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THE EVOLVING TORT OF CONSPIRACY TO RESTRAIN TRADE UNDER CANADIAN COMMON LAW

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For centuries, the common law doctrine of restraint of trade has prevented legal enforcement of agreements among competitors that courts find unreasonable. Although the concept of reasonableness has continued to evolve, and today in Canada reflects modern insights about the evils of competition-harming cartel practices, Canadian courts have never rejected an 1892 House of Lords decision, Mogul Steamship, holding that the tort of conspiracy to injure is unavailable in the case of trade restraints absent malice. Seizing upon hopeful language in several recent Supreme Court of Canada decisions suggesting that Canada might take a "different course" than the English courts, the author suggests that a fresh Canadian look at this issue would lead to the application of the tort of conspiracy to cartel practices. The article suggests that the English approach no longer reflects Canadian legal or economic thinking, explains how the tort of conspiracy will fill a valuable gap in the law due to the inability of the Competition Act to proscribe all anticompetitive cartel practices, assuages concerns that expansion of this tort will seriously harm organized labour, and distinguishes the application of the tort of conspiracy to conduct already unenforceable under the doctrine of restraint of trade from more radical proposals for tort expansion that have been rejected by the Supreme Court.

Depuis plusieurs siècles, la doctrine de common law de l'atteinte à la liberté du commerce a empêché l'exécution forcée des accords entre concurrents que les tribunaux trouvent déraisonnables. Malgré le fait que le concept de raisonabilité a continué de se développer, et qu'il reflète aujourd'hui au Canada une vision moderne du tort engendré par les pratiques anti-concurrence

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des cartels, les tribunaux canadiens n'ont jamais rejeté la décision rendue en 1892 par la Chambre des Lords. Mogul Steamship, qui posait le principe que le délit de conspiration pour causer un préjudice ne s'applique pas dans le cas d'une atteinte à la liberté du commerce, sauf s'il y a intention malicieuse. L'auteur souligne le texte encourageant de plusieurs décisions récentes de la Cour suprême, qui suggèrent que le Canada pourrait prendre une attitude différente de celle des tribunaux anglais, et il suggère que si les tribunaux canadiens abordaient cette question avec un regard neuf, le délit de conspiration pourrait être appliqué aux pratiques des cartels. L'article suggère que l'approche anglaise ne reflète plus les opinions juridiques ou économiques au Canada, il explique comment le délit de conspiration comblera des lacunes importantes dans le droit causées par l'incapacité de la Loi sur la Concurrence de proscrire toutes les pratiques anti-concurrence des cartels, il calme les inquiétudes que le développement de ce délit serait très nuisible aux organisations ouvrières, et il fait la distinction entre l'application du délit de conspiration à des actes qui presentement sont illégaux en vertu de la doctrine de l'atteinte à la liberté du commerce et des propositions plus radicales pour le développement du droit des torts qui ont été rejetées par la Cour suprême.

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Introduction

Writing at the beginning of the century, the great common lawyer Sir Frederick Pollock wrote that the common law's treatment of restraint of trade was a "singular example" of the judiciary, "without aid from legislation and without any manifest discontinuity, having practically reversed its older doctrine in deference to the changed conditions of society and the requirements of modern commerce."¹ Pollock was referring approvingly to the greater leeway courts were extending to private parties, consistent with the *laissez-faire* ideology that permeated the judiciary of the day. Yet, as the Privy Council recognized in 1934, "the scope of a doctrine which is founded on public policy necessarily alters as economic conditions alter."² At the end of the century, Canadian judges continue to demonstrate this flexibility in their practice of allowing the

¹ F. Pollock, *Principles of Contract*, 3d American ed. (New York: Baker, Voorhis & Co. 1906) at 467.

² *Vancouver Malt & Sake Brewing Co. Ltd. v. Vancouver Breweries Ltd.*, [1934] A.C. 181 at 189, [1934] 2 D.L.R. 310.

substance of the common law of restraint of trade to continue to evolve.³ However, due in part to the passage of anti-cartel legislation in most common law countries, there has been less pressure for common law tort remedies to keep pace with the “requirements of modern commerce.” Thus, in 1986 a leading scholar could still write that the House of Lords’ 1892 decision in *Mogul Steamship Co. v. McGregor, Gow & Co.*⁴ “authoritatively foreclosed” an action for damages by third-party victims of anticompetitive cartel practices.⁵ Thus, despite the close doctrinal relationship between the contract law doctrine of restraint of trade and the tort law doctrine of conspiracy, courts have not been as sensitive in the tort area to the need for continuing flexibility, even though the same public policy considerations have traditionally influenced both doctrines.

