the capital invested in manufacturing firms which themselves accounted for 48% of our exports of manufactured goods. Besides, about 70% of these exports is intra-corporate transfers.

The "Gray Report", published in 1972 but which remains the most extensive work written on the question, presents the problem of foreign direct investment in Canada in these terms:

> The degree of foreign ownership and control of economic activity is already substantially higher in Canada than in any other industrialized country and is continuing to increase.
>
> Nearly sixty per cent of manufacturing in Canada is foreign controlled and in some manufacturing industries such as petroleum and rubber products foreign control exceeds ninety per cent.
>
> Sixty per cent of Canadian mining and smelting is controlled from abroad. Approximately eighty per cent of foreign control over Canadian manufacturing and natural resource industries rests in the United States.
>
> In terms of total national wealth, the proportion controlled by non-residents may be of the order of ten per cent. But about one-third of total business activity in Canada is undertaken by foreign-controlled enterprises (5).

Thus, by comparison with other industrialized countries,

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3. Supra, footnote 1, at p. 74.
4. R. N. WALTZ, The Myth of National interdependence, in C.P. KINDLEBERGER (ed.), The International corporation, Cambridge, M.I.T. Press, 1970, p. 218.
5. Foreign Direct Investment in Canada, Ottawa, Government of Canada, 1972, p. 5.

the Canadian economy is characterized by a high degree of foreign control. A United Nations study describes Canada as the country where the presence of foreign penetration is the most pervasive: the "end of the spectrum". (6)

Note that from now on, unless otherwise provided, the concern of this paper will be limited to manufacturing industry. There, foreign control is even more acute in most of the high technology industries. The sectors of transport equipment, chemicals, machinery and electrical products are especially affected by such non-Canadian investment. (7)

B) Costs and Benefits Resulting From the Presence of Multinationals in Canada's Economy

Foreign investment generally takes the form of an affiliation between a Canadian subsidiary and a foreign parent.

For the purpose of this study we will borrow from the "Gray Report" the following definition of the multinational enterprise:

> The multinational enterprise will be defined as the embodiment of foreign direct investment by a single business enterprise which straddles several economies (a minimum of four or five) and divides its global activities between different countries with a view to realizing overall corporate objectives. (8)

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6. UNITED NATIONS DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, Dimensions of Multinational Corporations, in K.P. SAUVANT and F.G. LAVIPOUR (ed.), Controlling Multinational Enterprises, Boulder Col., Westview Press, 1976, p. 18.
7. Supra, footnote 5, p. 26.
8. Supra, footnote 5, p. 51.

The very size of multinationals suggests an important source of power. Two hundred of these corporations have a sales volume of more than $1 billion and four of them reach the $10 billion figure. More than 3,500 corporations have affiliates in more than one other country and the operations of two hundred of them have ramifications in more than twenty countries. (9)

Depending on corporate strategy, on the attitude of governments and on market conditions, the organizational structure of the enterprise will vary, but typically the headquarters is a central parent holding company which exercices control on foreign subsidiaries through ownership of a majority of stock. Hierarchy can be established on the basis of territorial division, or can be product-oriented. Nevertheless when the multinational reaches a more sophisticated level of organization, one form or another of grid structure is established and product divisions and area divisions then acquire equal importance. (10)

The objective of the enterprise is to maximise global profits, which generally means to maximise global market share. This necessitates some degree of central control since interests of the various component units of the multinational often conflict.

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9. Supra, footnote 6, p. 9.
10. J.P. GRIFFIN, The power of host countries over the multinational: Lifting the veil in the European Economic Community and the United States, (1974) 6, Law and Policy in Int. Bus., p. 378 ff.; Y. HADARI, The Structure of the private Multinational enterprise, (1973) 71, Mich. L.R., p. 756 ff.; J.M. LIVINGSTONE, The International Enterprise, London, Associated Business Programs, 1975, p. 93 ff.

The head office makes decisions concerning the organization of production within the corporate system such as establishing what items will be produced and where, where research will be undertaken, how financing will be done, who will sell in a given market, what transfer prices and final product prices will be, where cutbacks in production will occur if necessary, and so forth. (11)

Obviously, all decisions cannot be made at the highest levels. But those decisions which are the most significant in terms of strategic planning are. In the process interests of a given unit will be ignored if they conflict with the best interests of the enterprise as a whole.

Undoubtedly significant benefits may result to the Canadian subsidiary from such affiliation. Cost of doing business can be reduced and level of efficiency raised by use of the multinational's name, research, sales organisation and knowhow. Orders obtained by the parent company can be channelled to the subsidiary for execution. Markets are generally allocated between subsidiaries thus reducing competitive pressure and assuring that the subsidiary will remain in business. These benefits do often translate into increased production, more jobs and, assuming not all dividends are sent back to the parent company home country, into a contribution to a favourable balance of trade for the host country. (12)

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11. Supra, footnote 1, p. 80,; R. VERNON, Storm over the Multinationals: The Real Issues, Cambridge Mass., Harvard University Press, 1977, pp. 715-716.
12. Supra, footnote 5, p. 169.

But affiliation with a multinational also implies costs for the economy of the host country. Decisions made by the parent company may often conflict with national objectives. (13) For example, subsidiaries may be prevented from entering certain markets including the local market in certain lines of products thus sometimes forcing the host country to import; they are also often bound to have procurement policies which do not allow local producers to supply the subsidiary; they are discouraged from creating an exportable distinctive product. (14)

Global optimization of profits and government policies do not necessarily correspond.

In addition, to the companies' rational decisions in pursuance of global profit, one must add other disadvantages which are even more questionable:

> The possible reasons for the existence of these restrictions and the techniques used to maintain them are then considered. It is noted that in at least some cases, the existing restrictions probably reflect the parent company's assessment of the relative costs of undertaking the activity in the Canadian and other economies. However, this initial judgment on comparative costs can develop into a pattern of dependence, and perpetuate itself beyond reasons that are justifiable on the grounds of cost. This could occur for a number of reasons.

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13. Supra, footnote 1, p. 81.; I.A. LITVAK, C.J. MAULE, Canadian United States corporate interface and transnational relations, (1974) 28 I.O. p, 712 and p. 728.; K. MARKET, Anti-monopoly legislation in Europe, in H.R. HAHLO, J.G. SMITH, R.W. WRIGHT (ed.), Nationalism and the Multinational Enterprise, New York, Oceana Publications, 1973, p. 279.
14. D.H.W. HENRY, Anti-monopoly legislation in Canada, in H.R. HAHLO, J.G. SMITH, R.W. WRIGHT (ed.), Nationalism and the Multinational Enterprise, New York, Oceana Publications, 1973, p. 312; O.E.C.D., Restrictive Business Practices of Multinational enterprises: Report of the Committee of Experts on Restrictive Business Practices, Paris, O.E.C.D. Publications, 1977, p. 18.

> Firstly, the foreign controlled firm may not respond to the development of cost competitiveness in the Canadian economy because of committed costs elsewhere and perhaps non-economic biases, such as preference for the location in the home economy, minimizing investment in foreign countries to reduce risks or the existence of governmental pressures to invest at home. Secondly, as noted above, it is difficult for a foreign controlled subsidiary to develop into a centre of innovation and export of distinctive products because it is primarily a vehicle for selling foreign distinctiveness to Canadians. (15)

But more specifically related to the purposes of this paper, the general tendency for the investor to commit as little capital as possible in the foreign market, plus de desire to maximize returns by concentrating in the parent company fonctions for which there are economies of scale or other savings to be achieved (16) leads to what is sometimes described as the "branch plant syndrome". The investor's attitude has the effect of truncating the development of the foreign subsidiary.

For example, research and development is typically retained by the parent company. It explains why Canada, whose economy is characterized by the highest degree of foreign control among developed nations, is also the country where the proportion of patents filled by Nationals is the lowest. (17)

Another aspect of the "branch plant syndrome" is that the foreign investor tends to require that the local plants produce a wide range of products in short run to supply the

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15. <u>Supra</u>, footnote 5, p. 154.
16. <u>Supra</u>, footnote 5, p. 42.
17. <u>Supra</u>, footnote 1, p. 64.

entire, but no more of, than local market. (18)

To a large extent this explains why Canadian subsidiaries although not necessarily more costly in their operations than Canadian owned enterprises, are less efficient by comparison with the parent companies. (19) The Canadian market being too small, economies of scale cannot generally be achieved unless enterprises develop export markets and Canadian subsidiaries cannot compete internationally if they are not allowed to specialize:

> There is ample evidence that our ability to compete internationally for markets for our majufactured products has declined and that the decline is serious:
>
> - Our trade balance in end products has deteriorated seriously since 1968. (Mostly because other countries' skill improved)
> - Our productivity falls short of that in the United States by 20 per cent to 25 per cent in most sectors
> - Our wage-cost competitiveness is deteriorating compared with that of our major trading partner
> - Our research and development expenditure is minimal
> - Canadian-owned firms have demonstrated a lack of marketing clout.
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> This state of affairs is a result of many causes. Notwithstanding the advantages Canada possesses as a result of high per capita resource endowment and a highly educated labour force, the international competitiveness of our manufacturing sector has been

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18. S. FREEMAN, Canada's changing posture toward multinational corporations: an attempt to harmonize nationalism with continued industrial growth, (1974) 7 NYVJ of International Law and Politics, p. 275.
19. Supra, footnote 5, p. 43.

> eroded. Labour, management and government have all, it can be argued, contributed to this erosion and, clearly there is room for improvement in the way in which the major economic actors play their roles. A reversal will require more cohesive and co-ordinated action. But the one cause that stands out and that urgently requires correction, is the bottleneck that results from the truncated, multi-product output of a large proportion of our manufacturing sector. (20) (parenthisis is ours)

It is not uncommon to hear that one solution to the rationalization of our manufacturing industry is to produce fewer products but to produce them on a longer run so that, benefiting from economies of scale, Canadian firms could compete on export markets and vice-versa. (21) This "world mandate product" theory is closely related to the question of tariffs as was demonstrated by the Auto Pact where elimination of tariffs did enable Canadian plants to gain economies of scale by producing a greater number of fewer models while the country imported other models from the United States at lower costs than if all models would have been produced in short runs in Canada. (22)

At this point, it is important to understand that although tariff policies may help in solving structural problems of manufacturing industry, they cannot be a fully satisfactory solution. Moreover, if not used properly, they may contribute in creating such problems as they probably did in the past.

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20. J.D. FLECK, A personal perspective on Stage II: The Views of a Provincial deputy minister, in J. WROWLEY and W.T. STANBURY (ed.), Competition policy in Canada: Stage II, Bill C-13, Halifax, Dalhousie University Press Ltd, 1978, p. 60.
21. H.E. ENGLISH, Specialization and export agreements: Their potentials and limitation, in Canadian Competition Policy: Proceedings of a Conference held at Queen's University (ed.), Kingston, Industrial Relations Center Queen's University, 1972, p. 31.
22. Supra, footnote 18, p. 285.

First one must remember that the cost of maintaining inefficient firms in business is finally borne by the consumer. Moreover, by diminishing competition, the tariff also diminishes incentives to efficiency.

But more directly related to the previous discussion, the fact is that at least in the past, the so-called "branch plant syndrome" was favoured by our protectionist policy. It is possible that the tariff, by creating obstacles to importation of finished articles, forced direct investment in Canada but it is certain that at the same time it contributed to the fact that local plants would have to produce too wide a variety of products precisely because all products had to be produced in Canada. Thus condemned to short run production local plants would compete only where special protection was afforded. (23)

This relation between "branch plant syndrome" and tariff is illustrated by the fact that those who are largely responsible for that unhealthy situation often find themselves favouring the tariff <u>status quo</u>:

> Another result of branch factory expansion is the vested interest that those plants come to have in the tariff status quo. True, it may be that in the beginning many of them were established reluctantly by American companies who would have much preferred to export finished articles to Canada. Once in operation on a reasonably profitable basis, however, there may be almost equal reluctance to abandon them should tariffs be lowered. It was

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23. <u>Supra</u>, footnote 20, p. 60.

> reported that more than one of the lobbying firms at the Ottawa Conference in 1932 were American subsidiaries anxious that "Empire content" rules be stiffened and that other protection be maintained or increased to retain their Empire markets.
>
> In general the management of American-owned plants in Canada will be found supporting a protectionist tariff policy, not only because that is part of the traditional habit of mind of manufacturers on this continent, but because if an American company has established a Canadian plant to serve the Canadian market, it is naturally anxious to retain a substantial tariff against its competitors in the United States which have not established branches.
>
> In two short paragraphs, Marshall, Southard and Taylor raise three critical propositions, which such a study could easily pass over: first, that an American firm's preference for exporting over investing may disappear or even reverse itself after investments are made; second, that American multinationals may have substantially different policy objectives from American exporters; and third, that multinationals may themselves be instrumental in maintaining or even raising barriers to American exports. (24)

In any event, serious doubts are cast on the effectiveness of tariff barriers in today's world (25) and the G.A.T.T. accords seem to indicate that the trend is toward a more liberalised international trade. One might argue that non-tariff barriers are simply replacing the former more formal barriers but the fact is that Canada has traditionally shown little skill in administering those informal techniques.

Besides, while it is very likely that tariffs favoured

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24. C.F. BERGSTEN, T. HORST, T.H. MORAN, American Multinationals and American Interests, Washington, The Brookngs Institution, 1972, p. 49.
25. Supra, footnote 20, p. 61.

the development of a branch plant economy, there is no reason why their reduction, in the present state of affairs, would eliminate the problem.

Thus, one way or the other, tariff policies, while they may be a partial solution, cannot reach to the heart of Canadian economic problems and one must also look for other measures which will, among other things, enable firms to compete internationally. Should these include changes in the content of our antitrust laws?

C) Development of Export Markets and Antitrust Laws

As a matter of fact the development of international competitiveness is generally viewed as a government goal. In 1966 the Minister of Trade and Commerce published its "Guidelines of Good Corporate Citizenship" which is a set of guiding principles concerning the behaviour of foreign controlled corporations. It stresses the need for the "maximum development of market opportunities in other countries as well as in Canada". (26)

In 1973 the Foreign Investment Review Act which creates a screening agency for foreign takeovers was enacted by Parliament. It is expressly stated in Section 2 of the Act that one of its purposes is to encourage exports from Canada. (27)

We think that antitrust legislation should also reflect

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26. For comments see.: W.L. FUGATE, Antitrust Enforcement and the Multinational Corporation, (1973), 8 J.K.L.E., p. 8.
27. 1973-74 S.C., c. 46., s. 2.

this goal of developing export markets.

Traditional aims of the Antitrust Policy, such as assuring through spontaneous market regulation the most efficient allocation of society's resources, although still valid, must be viewed in the context of today's world where businesses have attained high levels of complexity and where the size and the number of markets a firm can reach have seriously increased. Peculiarities of the Canadian situation must also be kept in mind.

Among other things, for reasons we discussed before (28), efficient use of Canadian resources implies long run production, which itself requires that other markets than the domestic one must be reached by firms located in Canada. Antitrust laws should then be aimed at favouring the attainment of international competitiveness by these firms.

Besides the channelling of the activities of Multinationals depends on a set of overall policies of which antitrust laws should be part. (29) As one of its principal authors wrote in reference to the Economic Council's <u>Interim Report on Competition Policy</u> (30), although competition policy

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28. <u>Supra</u>, Chapter I, section B).
29. N.T. WANG, <u>The International Community and Transnational Corporations</u>, in K.P. SAUVANT and F.G. LAVIPOUR (ed.), <u>Controlling Multinational Enterprises</u>, Boulder Col., Westview Press, 1976, pp. 218-219.
30. ECONOMIC COUNCIL, <u>Interim Report on Competition Policy</u>, Ottawa, Queen's Printer, 1979.

is not wholly economic policy, it is so to a large extent. As recognized in the report, competition policy objectives should have much in common with those of other economic policies although in practice emphasis will be put on those objectives for the attainment of which antitrust laws are particularly relevant tools:

> To the Council, maximizing longer-term dynamic efficiency in resource allocation is much the most relevant objective for competition policy. This is less a broad, motherhood position than it may at first appear. The seeming booster expressions "longer-term" and "dynamic" have a specific significance in economic analysis. They mean that one lifts one's head from excessive preoccupation with resource allocation in the short term; that one recognizes the role of scale exonomies and learning processes in advancing human welfare over the longer term; that one accepts some of the forces that bring about large firms and activities such as advertising and research-and-development, in which large firms often heavily engage; that one conceives competition policy in much more sophisticated and realistic terms than simply trying to push the economy, industry by industry, back to a text-hook state of atomistic perfect competition. A longer-term concept of competition embracing, non-price as well as price competition, at least, where the non-price variety clearly operates to the benefit of consumers, is employed. Even thus conceived however, competition is valued, not for itself, but rather for its ability to promote, in conjunction with other policies, dynamic efficiency. It is a means to an end, not an end in itself. (31)

At times, the antitrust policies of the Department of Consumer and Corporate Affairs have been harshly criticized. It has been said that the reliance of the department on classical

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31. D. McQUEEN, Revising Competition Law: Overview by a Participant, in J.R.S. PRICHARD, W.T. STANBURY, T.A. WILSON (ed.), Canadian Competition Policy, Essays in Law and Economics, Toronto, Butterworths, 1979, p. 7.

concepts implied too little concern for long-term goals of the Canadian economy. (32)

There are few indications that present antitrust laws are considered as a practical means of developing such international competitiveness. True, some specific measures seem to indicate some concern. For example, the exemption afforded by section 32(4) of the Combines Investigation Act (33) (The Act, The Combines Act) for arrangements or agreements in restraint of trade which relate only to the exportation of products from Canada do point in that direction. But it can also be viewed as a mere expression of the fact that the Act has no concern for what happens abroad. (34)

Besides, the exemption is rarely applicable since it is not allowed as soon as a Canadian competitor is adversly affected.

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32. Supra, footnote 20, p. 63.; H.I. MacDONALD, Competition policy and provincial economic development, in Canadian Competition Policy: Proceedings of a Conference held at Queen's University, (ed.), Kingston, Industrial Relations Center Queen's University, 1972, pp. 20-21.
33. 1970 R.S.C., c. 23.
34. D.H.W. HENRY, Mergers and Joint Ventures as they affect Canadian-United States Trade and Relations, (1966) 32 A.L.J. p. 170.

No positive measure to increase exports is found in the Act.

Bill C-13 (The Bill) might indicate a more encouraging trend. For example, the exemption on export agreements would be allowed when the effect on a Canadian competitor is only incident to the agreement. (35)

The Bill also includes in its preambule the following statement:

> Whereas a central purpose of Canadian public policy is to promote the national interest and the interest of individual Canadians by providing an economic environment that is conducive to the efficient allocation and utilization of society's resources, fosters innovation in technology and organization, expands opportunities relating to both domestic and export markets and encourages the transmission of those benefits to society in an equitable manner; (36)

In that sense, the most significant proposal contained in the Bill might very well be the specialization agreement provisions contained in what would become section 31.75 of the Act. It is provided that, subject to certain conditions, former competitors could agree that each party discontinue producing some article on the condition that each other party to the agreement discontinue producing some other article. Exclusive dealing agreements could

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35. Bill C-13: An Act to amend the Combined Investigation Act and to amend the Bank Act and other Acts in relation thereto or in consequence thereof, 1977, 3rd Session, 30th Parliament, 26 Elizabeth II, s. 32.
36. Supra, footnote 35, s. 1. For comments see: W.R. STANBURY, The Stage II amendments: An overview, in J.R.S. PRICHARD, W.T. STANBURY, T.A. WILSON (ed.), Canadian Competition Policy: Essays in Law and Economics, Toronto, Butterworths, 1979, pp. 61-62.

also be attached to the specialization contract. (37)

As we have seen, in a small market economy product diversity, by preventing the realization of economies of scale, seriously impairs the capacity to compete internationally. Consequently specialization is needed to permit the achievement of longer production runs by concentrating on the development of particular product lines.

