Loyola Consumer Law Review

Volume 14
Issue 4 *Antitrust - 2 conferences*

Article 16

2002

A Review of the Treatment of the *Per Se* Rule by the U.S. Supreme Court Over the Last Twenty-Five Years: A Response to Albert Gourley's Proposal to Add a *Per Se* Rule to Canada's Competition Law

Jeffrey M. Cross
Partner, Freeborn & Peters, Chicago, IL

A Review of the Treatment of the *Per se* Rule by the U.S. Supreme Court Over the Last Twenty-Five Years: A Response to Albert Gourley's Proposal to Add a *Per se* Rule to Canada's Competition Law

Jeffery M. Cross*

In response to a request by the Canadian Bureau of Competition in June 2001, Albert Gourley of the Toronto office of Macleod Dixon proposed an innovative and thoughtful approach to modifying Section 45 of the Canadian Competition Act.[1] One of the components of Mr. Gourley's proposal is to create a *per se* rule to identify unlawful conduct. If a person is found to have entered into an agreement or arrangement with another person for the purpose or effect of fixing prices, eliminating or restricting output, or allocating markets, among other things, that person would be guilty of a crime.[2]

---

* Jeffrey Cross is a partner in the Chicago law firm of Freeborn & Peters, where he practices antitrust law and business litigation. He also is an Adjunct Professor at John Marshall Law School in Chicago, where he teaches antitrust law.

[1] Albert C. Gourley, *A Report on Canada's Conspiracy Laws: 1889-2001 and Beyond*, August 2001, *available at* http://strategis.ic.gc.ca/pics/ct/gourleyrep.pdf [hereinafter Gourley Report] (last visited Mar. 1, 2002).

[2] Section 45(1) of the draft code proposed by Mr. Gourley reads as follows:

> Every one who enters into an agreement or arrangement with one or more other persons for the purpose or having the effect of:
>
> (a) fixing, stabilizing or otherwise affecting prices in or of a market,
>
> (b) eliminating or restricting capacity, output or supply in, of or to a market,
>
> (c) impeding expansion or entry in, of or into a market, or
>
> (d) allocating, ceasing to supply or purchase, or otherwise affecting relations of either or any of them with one or more of any of their

This would be a *per se* approach to adjudicating business behavior because liability hinges solely upon a determination of whether the actor's conduct falls within certain defined categories, not whether there is an impact on competition.[3] This approach would replace the current Canadian Competition Act which is essentially a Rule of Reason standard. The current Competition Act requires that all restraints be found to "restrain or injure competition unduly."[4]

There is a great deal of discussion today among antitrust and competition law specialists about the need for convergence of the world's antitrust laws. Such convergence would enable transnational corporations to do business more efficiently across many borders without the constrictions of different and perhaps conflicting competition laws. Antitrust law in the United States, of course, has had a *per se* rule since the 1897 Supreme Court decision in *United States v. Trans-Missouri Freight Ass'n.*[5] However, over the last

---

> customers in, or suppliers to, a market, where those persons or their affiliates, or two or more of them, compete in the market, is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or to a fine not exceeding [x] or to both.

Gourley Report, *supra* note 1, at app. 2.

[3] Mr. Gourley's proposal has two other major components: (1) to exempt from condemnation under the Act restraints that are ancillary to an agreement or arrangement whose predominant purpose is the achieve efficiencies, and (2) to subject to government review and regulation conduct that falls between that which is condemned as *per se* and that which is exempted.

[4] Currently, Section 45(1) of the Canadian Competition Act states:

> 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 on persons or property, or
>
> (d) to otherwise restrain or injure competition unduly, is guilty of an indictable offense and liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million dollars or both;

Competition Act, R.S.C. Ch. C-34, § 45(1) (2001) (Can.).

[5] 166 U.S. 290 (1897).

twenty-five years, the trend in the United States Supreme Court has been to narrow and refine the range of conduct subject to the *per se* rule. In evaluating the changes proposed by Mr. Gourley to the Canadian Competition Act, it is valuable to consider the treatment of the *per se* rule by the United States Supreme Court during this period and particularly the Court's rationale for adopting one mode of analysis over the other.