More hopeful signs are apparent, though, at least in Canada. Four years later, in *Hunt v. Carey Canada, Inc.*,⁶ the Supreme Court resurrected the relevant common law action — the tort of conspiracy to injure — from prior criticism as “a commercial anachronism,”⁷ suggesting that “careful consideration might conceivably lead to the conclusion that the tort has a useful role to play in new contexts.”⁸ Displaying caution because the case arose in the context of a motion to strike the conspiracy allegations from the plaintiffs’ statement of claim — the defendants thereby seeking a decision that it was “plain and obvious” that pursuing a conspiracy claim would abuse judicial process — Wilson, J., for the Court, suggested that the tort should be extended to redress situations “where the fact of combination creates an evil which does not exist

³ The general measure for trade restraints is whether they are reasonable “between the parties and with reference to the public interest.” *Elsley v. J. G. Collins Ins. Agencies Ltd.*, [1978] 2 S.C.R. 916 at 923. Specifically, courts will look skeptically on agreements — especially ones involving parties with unequal bargaining power — that restrain an individual’s ability to compete in the marketplace to a degree greater than is necessary to protect the legitimate interests of the other party. See *Maguire v. Northland Drug Co., Ltd.*, [1935] S.C.R. 412; *Herbert Morris, Ltd. v. Saxelby*, [1916] A.C. 688 at 714; *Mason v. Provident Clothing & Supply Co.*, [1913] A.C. 724 at 740-41. This test, first enunciated in the landmark case of *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.*, [1894] A.C. 535 at 565 (H.L.), “has proved to be remarkably flexible in its application to ever-changing economic and social conditions.” - *Tank Lining Corp. v. Dunlop Industrial Ltd.* (1982), 40 O.R. (2d) 219 at 222. *Nordenfelt*’s required inquiry into the public interest has been hailed “as a valuable instrument for adjusting this branch of the law to changing economic and social conditions.” *Ibid.* at 233.

⁴ [1892] A.C. 25 (H.L.) [hereinafter *Mogul Steamship*].

⁵ M.J. Trebilcock, *The Common Law of Restraint of Trade: A Legal and Economic Analysis* (Toronto: Carswell, 1986) at 287.

⁶ [1990] 2 S.C.R. 959.

⁷ *Canada Cement LaFarge Ltd. v. B.C. Lightweight Aggregate, Ltd.*, [1983] 1 S.C.R. 452 at 473.

⁸ *Hunt*, *supra* footnote 6 at 988-89.

in the absence of combination"⁹ — precisely the evil caused by anticompetitive cartel behavior.

In other common law jurisdictions, courts have modified *Mogul Steamship's* force by granting declaratory and injunctive relief in a series of cases involving unreasonable restraints on competition for the services of professional athletes.¹⁰ This approach is not completely satisfying for two reasons, one practical and one theoretical. First, the denial of money damages creates an incentive for cartels to pursue anticompetitive policies unless and until ordered to desist.¹¹ Second, these cases provide no coherent rationale for allowing the equitable chancellor, but not the law judge, to depart from *Mogul Steamship's* holding that contracts in restraint of trade are unenforceable between the parties but not actionable by the victims. In the landmark case of *Eastham v. Newcastle United Football Club Ltd.*,¹² Wilberforce J. recognized the continuing force of *Mogul Steamship's* bar on actions for damages for conspiracy, and then simply held that it did not bar an action for declaratory judgment because it "is a comparatively modern remedy which is being found to have a usefulness which was probably not appreciated when [*Mogul Steamship* was] decided."¹³

Canadian courts have yet to rule on this precise issue. In order to grant relief in cases brought by third parties injured by trade restraints, which is the direction in which *Hunt v. Carey Canada* seems to point, Canadian courts will either need to relax the traditional rule and permit equitable challenges to contracts in restraint of trade by plaintiffs other than the parties to the bargain — the course adopted by England, Australia, and New Zealand — or apply the tort of conspiracy to agreements to restrain trade. Given the alternatives of denying

⁹ *Ibid.* (quoting *Frame v. Smith*, [1987] 2 S.C.R. 99 at 125).