But such specialization is not easy to achieve in normal conditions. True, established firms could compete with one another until each one specializes in what it does best but it would be a risky course of action to undertake since uncertainties exist as to how the over-all market shares and thus profitability would be affected. Added to that reasons which are peculiar to the Canadian manufacturing industry such as the fact that the firms are often large international companies accustomed to competing with other similar firms also producing a full range of products in Canada and elsewhere and the fact that tariff policies render short production runs of a diversified range of goods abnormally profitable, chances are that unless firms agree between themselves specialization will rarely occur. (38)

<u>Bill C-13</u> would, within very narrow limits, exempt specialization agreements from the application of the <u>Combines Act</u>. It is a case where the application, or rather the non-application, of the <u>Act</u> would tend to enhance the capability of

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37. <u>Supra</u>, footnote 35.
38. <u>Supra</u>, footnote 21, p. 30.

some Canadian firms to compete here and abroad.

Other dispositions such as proposed section 31.61 might also point in that direction but we plan to discuss them in Chapter VI.

From now on it will be assumed, in any event, that the development of international competitiveness should be one of the primary goals of Canadian Antitrust laws.

D) <u>International Collaboration in Controlling Restrictive Business Practices of Multinationals</u>

In this paper we have chosen not to elaborate in great length concerning attempts made by the international community to adopt a universal code of conduct which would apply to business practices of multinationals. The reason why we have chosen not to do so is that, in the immediate future at least, we do not believe that one can realistically expect international collaboration to become a major tool in controlling multinationals.

But it is most interesting to note at this point that the very reason why past efforts to formulate such a code of conduct have failed is that, while developed countries generally view an international code of conduct merely as a mean to maintain competition, developing countries view antitrust laws as a tool to get a better share of international trade. It brings the latter to insist on getting special exemptions while developed countries advocate a code of conduct based on reciprocity of treatment. (39)

This point is interesting in that it raises the question as to where does Canada stand? On the one hand it certainly is

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39. On these questions see: S.WEX, <u>A Code of Conduct on Restrictive Business Practices: A Third Option</u>, (1977), 15 The Canadian Yearbook of International Law, 198-235; <u>Legal Problems of the Code of Conducts of Multinational Corporations</u>, M. Horn (Ed.), Studies in Transnational Economic Law, Vol. 1, Hingham, Kluwer, 1980; B.R. CAMPBELL, The Canada-United States Antitrust Notification and Consultation Procedure, (1978) 56 C.B.R. 459-495.

a developed country but on the other hand, since it appears to consider that antitrust laws should be oriented toward improving its position with respect to international trade, when time will come to negociate an international code of conduct, it might very well side with less developed countries. Remember our discussion at the very beginning of this chapter.

But as we have already said, this paper will focus on domestic law.

CHAPTER II

EXPORT RESTRICTIONS

A) Existence of Export Restrictions

Various types of restrictions may be imposed by the parent company on the subsidiaries activities. According to an O.E.C.D. report, the most common are the following: restrictions on improved technology, restrictions on dealing in competing goods, imposing of undue prices, restrictions on resale prices, quality restrictions, customs restrictions, restrictions on advertising, restrictions on sale methods; restrictions concerning importation or exportation of goods. (40)

At this point we want to establish that there is no doubt that foreign controlled corporations in Canada, particularly in the manufacturing sector, often are subject to export restrictions. For the purpose of the discussion, we will first focus on cases where the parent company expressly forbids to export.

If one looks at the actual performance of multinational subsidiaries, especially in sectors of manufacturing industry, where foreign investment is heavy, one can see that they do not

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40. Supra, footnote 14, pp. 30-31.

export as one could expect. Foreign-owned corporations should normally perform much better than Canadian-owned since they benefit from unique international connections and from technological and other advantages. But they do not: some studies (41) indicate that Canadian and foreign owned firms do just about as well and these studies are even contradicted by more recent ones which show that Canadian owned corporations export proportionally much more. (42)

In 1959 Safarian surveyed 280 firms. Representatives of twenty of these felt free to admit that affiliation retarded their exports because of restrictions on sales to certain markets or because of the existence of affiliates abroad. (43) Machinery, electrical products and chemicals' sectors are the most affected by such restrictions. Canadian subsidiaries are generally not allowed to export to any country where the multinational has a local plant. (44)

But the most convincing figures are once again those

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41. Supra, footnote 5, pp. 153-154.; T.L. POWRIE, Foreign Direct Investment in Canada, in S.E. ROLFE and W. DAWN, The Multinational Corporation in the World Economy, New-York, Praeger Publishers, 1979, p. 96.
42. U.S. TARIFF COMMISSION, Implications of Multinational Firms for World Trade and Investment and for U.S. Trade and Labour, Washington, 1973, 625 pp.
43. A.E. SAFARIAN, Foreign Ownership of Canadian Industry, Toronto, McGraw-Hill, 1956, pp. 134 ff.; See also: A.E. SAFARIAN, The Performance of Foreign-Owned Firms in Canada, Canadian-American Committee, 1969, 108 pp.
44. Foreign Ownership and the Structure of Canadian Industry; Report of the Task Force on the Structure of Canadian Industry, Ottawa, 1968, p. 206.

published in the Gray Report:

> Table 29 below contains an analysis of the export policy of 964 foreign controlled manufacturing subsidiaries listed in the Canadian Export Directory, published by the Minister of Industry, Trade and Commerce. This table shows that 42% or 339 of the 798 United States controlled manufacturing subsidiaries appear to have unrestricted access to world markets. Most of these are exporting to some extent, with about two-thirds exporting more than \$100,000 per annum. The remaining 459 companies (58%) operate under some type of restriction on exports: 135, or 17%, are excluded from the United States market; 113 or 14% are limited to the Commonwealth (these are also kept out of the United States markets, bringing the total excluded from the United States to 248, or 31%); 81, or 10% had some other type of restrictions (e.g. can export only to United States or developing countries, excluded from communist countries, etc); and 17 companies, or 2% were not permitted any exports. One hundred and five, or 13% had exports allocated by the parent company; another 51, or 7% tended to use the parent's organization for export activities. In the case of companies controlled in other than the United States, 94, or 57% were apparently free to export while 72, or 43% were under some form of export limitation. (45)

We are told by representatives of the Minister of Industry, Trade and Commerce and by representative of Statistics Canada that these statistics are the latest available.

Exact figures given by various voluntary survey of this kind cannot be relied upon with complete certainty. But they do indicate that even straight directives plainly restricting exports from Canadian subsidiaries are freely admitted to exist in a very significant number of cases.

Inquiries in specific cases also demonstrated this. For example: a representative of Bell and Howell (Canada) Ltd once stated at a public hearing that it had been the practice of the parent company to grant exclusive market territories to its

45. Supra, footnote 5, pp. 163-164.

subsidiary plants. (46).

Export restrictions should concern Canadian authorities. True, there is no reason to intervene directly when such restrictions simply are a reflection of our low productivity (47) but then two questions arise: if a Canadian subsidiary is not efficient enough to compete internationally, why would the parent bother to impose formal restrictions on it? If it cannot compete on export markets it will not sell there anyway. (This is basically what free market regulation is all about.)

Also, to what extent are these restrictions precisely responsible for the low productivity of a given subsidiary by preventing it from benefiting from economies of scale? Which one came first, the chicken or the egg?

B) <u>Export restrictions as more than legitimate management strategy</u>

Even ignoring the particular need for Canadian economy to develop export trade, intra-corporate arrangements of the nature described above may often be viewed as being intrinsically undesirable in terms of antitrust policy.

Often restrictions will exist in order to create artificial separations between world markets:

> The international firm may engage in price discrimination and predatory pricing on an international scale. This may be accomplished through the internal

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46. O.E.C.D., <u>Supra</u>, footnote 14, p. 19.
47. T.L. POWRIE, <u>Supra</u>, footnote 41, p. 93.

> organization of the firm itself. An enterprise with a strong market position may seek to increase its profits by instructing its various national subsidiaries to charge different prices in different national markets according to the state of demand in each market. In order for price discrimination of that kind to be successful the seller must find means of preventing buyers in the market with high prices from buying their requirements in the market with low prices. On the international level, the seller accomplishes the separation of markets by the erection of private non-tariff barriers to trade. Such non-tariff barriers may include control of dealers in the markets with low prices in order to prevent them from selling to buyers from the high-prices markets, and aggressive use of industrial property rights. This situation is exemplified by the report of the Royal Commission on Farm Machinery, as well as by the report of the Restrictive Trade Practices Commission on Drugs. Supplies coming into the Canadian domestic market may therefore be at prices which place the Canadian buyer, or ultimate user of the product at a considerable disadvantage vis-a-vis buyers and users in other countries, at a disadvantage which is not necessarily measured by the cost of transporting the same goods from the place of origin to the markets concerned. (48)

The Farm Machinery incident is very illustrative in this respect. (49)

The report of inquiry indicates that the parent company of Ford, located in the United States, had initiated a policy of price discrimination, the purpose of which was to raise prices on the Canadian market.

The tractors sold in Canada were manufactured by a United Kingdom subsidiary. The parent company ordered it to sell

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48. D.H.W. HENRY, Supra, footnote 14, p. 313.
49. ROYAL COMMISSION ON FARM MACHINERY, Special Report on Prices, Ottawa, Queen's Printer, 1969, pp. 61-90.

at a higher price to Canadian dealers and to have its UK dealers agree not to sell outside the UK. The artificial separation of markets had thus permitted the prices of tractors sold in Canada to rise abnormally without diminishing the number of sales in the UK.

The basic purpose of erecting such artificial barriers between markets may often very well be to prevent the consumer from procuring goods from the producer selling, for one reason or another, at lower prices.

Artificial market separation of that type may also serve predatory purposes: For example, in order to eliminate a local competitor, the multinational may seek to temporarily lower its prices in a given market without suffering losses of profits elsewhere. Worse, sales in the target market may be subsidised by sales in other markets.

The Anti-Dumping Act (50) also deals with this problem by attempting to prevent imported goods from being sold in Canada at prices below the price of like goods when sold by the exporter in the normal course of trade for consumption in the country from where the goods are imported.

Export restrictions also exist for other reasons which cannot be justified merely by the normal need to organize labour. One which should be of particular concern to Canadian government

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50. Anti-Dumping Act, 1970 R.S.C., c.A-15.

is the fact that market restrictions are sometimes imposed in response to the policies of the home government. For example, American measures such as the Trading With the Enemy Act, the Export Administration Act, the Buy America Act, the inclusion in tax laws of dispositions such as DISC (Domestic International Sales Corporations), the balance of payment programme, and so forth, are especially worrying. (51)

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51. R. VERNON; Supra, footnote 11, p. 181.

CHAPTER III

THE "INTRA-CORPORATE CONSPIRACY" DOCTRINE

A) Multinational Intra-corporate Arrangements: A sophisticated form of Cartel?

Antitrust laws of most political entities of the world, (the United States (52), the European Economic Community (53), and Canada (54) to mention a few) distinguish between two types of antitrust offences. First are those offences which do not necessarily require that two parties or more agree on something. For example the Sherman Act makes it an offence to monopolize, whether of not there is colusion between separate offenders (55). In the same vein, in the E.E.C. the mere abuse of a dominant position can constitute an offence (56). In Canada also there are offences which can be committed in the absence of any "combination" between different persons: to "monopolyze" (57), to engage in price discrimination or in predatory pricing (58) are some examples.

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52. The Sherman Act, (1890) 15 U.S.C.A. 1-17; The Clayton Act, (1914) 15 U.S.C.A. 12-27; And for reference, The Federal Trade Commission Act, (1914) 15 U.S.C.A. 41-51.
53. Treaty of Rome, (1957) s 85-86 ff.
54. Combines Investigation Act, supra, footnote 33.
55. Supra, footnote 52, section 2.
56. Supra, footnote 53, s. 86.
57. Combines Investigation Act, supra, footnote 33, section 32 ff.
58. Combines Investigation Act, supra, footnote 33, section 34.

The second category of offences always found in Anti-trust laws are those requiring the existence of a conspiracy. The simplest example is price-fixing. At least two persons must agree to fix prices or otherwise there cannot be any offence. Obviously one cannot condemn the seller of a product because it determines for itself the price at which it will accept to sell. The United States (59), the European Community (60) and Canada (61) all enacted this type of offence.

Our attention will now focus on this second category: the conspiracies.

When the purpose of an agreement is to fix prices, to impose production quotas or to allocate markets, it is recognized that the conspiracy generally damages the economy. Not surprisingly, these are the cases where American tribunals apply the so called "per se" rule: the accused is not even allowed to try to prove that the economy as a whole has benefited from the agreement (62).

The basic issue this paper addresses is the following: when the parent company and the subsidiaries of a multinational agree or arrange to allocate markets among themselves,

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59. Sherman Act; Supra, footnote 52, s. 1.
60. Supra, footnote 53, s. 86.
61. Combines Act; Supra, footnote 33, s. 32.
62. U.S.V. Socony-Vacuum Oil Co. (1940) 310 U.S.150, 60 S.CT 811, 84L.Ed. 1129.; U.S. V. Topco Associates Inc. (1972), 405U.S. 596, 92S.Ct.1126, 31 L.Ed.(2d) 515.

does it constitute a conspiracy prohibited by the <u>Combines Act</u> and if not, should it? In other words, when the component units of a multinational agree that, for example, the Canadian subsidiary will serve the Canadian market only, the American subsidiary will serve the U.S. market only and the German unit will serve the European market only, is it a conspiracy to be condemned by antitrust laws?

Initially cartels used to be entirely executed inside a given country. From the antitrust law enforcement point of view, it is relatively simple to deal with this kind of cartel.

At the beginning of this century the international cartel became more common (63). This type of cartel is already much more difficult to reach mostly because of jurisdictional problems and because of the difficulties encountered in obtaining evidence and in executing a judgment.

But since World War II the world is often divided, not between separate firms, but between component units of what has become a gigantic "enterprise":

> 2. <u>Emerging Situations in the Post War Period</u>
>
> Under this heading fall arrangements which have been increasingly familiar in world market since World War II. viz. restraints on the international competitive market which are internal to the international firm in contrast to the classic situations which involve arrangements between independent firms. In this context one must view the international firm as a global entity with decision making taking place outside the territorial limits of any one national

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63. D.H.W. HENRY; <u>Supra</u>, footnote 14, pp. 308-309.

(except that of the head office). (64)

One might indeed wonder if the multinational enterprise is not to be viewed, in a sense, as a very sophisticated form of international cartel.

The legality of a given arrangement would then turn on whether component units of the multinational are to be regarded as constituting a single enterprise or as collaboration between several separate entities. (65)

To illustrate: should a football league be viewed as one league or as many teams? Should "Associated Press" be considered as a single joint enterprise or as a system for separate newspapers to collaborate?

B) Two Possible Approaches

When dealing with relations between component units of a multinational enterprise, one can adopt two attitudes. One can view the multinational as a single enterprise (the "Unitary" concept) or as an association between separate entities (the "distinct entity" concept).

We will now look at practical applications of these two concepts in Europe and in the United States. In so doing, our purpose is not to state what the law is in these countries; it

64. O.H.W. HENRY, Supra, footnote 14, p. 312.
65. L.B. SCHWARTZ, Free Enterprise and Economic Organization, 4th, New York, Foundation Press, University Caseboop Series, 1972, p. 476.

is full of uncertainties in any event. Our purpose is rather to illustrate how the two concepts can be used. We will focus on cases which seem the most relevant in that regard.

In 1969 the Commission of the European Economic Community (the Commission) was requested to exempt from the application of section 85(1) of the treaty (66) an agreement intervened between the parent company and the Dutch subsidiary of Christiani and Nielsen, a Copenhagen-based multinational specializing in public works and major industrial construction projects (67). The agreement involved is quite illustrative. The Commission desdribes it as follows:

> Christiani & Nielsen, Copenhagen, has agreed, in particular:
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> - to prepare plans, designs and estimates that its subsidiary is unable to prepare;
> - to send its subsidiary reports on projects it is working on;
> - to place engineers or experts at the disposal of its subsidiary;
> - to collaborate with its subsidiary in cases where its cooperation proves necessary for technical or economic reasons;
> - not to operate in the Netherlands.
>
> Christiani & Nielsen, The Hague, in turn agrees:
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> - not to operate outside the Netherlands without the consent of the parent company;

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66. Supra, footnote 53, s. 85(3).
67. Christiani and Nielsen N.V., (1969) CCH COMM. MKT. REP. #9308.; For comments see: Y. HADARI, supra, footnote 10, p. 785; K. MARKET, supra, footnote 13, p. 281.

- to inform the parent company, in detail, of work in process, its plans and matters relating to employees;
- to carry out instructions of the parent company;
- to pay the parent company a stipulated amount for any work completed and to reimburse it for expenses incurred in the interest of the subsidiary.

Christiani & Nielsen, Copenhagen, has the right to appoint the managers of its subsidiary in The Hague.

Any inventions of Christiani & Nielsen, its Dutch subsidiary, or its other subsidiaries or branches are placed at the disposal of all enterprises in the group on a reciprocal and no-charge basis.

The agreement can be cancelled only with the consent of both parties.

2. Christiani & Nielsen has numerous subsidiaries in various countries. Within the E.F.C., Christiani & Nielsen has, in addition to its Dutch subsidiary wholly-owned subsidiaries in Germany and France. The subsidiaries of Christiani & Nielsen may not engage in any activities in countries in which other subsidiaries are established. (68)

The Commission concluded that the agreement could not have the effect of distorting competition within the Common Market because, although there were from a legalistic point of view separate units involved, the different components were part of a single economic entity and could not be expected to compete against each other.

It is important to note that the Commission did not apply a test based on the degree of ownership of the subsidiary by the parent company but rather a test based on the actual existence or non-existence of independent decision power

68. Supra, footnote 67.

retained by the subsidiary. In other words, if, in fact, the subsidiary had been able to act independently, the Commission would have been willing to find that the agreement restrained trade. For now we would just like to suggest that, from the Dutch point of view at least, it can be a way of proceeding which approaches the problem from the wrong end: if the agreement is expempted from the application of section 85(1) of the treaty, there is no chance the subsidiary will ever become independent. However, the Commission is not concerned with national interests but with Community interests.

Besides, in light of what we already said in section B) of Chapter II, we suggest that the Commission viewed too readily the division of markets as mere legitimate division of labour.

A year later the Commission viewed a multinational as a single entity once again. In the Kodak case (69), subsidiaries, under instructions from the parent company, had arranged to apply uniform supply and payment conditions for Kodak products. The Commission first insisted on the fact that no restrictive agreements in pursuance of this common policy were reached with unrelated third parties. It then held that since in the Kodak enterprise the adoption of market policies was not actually decentralized, the "agreement" on these policies could not be viewed as an agreement between truly separate economic units.

> Where the subdidiaries concerned, as in this case, depend exclusively and completely on their parent company and where this parent company exercises its power of supervision by giving exact instructions, it is impossible for the subsidiaries to act

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69. Eastman Kodak Co. (1970) 2 C.C.H. COMM MKT REP. #9378.