The scope of the language of Section 1 of the Sherman Act is very broad. It simply says that "every contract, combination. . .or conspiracy in restraint of trade. . .is illegal."[6] For the last 112 years, the Sherman Act has been molded and shaped almost solely by judicial construction. Indeed, Congress and the original sponsors of the Sherman Act recognized that there would have to be judicial construction of the statute.[7] Consequently, antitrust jurisprudence in the United States has been a very dynamic and evolving law and is antithetical to the draft code proposed by Mr. Gourley.

For much of this 112-year period, the treatment of the *per se* rule and the Rule of Reason gave the appearance that the two methodologies were finite in their application and definition. The hallmark of the *per se* rule in the United States during the first two-thirds of this period was similar to that proposed by Mr. Gourley in his draft code. The court would determine whether the defendant's conduct fit into definable categories. Such a method of analysis was justified by the Supreme Court as being less expensive and less time consuming than an elaborate inquiry into the reasonableness of the business practice typically called for under the Rule of Reason.[8] It was also justified because the Court felt that the judiciary lacked expertise in understanding the dynamics of the market place.[9] Moreover, the *per se* rule was seen as providing more certainty and

---

[6] 15 U.S.C. § 1 (2001).

[7] For an interesting and thought-provoking analysis of the historical foundations of the Sherman Act, see ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 15-71 (Basic Books 1978).

[8] Ariz. v. Maricopa County Med. Soc'y, 457 U.S. 332, 343 (1982) (citing N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958) ("The elaborate inquiry into the reasonableness of a challenged business practice entails significant costs. Litigation of the effect or purpose of a practice often is extensive and complex.")).

[9] *Maricopa County*, 457 U.S. at 343 (citing United States v. Topco Assocs., Inc., 405 U.S. 596, 609-10 (1972) ("Judges often lack the expert understanding of industrial market structures and behavior to determine with any confidence a practice's effect on competition.")).

guidance to businesses.[10]

The Court, however, expressly recognized that the result of such a regime might be to condemn conduct in error. Conduct found unlawful under a *per se* rule might be found lawful if it had been fully analyzed under the Rule of Reason.[11] However, during most of this period, the Court expressly found such possibility of error to be tolerable in light of the efficiencies and certainties of a *per se* rule.

Over the last twenty-five years, the Supreme Court, as well as the lower courts, economists and academicians, have become more concerned with this possibility of error.[12] There has been a heightened concern about condemning conduct that a fuller, more sophisticated analysis would find pro-competitive. There also has been concern that such an application of the antitrust laws itself may have been stifling competition as measured in terms of consumer welfare. This recognition is perhaps the most important contribution of the so-called Chicago School of antitrust jurisprudence.

One of the earliest cases during this twenty-five year period that recognized these issues was *Continental T.V., Inc. v. GTE Sylvania Inc.*[13] *GTE Sylvania* was truly a watershed of antitrust thinking in the United States. The Court reiterated the principle that the Rule of Reason should be the standard mode of analysis and enunciated the equally important idea that any departure from the Rule of Reason should be based upon demonstrable economic effects rather than merely "formalistic line drawing."[14]

The problem with such formalistic line drawing is that a court may end up committing error and condemning pro-competitive conduct under the guise of *per se* certainty and ease of decision making. The *GTE Sylvania* case involved restraints on intrabrand competition imposed by GTE Sylvania on its dealers in the form of a location clause that prevented competition between retailers of the

---

[10] *Maricopa County*, 457 U.S. at 343-44.

[11] *Id.* at 344 ("As in every rule of general application, the match between the presumed and the actual is imperfect. For the sake of business certainty and litigation efficiency, we have tolerated the invalidation of some agreements that a fullblown inquiry might have proved to be reasonable.") (footnote omitted).

[12] *Id.* at 343-44.