This approach seems more consistent with Canada's southern sister than her trans-Atlantic mother. See W.P. Keeton, D.B. Dobbs, R.E. Keeton, & D.G. Owen, *Prosser & Keeton on Torts*, 5th ed. (St. Paul, Minn.: West Publishing, 1984) at 324: "...it now seems generally agreed, although there has been authority to the contrary, that there are certain types of conduct, such as boycotts, in which the element of combinations adds such a power of coercion, undue influence or restraint of trade, that it makes unlawful, when done in combination, acts which one person alone might legitimately do." Because of the proliferation of federal and state antitrust statutes permitting multiple damage awards for victims of trade restraining conspiracies, the typical application of American common law arises in cases involving professionals that, for a variety of jurisdictional reasons, are not subject to the competition legislation. See, e.g., *Willis v. Santa Ana Community Hospital Association*, 58 Cal. 2d 806 (1962) (doctor excluded from hospital privileges).

¹⁰ The landmark case is Wilberforce J.'s decision in *Eastham v. Newcastle United Football Club Ltd.*, [1964] Ch. 413. His reasoning was subsequently adopted by the Australian High Court in *Buckley v. Tutty* (1971), 125 C.L.R. 353, and by the New Zealand Court of Appeal in *Blackler v. New Zealand Rugby Football League*, [1968] N.Z.L.R. 547. Interestingly, the only cases cited in a leading English treatise for the proposition that third parties injured by trade restraints may obtain declarations relate to sports. See *Chitty on Contracts*, 26th ed. (London: Sweet & Maxwell, 1989) at 725 n.57.

¹¹ Trebilcock, *supra* footnote 5 at 214.

¹² *Supra* footnote 10.

¹³ *Ibid.* at 446.

relief based on an outmoded *laissez-faire* British tolerance for cartel practices, or granting relief based on a judicial *ipse dixit* dispensing on equitable grounds with contract privity notions, the better course is to acknowledge that the doctrine set forth in *Mogul Steamship* is no longer applicable in Canada and to apply the tort of conspiracy to agreements that unreasonably restrain trade where the principal purpose of the agreement is to use the combined economic power of the conspirators to profit at the expense of sellers, buyers, or workers.

Part I of this Article analyses the *Mogul Steamship* case, concluding that every foundation upon which the decision was based has now been rejected by Canadian courts as the common law and modern understanding of cartel practices have evolved. Part II explains why victims of anticompetitive cartel conduct need a common law right of action, notwithstanding their right to sue for losses under the *Competition Act*.¹⁴ Analysis of judicial interpretation of the conspiracy section of the *Competition Act* reveals that the statute does not accurately delineate between socially harmful and socially beneficial agreements, leaving outside its scope some important types of unreasonable restraints of trade at common law that need to be redressed. Part III is designed to assuage concerns that this logical extension of the tort of conspiracy will, as earlier, be used against workers and organized labour. Because the tort of conspiracy to injure inherently requires judges to form a judgment about the desirability of business practices, the formal ability of courts to subject union conduct to tort liability absent *Mogul Steamship* poses little risk to organized labour. Judges who find union activities desirable will not find such conduct tortious; those who find labour activities objectionable have a variety of other means at their disposal under current law to subject unions to tort liability; those with no firm ideology on labour practices are likely to follow precedents suggesting that judges should leave labour relations disputes to specialized tribunals and thus will be unlikely to extend tort liability to practices that have not already been prohibited under labour relations statutes. Finally, Part IV demonstrates the relatively modest nature of my proposal, and distinguishes it from other bolder efforts to expand common law tort liability that have been rejected by the Supreme Court of Canada.

I. The Canadian Rejection of *Mogul Steamship's* Foundations

There are two prongs to the tort of conspiracy. Defendants can be liable for conspiring to injure a plaintiff through the use of unlawful means; this aspect of the tort is discussed in Part II, *infra*. Defendants can also be liable for joint conduct causing injury to the plaintiff even if the methods used are not independently unlawful. As the Supreme Court of Canada recently explained:

If A and B agree to commit acts which would be lawful if done by either of them alone but which are done in combination and cause damage to C, no tortious

¹⁴ R.S.C. 1985, c. C-34.

conspiracy actionable at the suit of C exists *unless the predominant purpose of A and B in making the agreement and carrying out the acts which cause the damage is to injure C and not to protect the lawful commercial interests of A and B.*¹⁵