> independently of each other in the areas which the parent company controls.
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> Accordingly when the MNE affiliates in fact constitute a single economic entity, intra-MNE arrangements do not violate the EEC law as long as they do not involve restrictive arrangements with unrelated third parties. But, MNEs that decentralize their marketing decisions and, despite the legal control over the subsidiaries, do not instruct affiliates as to marketing and pricing behaviour might still be subject to the antitrust laws in their intercorporate dealings; the reason for such a distinction is that such affiliates might be viewed and expected to act as competitors. (70)

The "Unitary" concept can also work against multinationals. It is demonstrated by the two following decisions of the Court of Justice of the European Communities. In the Dyestuffs Case (71), the parent company of I.C.I. Ltd. was accused of having participated consciously with other dyestuffs producers in parallel price increases on European markets. The parent company objected, among other things, that the reprehensible conduct was the conduct of its subsidiaries and not its own and that the parent company itself had committed no wrong doing inside the Common Market. Unless the different components of the multinational were to be considered as a single entity the Court had no jurisdiction over the parent company.

The Court of Justice utilized the "unitary" concept approach: Although the subsidiary had its own legal personality, its conduct was attributable to the parent company. The subsidiary

70. Supra, footnote 69, at 8819.
71. Imperial Chemical Industries V. Commission of the European Communities (1972) 2C.C.H. COMM. MKT. REP. #8161.

had no autonomy whatsoever as far as market strategy was concerned. An affiliated group so structured forms, according to the Court, a unity and the parent company can be held responsible for the actions of the subsidiary thus giving jurisdiction over the former to the Court. (72)

The Court of justice reacted the same way a year later when its jurisdiction was challenged in the Europemballage Case (73). Here Continental Can Company was accused of having abused its dominant position through the purchase in April 1970 by its subsidiary, Europemballage Co., of stocks and bonds of a former Dutch competitor, thus virtually eliminating competition. The Court stated:

> The fact that the subsidiary has its own legal personality is not sufficient to rule out the possibility that its conduct can be imputed to the parent company. This applies particulary where the subsidiary does not determine its market conduct autonomously but in the main follows the instructions of the parent company. (74)

Note that, although this paper deals with the concept of conspiracy rather than with the concept of abuse of diminant position, it is interesting to look at such cases where the multinational is accused of abusing its dominant position. First, such cases help understanding what the so called "Unitary approach" means. Second, one has to realize that where the subsidiary will be held very tightly, the "Unitary approach" may in some instances bring a conviction on the basis of abuse of dominant position.

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72. Supra, footnote 71, et 8031.
73. Europemballage and Continental Can V. Commission of the European Communities (1973) O.J.L. 69.

74. Supra, footnote 73, p 70.

Other decisions of the Court of Justice and the Commission concerning abuse of dominant position contrary to section 86 of the treaty (where no conspiracy or concertation is required) also adopt the "unitary" concept approach. (75)

Incidentally, the German Federal Cartel Office seems to adopt the same attitude. (76)

Cases like those we just discussed lead some authors to conclude that multinationals would normally be considered as a single entity in Europe:

> The conclusion, therefore, is that the antitrust rules against restrictive agreements in Germany and the European Economic Community do not, as a rule, apply to intra-enterprises practices. Multinational firms may, therefore, without violating these rules, restrict the business activity of their subsidiaries, e.g. their exports. The antitrust rules against restrictive agreements thus do not provide a remedy to deal with possible adverse effects which such restrictions may have on the economies of the countries where the subsidiaries are located. (77)

But one should not neglect the fact that where the subsidiary would in fact possess some independent powers, conspiracies between it and the parent would probably be dealt with as if two separate enterprises were involved. For example in the Centrafarm Case (78) the Court of Justice had to determine if Article 88 applied to a licensing agreement reached between a parent

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75. Intituo Chemioterapico Italiano SPA and Commercial Solvents Corp. V. Commission of the European Communities (1974) C.C.H. COMM. MKT. REP. #8209; United Brands Co. (1975) C.C.H. COMM. MKT. REP. #9800.
76. Supra, K. MARKET, Supra, footnote 13, p. 282.
77. Supra, footnote 13, p. 282.
78. Centrafarm B.V. and Adriean de Peifper V. Sterling Drug Inc. (1974-76) ECR 1147. O.E.C.D.; Supra, footnote 14, p. 29.

company and its subsidiary. Implicitely, the Court recognized that there might be separate economic entities when subsidiaries have freedom of action.

The same questions have been raised in the United States in regard to both Section 1 of the Sherman Act which always requires collaboration between two or more persons in order to constitute a violation and to Section 2 which does not always require such conspiracy. (79)

In the General Motors case (80) the enterprise was charged under Section 1 of the Sherman Act because it had conspired with its wholly owned financing and sales subsidiaries to force dealers into arranging wholesale and retail financing through the financing subsidiary of GM. The multinational opposed among other things that wholly owned subsidiaries could not conspire between themselves and with their parent company. The Court of Appeals of the Seventh Circuit answered that:

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79. For comments on American cases see among others: J.W. BURNS, Antitrust Dilemna: Why Congress Should Modernize the Antitrust Laws, New York, Central Book Co., 1969, 251 p.; H.O. KRAUSE, The Multi-Corporate International business under section 1 of the Sherman Act: Intra-enterprise conspiracy revisited, (1962) 17 BL, 912-938; R.A. SOLO, Intra-Enterprise Conspiracy and the Theory of the Firm, (1961) 34 J. of B. 153-166; G.W. STENGEL, Intra-Enterprise Conspiracy under section 1 of the German Act, (1963) 35 Miss L.J. 5-27.

80. U.S. V. General Motors Corp., (1941) 121 F. (2d) 376 (7th Ar.), Cert. denied 314 V.S. 618.

> The specific charge requested by the appellants... amounted in practical effect to a request that the jury be directed to find the appellants legally impotent to restrain the trade and commerce in General Motors cars. It has been shown as a matter of law that the appellants are separate entities, even though as a matter of economics they may constitute a single integrated enterprise, and that they are not impotent to restrain the trade and commerce of the dealers in General Motors cars. Consequently, the Court was not obliged to give such an instruction. (81)

Note that the decision does not rest solely on the ground that, from a technical point of view, legally separate entities were involved. It also rests to a certain extent in the fact that third parties (the dealers) were coerced. This test seems limitless since at least the customer will always be affected by intra-corporate arrangements. We will come back to this question in Chapter I, section A).

In <u>United States V. Crescent Amusement Co.</u> (82) and <u>Schine Chain Theatres Inc. V. United States</u> (83), affiliated corporations, their officers and independent distributors were charged with conspiracy to violate both Sections 1 and 2 of the <u>Act</u>. Involved in the motion picture exhibition business, the affiliated exhibitors had used the buying power they had as a result of their monopoly in some localities in order to achieve monopoly power in other areas. (84)

Not only did the Supreme Court in both of these cases

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81. <u>Supra</u>, footnote 80, p. 410.
82. (1944) 323 U.S. 173.
83. (1948) 334 U.S. 110.
84. See also <u>U.S.</u> V. <u>Griffith</u> (1948) 34 U.S. 100.

rejected the argument to the effect that there could be no conspiracy between affiliates, but, in Crescent Amusement, it described the affiliation as the instrument used to achieve the conspiracy. (85) Remember the discussion in Chapter III, section A) where it was suggested that multinationals might be in a sense the ultimate form of international cartel.

For various reasons it would be pointless to discuss here since our purpose is not to state precisely what American Law is, there is no doubt that the "theatre cases" have not been considered as being equivalent to the adoption of the intra-corporate conspiracy doctrine by the Supreme Court.

But a step in this direction which would eventually demonstrate to be an important one was to be accomplished in the Yellow Cab case (86). There, Markin controlled more or less directly various corporations which accounted for 15% of cab licenses in New York, 58% in Minneapolis, 86% in Chicago and 100% in Pittsburgh. It also owned "Checker Cab Manufacturing Corp." which manufactured taxicabs. The Court was convinced that operating companies were bound to buy their taxicabs from Checker and it considered that, since the very purpose of the affiliations was to allow the conspiracy between different corporations to be effective, the integration could not be a

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85. Supra, footnote 82, p. 183.
86. U.S. V. Yellow Cab Co. (1947) 332 U.S. 218.

defence. Justice Murphy wrote:

> The fact that these restraints occur in a setting described by the appellees as a vertically integrated enterprise does not necessarily remove the ban of the Sherman Act. The test of illegality under the Act is presence or absence of an unreasonable restraint on interstate commerce. Such a restraint may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent. Similarly, any affiliation or integration flowing from an illegal conspiracy cannot insulate the conspirators from the sanctions which Congress has imposed. The corporate interrelationships of the conspirators, in other words, are not determinative of the applicability of the Sherman Act. The statute is aimed at substance rather than form.
>
> And so in this case, the common ownership and control of the various corporate appellees are impotent to liberate the alleged combinations and conspiracy from the impact of the Act. The complaint charge that the restraint of interstate trade was not only effected by the combination of the appellees but was the primary object of the combination. The theory of the complaint, to borrow language from United States v. Reading Co. 253, U.S. 26,57, is that "dominating power" over the cab operating companies, "was not obtained by normal expansion to meet the demands of a business growing as a result of superior and enterprising management, but by deliberate, calculated purchase for control". Moreover, the fact that the competition restrained is that between affiliated corporations cannot serve to negative the statutory violation where, as here, the affiliation is assertedly one of the means of effectuating the illegal conspiracy not to compete. (87)

Once again integration was viewed as a sophisticated form of cartel.

It was in 1951 however that, in principle, the idea

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87. Supra, footnote 86, p. 227-229.

that affiliates could conspire between themselves, even absent a sham, was to be expressly accepted by the United States Supreme Court.

In Kiefer-Stewart Co. v. Joseph E. Seagram and Sons Inc. Ltd. (88) "Kiefer-Stewart", a liquor wholesaler, was awarded treble damages because closely affiliated distillers had conspired between themselves to fix maximum prices above which wholesalers could not resell. Relying on the Yellow Cab Case (89) Justice Black said for the Court:

> Respondents next suggest that their status as "mere" instrumentalities of a single manufacturing-merchandising unit" makes it impossible for them to have conspired in a manner forbidden by the Sherman Act. But this suggestion runs counter to other past decisions that common ownership and control does not liberate corporations from the impact of the antitrust laws, e.g. (United States v. Yellow Cab Co., 332 U.S. 218, 675 Cr 1560, 91L, Ed. 2010.) The rule is especially applicable where as here, respondents hold themselves out as competitors. (90)

A few months later, the Intra-corporate conspiracy doctrine was applied in a case involving a multinational enterprise: Timken Roller Bearing Co. vs United States. (91)

The facts of this case are quite typical with regard to our previous discussions concerning the historical evolution of cartels and the type of arrangements made in order to artificially separate world markets.

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88. (1951) 340 U.S. 211.
89. Supra, footnote 86.
90. Supra, footnote 88, p. 215.
91. (1951) 341 U.S. 593.

From 1909 to 1927 Timken Roller Bearing Co. (Ohio Timken) had conspired with British Timken Ltd's predecessor in order to divide territories of the world markets for anti-friction bearings. In 1927, Ohio Timken and Dewar, an English businessman, cooperated in purchasing all the stocks of British Timken. Later, stocks of British Timken were offered to the public so that Ohio Timken and Dewar ended up holding respectively 30% and 24% of British Timken. In 1928, Ohio Timken and Dewar created "Société anonyme française Timken" (French Timken) of which they were the sole stockholders. Since that time, Ohio Timken, British Timken and French Timken had continously agreed to regulate between themselves the manufacture and sale of anti-friction bearings and to use the trademark "Timken". Agreements concerned allocation of trade territories, fixing of prices on products of one company sold in the territory of the others, cooperation to protect each other's markets and to eliminate outside competition and participation in cartels to restrict imports to, and exports from, the United States.

Once again the Court rejected the defence based on the affiliation. Justice Black wrote for the majority:

> The fact that there is common ownership or control of the contracting corporations does not liberate them from the impact of the antitrust laws. E.g., Kiefer-Stewart Co. vs Seagram & Sons, supra 340 U.S. at page 215, 71 S. Cr. at page 262. Nor do we find any support in reason or authority for the proposition that agreements between legally separate persons and companies to suppress competition among themselves and others can be justified by labeling the project a "joint venture". Perhaps every agreement and combination to restrain trade could be so labeled. (92)

92. Supra, footnote 91, pp. 974-975.

The Supreme Court adoption (if it was one) of the intra-corporate conspiracy doctrine has often been criticized in the United States. It started with Justices Frankfurter and Jackson dissenting in "Timken". It is interesting to note that both dissenters declare to have been considerably influenced in their opinion by the fact that the decision would have the effect of impairing "Timken" in its ability to reach foreign markets by discouraging it from using a separate corporate form to serve markets located abroad. As a matter of fact, this appears to be the basic reason why the two Justices dissented in "Timken" and not in "Kiefer-Stewart". (93)

It is ironic that, as we hope to demonstrate in this paper, from the Canadian point of view, the adoption of the intra-corporate conspiracy doctrine rather than its rejection, might favour the development of export markets! Not too many parent companies are located on the Canadian side of the border.

Since these decisions, the Supreme Court has been accused of putting more emphasis on legal forms than on economic reality. It has been said that although from a legalistic point of view subsidiaries are separate entities, in fact they are often all part of one single enterprise. (94) However, cases such as Sunkist Growers Inc. v. Winsler and Smith Citrus Co. (95) clearly indicate that the mere fact that units are separately

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93. Supra, footnote 88.
94. Supra, footnote 79.
95. (1960) 370 U.S. 19.

incorporated will not bring an automatic application of the intra-corporate conspiracy doctrine. There, the Court refused to consider an agricultural cooperative, its subsidiary and an affiliated cooperative as distinct entities conspiring with each other.

Although legal form will be an important element (96), other variables will be influential. For example, there will be more chances that conspiracy will be found possible if units hold themselves as competitors in public, if, as a matter of fact, they operate separately from each other, or if third parties are coerced (97). In this sense Section 7 of the Clayton Act which deals with mergers may also limit the field of application of the doctrine:

> Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of the immediate lawful business, or the natural and legitimate branches or extentions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations when the effect of such formation is not to substantially lessen competition. (98)

We could discuss in greater length the application of the doctrine in the United States. For example we might enter into the polemic as to whether the doctrine was truly adopted

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96. Nelson Radio and Supply Co. V. Motorola (1952) 200 F (2d) 911; cert. denied (1953) 345 U.S. 925; Supra, footnote 79; Supra, footnote 10, pp. 786-787.
97. Supra, footnote 79. Y. HADARI, Supra, footnote 10, pp. 774-775; O.E.C.D.; Supra, footnote 14, p. 55.
98. Clayton Act, supra, footnote 52, D.7.

or whether court statements were mere <u>obiter dicta</u> (99). We could also look at tax cases to find out if Courts really prefer the "separate entity" concept to the "unitary" concept and if the adoption of such an approach in the restrictive business practice field requires its adoption in any other field of law. (100)

But, as we have stated already, our purpose at this point is not to determine precisely what American law is, it is simply to show the apparent contrast between two approaches.

C) <u>Intra-Corporate Conspiracies in the Combines Act</u>

Although one might blame the Parliament for the occasional superficiality with which it treats the question of intra-corporate arrangements, one could not say that it ignores the problem.

Part IV.1 of the <u>Combines Act</u> (Sections 31.2 to 31.9) deals with matters reviewable by the "Restrictive Trade Pracices Commission" (The Commission).

Section 31.4 provides that, on application by the "Director of Investigation and Research" (the Director) the Commission will have the power to make certain orders in cases where a major supplier or many of them would practice exclusive dealing or tied selling or would impose market restrictions on customers with the effect of substantially lessening competition

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99. Y. HADARI, <u>Supra</u>, footnote 10, pp. 774-775; H.O. KRAUSE, <u>supra</u>, footnote 79, pp. 925 ff.; G.W. STENGEL, <u>Supra</u>, footnote 10, pp. 17-18.

100. <u>Mobil Oil Corp. V. Commissioner of Taxes of Vermont</u>, (1980) 100 S.A. 1223. <u>Exxon Corp. V. Wisconsin Department of Revenue</u>, (1980) 10 S.A. 2109; see Chapter IV, section B.

in any way. But paragraph (4) indicates that orders made under this section do not apply in cases where such restrictions occur"between or among companies, partnerships and sole proprietorships that are affiliated". (101) Paragraphs (5) to (7) then describe with some details what affiliation means.

Thus section 31.4 rejects the idea of intra-corporate conspiracy.

Sections 31.5 and 31.6 deal with problems of direct or indirect extra-territorial reach of orders from foreign judicial, executive or legislative bodies. They allow the Commission to order persons in Canada or companies incorporated in Canada not to take measures to implement such orders when the Canadian economy would be adversly affected.

But as far as we are concerned, the most interesting aspect of section 31.6 is that the Commission may also intervene if the parent company of a multinational enters into an international cartel and consequently orders to the Canadian subsidiary to act in pursuance of this cartel. (102)

Moreover, section 32.1 makes it a criminal offence for the subsidiary to implement such a communication. (103)

But sections 31.6 and 32.1 cannot be interpreted as a limited adoption of the intra-corporate conspiracy doctrine since these sections will not apply unless the arrangement

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101. <u>Supra</u>, footnote 33, s. 31.4.
102. <u>Supra</u>, footnote 33, s. 31.6.
103. <u>Supra</u>, footnote 33, s. 32.1.

entered into outside Canada would be in violation of section 32 if entered into in Canada: section 32 creates no offence when arrangements between anything but affiliates are involved.

As far as conspiracies in restraint of trade are concerned, section 32 remains the core of the Combines Act. It is more or less the equivalent of section 1 of the Sherman Act or of section 85 of the Rome Treaty. Subsection 32(1) and 32(7) read as follow:

> 32. (1) Every one who conspires, combines, agrees or arranges with another person
>
> (a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product,
>
> (b) to prevent, limit or lessen, unduly the manufacture or production of a product, or to enhance unreasonably the price thereof,
>
> (c) to prevent, or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance upon persons or property, or
>
> (d) to otherwise restrain or injure competition unduly,
>
> is guilty of an indictable offence and is liable to imprisonment for five years or a fine of one million dollars, or both.
>
> ....
>
> (7) Subsection (1) does not apply in respect of a conspiracy, combination, agreement or arrangement that is entered into only by companies each of which is, in respect of every one of the others, an affiliate as that relationship is defined in subsections 38(7) and (7.1). (104)

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104. Supra, footnote 33, s. 32.

Concerning paragraph (7) of section 32, we would like to mention that one cannot talk of Intra-corporate conspiracy doctrine unless an agreement reached _only_ between affiliates can constitute an offence.

For example, the _Dominion Steel and Coal Co._ case cannot be truly considered as a recognition of the Intra-corporate conspiracy doctrine although it raised the question as to know if both the parent company and the subsidiary can be fined concerning a same conspiracy. In this case, independent companies were also involved and it was not necessary to find a conspiracy between affiliated units since there was a conspiracy between independent corporations to restrict trade in the wire fencing industry anyway.

The concept of intra-corporate conspiracy is thus rejected in section 32.

Section 32.2 which creates specifically the offence of "bid-rigging" also excludes from its application arrangements between affiliates. (106)

In conclusion, there is no doubt that the _Combines Act_ in its present state rejects the Intra-corporate conspiracy doctrine and rather adopts the "Unitary" approach.

But future legislation might follow a different path as we will see when discussing _Bill C-13_ in Chapter VI, section A).

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105. R.V. _Dominion Steel and Coal Co. et al._ (1956) 116 C.C.C. 117.
106. _Supra_, footnote 33, s. 32.2.