[13] 433 U.S. 36 (1977).

[14] *Id.* at 58-59 ("[W]e do make clear that departure from the rule-of-reason standard must be based on demonstrable economic effect rather than. . .upon formalistic line drawing.").

Sylvania brand of television sets.[15] The Court concluded that such intrabrand restraints could actually stimulate interbrand competition between the retailers of different manufacturers.[16] Given this stimulation of interbrand competition, condemning such conduct because it potentially fit into a *per se* unlawful category of restraint would commit error and diminish consumer welfare.[17]

Two years later in 1979, the Supreme Court handed down an equally important opinion, *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.* (hereinafter "*BMI*"), which involved copyright music licensing associations.[18] Owners of copyrighted music had banded together to form associations to police copyright violations and to license the sale of copyrighted music to entities such as television stations.[19] The associations decided to sell a blanket license pursuant to which users such as CBS could own the entire repertoire for a single fee.[20] The associations, of course, had to establish a price for this blanket license.[21] The Court recognized that such conduct was literally price fixing, which classically has been considered to be one of the categories condemned under the *per se* rule.[22] The Supreme Court in *BMI*, however, rejected the literal approach as insufficient by itself in establishing whether the conduct was one of those categories that should be treated as a violation of the antitrust laws.[23] The Court stated, for example, that not all arrangements between actual or potential competitors that have an impact on price are *per se* violations of the antitrust laws or even unreasonable restraints.[24]

---

[15] *Id.* at 43-44.

[16] *Id.* at 54-55.

[17] *Id.* at 58-59.

[18] Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1 (1979).

[19] *Id.* at 4-6.

[20] *Id.*

[21] *Id.*

[22] *Id.* at 8.

[23] *Id.* at 9 ("'[P]rice fixing' is a shorthand way of describing certain categories of business behavior to which the *per se* rule has been held applicable. The. . .literal approach does not alone establish that this particular practice is one of those types or that it is 'plainly anticompetitive' and very likely without 'redeeming virtue.' Literalness is overly simplistic and often overbroad.").

[24] *Id.* at 23.

One of the important ideas that the Supreme Court recognized in the *BMI* case was that experience with a particular challenged practice should be an important part of determining the particular methodology to apply. In other words, if the courts do not have experience in a particular industry or the application of a particular restraint to an industry, they should be very cautious about adopting a *per se* approach. In noting that it had never examined a blanket license like the one before it, the Supreme Court stated: "[I]t is only after considerable experience with certain business relationships that courts classify them as *per se* violations. . . ."[25]

In 1984, the Supreme Court decided *NCAA v. Board of Regents of University of Oklahoma.*[26] *NCAA* involved horizontal agreements among actual or potential competitors to restrict output. Colleges and universities were viewed as competitors for lucrative contracts for televising college football. The NCAA was an association of such competing colleges and universities that imposed restrictions on the total number of televised intercollegiate games and the number of games any one team could play.[27] The Court recognized that the restraint was of the type often held unreasonable as a matter of law before – in other words, a *per se* restraint.[28] Yet the Supreme Court treated that case under the Rule of Reason. The Court recognized that some form of horizontal output restraint among competitors was necessary for the product, intercollegiate football, to come to the market in the first instance.[29]

The Supreme Court in *NCAA* also recognized that the *per se* rule and the Rule of Reason are not as concrete and finite in their application as they might appear to be. Indeed, it found that the application of the *per se* rule may require more than just identifying that the challenged conduct fit into a category that had been previously condemned.[30] Rather, the Court found that there may have to be considerable inquiry into market conditions before the *per se* rule could be applied. In this regard, the Court stated "there is often

---

[25] *BMI*, 441 U.S. at 9.

[26] 468 U.S. 85 (1984).

[27] *Id.* at 94.

[28] *Id.* at 99.

[29] *Id.* at 101 ("[W]hat is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all.").