The dichotomy between injuring the victims and protecting lawful or legitimate business interests comes from *Mogul Steamship*.¹⁶ It is principally grounded on the *laissez-faire* policy that firms should be allowed to engage in any conduct that is not positively outlawed.¹⁷ The “requirements of modern commerce” demonstrate, however, that an agreement formed with the purpose of allowing A and B to use their combined economic power to reap monopoly profits that would be unavailable to them were they required to compete is *not* for the protection of “lawful commercial interests.” A fresh reading of the elements of this tort, then, would lead to a recognition of its availability in cartel settings. Canada’s continuing fealty to *Mogul Steamship* deserves this fresh reading because the judges’ several opinions in that venerable case rely on a number of assertions of law and fact, *all of which* are either distinguishable from modern anticompetitive cartel practices or have been rejected as a matter of doctrine or policy by contemporary Canadian courts.

Contemporary supporters of the *Mogul Steamship* doctrine made their view clear that a firm’s increased profits through efficiency or innovation could not be distinguished from business successes due to concerted economic power and anticompetitive tactics. In his treatise on tort law, Sir Frederick Pollock began his discussion of injury through trade competition with the famous *Schoolmaster’s Case*,¹⁸ which rejected a claim brought by the incumbent master of a Gloucester grammar school for injuries suffered when a rival school opened and the incumbent was forced to lower prices. Pollock concluded from this holding that “[c]ompetition is in itself no ground of action, whatever damage it may cause.”¹⁹

In contrast to the young rival who undercut the Gloucester school monopoly, the defendants in *Mogul Steamship* formed a cartel that set prices among firms previously in rivalry with each other; boycotted any agents who did business

¹⁵ *Hunt*, *supra* footnote 6 at 981 (quoting *Metall und Rohstoff A.G. v. Donaldson, Lufkin & Jenrette Inc.*, [1989] 3 W.L.R. 563 at 593). See also *Crofter Hand Woven Harris Tweed Co. v. Veitch*, [1942] A.C. 435 at 443 (H.L.) [hereinafter *Crofter* cited to A.C.] (an act is tortious if the “real purpose of the combination is the inflicting of damage on [plaintiff] as distinguished from serving the bona fide and legitimate interests of those who so combine”).

¹⁶ P. Burns, “Civil Conspiracy: An Unwieldy Vessel Rides a Judicial Tempest” (1982) 16 U.B.C. L. Rev. 229 at 231.

¹⁷ In *Mogul Steamship*, *supra* footnote 4 at 36, the Lord Chancellor quoted from *Hilton v. Eckersly* (1855), 6 E. & B. 47 at 74-75, 119 E.R. 781 (Exch.) “... a trader in a free country in all matters ‘not contrary to law may regulate his own mode of carrying on his trade according to his own discretion and choice.’”

¹⁸ (1410-11) Y.B. Hil. 11 Hen. f. 47, pl.21.

¹⁹ F. Pollock, *The Law of Torts* (New York: Banks Law Publishing, 1901) at 149.

with non-members (this was the precise injury to the plaintiff, a non-member); and engaged in concerted predatory pricing to block the market entry of new rivals. Yet the English courts found nothing actionable about their conduct. Modern minds might question how Pollock and their Lordships in *Mogul Steamship* could leap from a finding that undercutting a monopoly is not tortious to the conclusion that there is “no restriction imposed by law on competition by one trader with another with the sole object of benefiting himself.”²⁰ The answer was succinctly put by Fry L.J., in the lower court decision affirmed in *Mogul Steamship*: “To draw a line between fair and unfair competition, between what is reasonable and unreasonable, passes the power of the Courts.”²¹ Inquiring modern minds take for granted economist Alfred Marshall’s insights concerning marginal cost that underlie modern competition policy’s view of predatory pricing — suggesting “a line between fair and unfair competition” based on whether the defendant’s price would only “benefit himself” by eliminating competition.²² But as Marshall himself observed in 1914, traditional liberal economic thought had not yet digested these insights.²³

The tolerance for anticompetitive cartel practices demonstrated in *Mogul Steamship* was not simply based on a perceived inability to distinguish the good

²⁰ *Ibid.* at 150 (quoting *Mogul Steamship* [1892] A.C. 25 at 59 (Lord Hannen)).