CHAPTER IV

DESIRABILITY OF THE INTRA-CORPORATE CONSPIRACY DOCTRINE

A) Is Intra-Corporate Competition an absurdity?

The bottom line question raised by the intra-corporate conspiracy doctrine is the following: Is it conceivable that a subsidiary ignores the wishes of its parent company? The question is rendered even more accute in the case of market restrictions for it will generally mean that the disobedient subsidiary would, in fact, compete with other components of the same multinational.

Before we go further on this path, a few remarks must be made concerning the practicability of the doctrine.

First, one of the points this paper purports to make is precisely that, in the eventuality that the doctrine was to be adopted in regard to territorial allocation of markets and where it would be made clear that Canadian authorities are serious about it, those who make worldwide strategy planning for the multinational might, in order to avoid troubles, make decisions taking the Canadian position into consideration. For example, in some cases, the Canadian subsidiary could be asked to specialize in one line of products and to produce it for worldwide consumption. Thus, assuming a limited adoption of the intra-corporate conspiracy doctrine, there would not necessarily be directives from the parent company to be ignored by the subsidiaries and component units would not necessarily have to compete against each others. We will come back on this in Chapter VI, section B).

Secondly, the problem of actually forcing corporations to compete among themselves, although a serious one, is not one which is truly peculiar to intra-corporate conspiracy cases. For example, consider a situation in which a few independant enterprises producing fungible goods in a closed market reach an agreement by which they allocate territories among themselves. A court decree declaring the cartel agreement void will not by itself lead to competition among these firms, at least not in the short term. If enterprises, even if not affiliated, do not want to compete, a problem of enforcement exists in any event. The same could be said about price-fixing cartels which are simply replaced by conscious parallelism policies after a Court decree.

We would even go further. Not only is the problem of actually "forcing" entities to compete among themselves, one which is not restricted to cases where affiliation is involved but, in many cases, it is one which is less acute where component units of some gigantic enterprise are concerned. When independent firms reach a cartel agreement, it is because each firm involved expects to benefit from it in one way or another. But, as we have seen, allocation of markets oriented toward a global maximization of profits does not necessarily benefit a specific subsidiary. Thus, while the independent firms would dislike the fact that the cartel they reached is voided and would resist, often the subsidiary could be not too reluctant to see the validity of the arrangement challenged for it would often mean that its profits and its zone of influence could be increased.

It has been said that it was "obviously unrealistic to expect wholly-owned affiliates to compete". (107) We think that such a blunt statement is based on too superficial a study of the question. We suggest that it is derived from a conception of the firm which ignores modern realities of the multinational enterprise:

> The doctrine appeared absurd because its critics conceived of the enterprise as though it were a person. This is our traditional and very nearly universal way of conceiving of the firm. For the lawyer, the enterprise, the "corporation", has the formal status of a person, is entitled to the constitutional prerogatives of a person, is fitted into the apparatus of the law as a person. For the economist, enterprise - "the firm" - is the instrument of the entrepreneurial person the instrument of an individual will, shaped to the pursuit of an individual self-interest. If the enterprise is a person, or may properly be conceived by analogy to a person, then the doctrine of intra-enterprise conspiracy is an absurdity. A person cannot be made to compete with himself, short of schizophrenia, a person cannot conspire with himself. Yet a great modern enterprise, such as General Motors, Timken or the Distiller Corporation-Seagrams Ltd., is not a person. Great organizations such as these companies can no more be understood as a person than a nation can be so understood. Large organizations must be conceived differently, treated differently. That is accepted. But, alas, given a conventional problem in monopoly, we turn again to the established analytic techniques, back to the traditional idea of the firm as a profit-seeking individual. Though the fact of organization may be admitted the concept of

107. Report of Attorney General's National Committee to Study the Antitrust Laws, 1955, p. 36.

> organization has not yet permeated our way of thinking. The firm, as a function of personal choice, remains integral to our theory.
>
> As evidence of this, we have the response of the sixty members of the Attorney General's Committee, quite possibly the reader's own response as well, to the Doctrine of Intra-enterprise Conspiracy. (108)

Various factors have made multinationals resemble more closely the national political entities than a traditional corporation, a "person". We have already seen some of these factors (109) but let us consider some others.

The primary purpose of the enterprise is global maximization of profits (which is generally related with market share) but, as once pointed out by a president of E. I. duPont de Nemours and Company (110), the fact that the multinationals reached such tremendous proportions and that they are that much more diversified make it impossible even for the most gifted individual or group of individuals to comprehend and control the whole enterprise. At best, can such individuals make global strategic planning?

Consequently authority is necessarily delegated and specialized functions are developed, thus diminishing central control. The massiveness and the complexity of the enterprise require that operations be decentralized to a large extent in order to permit adaptation to specific circumstances. Special-

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108. R.A. SOLO, Intra-Enterprise Conspiracy and the theory of the firm, (1964) J.B., pp. 156-157.
109. Supra, Chapter I, section B).
110. Supra, footnote 108, p. 158.

ization within the firm takes two forms; territorial or functional and because of the complexity of the operations central management has but a remote control on specific activities.

Although it remains that the enterprise as a whole will research global maximization of profits (111) and that many strategic decisions will be made at the highest level, groups or individuals within the firm will have different outlooks as to how to reach such maximization of profits and these disparities will manifest in the decision making process.

Added to this is the fact that individuals have much to gain in terms of personal advancement and personal power in having the component unit to which they belong succeed better than others. Thus it does not appear at all unlikely that units of the multinational could oppose each other in specific situations.

Besides, intra-corporate competition is sometimes openly used as a means of improving efficiency within the enterprise thus demonstrating that it is not at all "absurd". (112)

When dealing with multinationals, the intra-corporate conspiracy doctrine cannot be rejected out of hand merely because it would appear at first glance inconceivable that component units of an enterprise oppose each other.

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111. Supra, Chapter I, Section B.
112. Supra, footnote 108, pl 162.

B) <u>Cost and benefits resulting from forbiding export restrictions</u>

Assuming for now that parliament would enact legislation stating that it is unlawful for a Canadian subsidiary and its parent company to make agreements with each other so that the subsidiary will refrain from exporting and assuming also that multinationals would bend to such an order, what could be won and what could be lost in terms of national interest?

First, note that in cases where a Canadian subsidiary is basically not efficient enough to compete on foreign markets, it would not export more after than before the government order.

In cases where the subsidiary is efficient enough to compete internationally or where it could be reorganized to become so, the search for profit would lead the company to export. On this point we refer to what has been said before. (113)

Besides, in order to rationalize its production, the multinational might replace former restrictions by restrictions not related to where the subsidiary can sell but to what it can sell. In view of what we have said concerning the need for specialization of Canadian economy and the "world mandate product" theory, this should not be considered as an unhappy result. (114)

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113. *Supra*, Chapters I and II.
114. *Supra*, Chapter I, Section B).

There is also an important positive side effect which could result from the eventual adoption of the intra-corporate conspiracy doctrine: It is a means of reaching international cartels. When any true international collaboration is absent, these cartels are often virtually immune from domestic antitrust laws although they may seriously affect competition inside given states.

These arrangements present difficult problems of jurisdiction, evidence and enforcement. The question has been presented in these terms:

> The international cartel is the classic vehicle of international restrictive business practices which are often beyond the reach of a single national jurisdiction. The presence of international enterprise in them adds further jurisdictional complications. For example a country may have no means of preventing a national subsidiary from becoming a <u>defacto</u> member of a cartel when its parent is a member. The subsidiary's policies respecting exports and imports may be directed by the foreign parent acting in accordance with the rules of the cartel. In such circumstances there is no evidence in the subsidiary's possession to establish that it is aiding and abetting as <u>prima facie</u>. it is only taking instructions from the parent". (115)

The "Stage II" proposal also underlines the difficulties encountered in attempting to reach such cartels. (116)

In 1966 the Restrictive Trade Practices Commission studied the <u>ERCO case</u> (117). Abuse of monopoly and merger were

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115. D.H.W. HENRY, <u>Supra</u>, footnote 14, pp. 309-310.
116. DEPARTMENT OF CONSUMER AND CORPORATE AFFAIRS, <u>Proposal for a new Competition policy for Canada</u>, Ottawa, Government of Canada, 1977, p. 68.
117. <u>R. V. Electric Reduction Company of Canada Ltd</u>, (1970) 61 C.P.R. 235.

then the main points of concern but the inquiry also revealed that four producers located outside Canada had allocated among themselves most of world markets. The cartel agreement as such was reached outside Canada. One of these producers was "Allright and Wilson" which owned a Canadian company, ERCO and directed it as to its export sales. No charge was laid but this case is interesting in that it probably would bave been difficult to actually obtain sufficient evidence as to the cartel agreement which occured between the four foreign producers.

But if the intra-corporate conspiracy doctrine had been applied evidence of an unlawful agreement between ERCO and "Allbright and Wilson" would have been sufficient to find guilt and to prevent ERCO from becoming, through its parent, part of the cartel. Evidence would have been somewhat easier to obtain, jurisdiction would have been easy to establish and a judgement could have been enforced since the Canadian subsidiary could have been "taken hostage".

High levels of sophistication of multinationals and their enormous means often constitute a barrier to enforcement of antitrust laws. For example, Alcan was initially created to a large extent as a means of permitting the United Steel Co. to participate in an international cartel without being subjected to U.S. antitrust laws. It was only many years later that stock-holders with shares in both Alcoa and the Canadian producer, were required to sell their interests in one of the companies. Certain patent practices were also then terminated. (118)

To gain respectability it is important for Canadian Antitrust Laws to find the means to reach, directly or otherwise, large enterprises. Incidentally, a study shows that from 1966 to 1972, the total number of decisions relating to antitrust laws increased by 146 (or 47.9%) by comparison to the previous seven year period but that the actual number of decisions registered against the largest corporations decreased by four. Thus the number of decisions concerning the big enterprises was proportionally reduced by 60%. (119) These figures are not necessarily as indicative as they appear at first glance since they reveal nothing as to the content of the decisions involved but they certainly are worth mentioning.

In any event some objections are repeatedly raised as to the desirability of preventing some types of intra-corporate arrangements. Let us take these objections one by one.

Should we refrain from forbiding intra-corporate allocation of markets since the Canadian subsidiary may often be the one with low productivity problems which benefits from such additional protection (120)? We do not think so.

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118. U.S. V. Aluminum Co. of America, (1945) 148 F.(2d) 416 (2nd Cir.); U.S. V. Aluminum Co. of America, (1950) 91 F.Supp. 333 (S.D.N.Y.); U.S. V. Aluminum Co. of America (1957) 153 F.Supp. 132 (S.D.N.Y.); See I.A. LITVAK and C. I. MAULE, Cartel Strategies in the International Aluminum Industry, (1975) 20 Antitrust Bulletin 641-663.
119. C. GOLF, C.E. REASONS, Corporations in Canada: A Study of Crime and Punishment, (1975-76) 18 C.L.Q., p. 470-472.
120. T.L. POWRIE; Supra, footnote 41, p. 97.

First note that the problem could possibly be avoided if parliament would prohibit nothing but export restrictions imposed on Canadian subsidiaries.

But more fundamental, as a matter of principle in a liberal system one has to be prejudiced in favour of the efficient firm, not the inefficient one. Thus, policies should be oriented toward developing efficiency rather than toward fostering weak subsidiaries.

Remember the previous discussion concerning tariffs (121). It was then concluded that such a protectionist attitude was, to a certain extent, responsible for low productivity problems in Canada in that local subsidiaries were encouraged to produce too wide a variety of goods to serve too small a market. One must understand that when a multinational prevents its non-Canadian subsidiaries from exporting to Canada, it does nothing but impose private non-tariff barriers of the same nature as formal tariff barriers. The tariff imposed by a "responsible" government is paralleled or replaced by other barriers imposed by a business organization. Remember also our discussion in which the multinational was described more as a "political body" than as a "person". (122)

Moreover, as we have seen before, in many instances if not in most of them, the inefficiency problems encountered

121. Supra, Chapter I, Section B).
122. Supra, Chapter IV, Section A).

by the subsidiary are the very result of intra-corporate allocation of markets. (123) These arrangements do not protect the subsidiary as such, they bring about the inefficient organization of subsidiaries and they then allow these subsidiaries to survive no matter what their inadequacies may be as long as they still are efficient enough in terms of domestic market place. The tariff barriers favour intra-corporate market allocation which in turn favours an inefficient organization of the subsidiary which has to be protected through more tariffs or intra-corporate market restrictions.

Antitrust laws must not favour perpetuation of this vicious circle.

The objection that we are dealing with is sometimes pushed further: Canadian subsidiaries have to be protected since they cannot compete against U.S. firms which benefit, because of the large U.S. market, from substantial economies of scale. To this we answer that if market restrictions would not impose on Canadian subsidiaries the requirement to deal in Canada only, often they could also achieve economies of scale by enlarging the market they sell to. Note in this respect that penetration of foreign markets implies that other countries will also reduce their tariff or non-tariff barriers. In that sense, the recent G.A.T.T. round is encouraging.

123: <u>Supra</u>, Chapters I and II.

Is there a risk that, faced with a prohibition which would have some effect on its very structure (as to its Canadian activities at least) the multinational decides to export to Canada rather than to invest in it?

Before we get to the core of the question, a few remarks should be observed. First, one must not over-evaluate the overall practical importance of Canadian antitrust laws. Also, even if the risk exists in some instances it could be one that the Canadian economy must face. Finally, in most cases multinationals already have plants in Canada and have vested interests in maintaining their investment.

But more important, at least in many cases the multinational has no real choice. (124) The best evidence of this could be the very fact that, although the investor naturally tends to limit its investment abroad to a minimum, multinationals, by definition, do invest in foreign countries. It tends to prove that, at least at one point in their history, they had to do so in order to maximize profits or to protect or increase their market share.

Without getting into a long discussion on the incentives to foreign investment, let us look briefly at the elements involved. The Gray Report presents foreign direct investment

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123. Supra, Chapters I and II.
124. C.F. BERGSTEN, T. HORST, T.H. MORAN, American Multinationals and American Interests, Washington, The Brookings Institution, 1978, 534 pp.

as the normal step to take once the foreign market has been secured through trade. (125) Factors related to the profitability and market position of the multinational, to the host country environment and to the home country-environment lead a firm to invest.

Following is a brief enumeration of these factors: Tariffs policies; transport costs; need for product modification in order to adapt to local market conditions; existence of strong local competition; servicing requirements; factors related to the nature of the product; patent laws; government and other customers discrimination in purchasing policies; relative values of the currencies; size of the prospective market; tax laws; attitude of the government of the host country; labour costs; local human resources; financing facilities; desire to prevent eventual competition on the home market; behavioural factors; antitrust laws of both home and host country; and so forth. (126)

In short it is unlikely that the adoption of the intra-corporate conspiracy doctrine by itself would prevent foreign investment in any significant manner. Too many other factors are involved.

Another frequently heard objection to the intra-corporate conspiracy doctrine was enunciated by the O.E.C.D. Committee of Experts which considered that holding practices such as allocation of functions (in general) among units of a single

125. Supra, footnote 5, pp. 35-36.
126. Supra, footnote 124.

enterprise unlawfull" would be likely to discourage internal growth and decrease efficiency." (127)

This is highly questionable since, when allocating markets at least, the multinational seeks primarily to increase its profits, not its efficiency. Both objectives do not necessarily overlap completely.

Also, the parent company's interest may very well differ from Canadian interest. We have seen that export restrictions are one of the key elements which have the effect of forcing the Canadian subsidiaries into a chronic pattern of inefficiency. (128) From the Canadian subsidiary's point of view intra-corporate allocations of markets, not their elimination, often "discourage internal growth and decrease efficiency".

Besides, to prohibit export restrictions does not mean that all types of allocation of functions have to be forbiden without discrimination.

Considering what we have said above in this paper, there is not much to add on these points.

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127. O.E.C.D.; Supra, footnote 14, p. 59.
128. Supra, Chapters I and II.

CHAPTER V

SPECIFIC PROBLEMS RAISED BY THE INTRA-CORPORATE CONSPIRACY DOCTRINE

A) Issues Related to the Legal Form of Organization of the Enterprise

Intra-corporate agreements cover arrangements between a parent company and its subsidiary or between corporations owned directly or indirectly by the same natural person. But they also cover arrangements between unincorporated divisions of a same corporation, arrangements between a corporation and its officers and arrangements among the officers themselves. (129). For practical purposes, they can be grouped under three headings: arrangements occuring wholy between legally separate entities (subsidiaries), arrangements occuring between unincorporated divisions (branches) and arrangements to which at least one party is a natural person (officers or employees).

In this paper, we have used (and unless otherwise provided we will keep on using) as working premises, the case of intra-corporate conspiracy between a parent company and its

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129. P.A. REEDA, Antitrust Analysis, Toronto, Little, Brown and Co., 1967, p. 207.

subsidiaries or between subsidiaries themselves. Thus, in regard to the rest of the paper, no special problem is raised by the use of separate corporate form by the multinational.

But before we discuss problems raised by arrangements to which unincorporated divisions of a multinational are parties, we would like to underline the existence of issues relating to the degree of affiliation required in order to truly have intra-corporate conspiracy. For example, are arrangements intra-corporate only when they occur between two corporations one of which owns all the stocks of the other or is there intra-corporate conspiracy if one company owns 51% of the stocks of the other? Also, what if one corporation has effective control on another even if it does not own a majority of stocks? (Which is the common rule when large public corporations are involved) And what about a principal agent relationship? (130)

Besides, should the nature of the investment, the identity of the investors or the degree to which they intervene into the affairs of the company be taken into consideration? (131)

We raise these questions mostly so that the reader notices that the solution we will later propose (132) has at least the merit of avoiding

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130. On these questions see: H.D. KRAUSE, <u>Supra</u>, footnote 79, p. 930 ff.
131. IBID.
132. <u>Infra</u>, Chapter VI, Section B).

this type of consideration.

After the Supreme Court of the United States convicted Seagram in Kiefer-Stewart (133) the company reorganized itself so that former subsidiaries were replaced by unincorporated divisions. Given that the branches had separate and autonomous sales organizations, that the divisions held themselves out as competitors and that they acted entirely independently, the jury was informed, in Hawaiian Oke and Liquors Ltd., v. J. E. Seagram and Sons (134) that unincorporated divisions of a single company could be found guilty of conspiring with each other. But, in line with Poller v. Columbia Broadcasting System Inc. (135) and the Nelson Radio Case (136) the Appeal Court reversed. (137)

Note first that it is unlikely that there could be many cases where, as in Hawaiian Oke and Liquor incorporated entities would be replaced by unincorporated divisions merely in order to avoid antitrust laws. Financing and tax considerations, advantages in terms of political and public relations coming from operating under a local name, limitation of liability and other considerations strongly favor the use of the corporate form. (138)

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133. Supra, footnote 88.
134. (1967) 272 F. Supp. 915 (O. Hawaii).
135. (1962) 368 U.S. 464.
136. Nelson Radio and Supply Co. V. Motorola (195 2) 200 F.(2d) 911, 914 (5th Circuit); (1953) 345 U.S. 925 (Cert. denied)
137. J.E. Seagram and Sons V. Hawaiian Oke and Liquors Ltd (1969) 416 F. 2d. 71 (9th Cir.), cert. denied, (1970) 396 U.S. 1062.
138. J.G. GRIFFIN, Supra, footnote 10, p. 379.