[30] *Id.* at 103-04.

no bright line separating *per se* from Rule of Reason analysis. *Per se* rules may require considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive conduct."[31]

Two years later, the Supreme Court unanimously decided *FTC v. Indiana Federation of Dentists*.[32] A group of competing dentists in southern Indiana agreed among themselves that they would not provide x-rays to health maintenance organizations who wanted to use them to determine whether adequate care was being given.[33] This was clearly a horizontal agreement among competitors to restrict output, or refuse to deal. Traditionally, such conduct had been condemned under the *per se* rule. Yet once again, the Court applied the Rule of Reason.[34] In doing so, the Court indicated that it should be slow to condemn conduct as a *per se* violation of the antitrust laws if it is conduct of professional associations or if the conduct imposes a restraint in the context of a business relationship where the economic impact is uncertain.[35]

The Supreme Court also addressed its concern about committing error through "formalistic line drawing" in two important vertical cases. One was *Monsanto Co. v. Spray-Rite Service Corp.*[36] This case involved vertical resale price maintenance, traditionally condemned under *per se* rules. Monsanto had terminated a price-cutting dealer based upon complaints from other, competing dealers.[37] The Court recognized, however, that the economic effects of some conduct traditionally condemned as an antitrust violation may be the same as conduct found to be pro-competitive.[38] For example, the Court recognized that the economic effect of unilateral price restraints imposed by a manufacturer may be the same as a vertical price-fixing arrangement.[39] Similarly, the economic effects of

---

[31] *Id.* at 104 n.26.

[32] 476 U.S. 447 (1986).

[33] *Id.* at 448-49.

[34] *Id.* at 459.

[35] *Id.* at 458-59 ("[W]e have been slow to condemn rules adopted by professional associations as unreasonable *per se*. . .and, in general, to extend *per se* analysis to restraints imposed in the context of business relationships where the impact of certain practices is not immediately obvious. . . .") (citation omitted).

[36] 465 U.S. 752 (1984).

[37] *Id.* at 757.

[38] *Id.* at 762.

[39] *Id.*

vertical non-price restraints may be the same as vertical price restraints.[40] The Court felt that inferring an agreement merely from the existence of price complaints from competing dealers, or even from the evidence that the termination by the offending dealer was in response to such price complaints, could deter or penalize legitimate conduct.[41]

The Court faced similar considerations in the decision of *Business Electronic Corp. v. Sharp Electronics Corp.*[42] The *Sharp Electronics* case also involved the termination of a price-cutting dealer based on complaints from competing dealers. The competing dealers went so far as to threaten to resign if the manufacturer did not take action against the offending dealer.[43] The Court recognized that inferring price-fixing based on price complaints by other distributors could condemn pro-competitive conduct.[44] In rejecting the use of the *per se* rule, the Court emphasized that the term "restraint" as used in the Sherman Act "refers not to a particular list of agreements, but to a particular economic consequence."[45] The Court also noted that the term "restraint of trade" must be dynamic and "not merely the static content that the common law had assigned to the term in 1890."[46]

Another case along the same lines is *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, which was a predatory price case.[47] In *Matsushita*, Japanese manufacturers of televisions allegedly conspired over a 20-year period to reduce the price of televisions in the United States and ultimately drive Zenith out of the market.[48] When the conspiracy began, the largest American producers, Zenith and RCA, had a combined market share of about 40 percent.[49] The Court concluded that the allegation of a predatory pricing conspiracy was implausible. In doing so, the Court was concerned about committing error in condemning conduct that could be viewed as pro-

---

[40] *Monsanto*, 465 U.S. at 762.

[41] *Id.* at 763-64.

[42] 485 U.S. 717 (1988).

[43] *Id.* at 721.

[44] *Id.*

[45] *Id.* at 731.

[46] *Id.* at 732.

[47] 475 U.S. 574 (1986).

[48] *Id.* at 578, 591.