²¹ 23 Q.B. Div. 598 at 625-26. Lord Watson declared, “I cannot for a moment suppose that it is the proper function of English Courts of Law to fix the lowest prices at which traders can sell or hire, for the purpose of protecting or extending their business, without committing a legal wrong which will subject them in damages” [1892] A.C. at 43. Lord Morris endorsed this view, opining that he could not “see why judges should be considered specially gifted with prescience of what may hamper or what may increase trade, or of what is to be the test of adequate remuneration.” *Ibid.* at 50. See also *Crofter*, *supra* footnote 15 at 472 (“English common law may have felt that it was beyond its power to fix by any but the crudest distinctions the metes and bounds which divide the rightful from the wrongful use of the actor’s own freedom”).

²² Although there are significant disagreements among modern minds about the appropriate place to draw the line between fair and unfair competition, virtually everyone agrees on the importance of facts such as the relationship between price and variable cost (a workable measure based on the concept of marginal cost) and the intent and likelihood that the alleged predator could recoup monopoly profits (defined as profits significantly above marginal cost). See generally S.F. Ross, *Principles of Antitrust Law* (Mineola, N.Y.: Foundation Press, 1993) at 55-72. The guidelines for enforcement of section 50(1)(c) of the *Competition Act*, R.S.C. 1985, c. C-34, which prohibits selling at “prices unreasonably low, having the effect or tendency of substantially lessening competition or eliminating a competitor,” requires proof both of market power and that prices were below cost, with a principal focus on whether the “average variable cost” of a product is higher or lower than the price charged. See Director of Investigation and Research, *Competition Act, Predatory Pricing Enforcement Guidelines* (Ottawa: Supply & Services Canada, 1992). Without Marshall’s economic insights, this sort of inquiry would not be conceivable.

²³ P.S. Atiyah, “The Legacy of Holmes Through English Eyes” (1983) 63 Boston U. L. Rev. 341 at 364 (quoting A.C. Pigou, ed., *A. Marshall Memorials of Alfred Marshall*, (N.Y.: A.M. Kelly, 1966) at 452-53). See also P.C. Carstensen, “Predatory Pricing in the Courts: Reflection on Two Decisions” (1986) 61 Notre Dame L. Rev. 928 at 939 (*Mogul Steamship* resulted from the inability of common law to develop a workable definition of what prices were unfair).

from the bad.²⁴ Rather, their Lordships viewed the cartel's practices as wholly legitimate. Lord Halsbury found concerted predatory pricing to be an ordinary and acceptable business practice.²⁵ Lord Bramwell suggested that the cartel served a desirable goal of avoiding waste and duplication.²⁶ Characterizing what we would today label as exclusionary practices or an abuse of dominant position as "effective competition," Lord Field took note of the "excessive" number of ships in the trade in prior years and thus viewed the injury to the plaintiff as "one of the necessary results of competition."²⁷ As a leading British observer of this area of law has noted, their Lordships thought that free trade and competition demonstrated that cartels were inherently unstable and posed no threat to the public interest.²⁸

Putting aside the hypothetical case of a cartel that posed no threat to the public because of the ease of entry by non-members into the market,²⁹ the attractiveness of cartels as responses to ruinous competition has disappeared

²⁴ Modern Canadian legislation has responded by prohibiting businesses from "engag[ing] in a policy of selling products at prices unreasonably low, having the effect or tendency of substantially lessening competition or eliminating a competitor, or designed to have that effect." *Competition Act*, *supra* footnote 14, s.50(1)(c). In addition, the Director has the option of prosecuting predation before a specialized Competition Tribunal pursuant to s.79 of the *Competition Act*, which prohibits the abuse of dominant market position. Section 36 of the *Act* provides a private right of action for parties suffering loss or damage by reason of a violation of s.50(1)(c), but not s.79.

²⁵ *Mogul Steamship*, *supra* footnote 4, [1892] A.C. at 37.

Discussing *Mogul Steamship* two decades later, Alfred Marshall wrote that "Halsbury went out of his way to preach an enormous sermon in favour of unlimited freedom to grant rebates: and had no idea that American economists — who are the highest authority on this particular subject — are convinced that those rebates strengthen the destructive and antisocial effects of unscrupulous trade combinations more than almost anything else." P.S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Clarendon Press, 1979) at 617 (quoting *Memorials of Alfred Marshall*, *supra* footnote 22 at 452-53). However, Atiyah notes that in 1890, Marshall was less sure "of the nature of the problem and of the right way to deal with it." *Ibid*.