Often, the multinational has no real choice:

> Most of the large corporations, and many small ones, have one or more subsidiaries. This multi-corporate form has been employed for various reasons. In many cases it is merely a matter of administrative convenience. Sometimes it is used for minimizing taxes. For example, there may be a saving in franchise taxes by creating local selling companies to operate in various states. It may also be used for spreading risks and limiting tort or contractual liability. If one branch of a corporation's business is exceptionally risky, a subsidiary may be organized to conduct that part of its business. On the other hand, if one part of a corporation's business is of greater interest to investors than another part, it may be easier to raise capital if a subsidiary is organized. When another business is purchased by a corporation, it may help in preserving the goodwill of the acquired business if it is conducted by a separate subsidiary. When a corporation desires to do business in another state, it may be easier to qualify a subsidiary to conduct that business than to qualify the parent corporation. Or a subsidiary might be organized to do business in another state in order to prevent service of process on the parent company. Quite frequently organization of a subsidiary is the only feasible way in which an American corporation can enter the markets of a foreign country. (139)

Thus an author observed that most marketing-oriented American-based multinationals by opposition to service corporations and firms in extractive industries, operate abroad through subsidiaries and affiliates. (140) He explains the popularity of the subsidiary in these terms:

> One of the primary functions of the corporate form is the insulation of individual stockholders from liability for corporate debts. Additional advantages and attributes include separation of management and control from ownership, easy transferrability of ownership, ability to retain earnings for internal growth, large investments in

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139. G.W. STENGEL, Supra, footnote 79, p. 9.
140. Y. HADARI, Supra, footnote 10, p. 748.

> research and development, and attraction of large sums of funds either through equity participation or debentures. Those factors and ever increasing sophistication of managerial skills and techniques have brought the corporation to its present status as the principal mode of business organization.

Hence, in most cases, there is only one legal form of organization truly available and the intra-corporate conspiracy doctrine cannot be rejected out of hand merely because it would favor an inefficient legal organization of the enterprise (142).

Moreover we think that when dealing with intra-corporate arrangements, antitrust laws should ignore legal forms thus eliminating in this regard any incentive in one way or the other. It is much too superficial an approach on which to rely whether or not component units of the multinational are separately incorporated to determine if there can be a conspiracy between them. It tells little about the way the firm is managed. (143)

Some alternative tests have been suggested.

In terms of benefits of the Canadian economy, a test

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141. Y. HADARI, Supra, footnote 10, p. 158.
142. G.W. STENGEL, Supra, footnote 79, p. 9.
143. J.P. GRIFFIN, Supra, footnote 10, p. 380-382.

based solely on the actual degree of autonomy of the subsidiary (or branch) is undesirable: it would encourage the multinational to delegate as little authority as possible to its Canadian units in order to avoid to be convicted of conspiracy.

Many have seen in United States Supreme Court decisions, indication that the intra-corporate conspiracy doctrine was to he applied only when third parties were involved. (144)

The problem with this test is that, strictly speaking, it is limitless. For example, in case of market allocation at least, the customer will always be coerced. Besides, since it ignores the fact that the subsidiary (or the local branch) can itself be coerced by the agreement, this attitude is essentially based on the notion that component units of a multinational cannot be considered as separate entities.

Other factors could be taken into consideration when it comes time to determine if a given multinational has to be treated as a single trader or as an "association" of separate units. We can think of three: the fact that component units hold themselves out as competitors seems to influence American judges and scholars (145) and in the Yellow Cab case (146) the fact that affiliation

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144. Report of Attorney General's National Committee to Study the Antitrust Laws, 1955, p. 20.
145. G.W. STENGEL, Supra, footnote 79, p. 10.
146. Supra, footnote 86.

occured in order to make effective an illegal conspiracy which would have existed in any event was not ignored.

A third factor which can be quite significant is the economic history of the entities involved (147). For example, when proposing the creation of a screening agency, the Gray Report "makes a sharp distinction between acquisitions of existing Canadian firms and the creation of new operations". (148)

But, although the three factors we just mentioned certainly are relevant, they apply only in a limited number of cases and thus reliance on them does not really help find a global solution to problems related to intra-corporate behaviour.

Finally, how should we deal with the relations between officers (or employees) of a company and relations between these natural persons and the company itself? (149)

An author suggests that since the basic rationales of criminal conspiracy (conspiracy is undesirable for society in that it constitutes an "attempt" to commit a substantive crime or in that once there is an agreement reached with another person it is more difficult to change his mind and "back up") focus on individuals, it should not be invoked against the company but rather against the human actors involved. (150)

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147. J.A. RAHL. Conspiracy and the Anti-Trust Laws, (1950) ee 44 IMLR, pp. 766-767.
148. Supra, footnote 5, p. 272.
149. Supra, footnote 147, p. 766.
150. M.R. GOODE, Criminal Conspiracy in Canada, Toronto, Carswell, 1975, pp. 136-137.

This question could be the object of a very long discussion. But we think that at least in the field of anti-trust laws Canadian tribunals are just not psychologically ready to take such drastic steps as convicting officers of big companies on a regular basis. Moreover, it seems unlikely that they will ever be. In other words to convict personally officers or employees of a company (except for perhaps a one man company) is such a drastic measure that, as a matter of fact, tribunals will in most cases do their best to acquit, thus endangering the rational application of the whole doctrine. It would thus become a means of dealing with the problem which would have more negative than positive effects.

B) Problems Related to Licensing Agreements

Laws relating to industrial and intellectual property are at the same time essentially of the same nature as antitrust laws and in direct contradiction to them: both types of laws create devices to deal with monopoly powers, but while antitrust laws oppose these monopoly powers, industrial and intellectual property laws expressly protect them in specific circumstances.

By "Industrial and intellectual property laws" we mean generally laws dealing with patent rights (151), industrial design (152), copyrights (153), trade marks (154) and so forth.

151. Patent Act, 1970 R.S.C., c. P-4.
152. Industrial Design Act, 1970 R.S.C., c. 1-8.
153. Copyright Act, 1970 R.S.C., c. C-30.
154. Trade Marks Act, 1970 R.S.C., c. T-10.

For practical purposes though, we will mainly focus on apparent conflicts between antitrust law and patent law.

Essentially what patent law does is grant a monopoly power to someone over a given invention. It necessitates antitrust legislation to exempt such a monopoly from their application. (155)

Through a licensing agreement the owner of the patent right can grant to someone else the right to share his monopoly power. Such a licensing agreement will generally include diverse restrictions as to how the licensee will be allowed to utilise the invention.

The restrictions often raise the question as to where to draw the line between rights granted by Patent law and conduct prohibited by antitrust laws. True, Patent law grants rights to the patentee, but to what extent are these rights transferable and, more importantly, in transmitting these rights can he acquire powers that patent law does not expressly give to him in the first place?

For example, can corporations allocate territories between themselves through licensing schemes when they could not do it otherwise? In this respect the Imperial Chemical Industries (156) case is interesting in that it shows how such

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155. Supra, footnote 33, s. 2.
156. U.S. V. Imperial Chemical Ind. Ltd, (1952) Civil No.24-13 (S.D. N.Y.).

licensing schemes can be efficient in allocating territories.

DuPont and I.C.I. had divided the chemical products markets between them and licensing agreements had been used to limit exports by I.C.I. to U.S. and exports by DuPont to Great Britain. Thus in 1949, I.C.I.'s exports to U.S. amounted to 500,000 dollars. In 1950, export restrictions were removed. As a result, in the first nine months of 1951 only, I.C.I. exported for 4,000,000 dollars. (157)

Following is a list of potential abuses often found in licensing contracts (158): price control, territorial limitations, production or quantity limitations, field of use limitations, resale limitations, limitation on the right to purchase from others, limitations on the right to secure industrial property rights from others, extended duration of protection, obligations not to challenge validity of the patent and so forth.

An author explains why such restrictions exist:

> Contracts relating to the transfer of technology usually contain clauses limiting the freedom of the licensee (whether indigenous firm or foreign subsidiary) to exploit the technology. Three of the most common types of restriction are quotas or prohibitions on exports, obligations to purchase key inputs from the licensor and obligations to offer technical improvements back to the licensor.
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> It is easy to see why restrictions are to the advantage of the licensor. Restrictions on exports from the host economy permit the licensor to

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157. Supra, footnote 14, pp. 32-33.
158. J.C. OSBORNE, Industrial Property and Bill C-13, in J.W. ROWLEY, W.T. STANBURY, (ed) Competition Policy in Canada: Stage II, Bill C-13, Halifax, Dalhousie University Press Ltd, 1978, pp. 280-281.

> segment the world market and charge according to what the market will bear in each segment, thereby achieving the maximum possible return from his monopoly of the technology. Obligations to purchase key inputs enable the licensor to monitor the activities of the licensee; in particular the licensee's demand for the key input provides an independent check on the production figures quoted by the licensee when determining his royalty payment. The obligation to offer back technical improvements protects the licensor against obsolescence arising from marginal technical improvements implemented by the licensee. (159)

Many studies have shown without a doubt that licensees all over the world and especially those doing business in less developed countries (the economies of which have manv features in common with Canada's (160)) must cope with export restrictions (161). Canada is no exception: the Firestone survey indicated that in at least 85% of cases, export limitations of some sort were attached to patents licensed in Canada. (162)

As we mentioned above (163) responsibility for Research and Development is generally retained by the parent company or by a specific unit of the multinational and when licensing its subsidiaries the parent company can impose straight market restrictions or reach the same result through more subtle means such as exclusive dealing clauses (164) or input related

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159. M. CASSON, Alternatives to the Multinational Enterprise, London, Billing and Sons, 1979, p. 20.
160. Supra, Chapter 1, Section A).
161. Supra, footnote 159.; O.E.C.D.: Supra, footnote 14.
162. Supra, footnote 1, p. 79.
163. Supra, Chapter I, Section B).
164. Supra, footnote 5, pp. 199-200.

royalties systems (165).

This will have to be kept in mind when looking for a means to encourage Canadian units of multinationals to export.

Before we temporarily leave this question of licensing agreements it has to be mentioned that the problem is addressed in section 29 of the Combines Act which gives to the Federal Court specific powers where exclusive rights granted by a patent or a trade mark are used in a way which restrains trade unduly.

Proposed section 31.74 of Bill C-13 would give some powers to the board in that respect.

C) Other Problems Related to the Vertical Integration of the Enterprise

Here again we would like to underline the fact that territorial allocation will not necessarily take the form of a bare directive emanating from the parent company. It thus raises identification and enforcement problems.

Subtle restrictions can be imposed when the subsidiary obtains supplies from another component unit of the multinational or when it reached the ultimate consumer through another such unit.

There are several reasons why multinationals' subsidiaries tend to obtain their supply from affiliates; maxim-

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165. Supra, footnote 159, p. 92.

ization of economies of scale; repatriation of profits (through transfer-pricing); desire to use maximum capacity of plants abroad; avoidance of competition; quality control; reliability of supply; appropriate timing of deliveries; industrial secrecy; maintenance of market power; non economic reasons (such as lethargy, labour relations or home government policies) and so forth. (166)

A high level of procurement from affiliates may have serious negative consequences as far as government control and economic structure are concerned. More specifically related to this paper, procurement policies can be used as a means of actually preventing a Canadian subsidiary from exporting. For example: if the subsidiary is bound, for one reason or another, to obtain supply from an affiliate and the said supply is then sold at a price artificially high, it can very well have the effect of rendering the Canadian subsidiary unable to compete on foreign markets. Thus the immediate damages are threefold: Canadian consumers will pay more for the finished product; tax perception will be rendered difficult (167) and the subsidiary will not be able to export (168).

Although doubts have been cast on the actual ability of the large multinational to use inter-company sales to mani-

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166. Supra, footnote 5, pp. 195 ff.
167. Y. HADARI, Supra, footnote 37, p. 780.
168. On those questions see: R. VERNON, supra, footnote 11, pp. 129 ff.

pulate allocation of income, if we are concerned with intra-corporate allocation of market we have to keep in mind that it can also be achieved through indirect means such as procurement policies.

Such allocations of territories can also be obtained by actions occuring at the other end of the subsidiary production line. For example exclusive dealing arrangements can force the subsidiary to deal only with a given affiliated distributor which will itself sell Canadian production in Canada only.

D) Other Problems of Enforcement

We would now like to mention briefly three problems which are susceptible to arise if the intra-corporate conspiracy doctrine is adopted when allocation of markets is involved.

First, agreements of this nature will not always be formalized in writing (although they generally are when such large multinationals are involved) and, if they are, documents can be most difficult to obtain, especially when located abroad. (169) We will come back to this question in the next chapter but for now we would like to underline the fact that this kind of problem is not one which is necessarily peculiar to cases of intra-corporate conspiracy.

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169. Y. CARON, Aspects internationaux de la législation et de précédents judiciaires en matières de pratiques restrictives sur le commerce (anti-trust), (1966) 1R.J.T., p.218; J.P. GRIFFIN, Supra, footnote 10, p. 413; S. ZUCKER, Extraterritoriality and Canadian Criminal Law, (1974-75) 17 Crim.L.Q., 146-177.

The same could also be said of execution measures although the problem is rendered somewhat less accute by the fact that the subsidiary will have assets located on Canadian soil making it easy to reach.

Finally, as we have already seen, a multinational has at its disposal a wide range of techniques to control the export activities of subsidiaries so that they remain in accord with its global marketing strategy. We would like to say a word about one of them, which consists in limiting plant capacity to a size which would allow a Canadian subsidiary to supply the domestic market and not more. (170)

We suggest that limited plant capacity should not necessarily constitute an excuse not to export. As a matter of fact, when strongly corroborated by surrounding circumstances, the very existence of limited plant capacity could be viewed as additional evidence of the existence of a cartel. The act of planning such limited capacity could then be viewed as an "overt act" in furtherance of the conspiracy to allocate markets. We will come back on this question in section B) of the next chapter.

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170. P.K. GORECKI, Economies of Scale and Efficient Plant Size in Canadian Manufacturing Industries, Ottawa, Department of Consumer and Corporate Affairs, 1978, 110 pp; Supra, footnote 5, pp. 168-169.

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CHAPTER VI

PERSPECTIVE FOR THE FUTURE

A) Bill C-13

Now pending is Bill C-13 (171) which would modify the Combines Act if adopted. (172) Is there anything in the Bill for intra-corporate conspiracy doctrine?

We have seen that under section 31.6 and 32.1 of the Combines Act, a subsidiary can be prevented from implementing a directive of its parent company, located abroad, when the communication is for the purpose of giving effect to a conspiracy entered into outside Canada (for example an international cartel). (173)

Bill C-13 would modify section 31.6 so that would be exempted from its application the case of a Canadian subsidiary obeying to a directive emanating from its U.S. parent where the said directive would be in furtherance of a cartel reached

171. Supra, footnote 35.
172. For comments see: J.W. ROWLEY, W.T. STANBURY, Competition Policy in Canada: Stage II, Bill C-13, Halifax, Dalhousie University Press, 1978, 311 p.
173. Supra, Chapter III, Section C).

between incorporated units of a same multinational. (174)

But the situation would be covered by what would become the new section 31.61:

> 31.61 (1) where, on application by the Competition Policy Advocate, and after affording every person against whom an order is sought a reasonable opportunity to be heard, the Board finds that a corporation carrying on business in Canada
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> (a) has entered into an agreement or arrangement with an affiliate carrying on business outside Canada to substantially restrict the importation or exportation of a product into or from Canada, or
>
> (b) has received from or given to an affiliate that carries on business outside Canada a directive, instruction, intimation of policy or other communication that has brought about or if, implementated, would bring about, a substantial restriction in the importation or exportation of a product into or from Canada,
>
> and the Board also finds that the restriction is designed to protect the price level in a Canadian market from the influence of lower-priced products from outside Canada or to protect the price level in a market outside Canada from the influence of lower-priced products from Canada, subject to subsection (2), the Board may, by order, direct that the corporation carrying on business in Canada withdraw forthwith from the agreement or arrangement or refrain from enforcing or implementing the communication, as the case may be.
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> (2) No order shall be made under the section in respect of a corporation where the Board is satisfied that the corporation does not account for 25% or more of the production or supply in Canada of the product in relation to which an application is made for an order against the corporation.

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174. Bill C-13; Supra, footnote 35, s. 27. For comments see: R.M. DAVIDSON, An Overview of the Stage II Amendments, Bill C-13, in Supra, footnote 174, p. 51.

> (3) For the purposes of this section, corporations are affiliated if they are affiliated within the meaning of subsections 31.71(16) and (17)". (175)

Proposed section 31.61 shows that the development of international competitiveness is viewed by government as one of the goals antitrust legislation must aim at.

Underlying section 31.61 is the assumption that component units of a multinational can illegally conspire with other units of the same multinational. Otherwise proposed section 31.61 and especially paragraph 1(a), would make no sense in terms of antitrust laws. Why would such antitrust legislation force a Canadian subsidiary to export unless it conspired with some other unit? Merely refraining from exporting certainly does not by itself constitute an abuse of dominant position and in any event, if the multinational is viewed as a single unit, such decision to the Canadian subsidiary from exporting is mere management strategy. In terms of antitrust law, it is condemnable for a company not to export only if it conspired with another one in order to allocate markets.

But section 31.61 does not reach far enough although it is a step in the right direction. For example it probably does not reach arrangements or communications between unincorporated units of an enterprise.

Also, at least two findings have to be made by the Board. Firstly, it has to find that importation or exportation

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175. Supra, footnote 35, s. 28.

would be restricted.

Secondly, the Board must make a finding that the restriction is designed to protect price levels. We think that, as far as Canadian interests are concerned, to require the second finding serves nothing more than causing headaches to those who will have to prove it in every specific case and permitting some enterprises to escape enforcement of the law unduly. Take a case where a Canadian subsidiary agrees with its parent not to export; no matter what the ultimate aim of the arrangement, there is damage to the Canadian economy in that the absence of exportation will not flow from natural market causes but from artificial restrictions. Moreover, one can hardly think of a case where, when corporations would take the trouble of engaging in such agreements the ultimate purpose would not be in one way or another to separate markets in order to protect price levels.

Before we close temporarily the discussion on this section, it is important to mention that the "Stage II" proposals (176) give no reasons for the presence of the 25% exemption of subsection (2). (177)

The criminal counterpart of section 31.61 would be the new section 32.1 which, among other things, makes it an

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176. Supra, footnote 116.
177. R.M. DAVIDSON, An Overview of the Stage II Amendments, Bill C-13, in supra, footnote 172, pp. 51-52.

offence to conspire, combine, agree or arrange to reduce or limit the value of exports of a product from Canada. (178)

Contrary to section 31.61, subsection 32.1 (3)(b) expressly excludes the idea of criminal conspiracy between affiliates thus excluding multinationals intra-coroporate arrangements from its field of application.

Current section 32.1 would be replaced by section 32.11 which would make it an offence for a corporation carrying on business in Canada to implement in Canada a communication from a person abroad when such communication is to give effect to a cartel wherever entered into. Subsection 32.11(3) rejects the intra-corporate conspiracy doctrine in that a combination between affiliates only cannot give rise to the application of section 32.11. (179)

B) - Some Proposals

We think that the same few mistakes are repeatedly made when dealing with the question of relations between affiliates.

First, there is a tendency to lump together all types of interaffiliate arrangements and try to find a global solution. It often leads to the exclusion of all agreements between related parties from the field of antitrust laws because with some categories of these agreements the intra-corporate conspiracy

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178. Bill C-13, Supra, footnote 35, s. 33.
179. Bill C-13, Supra, footnote 35, s. 33.

doctrine does not make any practical sense. But practices such as price fixing, exclusive dealing, price discrimination, market allocation and so forth present different types of problems requiring specifically tailored solutions.

This is why, in this paper, we have chosen to focus on one particular practice: market allocation. More specifically, we have dealt with market allocations which have the effect of preventing exports of manufactured goods from Canada.