[49] *Id.* at 591.

competitive – the cutting or lowering of prices.[50]

As noted above, the Court in *NCAA* recognized that the *per se* rule and the Rule of Reason are not always fixed, definable concepts, and that the application of these rules had to have the flexibility to adjust to different variations of business conduct. This idea was most recently addressed in the case of *California Dental Ass'n v. FTC*, where an association comprising three-quarters of the dentists in California agreed to abide by a code of ethics and advisory opinions interpreting that code.[51] The result was to prohibit price advertising that was false or misleading, that misrepresented the training and qualifications of dentists, and that made claims regarding the quality of dental care that was not verifiable, such as "painless dentistry."[52] The FTC treated the restrictions as *per se* restrictions on price. In the alternative, it applied a truncated Rule of Reason analysis, under which it also found the restrictions unlawful.[53] The Ninth Circuit Court of Appeals reversed the *per se* approach, but affirmed the application of a truncated Rule of Reason analysis.[54] The Supreme Court, however, rejected the truncated Rule of Reason analysis applied by the Court of Appeals, calling for a fuller analysis.[55] In doing so, the Court recognized that the "categories of analysis of anticompetitive effect are less fixed than terms like '*per se*,' 'quick look,' and 'rule of reason' tend to make them appear."[56] The Court stated that no categorical line could be drawn between the *per se* rule and the Rule of Reason, but rather an analysis must be tailored to the facts:

> [T]here is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment. What is required, rather, is an enquiry meet for the case, looking to the circumstances,

---

[50] *Id.* at 594 ("[C]utting prices in order to increase business often is the very essence of competition. Thus, mistaken inferences. . .are especially costly, because they chill the very conduct the antitrust laws are designed to protect.").

[51] 526 U.S. 756 (1999).

[52] *Id.* at 760 & n.1.

[53] *Id.* at 762-63.

[54] *Id.* at 763-64.

[55] *Id.* at 781.

[56] *Id.* at 779.

> details, and logic of a restraint. The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one.[57]

What should these decisions by the United States Supreme Court over the last twenty-five years contribute to the discussion concerning changes to the Canadian Competition Act? First, these decisions teach that any changes to Canada's Competition Act should avoid "formalistic line drawing." In other words, they should avoid a methodology whereby the challenged conduct would be categorized into one or more descriptions of conduct that establish liability without more. As recognized by the United States Supreme Court in the cases discussed above, such an approach has the possibility of committing error, condemning otherwise pro-competitive conduct. Second, some form of the Rule of Reason analysis should be adopted. Third, departure from this Rule of Reason standard should be based only upon demonstrable economic effects.

Fourth, courts should be very cautious about condemning as *per se* unlawful restraints in businesses and industries where the courts have little experience. This was the approach recently taken by the Court of Appeals for the District of Columbia in *United States v. Microsoft Corp.* in regard to the tying claim alleged there. [58] Under cases such as *Jefferson Parish Hospital District No. 2 v. Hyde*[59] and *Eastman Kodak Co. v. Image Technical Services, Inc.*,[60] tying has been held to be a *per se* violation of the antitrust laws if there is market power in the tying product. The District of Columbia Court of Appeals in the *Microsoft* case, however, rejected the application of the *per se* rule to the tying of Microsoft's web browser to its operating system, on the ground that the Court did not know enough about the competitive issues of such tying in the computer industry to be confident that they would not commit error.[61]

Fifth, a competition law scheme should be cautious in condemning restraints imposed in business relationships where the

---

[57] *Cal. Dental Ass'n*, 526 U.S. at 780-81.

[58] 253 F.3d 34 (D.C. Cir. 2001).

[59] 466 U.S. 2 (1984).

[60] 504 U.S. 451 (1992).

[61] *Microsoft*, 253 F.3d at 84 ("There being no close parallel in prior antitrust cases, simplistic application of *per se* tying rules carries a serious risk of harm.").

economic impact is not obvious. Sixth, a competition law scheme should also be flexible, applying a sliding scale that would be able to adjust the analysis to be "meet for the case" as the Supreme Court said in *California Dental*. Some initial market analysis may be appropriate before condemning conduct as *per se* unlawful, even if such conduct appears at first blush to fit into categories that had traditionally been treated as *per se*. Seventh, the competition law scheme should be dynamic. It should be prepared to change over time as more experience develops with a particular type of conduct applied to a particular industry or new conduct is encountered.