²⁶ *Mogul Steamship*, *supra* footnote 4 at 46.

²⁷ *Ibid.* at 52, 54, 57. Other lords echoed this view. *Ibid.* at 47 (Lord Bramwell); *ibid.* at 50 (Lord Morris).

²⁸ Atiyah, *supra* footnote 23 at 364. See also *Mogul Steamship*, *supra* footnote 4 at 50 (Lord Morris) ("Whenever a monopoly was likely to arise, with a consequent rise of rates, competition would naturally arise.") Cf. *Weidman v. Shragge*, [1912] 46 S.C.R. 1 at 26-27. (Idington J.) (distinguishing tolerance of conspiracy in *Mogul Steamship* and Canadian intolerance of conspiracy as reflected in anti-combines legislation because, unlike Canada, British markets were open to free trade).

²⁹ Such a cartel might not be a restraint of trade under the substantive common law, see, e.g., *Elsley v. J. G. Collins Insurance Agencies*, [1978] 2 S.C.R. 916 at 928-29, (no harm to public interest where insurance agent restrained in market including 20-22 competitors), or under the *Competition Act*, *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 at 654 [hereinafter *PANS*]. However, one always wonders why entrepreneurs would go to the trouble of organizing a cartel if their prospects for market power are, indeed, so dim. Consider *Connors v. Connors Bros. Ltd.*, [1939] S.C.R. 162, rev'd, [1940] 4 All E.R. 179 (P.C.). Duff, C.J.C., concluded that the defendants' "aim was admittedly to create a monopoly in the packing of Canadian sardines and there appears to

over the years. According to Michael Trebilcock, “[f]ew economists now recognize the concept of destructive or cut-throat competition as possessing any defensible economic content.” As he observes, such competition often occurs in industries characterized by substantial excess capacity, and the effect of such competition is to reduce industry capacity, which will be redeployed in society to more valuable economic activities. Cartelization simply delays this process.³⁰ The idea that collective anti-competitive practices like those in which the defendants engaged in *Mogul Steamship* can be justified as necessary to prevent ruinous competition is inconsistent with Canadian public policy as reflected in a century of anti-combines legislation.³¹

The foundational argument in *Mogul Steamship* that has been most clearly rejected by modern Canadian courts is the argument that the defendants’ concerted actions were indistinguishable from the actions of an individual trader. The cartel, wrote Lord Halsbury, “effects no more and is no more, so to speak, a combined operation than that of a single person. If the thing done is rendered unlawful by combination, the course of trade by a person who singly trades for his own benefit... would be open to the same objections.”³² This principle continues to motivate English jurisprudence. Ninety years after *Mogul Steamship*, Lord Diplock still insisted that the tort of conspiracy should not be extended to acts done to protect the economic self-interest of the defendant. His Lordship explained that the “gist” of the cause of action consists in concerted action taken pursuant to agreement, but “to suggest today that acts done by one street-corner grocer in concert with a second are more oppressive and dangerous to a competitor than the same acts done by a string of supermarkets under a single ownership ... is to shut one’s eyes to what has been happening in the business and industrial world...”³³

be no doubt that it was successful” [1939] S.C.R. at 171. On the other side of the Atlantic, Viscount Maugham concluded that “there are no grounds for holding that a restriction restraining the respondent from carrying on a sardine business in Canada [was] likely to produce a real monopoly, since every other person in Canada can set up such a business, and the evidence is to the effect that some persons have done so. The practical difficulty in successfully competing with the appellants may well be due to their skill and enterprise and long experience,” at 195. When judges disagree about such matters, perhaps the parties in the market might be presumed to best foresee the consequences of their efforts to restrain trade.

³⁰ Trebilcock, *supra* footnote 5 at 300-01.

³¹ In *PANS*, *supra* footnote 29 at 649-50, the Supreme Court held that Canadian public policy in favor of free competition meant that the inquiry into whether a conspiracy had “unduly lessened” competition under the *Competition Act* was limited to whether the agreement had anti-competitive effects, and excluded consideration of “counterbalancing efficiency gains by the public.” See also *Tank Lining*, *supra* footnote 3 at 228 (Canadian common law looks to federal competition statutes “as expressions of Canadian public policy and the public interest in relation to agreements in restraint of trade”).