One should not lump together enterprises of all sizes and all natures either. The multinational corporation can obviously not be approached with the same concepts as is the "one man" company or in that respect any other traditional kind of small enterprise. These are different animals altogether: the latter remains more or less a projection of a natural person or of a group of natural persons while the former constitutes a political type of organization functioning through complicated interplay between several relatively autonomous units whose respective interests are not always concordant. This is why in this paper we have chosen to treat the multinational's intra-corporate relations only.

Lastly, one must not forget that parliament is sovereign and if it considers that in a given case policy considerations favour the implementation of the intra-corporate conspiracy doctrine, it can order so even if, from a purely theoretical point of view, the adoption of the doctrine might sound artificial in some respects (which we do not think it does in any event). Also, we do not think that if parliament adopts the "separate entity" concept with regard to a specific type of business practices, it is bound to adopt the same attitude with regard to all sorts of restrictive business practices. In the same vain, we do not think that a sovereign parliament adopting the "separate entity" concept in the field of Antitrust laws has to adopt it in other fields of law such as tax, bankruptcy or labour.

Before we make some concrete proposals, we would like to state that obviously we are fully aware that short production runs problems of the Canadian economy will not be solved simply by the inclusion of some dispositions in the Combines Act. More, we are very conscious that even if the doctrine should be adopted as proposed, in practice, it could be applied in nothing but a limited number of cases. Among other things one has just to think of problems of evidence to realize it.

But we think that in some cases it could be effectively enforced. We also think that if the Canadian government, through concrete measures, make it clear that it intends to retaliate against multinationals when agreements prevent Canadian subsidiaries from exporting, these corporations might occasionally take it into consideration in making their strategic planning. For example, arrangements might impose restrictions of a product nature rather than restrictions of a territorial nature thus leading to the "world mandate product" theory. This could be true especially if other measures such as tax incentives would also be taken. We have seen in Chapter I section B) that, as far as developing international competitiveness for Canadian subsidiaries is concerned, conspiracies as to product are less damageable than those as to territories. Note though that government would then have to inquire into what kind of product the Canadian subsidiary is required to produce. But we then leave the field of antitrust law to get into plain regulation. This could be the topic of another paper.

In any event, even if we do not know how much there is to win in practice by adopting the doctrine, we certainly know that there is not much to lose as was demonstrated in Chapter IV.

With these remarks in mind, we suggest the following amendments to the <u>Combines Act</u>.

A new section should read:

32.1(1) For the purpose of this section

"Canadian unit" means any part located inside Canada of a multinational corporation or any part located inside Canada of a corporation controlled in one way or another by a multinational corporation.

"Corporation" means a body corporate with or without share capital.

"Multinational corporation" means a corporation which controls investments inside Canada and of whici 25% of the total assets it controls are located outside Canada. Once it is established that a corporation owns any assets outside Canada, it is deemed to own 25% or more of its total assets outside Canada unless otherwise demonstrated.

"Unit" means any part of a multinational corporation. It includes "Canadian unit".

(2) Notwithstanding any other section in this act, it is unlawful for a unit of a multinational corporation to agree or arrange with any other unit of the same multinational corporation to allocate territories between themselves when one of the potential effects of the conspiracy could be to prevent a Canadian unit of the multinational corporation from exporting manufactured goods outside Canada.

(3) Every unit of a multinational corporation which becomes party to a conspiracy such as the one described in subsection (2) is guilty of an indictable offence and is liable to a fine in the discretion of the Court.

(4) Where, on application by the Director, and after affording the multinational corporation against whose units an order is sought a reasonable opportunity to be heard, the Restrictive Trade Practices Commission finds that subsection

(2) is or is about to be infringed, it may make all orders deemed appropriate.

(5) For the purposes of this section a Canadian unit is deemed to be efficient enough to export in any part of the world unless otherwise demonstrated.

(6) For the purposes of this section when a Canadian Unit is efficient enough to export, or is deemed to be so, but does not actually export a significant part of its production, a conspiracy contrary to subsection (2) is deemed to exist between units of the multinational corporation involved unless it is demonstrated that the failure to export is caused by other factors than a conspiracy contrary to subsection (2).

(7) Where a Canadian unit obeys a communication made by another unit of the same multinational corporation, an agreement is deemed to have been reached between the two units.

(8) For the purposes of this section it is no defense to demonstrate that a practice dealt with in subsection (2) is not harmful to the Canadian economy.

(9) For more precision and without restricting the generality of the rest of this section, it is no defense for the purpose of this section, to demonstrate that a Canadian unit does not constitute a separate entity legally or otherwise.

(10) For the purposes of this section it is no defense to demonstrate that a Canadian unit does not export more than it

does because of its limited plant capacities unless it is also demonstrated that such limited plant capacity does not exist in order to prevent a Canadian unit from exporting.

(11) For the purposes of this section, it is no defense to demonstrate that to increase the amount of manufactured goods it exports, a Canadian unit would have to compete with other units of the same multinational corporation.

(12) For the purposes of this section, it is no defense to demonstrate that territorial market restrictions flow from licensing agreement or in that respect from any other agreement related to the vertical integration of the multinational corporation.

(13) For the purposes of this section the burden of proof required before a finding of any kind can be made is the balance of probabilities.

(14) For greater ~~more~~ certainty, this ~~particular~~ section does not make it unlawful for units of a multinational corporation to agree or arrange ~~become party to an arrangement,~~ with other units of the same multinational corporation where the only because one of the purposes of such an arrangement would be to allow product specialization.

(15) In any proceeding under this section, the multinational corporation or any unit thereof may request that sensitive information be kept outside the reach of the public when the unveiling of such information would put competitors of the multinational corporation or of any unit thereof in an

unduly favoured position.

(16) On recommendation of the Director, and after having afforded to anyone who requests a reasonable opportunity to be heard, the Minister may exempt a multinational corporation from the application of this section when the Canadian economy would benefit from it. Such an exemption is valid for a maximum period of five years and can be renewed by the Minister on recommendation of the Director for another five year period. Both the recommendation of the Director and the decision of the Minister to grant or renew an exemption must be motivated.

Naturally, proposed section 32.1 is nothing but a fairly rough draft of what could be put in the Combines Act and it serves only the purpose of demonstration. Also, relevant adjustments would have to be made in other sections of the Act.

We think that, considering what has been said before, most dispositions of proposed section 32.11 speak for themselves but some comments must be made.

First, the proposed amendments, except for subsection (4), remain criminal in their nature even though different standards of evidence are involved and thus should not cause constitutional problems. In any event, since by definition exports involve international trade, federal jurisdiction should not be challenged. (180)

In subsection (1) the advantage of giving such a wide coverage to the word "unit" is that it includes unincorporated subsidiaries. (181) Subsection (9) simply confirms it.

In the definition of the "multinational corporation" the 25% of assets located outside Canada rule serves nothing but the purpose of restricting the application of the section to cases where a true multinational is involved. The 25% figure is a purely arbitrary choice. The line must be drawn somewhere and 25% seems at least as reasonable as any other figure. Note that multinationals of which the head office is located in Canada could be affected as well.

Subsection (2) speaks for itself.

Subsection (3) is more or less copied on proposed subsection 32.1(2) of <u>Bill C-13</u> (182). Note that liability to

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180. On these questions see, among others, P.W. HOGG, <u>Constitutional Law of Canada</u>, Toronto, Carswell, 1977, 547 pp.
181. <u>Supra</u>, Chapter V, Section A.
182. <u>Bill C-13</u>; Supra, footnote 35, s. 33.

imprisonment is excluded. (183)

Subsection (4) speaks for itself.

Subsections (5) and (6) are the harshest dispositions. They are felt necessary because in practice relevant elements of evidence are in the hands of the multinational, not the government, and unless the corporation is in one way or another forced into bringing them to the knowledge of the tribunal, in too many cases subsection (2) will remain dead letter.

Subsection (7) is designed to avoid conscious parallelism type of problems

Subsection (8) establishes the so-called "per se" rule. (184)

Considering what has been said before, subsections (10) to (14) require no more comment. (185)

Subsection (15) raises one issue which would itself deserve to be dealt with in another paper. For now, just note the potential conflict between subsections (15) and (16); any party can be heard by the Minister but some relevant information cannot be made available to such a party.

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183. <u>Supra</u>, Chapter V, Section A).
184. <u>Supra</u>, footnote 62.
185. For proposed Subsection 10: <u>Supra</u>, Chapter V Section D); For proposed Subsection 11: <u>Supra</u>, Chapter IV Section A); For proposed Subsection 12: <u>Supra</u>, Chapter V Section B) and Section C). For proposed Subsection 13: <u>Supra</u>, Chapter V Section D). For proposed Subsection 14: <u>Supra</u>, Chapter I Section B).

Subsection (16) is viewed as a precaution to be taken in cases of unforseeable circumstances. The five year maximum period for exemption is designed to avoid a newly elected government being bound for a long period by an exemption granted by a previous government.

Note, finally, that the proposed section could be adapted also to <u>Bill C-13</u>.

CONCLUSION

We have seen that foreign ownership is a major subject of concern in Canada. We have also seen that arrangements occuring inside the multinational corporation often prevent the Canadian component unit of the multinational enterprise from competing in foreign markets thus contributing to a large extent to structural problems of the economy.

Moreover, not only are these arrangements undesirable as a matter of economic policy but, if one views various component units of the multinational as separate entities, they conflict with basic antitrust legislation principles in that they are nothing but a cartel to allocate territories.

Once realized that the multinational cannot in any way be viewed as a projection of a natural person or of a group of such persons, to treat its components units as distinct entities becomes justifiable. Nevertheless, Canadian antitrust legislation currently rejects the intra-corporate conspiracy doctrine even when multinationals are involved.

But pending Bill C-13, although it does not reach far enough, indicates a more encouraging trend.

In this paper, we have proposed for parliament to enact that when the Canadian unit of a multinational agrees or arranges with other units of the same multinational to restrict exports by the Canadian unit, it constitutes an unlawful conspiracy.

Depending on where one stands, one can perceive anti-trust laws as a means of artificially controlling the economy or as an arm against such artificial burdens; On the one hand these laws do limit freedom of action of some firms but on the other hand they stop having any effect where natural laws of market economy are allowed to interact. Thus what we have proposed in this paper can be viewed as a means of regulating multinational enterprises or as a means of setting their subsidiaries free.

ANNEX A)

COMBINES INVESTIGATION ACT, 1970 R.S.C., c. 23

2. In this Act

"article" means real and personal property of every description including

(a) money,

(b) deeds and instruments relating to or evidencing the title or right to property or an interest, immediate, contingent or otherwise, in a company or in any assets of a company,

(c) deeds and instruments giving a right to recover or receive property,

(d) tickets or like veidence of right to be in attendance at a particular place at a particular time or times or of a right to transportation, and

(e) Energy, however generates; 1974-75, c.76, s.1(1), "business" includes the business of

(a) manufacturing, producing, transporting, acquiring, supplying, storing and otherwise dealing in articles, and

(b) acquiring, supplying and otherwise dealing in services; (1974-75, c.76, s.1(2).

"Commission" means the Restrictive Trade Practices Commission appointed under this Act;

"corporation" includes "company";

"Director" means the Director of Investigation and Research appointed under this Act;

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

(a) in a trade, industry or profession,

(b) among the sources of supply of a trade, industry or profession,

(c) among the outlets for sales of a trade, industry or profession, or

(d) otherwise than in paragraphs (a), (b) and (c),

is or is likely to be lessened to the detriment or against the interest of the public, whether consumers, producers or others; 1974-75, c.76, s. 1(3).

"Minister" means the Minister fo Consumer and Corporate Affairs;

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

"product" includes an article and a service; 1974-75, c.76, s. 1(4).

"service" means a service of any description whether industrial, trade, professional or otherwise; 1974-75, c. 76, s. 1(5).

"supply" means

(a) in relation to an article, sell, rent, lease or otherwise dispose of an article or an interest therein or a right thereto, or offer so to dispose of an article or interest therein or a right thereto, and

(b) in relation to a service, sell, rent, or otherwise provide a service or offer so to provide a service; 1974-75, c. 76, s. 1(6).

"trade, industry or profession" includes any class; division or branch of a trade, industry or profession, 1974-75, c. 76, s. 1(7).

29. In any case where use has been made of the exclusive rights and privileges conferred by one or more patents for invention or by one or more
7 trade marks so as

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

(b) to restrain or injure, unduly, trade or commerce in relation to any such article or commodity, or

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

(d) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, transportation or supply of any such article or commodity,

the Exchequer Court of Canada, on an information exhibited by the Attorney General of Canada, may for the purpose of preventing any use in the manner defined above of the exclusive rights and privileges conferred by any patents or trade marks relating to or affecting the manufacture, use or sale of such article or commodity, make one or more of the following orders:

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

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

(g) 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 remidies under this section would appear insufficient to prevent such use revoking such patent;

(h) directing that the registration of a trade mark in the register of trade marks be expunged or amended; and

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

but no order shall be made under this section that is at variance with any treaty, convention, arrangement or engagement with any other country respecting patents or trade marks to which Canada is a party.

31.4(1) For the purposes of this section,

"exclusive dealing" means

(a) any practice whereby a supplier of a product, as a condition of supplying the product to a customer, requires that customer to

(i) deal only or primarily in products supplied by or designated by the supplier or his nominee, or

(ii) refrain from dealing in a specified class or kind of product except as supplied by the supplier or his nominee, and

(b) any practice whereby a supplier of a product induces a customer to meet a condition set out in subparagraph (a)(i) or (ii) by offering to supply the product to him on more favourable terms or conditions if the customer agrees to meet the condition set out in either of those paragraphs;

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

"tied selling" means

(a) any practice whereby a supplier of a product, as a condition of supplying the product (the "tying" product) to a customer, requires that customer to

(i) acquire some other product from the supplier or his nominee, or

(ii) refrain from using or distributing, in conjunction with the tying product, another product that is not of a brand or manufacture designated by the supplier or his nominee, and

(b) any practice whereby a supplier of a product induces a customer to meet a condition set out in subparagraph (a)(i) or (ii) offering to supply the tying product to him on more favourable terms or conditions if the customer agrees to meet the condition set out in either of those subparagraphs.

(2) Where, on application by the Director, and after affording every supplier against whom an order is sought a reasonable opportunity to be heard, the Commission finds that exclusive dealing or tied selling, because it is engaged in by a major supplier of a product in a market or because it is widespread in a market, is likely to

(a) impede entry into or expansion of a firm in the market,

(b) impede introduction of a product into or expansion of sales of a product in the market, or

(c) have any other exclusionary effect in the market,

with the result that competition is or is likely to be lessened substantially, the Commission may make an order directed to all or any of such suppliers-prohibiting them from continuing to engage in such exclusive dealing or tied-selling and containing any other requirement that, in its opinion, is necessary to overcome the effect thereof in the market or to restore or stimulate competition in the market.

(3) Where, on application by the Director, and after affording every supplier against whom an order is sought a reasonable opportunity to be heard, the Commission finds that market restriction because it is engaged in by a major supplier of a product or because it is widespread in relation to a product, is likely to substantially lessen

competition in relation to the product the Commission may make an order directed to all or any of those suppliers prohibiting them from continuing to engage in market restriction and containing any other requirement that, in its opinion, is necessary to restore or stimulate competition in relation to the product.

(4) The Commission shall not make an order under this section where, in its opinion,

(a) exclusive dealing or market restriction is or will be engaged in only for a reasonable period of time to facilitate entry of a new supplier of a product into a market or of a new product into a market;

(b) tied selling that is engaged in is reasonable having regard to the technological relationship between or among the products to which it applies, or

(c) tied selling that is engaged in by a person in the vusiness of lending money is for the purpose of better securing loans made by him and is reasonably necessary for such purpose,

and no order made under this section applies in respect of exclusive dealing, market restriction or tied selling between or among companies, partnerships and sole proprietorships that are affiliated.

(5) For the purposes of subsection (4),

(a) a company is affiliated with another company if

(i) one is a subsidiary of the other,
(ii) both are subsidiaries of the same company,
(iii) both are controlled by the same person, ~~or~~
(iv) each is affiliated with the same company;

(b) a partnership or sole proprietorship is affiliated with another partnership, sole proprietorship or a company if both are controlled by the same person; and

(c) a company, partnership or sole proprietorship is affiliated with another company, partnership or sole proprietorship in respect of any agreement between them whereby one party grants to the other party the right to use a trade mark or trade name to identify the business of the grantee, provided

(i) such business is related to the sale or distribution pursuant to a marketing plan or system prescribed substantially by the grantor, of a multiplicity of products obtained from competing sources of supply and a multiplicity of suppliers, and

(ii) no one product dominates such business.

(6) For the purposes of this section, a company is deemed to be controlled by a person if shares of the company carrying voting rights sufficient to elect a majority of the directors of the company are held, other than by way of security only, by or on behalf of that person.

(7) For the purposes of subsection (4) in its application to market restriction, where there is an agreement whereby one person (the "first" person) supplies or causes to be supplied to another person (the "second" person) an ingredient or ingredients that the second person processes by the addition of labour and material into an article of food or drink that he then sells in association with a trade mark that the first person owns or in respect of which the first person is a registered user, the first person and the second person are deemed, in respect of such aagreement, to be affiliated. 1974-75, c. 76, s. 12.

31.5 Where, on application by the Director, and after affording a reasonnable opportunity to be heard to all persons and companies to whom an order hereinafter referred to would apply, the Commission finds that

(a) a judgment, decree, order or other process given, made or issued by or out of a court or other body in a country other than Canada can be implemented in whole or in part by persons in Canada, by companies incorporated by or pursuant to an Act of Parliament or of the legislature of a province, or by measures taken in Canada, and

(b) the implementation in whole or in part of the judgment, decree, order or other process in Canada would

(i) adversely affect competition in Canada,

(ii) adversely affect the efficiency of trade or industry in Canada without bringing about or increasing in Canada competition that would restore and improve such efficiency,

(iii) adversely affect the foreign trade of Canada without compensating advantages, or

(iv) otherwise restrain or injure trade or commerce in Canada without compensating advantages,

the Commission may, by order, direct that

(c) no measures be taken in Canada to implement the judgment, decree, order or process, or

(d) no measures be taken in Canada to implement the judgment, decree, order or process except in such manner as the Commission prescribes for the purpose of avoiding an effets referred to in subparagraphs (b)(i) to (iv). 1974-75, c.76, s. 12.

FOREIGN LAWS AND DIRECTIVES - Limitation.

31.6 (1) Where, on application by the Director, and after affording to the person or company, hereinafter referred to, a reasonable opportunity to be heard, the Commission finds that a decision has been or is about to be made by a person in Canada or a company incorporated by or pursuant to an Act of Parliament or of the legislature of a province

(a) as a result of

(i) a law in force in a country other than Canada, or

(ii) a directive, instruction, intimation of policy or other communication to that person or company or to any other person from

(A) the government of a country other than Canada or of any political subdivision thereof that is in a position to direct or influence the policies of that person or company, or

(B) a person in a country other than Canada who is in a position to direct or influence the policies of that person or company,

where the communication is for the purpose of giving effect to a law in force in a country other than Canada, and that the decision, if implemented, would have or would be likely to have any of the effects mentioned in subparagraphs 31.5(b)(i) to (iv), or

(b) as a result of a directive, instruction, intimation of policy or other communication to that person or company or to any other person, from a person in a country other than Canada who is in a position to direct or influence the policies of that person or company, where the communication is for the purpose of giving effect to a conspiracy, combination, agreement or arrangement entered into outside Canada that, if entered into in Canada, would have been in violation of section 32,

the Commission may, by order, direct that

(c) in a case described in paragraph (a) or (b) no measures be taken by the person or company in Canada to implement the law, directive, instruction, intimation of policy or other communication, or

(d) in a case described in paragraph (a), no measures be taken by the person or company in Canada to implement the law, directive, instruction, intimation of policy or other communication for the purpose of avoiding an effect referred to in subparagraphs 31.5(b)(i) to (iv).