Mr. Gourley recognizes in his report that his draft code may be overly broad in establishing the categories of conduct that should be condemned as a *per se* violation of the Competition Act.[62] He tempers such a possibility in part by proposing a complete exemption from antitrust scrutiny for conduct that is ancillary to another agreement or arrangement whose predominant purpose is to achieve efficiencies.[63] The recognition that restraints that are ancillary to pro-competitive collaborative conduct by competitors should not be condemned as *per se* unlawful was first recognized by the courts in the United States as early as 1898 by the Sixth Circuit Court of Appeals in the decision of Judge Taft in *United States v. Addyston*

---

[62] Gourley Report, *supra* note 1, at 14.

[63] Section 45(4) of the draft code proposed by Mr. Gourley would read as follows:

> (4) Subsection (1) does not apply in respect of an agreement or arrangement:
>
> * * *
>
> (c) or an effect that is ancillary ("ancillary agreement or effect") to another agreement or arrangement ("principal agreement"), including an agreement to acquire or lease assets, that was not entered into for a principal purpose of having an effect set forth in paragraph (1)(a), (b), (c) or (d), where:
>
> (i) the ancillary agreement or effect is reasonably necessary to give effect to, or an integral part of, the principal agreement; and
>
> (ii) it was not reasonably foreseeable, at the time that the principal agreement was entered into, that competition would be substantially lessened or prevented as a result of the ancillary agreement or effect, provided, however, that where the predominant purpose of the principal agreement is to achieve gains in efficiency the parties shall be deemed to have not entered into such agreement for a principal purpose of having an effect set forth in paragraph (1)(a), (b), (c) or (d).

Gourley Report, *supra* note 1, at app. 2.

Pipe & Steel Co.,[64] and more recently by decisions in the influential Seventh Circuit Court of Appeals in cases such as *Polk Bros., Inc. v. Forest City Enterprises, Inc.*,[65] and *General Leaseways, Inc. v. National Truck Leasing Ass'n.*[66] The United States Department of Justice and the Federal Trade Commission have jointly developed guidelines for collaborative conduct among competitors that adopt a similar but more restrictive approach than the courts.[67] The significant difference between those cases in the United States that recognize the potential pro-competitive contribution of ancillary restraints and the approach adopted by Mr. Gourley in his draft code is that the latter would totally exempt such conduct from antitrust scrutiny, while the former would merely apply the Rule of Reason.

In conclusion, Mr. Gourley's report suggesting changes to the Canadian Competition Act has raised some innovative and thoughtful ideas that contribute significantly to the dialogue in both Canada and the United States as to the proper standards to be applied in adjudicating potential antitrust violations. Such a dialogue contributes to the important goal of the convergence of the world's competition laws. This dialogue can be further advanced by a careful examination of the antitrust jurisprudence in the United States, especially the decisions of the United States Supreme Court in the last twenty-five years.

---

[64] 85 F. 271 (6th Cir. 1898).

[65] 776 F.2d 185 (7th Cir. 1985) (Judge Easterbrook applied the Rule of Reason to an ancillary restraint to restrict output because it contributed to the success of the cooperative venture between competitors that promised greater productivity and output).

[66] 744 F.2d 588 (7th Cir. 1984) (Judge Posner treated the division of markets among competing full-service truck lessors as per unlawful because it did not appear to be ancillary to the arguably pro-competitive agreement to provide reciprocal emergency breakdown service). The author was lead counsel for the plaintiff in *General Leaseways.*

[67] Antitrust Guidelines for Collaborations Among Competitors, issued by the FTC and the U.S. Department of Justice (Apr. 2000), *available at* http://www.ftc.gov/bc/guidline.htm (last visited Mar. 23, 2002).