³² *Mogul Steamship*, *supra* footnote 4 at 38.

³³ *Lonrho Ltd. v. Shell Petroleum, Ltd.*, [1982] A.C. 173 at 188-89. See also *Crofter* *supra* footnote 15 at 443 (“Cyrano de Bergerac’s single voice was more effective to drive the bad actor Montfleury off the stage than the protests of all the rest of the audience to restrain him”).

As Madame Justice Wilson acknowledged in *Hunt v. Carey Canada*, Canadian courts have chosen “to follow a somewhat different path from Lord Diplock.” Specifically, she suggested that there are situations “where the fact of combination creates an evil which does not exist in the absence of combination.”³⁴ As to this critical question, Wilson J., has the better of the argument.

There are two ways in which a combination of traders creates an evil that does not exist in the absence of combination. One is where, through combination, the conspirators control such a large share of the market, and, through unfair practices, can effectively deter new entry into the market, that each of them can raise prices or lower quality in ways that would have been impossible in a competitive market. Indeed, it has been Canadian public policy since the enactment of anti-combination legislation in 1889³⁵ that, contrary to Lord Halsbury’s understanding of economics, cartels *could* unduly lessen competition and *would* not be inevitably destabilized by new entry.

The second way in which an agreement among separate firms to restrain trade is more harmful than the same conduct engaged in unilaterally relates to the inherent inefficiency of cartels — the group does not act in the best interests of the whole (*i.e.*, as an efficient monopolist would), but rather each firm tries to persuade its co-conspirators to act in a way that supports its best individual interests. Lord Diplock therefore erred in concluding that a combination of small grocers could not possibly create more harm than a single supermarket chain.

Consider the following example: a new suburban housing development in Thunder Bay creates demand for a more proximate grocery store. Current patronage by residents of this development results in \$100,000 in profit for Safeway, a large supermarket chain with three stores in the area. Marketing estimates suggest that a new store built close to the development will result in \$200,000 profit. It is clear that Safeway will build the store.

Now suppose instead that Safeway is not a factor and that a cartel of small grocery stores operate in Thunder Bay. Because of predatory practices and boycotts like those employed in *Mogul Steamship*, new grocers cannot enter the market and existing grocers have agreed not to expand their own operations without permission from the group. If current patronage by residents of the new development results in \$25,000 in profit for each of four members of the cartel, none of them will be willing to consent to the opening of a new grocery store in

³⁴ *Hunt*, *supra* footnote 6 at 989.

³⁵ *An Act for the Prevention and Suppression of Combinations formed in restraint of Trade*, 52 Victoria c.41.

which they will not profit.³⁶ The new store will probably not be built, yet consumers are denied a tort remedy.³⁷

In sum, the House of Lords' decision in *Mogul Steamship* was based on three critical conclusions of law and political economy: (1) courts could not distinguish between fair and unfair competition; (2) concerted predatory practices, price fixing, and group boycotts posed no grounds for concern; and (3) firms that act in concert pose no greater evil than that posed by unilateral business conduct. These views reflected the considered opinion of the bench and bar, as well as many economists, in 1892. Today, the considered opinion of the Canadian bench and bar — and virtually all industrial organization economists — would reject each one of these propositions. Such an evolution in thinking should be reflected in Canadian common law.

II. Underenforcement Via The Competition Act

One of the principal foundations of *Mogul Steamship* was the distinction drawn by Lord Halsbury, L.C., between agreements that were “unlawful” in the sense of being unenforceable as unreasonable restraints of trade and, in his view, the “more accurate use of the word ‘unlawful,’ ... namely, as *contrary to law*.”³⁸ Indeed, the leading American antitrust jurist, William Howard Taft J. (as he then was), cited *Mogul Steamship* in noting that the effect of the *Sherman Antitrust Act* was “to render such contracts unlawful in an affirmative or positive sense ... and to create a right of civil action for damages in favor of those injured thereby....”³⁹ Consistent with *Mogul Steamship*'s distinction, the Supreme Court of Canada has held that conspiracies to injure are actionable when accomplished by means violative of statutory law and where the defendants

³⁶ Theoretically, the four affected grocers could agree to operate the new store as a joint venture, but bargaining problems usually prevent this result. An actual example of this problem is the strict territorial market division engaged in by professional sports leagues concerning broadcast rights. For example, until very recently, Los Angeles Dodger fans in Illinois could not receive satellite transmissions of Dodger games at any price, apparently because the Dodgers could not agree with the Chicago Cubs and White Sox on how to split the revenue.