(2) No application may be made by the Director for an order under this section against a particular company where proceedings have been commenced under section 32.1 against that company based on the same or substantially the same facts as would be alleged in the application. 1974-75, c.76, s.12.

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

(a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product,

(b) to prevent, limit or lessen, unduly the manufacture or production of a product, or to enhance unreasonably the price thereof,

(c) to prevent, or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance upon persons or property, or

(d) to otherwise restrain or injure competition unduly,

is guilty of an indictable offence and is liable to imprisonment for five years or a fine of one million dollars, or both. 1974-75, c. 76, s. 14(1).

(1.1) For greater certainty, in establishing that a conspiracy, combination, agreement or arrangement is a violation of subsection (1), it shall not be necessary to prove that the conspiracy, combination, agreement or arrangement, if carried into effect, would or would be likely to eliminate, completely or virtually, competition in the market to which it relates or that it was the object of any or all of the parties thereto to eliminate, completely or virtually, competition in that market.

(2) Subject to subsection (3), in a prosecution under subsection (1), the court shall not convict the accused if the conspiracy, combination, agreement or arrangement relates only to one or more of the following:

(a) the exchange of statistics,
(b) the defining of product standards,
(c) the exchange of credit information,
(d) the definition of terminology used in a trade, industry, or profession,
(e) cooperation in research and development,
(f) the restriction of advertising or promotion, other than a discriminatory restriction directed against a membre of the mass media

(g) the sizes or shapes of the containers in which an article is packaged,
(h) the adoption of the metric system of weights and measures, or
(i) measures to protect the environment.

(3) Subsection (2) does not apply if the conspiracy, combination, agreement or arrangement has lessened or is likely to lessen competition unduly in respect of one of the following:

(a) prices;
(b) quantity or quality of production;
(c) markets or customers; or
(d) channels or methods of distribution,

or the conspiracy, combination, agreement or arrangement has restricted or is likely to restrict any person from entering into or expanding a business in a trade, industry or profession.

(4) Subject to subsection (5), in a prosecution under subsection (1) the court shall not convict the accused if the conspiracy, combination, agreement or arrangement relates only to the export of products from Canada.

(5) Subsection (4) does not apply if the conspiracy, combination, agreement or arrangement

(a) has resulted or is likely to result in a reduction or limitation of the volume of exports of a product;
(b) has restrained or injured or is likely to restrain or injure the export business of any domestic competitor who is not a party to the conspiracy, combination, agreement or arrangement;
(c) has restricted or is likely to restrict any person from entering into the business of exporting products from Canada; or
(d) has lessened or is likely to lessen competition unduly in relation to a product in the domestic market.

(6) In a prosecution under subsection (1), the court shall not convict the accused if it finds that the conspiracy, combination, agreement or arrangement relates only to a service and to standards of competence and integrity that are

resonably necessary for the protection of the public

(a) in the practice of a trade or profession relating to such service; or

(b) in the collection and dissemination of information relating to such service.

(7) Subsection (1) does not apply in respect of a conspiracy, combination, agreement or arrangement that is entered into only by companies each of which is, in respect of every one of the others, an affiliate as that relationship is defined in subsections 38(7) and (7.1). 1974-75, c. 76, s. 14(2),(7).

32.1 (1) Any company, wherever incorporated, that carries on business in Canada and that implements, in whole or in part in Canada, a directive, instruction, intimation of policy or other communication to the company or any person from a person in a country other than Canada who is in a position to direct or influence the policies of the company, which communication is for the purpose of giving effect to a conspiracy, combination, agreement or arrangement entered into outside Canada that, if entered into in Canada, would have been in violation of section 32, is, whether or not any director or officer of the company in Canada has knowledge of the conspiracy, combination, agreement or arrangement, guilty of an indictable offence and is liable on conviction to a fine in the discretion of the court.

(2) No proceedings may be commenced under this section against a particular company where an application has been made by the Director under section 31.6 for an order against that company or any other person based on the same or substantially the same facts as would be alleged in proceedings under this section. 1974-75, c. 76, s. 15.

32.2 (1) In this section, "bid-rigging" means

(a) an agreement or arrangement between or among two or more persons whereby one or more of such persons agrees or undertakes not to submit a bid in response to a call o- request for bids or tenders, and

(b) the submission in response to a call or request for bids or tenders, of bids or tenders that are arrived at by agreement or arrangement between or among two or more bidders or tenderers,

where the agreement or arrangement is not made known to the person calling for or requesting bids or tenders at or before the time when any bid or tender is made by any person who is a party to the agreement or arrangement.

(2) Every one who is a party to bid-rigging is guilty of an indictable offence and is liable on conviction to a fine in the discretion of the court or to imprisonment for five years or to both.

(3) This section does not apply in respect of an agreement or arrangement that is entered into or a submission that is arrived at only by companies each of which is, in respect of every one of the others, an affiliate as that relationship is defined in subsections 38(7) and (7.1). 1974-75, c. 76, s. 15.

38.(1) No person who is engaged in the business of producing or supplying a product, or who extends credit by way of credit cards or is otherwise engaged in a business that relates to credit cards, or who has the exclusive rights and privileges conferred by a patent, trade mark, copyright or registered industrial design shall, directly or indirectly,

(a) by agreement, threat, promise or any like means, attempt to influence upward, or to discourage the reduction of, the price at which any other person engaged in business in Canada supplies or offers to supply or advertises a product within Canada; or

(b) refuse to supply a product to or otherwise discriminate against any other person engaged in business in Canada because of the low pricing policy of that other person.

(2) Subsection (1) does not apply where the person attemting to influence the conduct of another

person and that other person are affiliated companies or directors, agents, officers or employees of

(a) the same company, partnership or sole proprietorship, or

(b) companies, partnerships or sole proprietorships that are affiliated,

or where the person attempting to influence the conduct of another person and that other person are principal and agent.

(3) For the purposes of this section, a suggestion by a producer or supplier of a product of a resale price or minimum resale price in respect thereof, however arrived at, is, in the absence of proof that the person making the suggestion, in so doing, also made it clear to the person to whom the suggestion was made that he was under no obligation to accept the suggestion and would in no way suffer in his business relations with the person making the suggestion or with any other person if he failed to accept the suggestion, proof of an attempt to influence the person to whom the suggestion is made in accordance with the suggestion.

(4) For the purposes of this section, the publication by a supplier of a product, other than a retailer, of an advertisement that mentions a resale price for the product is an attempt to influence upward the selling price of any person into whose hands the product comes for resale unless the price is so expressed as to make it clear to any person to whose attention the advertisement comes that the product may be sold at a lower price.

(5) Subsections (3) and (4) do not apply to a price that is affixed or applied to a product or its package or container.

(6) No person shall, by threat, promise or any like means, attempt to induce a supplier, whether within or without Canada, as a condition of his doing business with the supplier, to refuse to supply a product to a particular person or class of persons because of the low pricing policy of that person or class of persons.

(7) For the purposes of subsection (2),

(a) a company is affiliated with another company if

(i) one is a subsidiary of the other,

(ii) both are subsidiaries of the same company,

(iii) both are controlled by the same person, or

(iv) each is affiliated with the same company; and

(b) a partnership or sole proprietorship is affiliated with another partnership, sole proprietorship or a company if both are controlled by the same person.

(7.1) For the purposes of this section, a company is deemed to be controlled by a person if shares of the company carrying voting rights sufficient to elect a majority of the directors of the company are held, other than by way of security only, by or on behalf of that person.

(8) Every person who violates subsection (1) or (6) is guilty of an indictable offence and is liable on conviction to a fine in the discretion of the court or to imprisonment for five years or to both.

(9) Where, in a prosecution under paragraph (1)(b), it is proved that the person charged refused or counselled the refusal to supply a product to any other person, no inference unfavourable to the person charged shall be drawn from such evidence if he satisfies the court that he and any one upon whose report he depended had reasonable cause to believe and did believe

(a) that the other person was making a practice of using products supplied by the person charged as loss-leaders, that is to say, not for the purpose of making a profit thereon but for purposes of advertising;

(b) that the other person was making a practice of using products supplied by the person charged not for the purpose of selling such products at a profit but for the purpose of attracting customers to his store in the hope of selling them other products;

(c) that the other person was making a practice of engaging in misleading advertising in respect of products supplied by the person charged; or

(d) that the other person made a practice of not providing the level of servicing that purchasers of such products might reasonably expect from such other person. 1974-75, c. 76, s. 18.

44.1 Notwithstanding any other Act, a prosecution for an offence under Part V or section 46.1 may be brought, in addition to any place in which such prosecution may be brought by virtue of the Criminal Code,

(a) where the accused is a company, in any territorial division in which the company has its head office or a branch office, whether or not each branch office is provided for in any Act or instrument relating to the incorporation or organization of the company; and

(b) where the accused is not a company, in any territorial division in which the accused resides or has a place of business. 1974-75, c. 76, s.20.

ANNEX B)

BILL C-13: An Act to amend the Combines Investigations Act and to amend the Bank Act and other Acts in relation thereto or in consequence thereof, 1977, 3rd Session, 30th Parliament, 26, Elizabeth II.

1. The long title to the Combines Investigation Act is repealed and the following substituted therefor:

An Act to provide for the general regulation of trade and commerce by promoting competition and the integrity of the market place and to establish a Competition Board and the office of Competition Policy Advocate

WHEREAS a central purpose of Canadian public policy is to promote the national interest and the interest of individual Canadians by providing an economic environment that is conducive to the efficient allocation and utilization of society's resources, fosters innovation in technology and organization, expands opportunities relating to both domestic and export markets and encourages the transmission of those benefits to society in an equitable manner;

AND WHEREAS one of the basic conditions requisite to the achievement of that purpose is the creation and maintenance of a flexible adaptable and dynamic Canadian economy that will facilitate the movement of talents and resources in response to market incentives, that will reduce or remove barriers to such mobility, except where such barriers may be inherent in economics of scale or in the achievement of other savings of resources, and that will protect freedom of economic opportunity and choice by discouraging unnecessary concentration and the predatory exercise of economic power and by reducing the need for detailed public regulation of economic activity;

AND WHEREAS the effective functioning of such a market economy may only be ensured through the recognition and encouragement of the role of competition in the Canadian economy as a matter of national policy by means of the enactment of general laws of general application throughout Canada and by the administration of such laws in a consistent and uniform manner;

NOW, THEREFORE, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

27. (1) Paragraph 31.6(1)(b) of the said Act is repealed and the following substituted therefor:

"(b) as a result of a directive, instruction, intimation of policy or other communication to that person or corporation or to any other person, from a person in a country other than Canada who is in a position to direct or influence the policies of that person or corporation, where the communication is for the purpose of giving effect to a conspiracy, combination, agreement or arrangement, wherever entered into, that has or is likely to have, in Canada, an adverse effect on competition, on prices, on quantity of quality of production or on distribution of a product, or on conditions of entry into a trade, industry or profession."

(2) Subsection 31.6(2) of the said Act is repealed and the following substituted therefor:

" (2) No application may be made by the Competition Policy Advocate for an order under this section against a particular corporation where proceedings have been commenced under section 32.11 against that corporation based on the same or substantially the same facts as would be alleged in the application.

(3) No order may be made by the Board under this section where a conspiracy, combination, agreement or arrangement referred to in paragraph (1)(b) was entered into only by corporations each of which is an affiliate, within the meaning of subsections 38(7) and (7.1), of each of the others."

28. The said Act is further amended by adding thereto, immediately after section 31.6 thereof, the following section:

"31.61(1) Where, on application by the Competition Policy Advocate, and after affording every person against whom an order is sought a reasonable opportunity to be heard, the Board finds that a corporation carrying on business, in Canada

(a) has entered into an agreement or arrangement with an affiliate carrying on business outside Canada to substantially restrict the importation or exportation of a product into or from Canada, or

(b) has received from or given to an affiliate that carries on business outside Canada a directive, instruction, intimation of policy or other communication that has brought about or, if implemented, would bring about, a substantial restriction in the importation or exportation of a product into or from Canada."

29. The said Act is further amended by adding thereto, immediatly after section 31.7 thereof, the following:

"31.71 (16) For the purposes of subsection (2)(a), a corporation is affiliated with another corporation if

(i) one is controlled by the other,
(ii) both are controlled by the same person or group of persons acting in concert, or
(iii) each is affiliated with the same corporation; and

(b) a partnership or sole proprietorship is affiliated with another partnership or sole proprietorship if

(i) one is controlled by the other,
(ii) both are controlled by the same person or group of persons acting in concert, or
(iii) each is affiliated with the same partnership or person.

(17) For the purposes of subsection (16), a

corporation, partnership or sole proprietorship is controlled by a person or group of persons acting in concert, if that person or group is in fact able, from time to time, to direct the policies of that corporation, partnership or sole proprietorship.

31.74(1) Where, on application by the Competition Policy Advocate, and after affording every person against whom an order is sought a reasonable opportunity to be heard, the Board finds that a person or persons, by exercising any right or interest, whether conferred by statute or otherwise, in a patent, trade mark, copyright or industricl design in a manner not expressly authorized by the Patent Act, the Trade Marks Act, the Copyrights Act or the Industrial Design Act, as the case may be, have affected or are likely to affect competition, adversely in a market, the Board may make an order directed to any person who has been so afforded an opportunity to be heard

(a) declaring unenforceable, in whole or in part, any agreement, arrangement or licence into which that person has entered relating to the use of the patent, trade mark, copyright or industrial design;

(b) restraining that person from carrying out or exercising any or all of the terms or provisions of an agreement, arrangement or licence mentioned in paragraph (a); or

(c) directing the granting by that person of licences under the patent, copyright or industrial design to such persons and on such terms and conditions as are specified in the order.

(2) No order shall be made under this section that is at variance with any treaty, convention, arrangement or engagement with any other country respecting patents, trade marks, copyrights or industrial designs to which Canada is a party.

31.76(1) For the purposes of this section,

"article" includes each separate type, size, weight and quality in which an article, within the meaning assigned by section 2, is produced;

"specialization agreement" means an agreement in which each party thereto agrees to discontinue producing an article in the production of which he is engaged at the time the agreement is entered into on the condition that each other party to the agreement agrees to discontinue producing an article in the production of which he is engaged at the time the agreement is entered into, and includes such an agreement in which the parties also agree to buy exclusively from each other the articles that are the subject of the agreement.

(2) Where, on application by any person who has entered into or proposes to enter into a specialization agreement, and after affording the Competition Policy Advocate a reasonable opportunity to be heard, the Board finds that an agreement or proposed agreement is a specialization agreement and that

(a) the implementation of the agreement or proposed agreement is likely to bring about substantial gains in efficiency, wherever they may arise, that will save resources for the Canadian economy, and

(b) no attempts have been made by the parties to the agreement or proposed agreement to coerce any person to become a party to the agreement or proposed agreement,

subject to subsections (3) and (4), the Board may, by order, allow the agreement or proposed agreement for a period specified in the order that is not longer than five years calculated from the date of the order or where, pursuant to subsection (3) or (4), the allowance of the agreement or proposed agreement is made effective after a condition described in paragraph (3)(b) is fulfilled, for a period specified in the order that is not longer than the period, not exceeding ten years, during which the series of reductions referred to in the condition is to take place.

(3) Where, on an application under subsection (2), the Board finds that a specialization agreement or proposed specialization agreement meets the

conditions prescribed in paragraphs (a) and (b) of that subsection and that a reduction in any duties of customs or other trade barriers applicable to an article that is a subject of the agreement or proposed agreement, a remission of such duties or some other act that is irreversible by the parties to the agreement or proposed agreement would prevent the agreement or proposed agreement from lessening competition substantially or would otherwise lessen any adverse effect that the agreement or proposed agreement might have on competition and would not be inconsistent with the purpose of the agreement or proposed agreement, the Board may, by order, allow the agreement or proposed agreement with such allowance to be effective only after such of the following conditions as are specified in the order are fulfilled:

(a) an order in council is made under section 16 of the Customs Tariff effecting a single reduction specified in the order of the Board of any duties of customs on the article;

(b) where the Board is satisfied that the gains in efficiency arising from the specialization agreement or proposed specialiaation agreement are likely to be achieved in such a manner or in such stages that a series of reduction rather than a single reduction in the duties of customs on the article is desirable, an order in council is made under section 16 of the Customs Tariff effecting a series of reductions specified in the order of the Baord of any duties of customs on the article during a period not exceeding ten years;

(c) an order in council is made under section 17 of the Financial Administration Act effecting a remission or remissions specified in the order of the Board of any duties of customs on the article;

(d) trade barriers, applicable to the article, other than duties of customs, are reduced in a manner specified in the order of the Board; and

(e) some other act specified in the order of the Board that is irreversible by the parties to the agreement or proposed agreement is done.

(4) Where, on an application under subsection (2), the Board finds that a specialization agreement or proposed specialization agreement meets the conditions prescribed in paragraphs (a) and (b) of that subsection but also finds that the agreement or proposed agreement would or would be likely to have the result of eliminating, completely or virtually completely, competition in the market to which it relates, the Board shall by order refuse to allow the agreement or proposed agreement unless it also finds that there are in effect duties of customs or other trade barriers applicable to an article that is a subject of the agreement or proposed agreement, a reduction or remission of which would prevent such result or that some other act, irreversible by the parties to the agreement or proposed agreement would prevent such result, in which case the Board shall, by order, allow the agreement or proposed agreement with such allowance to be effective only after such of the conditions, referred to in paragraph (3)(a) to (e), as would; in the opinion of the Board, prevent such result and as are specified in the order are fulfilled.

33. Section 32.1 of the said Act is repealed and the following substituted therefor:

"32.1(1) This section applies only in respect of conspiracies, combinations, agreements and arrangements whereby one or more persons who carry on business in Canada conspire, combine, agree or arrange with a person or persons who carry on business outside Canada to

(a) restrict the importation of a product into Canada;
(b) reduce or limit the value of exports of a product from Canada; or
(c) adversely affect competition in Canada in a manner otherwise than as described in paragraph (a) or (b).

(2) Every one who is a party to a conspiracy, combination, agreement or arrangement to which this section applies is guilty of an indictable offence and is liable to a fine in the discretion of the court or to imprisonment for five years or to both.

(3) Notwithstanding subsection (1), this section

does not apply in respect of an agreement or arrangement

(a) that is specifically authorized by an Act of Parliament; or
(b) that is entered into only by persons, each of whom is an affiliate, as that relationship is defined in subsections 38(7) and (7.1), of every other person who is a party to the agreement or arrangement.

(4) In a prosecution under this section, the court shall not convict a person or persons who carry on business in Canada where that person or those persons establish that they do not, individually or collectively, account for fifty per cent or more of the production or supply in Canada of the product in relation to which the prosecution was brought against that person or those persons.

32.11(1) Any corporation that carries on business in Canada and that implements, in whole or in part in Canada, a directive, instruction, intimation of policy or other communication to the corporation or any person from a person in a country other than Canada who is in a position to direct or influence the policies of the corporation, which communication is for the purpose of giving effect in Canada to a conspiracy, combination, agreement or arrangement wherever entered into, to fix prices, allocate markets, limit production or impede technological change is, whether or not any director or officer of the corporation in Canada has knowledge of the conspiracy, combination, agreement or arrangement, guilty of an indictable offence and is liable to a fine in the discretion of the court.

(2) No proceedings may be commenced under this section against a particular corporation where an application has been made by the Competition Policy Advocate under section 31.6 for an order against that corporation or any other person based on the same or substantially the same facts as would be alleged in proceedings under this section.

(3) Subsection (1) does not apply in respect of a conspiracy, combination, agreement or arrangement that is entered into only by corporations

each of which is, in respect of everyone of the others, an affiliate as that relationship is defined in subsections 38(7) and (7.1)."

ANNEX C)

FOREIGN INVESTMENT REVIEW ACT, 1973-74 S.C., c. 46.

Purpose of Act

2. (1) This Act is enacted by the Parliament of Canada in recognition by Parliament that the extent to which control of Canadian industry, trade and commerce has become acquired by persons other than Canadians and the effect thereof on the ability of Canadians to maintain effective control over their economic environment is a matter of national concern, and that it is therefore expedient to establish a means by which measures may be taken under the authority of Parliament to ensure that, in so far as is practicable after the enactment of this Act, control of Canadian business enterprises may be acquired by persons other Canadians, and new businesses may be established in Canada by persons, other than Canadians, who are not already carrying on business in Canada or whose new businesses in Canada would be unrelated to the business already being carried on by them in Canada, only if it has been assessed that the acquisition of control of those enterprises or the establishment of those new businesses, as the case may be, by those persons is or is likely to be of significant benefit to Canada, having regard to all of the factors to be taken into account under this Act for that purpose.

(2) In assessing, for the purposes of this Act, whether any acquisition of control of a Canadian business enterprise or the establishment of any new business in Canada is or is likely to be of significant benefit to Canada, the factors to be taken into account are as follows:

(a) the effect of the acquisition or establishment on the level and nature of economic activity in Canada, including, without limiting the generality of the foregoing, the effect on employment, on resource processing, on the utilization of parts, components and services produced in Canada, and on exports from Canada;

(b) the degree and significance of participation by Canadians in the business enterprise or new business and in any industry or industries in Canada of which the business enterprise or new business forms or would form a part;

(c) the effect of the acquisition or establishment on productivity, industrial efficiency, technological development, product innovation and product variety in Canada;

(d) the effect of the acquisition or establishment on competition within any industry or industries in Canada; and

(e) the compatilibity of the acquisition or establishment with national industrial and economic policies, taking into consideration industrial and economic policy objectives enunciated by the government or legislature of any province likely to be significantly affected by the acquisition or establishment.

ANNEX D)

GUIDELINES OF GOOD CORPORATE CITIZENSHIP, Minister of Trade and Commerce, 1066.

The guidelines provide as follows:

(a) pursuit or sound growth and full realization of the company's productive potential, thereby sharing the national objective of full and effective use of the nation's resources;

(b) realization of maximum competitiveness through the most effective use of the company's own resources, recognizing the desirability of progressively achieving appropriate specialization of productive operations within the internationally affiliated group of companies;

(c) maximum development of market opportunities in other countries as well as in Canada;

(d) where applicable, to extend processing of natural resource products to the extent practicable on an economic basis;

(e) puirsuit of a pricing policy designed to assure a fair and reasonable return to the company and to Canada for all goods and services sold abroad, including sales to the parent company and other foreign affiliates;

(f) in matters of procurement, to search out and develop economic sources of supply in Canada;

(g) to develop as an integral part of the Canadian operation wherever practicable, the technological, research and design capability necessary to enable the company to pursue appropriate product development programmes so as to take full advantage of market opportunities domestically and abroad;

(h) retention of a sufficient share of earnings to give appropriate financial support to the growth requirements of the Canadian operation, having in mind a fair return to shareholders on capital invested;

(i) to work toward a Canadian outlook within management, through purposeful training programmes, promotion of qualified Canadian personnel and inclusion of a major proportion of Canadian citizens on its board of directors;

(j) to have the objective of a financial structure which provides opportunity for equity participation in the Canadian enterprise by the Canadian public;

(k) periodically to publish information on the financial position and operations of the company; and

(l) to give appropriate attention and support to recognized national objectives and established government programmes designed to further Canada's economic development and to encourage and support Canadian institution directed toward the intellectual, social and cultural advancement of the community.

BIBLIOGRAPHY

LEGISLATION:

Anti Dumping Act, 1970 R.S.C., c. A-15.

Bill C-13: An Act to amend the Combines Investigation Act and to amend the Bank Act and other Acts in relation thereto or in consequence thereof, 1977, 3rd Session, 30th Parliament, 26 Elizabeth II.

Clayton Act, 15 U.S.C.A. 12-27.

Combines Investigation Act, 1970 R.S.C., c. 23.

Copyright Act, 1970 R.S.C., c. C-30.

Criminal Code, 1970 R.S.C., c. C-34.

Foreign Investment Review Act, 1973-74 S.C., c. 46.

Federal Trade Commission Act, (1914) 15 U.S.C.A., 41-51.

Industrial Design Act, 1970 R.S.C., c. 1-8.

Patent Act, 1970 R.S.C., c. P-4.

Sherman Act, 15 U.S.C.A., 1-17.

Trade Marks Act, 1970 R.S.C., s. T-10.

Treaty of Rome, (1957) ss. 85-86 ff.

DECISIONS:

Centrafarm B.V. and Adrian de Peijper V. Sterling Drug Inc., (1974-76) E.C.R. 1147.

Christiani and Nielsen N.V., (1969) C.C.H. COMM. MKT. REP. #9308.

Eastman Kodak Co., (1970) I.C.C.H. COMM. MKT. REP. #9378.

Europemballage and Continental Can V. Commission of the European Communities, (1973) O.J.L.69.

Exxon Co. V. Wisconsin Department of Revenue (1980) 100 S.Ct.2109.

Hawaiian Oke and Liquors Ltd V. J.E. Seagram and Sons (1967) 272 F. Supp. 915 (D.Hawaii)

Imperial Chemical Industries V. Commission of the European Communities (1972) I.C.C.H. COMM. MKT. REP. #8161.

Kiefer-Stewart Co. V. Joseph E. Seagram and Sons (1951) 340 U.S. 211; 71 S. Ct. 259.

Mobil Oil Co. V. Commissionar of Taxes of Vermont (1980) 100 S.Ct. 1223.

Nelson Radio and Supply Co. V. Motorola (1952) 200 F.(2nd) 911, 914 (5th Circuit); (1953) 345 U.S.925 (Cert. denied).

Philippe Beaubien and Co. V. Canadian General Electric (1976) 30 C.P.R.(2nd) 1000.

Poller V. Columbia Broadcasting System Inc. (1962) 368 U.S.464.

R. V. Dominion Steel and Coal Co. et al. (1956) 116 C.C.C. 117.

R. V. Electric Reduction Company of Canada Ltd, (1970) 61 C.P.R. 235.

Schine Chain Theatres Inc. V. United States (1948) 334 U.S. 110.

Sunkist Growers Inc. V. Winster and Smith Citrus Prods Co., (1960) 370 U.S. 19.

Timken Roller Bearing Co. V. United States, (1951) 341 V.S.593;

71 S.Ct. 971.

United Brands Co. (1975) C.C.H. COMM. MKT. REP. #9800.

U.S. V. Aluminum Co. of America (1945) 148 F.(2d) 416 (2nd Cir.).

U.S. V. Aluminum Co. of America (1950) 91 F. Supp. 333 (S.D.N.Y.).

U.S. V. Aluminum Co. of America (1957) 153 F. Supp. 132 (S.D.N.Y.).

U.S. V. Crescent Amusement Co. (1944) 323 U.S. 173.

U.S. V. General Motors Corp. (1941) 121 F.(2d) 376 (7th Cir.), Cert. denied 314 U.S. 618.

U.S. V. Griffith (1948) 34 U.S. 100.

U.S. V. Imperial Chemical Ind. Ltd (1952) Civil no. 24-13 (S.D.N.Y.)

U.S. V. Socony-Vacuum Oil Co. (1940) 310 U.S. 150, 60 S.Ct. 811, 84, L.Ed 1129.

U.S. V. Topco Associates Inc. (1972) 405 U.S. 596, 92 S.Ct. 1126, 31 L.Ed (2d) 515.

U.S. V. Yellow Cab Co. (1947) 332 U.S. 218.

REPORTS

DEPARTMENT OF CONSUMER AND CORPORATE AFFAIRS, Proposals for a new Competition policy for Canada, Ottawa, Government of Canada, 1977, 250 pp.

ECONOMIC COUNCIL, Interim Report on Competition Policy, Ottawa, Queen's Printer, 1969.

Foreign Direct Investment in Canada, Ottawa, Government of Canada, 1972, 400 pp.

Foreign Ownership and the Structure of Canadian Industry; Report of the Task Force on the Structure of Canadian Industry, Ottawa, 1968.

GORECKI, Paul K., Economies of scale and efficient Plant size in Canadian Manufacturing industries, Ottawa, Department of Consumer and Corporate affairs, 1978, 110 pp.

O.E.C.D., Guidelines for Multinational enterprises, Paris, O.E.C.D. Publications, 1976, 25 pp.

O.E.C.D., Restrictive Business Practices of Multinational enterprises; Report of the Committee of Experts on Restrictive Business Practices, Paris, O.E.C.D. Publications, 1977, 80 pp.

Report of Attorney General's National Committee to Study the Antitrust Laws, 1955, pp. 30-36 (Supplements 1955-1968: 1975).

Report on Intellectual and Industrial Property, Economic Council of Canada, 1971.

ROYAL COMMISSION ON FARM MACHINERY, Special Report on Prices, Ottawa, Queen's Printer, 1969, 110 pp.

A Science Policy for Canada, Report of the Senate Special Committee on Science Policy, 1970.

U.S. TARIFF COMMISSION, Implications of Multinational Firms for World Trade and Investment and for U.S. Trade and Labour, Washington, 1973, 625 pp.

TREATISES AND MONOGRAPHS:

AREEDA, Phillip, Antitrust Analysis, Toronto, Little Brown and Co., 1967, 835 pp.

BERGSTEN, Fred, HORST, Thomas, MORAN, Theodore H., American Multinationals and American Interests, Washington, The Brookings Institution, 1978, 534 pp.

BROWNDORF, Eric, RIEMER, Scott, Multinational Corporations Law: Bibliography of Multinational Corporations and foreign direct investment, New York, Ocean Publications.

BURNS, Joseph W., Antitrust Dilemna: Why Congress Should Modernize the Antitrust Laws, New York, Central Book Co., 1969, 25 pp.

Canadian Competition Policy: Proceedings of a Conference held at Queen's University, Kingston, Industrial Relations Center Queen's University, 1972, 102 pp.

CASSON, Mark, Alternatives to the Multinational Enterprise, London, Billing and Sons, 1979, 116 pp.

CASTEL, J.-G., Canadian Conflict of Laws, Toronto, Butterworths, 1975, 800 pp.

FIRESTONE, O.J., Economic Implications of Patents, Ottawa, University of Ottawa, 1971.

GOODE, M.R., Criminal Conspiracy in Canada, Toronto, Carswell, 1975, 276 pp.

HAHLO, H.R., SMITH, J.G., WRIGHT, R.W., Nationalism and the Multinational Enterprise, New York, Oceana Publications Inc., 1973, 278 pp.

HANDLER, M., BLAKE, H.M., PITOFSKY, R., GOLDSCHMID, H.J., Trade Regulation Cases and Materials, New York, Foundation Press, University Casebook Series, 1975, 1300 pp.

HOGG, Peter W., Constitutional Law of Canada, Toronto, Carswell Co., 1977, 547 pp.

IACOBUCCI, Frank, PIKINGTON, Marilyn L., PRICHARD, I. Roberts, Canadian Business Corporations, Agencourt Canada Law Book, 1977, 532 pp.

KINDLEBERGER, C.P., The International Corporation, Cambridge, M.I.T. Press, 1970, 223 pp.

LIVINGSTONE, James G., The International Enterprise, London, Associated Business Programs, 1975, 244 pp.

MADDEN, Carl H., The Case for the Multinational Corporation, Washington, Praeger Publishers, 1977, 212 p.

PRICHARD, J.R.S., STANBURY, W.T., WILSON, T.A., Canadian Competition Policy: Essays in Law and Economics, Toronto, Butterworths, 1979, 652 pp.

REA, K.J., McLEOD, J.T., Business and Government in Canada, Toronto, Metheun, 1969, 412 pp.

ROLFE, S.E., DAMN, W., The Multinational Corporation in the World Economy, New York, Praeger Publishers, 1970, 207 pp.

BOWLEY, J.W., STANBURY, W.T., Competition policy in Canada: Stage II, Bill C-13, Halifax, Dalhousie University Press, 1978, 311 p.

SAFARIAN, A.E., Foreign Ownership of Canadian Industry, Toronto, McGraw-Hill, 1966, 346 p.

SAFARIAN, A.A., The performance of foreign-owned firms in Canada, Montreal, Private Planning Ass. of Canada, 1969, 122 pp.

SAUVANT, Karl P., LAVIPOUR, Farid G., Controlling Multinational Enterprises, Boulder Col., Westview Press, 1976, 332 pp.

SCHWARTZ, Louis B., Free Enterprise and Economic Organization, (4d), New-York Foundation Press, University Casebook Series, 1972, 1380 pp.

SCHWARTZ, Louis B., FLYNN, John J., Antitrust and regulatory alternatives, 5th New York, Foundation Press, University Casebook Series, 1977, 1421 pp.

VERNON, Raymond, Storm over the Multinationals: The real issues, Cambridge Mass., Harvard University Press, 1977, 260 pp.

WILLIAMS, Sharon A., International Criminal Law Casebook, 3rd, Toronto, Osgoode Hall Law School, 950 pp.

ZIEGEL, Jacob S., Studies in Canadian Company Law, Toronto, Butterworths, 1967-1973, 540 pp.

REVIEW ARTICLES

BLAIR, Gordon, Combines' Controls or Competition?, (1953) 31 C.B.R. 1083-1115.

CAMPBELL, B.R., The Canada-United States Antitrust notification and consultation procedure, (1978) 56 C.B.R. 459-495.

CARON, Yves, Aspects internationaux de la législation et des précédents judiciaires en matière de pratiques restrictives sur le commerce (anti-trust), (1966) R.J.T. 197-232.

CAVES, Richard E., Multinational Firms, Competition and Productivity in Host-Country Markets, (1974) 41 Economica 176-193.

DUNNING, John H., Multinational Enterprises, Market Structure, Economic Power and Industrial Policy, (1974) 8 Journal of World Trade Law 575-613.

FREEMAN, Susan, Canada's changing posture toward multinational corporations: an attempt to harmonize nationalism with continued international Growth, (1974) 7 N.Y.U.V. of International Law and Politics 271-235.

FUGATE, W.L., Antitrust Enforcement and the Multinational Corporation, (1973) 8 Journal of International Law and Economics 1-9.

GOLDMAN, Berthold, Les Champs d'Application territoriale des lois sur la concurrence, (1969) 128 Receuil des cours de l'Académie de droit international 637-729.

GOLF, Colin, REASONS, Charles E., Corporations in Canada: A Study of Crime and Punishment, (1975-76) 18 Crime L.Q. 468-491.

GRIFFIN, Joseph P., The power of host countries over the multinational: Lifting the veil in the European Economic Community and the United States, (1974) 6 Law and Policy in International Business 375-435.

HADARI, Yitzhak, The structure of the private Multinational enterprise, (1973) 71 Michigan Law Review 729-802.

HANSARD, Hazen, The "Antitrust" Laws of Canada, 1960 A.L.J. 447-455.

HENRY, D.H.W., Mergers and Joint Ventures as they affect Canadian - United States Trade and Relations: A look at the Canadian Antitrust laws, (1966) 32 A.L.J. 156-175.

JONES, David Phillip, Trade Regulation (1978) 10 Ottawa Law Review 166-213.

KAISER, Gordon E., Conflict of Laws and the extraterritorial effect of commercial regulation, (1972), Queen's 384-440.

KRAUSE, Harry D., The Multi-Corporate International business under section 1 of the Sherman Act: Intra-enterprise conspiracy revisited, (1962) 17 Business Lawyer 912-938.

LINVAR, Isaiah A., MAULE, Christopher J., Cartel strategies in the international aluminum industry, (1965) 20 Anti-trust Bulletin, 611-663.

LITVAK, Isaiah A., MAULE, Christopher J., Canadian-United States Corporate interface and transnational relations, (1974) 28 International Organization 711-733.

MASSE, Mark S., Joint ventures and mergers in the Western hemisphere: A United States outlook, (1966) 32 A.L.J. 176-187.

McMILLAN, Charles J., After the Gray Report: The Tortuous Evolution of Foreign Investment Policy, (1974) 20 20 McGill L.J. 213-261.

RAHL, James A., Conspiracy and the Anti-Trust Laws, (1950) 44 Illinois Law Review 743-768.

SOLO, Robert A., Intra-Enterprise conspiracy and the Theory of the firm, (1961) 34 The Journal of Business 153-166.

STENGEL, George W., Intra-Enterprise Conspiracy under Section 1 of the Sherman Act, (1963) 35 Mississipi Law Journal 5-27.

VAGTS, Detlev F., The host country faces the multinational enterprise, (1973) 53 Boston U.L.R. 261-277.

VELVEL, Lawrence R., Antitrust suits by foreign nations, (1975-76) 25 Catholic University L.R. 1.

WEX, Samuel, A Code of Conduct on Restrictive Business Practices: A third Option, (1977) 15 Canadian Yearbook of International Law 198-235.

ZUCKER, Symon, Extraterritoriably and Canadian Criminal Law, (1974-75) 17 Crim. L.Q. 146-177.

ABSTRACT

One of the structural problems of the Canadian manufacturing industry is short production runs.

One might believe at first glance that it is due to the fact that the Canadian population is relatively small, but then the question arises: why not export more?

In this paper we submit that one of the reasons why Canadian corporations involved in the manufacturing sector do not extend their production runs by exporting more is that in a very significant number of cases, such corporations are part of a multinational conglomerate and the parent company imposes export restrictions on its subsidiaries. For various reasons including state of mind created partly by tariff policies, multinationals require their Canadian unit to supply the entire, but no more of than, local market.

In antitrust law, such market allocation is prohibited when it is agreed upon between separate entities. Nevertheless in the present state of legislation it is permited when occurring between affiliates.

We submit that territorial allocation of markets between units of a same multinational should also be viewed as an unlawful conspiracy when one of the consequences of

such a scheme is to prevent the Canadian unit from exporting.

The rational behind such an application of the "Intra-Corporate Conspiracy" theory is twofold: first, a closer look at the very structure of the multinational reveals that the actual level of conflicting interests within the multinational is neglected by both the traditional legal approach of the enterprise based on whether or not various units are separately incorporated and the traditional economic approach based solely on the idea that since what the multinational searches for is global maximisation of profits, it can constitute nothing but a single, one minded enterprise.

Secondly, from a purely practical point of view, Canadian interest in exporting more manufactured products militates in favour of a limited adoption of the intra-corporate conspiracy doctrine. Since it is sovereign, Parliament could decide to adopt the doctrine, even assuming that from a theoretical point of view there could be no true conspiracy within a same multinational two separate minds not being involved.

In order to have Canadian subsidiaries producing in longer runs and exporting rather than producing too wide a variety of goods for Canadian consumption only, we propose that Parliament make it unlawful for a unit of a multinational corporation to agree or arrange with any other unit of the same multinational corporation to allocate territories between themselves when one of the potential effects of the conspiracy could be to prevent a Canadian unit of the multinational corporation from exporting manufactured goods outside Canada.