Of course, it is quite unlikely that a small-grocer cartel would actually exercise complete monopoly power anywhere in Canada. However, product differentiation could still result in a combination of small grocers that would hurt consumers (e.g. the only store built near the new development is a Safeway and a significant amount of consumers would prefer the convenience/ friendliness of a smaller grocer).

³⁷ This same issue arose in the United States in the context of a government antitrust challenge to a joint venture of small grocers. *United States v. Topco Association*, 405 U.S. 596 (1972). An analysis similar to that described in the text can be found in Ross, *supra* footnote 22 at 152.

³⁸ *Mogul Steamship*, *supra* footnote 4 at 39 (emphasis in original).

³⁹ *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271 at 279 (1898), *aff'd*, 175 U.S. 211 (1899).

should have known that the plaintiff would be injured.⁴⁰ Thus, in *Gagnon v. Foundation Maritime Ltd.*,⁴¹ the Court found union organizers liable for the tort of conspiracy, based on conduct in violation of the provincial labour relations statute. Consistent with this principle, in *Westfair Foods Ltd. v. Lippens Inc.*,⁴² the Manitoba Court of Appeal permitted a victim of a group boycott to sue for tortious conspiracy to injure by unlawful means, since the boycott was allegedly a violation of the conspiracy section of the *Competition Act*.⁴³ In addition, the plaintiff was able to pursue a statutory claim for relief under section 36 of the Act.⁴⁴

At this juncture, a reader familiar with these remedies may well question the need for this entire exegesis into the common law and *Mogul Steamship*. If a Parliamentary statute set forth a comprehensive standard for evaluating agreements among competitors that might restrain trade, drawing a line that effectively prohibited restraints that harmed society and permitted restraints that benefitted society, then the addition of common law liability would serve no valuable purpose.⁴⁵ Victims of *Competition Act* violations could, per *Gagnon* and *Westfair Foods*, bring tort actions for conspiracy to injure by unlawful means, and expansion of the tort of conspiracy to injure to cover agreements that were not unlawful under the *Competition Act* would be counter-productive, since, by definition, they would be creating tort liability for, and thus deterring, restraints that benefit society.

The answer to this concern lies in the shortcomings in the current state of judicial and administrative interpretation of the *Competition Act*'s prohibition on conspiracies to lessen competition unduly. The paucity of judicial precedent makes it difficult to make any confident statement about the degree to which section 45 of the *Competition Act*, which prohibits conspiracies or agreements

⁴⁰ *Hunt v. Carey Canada, Inc.*, supra footnote 6 at 985-86 (citing *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, supra footnote 7 at 471-72, and G.H.L. Fridman, *The Law of Torts in Canada, Vol. 2* (Toronto: Carswell, 1990) at 265.

⁴¹ [1961] S.C.R. 435.

⁴² (1989), 64 D.L.R. 4th 335 (C.A.).

⁴³ Now codified as s. 45 of the *Competition Act*, R.S.C. 1985, c. C-34.

⁴⁴ Section 36(1) permits recovery for loss or damage suffered as a result of conduct contrary to any provision of Part VI of the Act, which includes s.45, outlawing conspiracies to lessen competition unduly.

⁴⁵ There is, of course, considerable dispute as to what the goals of competition policy ought to be. Some believe that the sole guidepost for social harm ought to be whether a restraint promotes or impedes the efficient allocation of goods and services. Others maintain that short-term efficiencies in production of goods and services do not justify the elimination of competitive rivalry that may cause a reduction in long-term innovation. Yet others suggest that a statute passed by a House of Commons, where the majority of "commoners" are consumers, ought to be interpreted so as to prevent concerted efforts to transfer wealth from consumers to producers, so that agreements that result in higher prices would not be justified even if they also resulted in lower costs. For a discussion of these issues in an American context, see Ross, supra footnote 22 at ch. 1.

“to lessen competition unduly,”⁴⁶ accurately delineates between agreements that are socially beneficial and those that are socially harmful. Those precedents that do exist, however, suggest that there are a variety of restraints of trade that Canadians would want to deter that may escape sanction under the *Competition Act*. As detailed below, some cases suggest that defendants whose agreements are indeed found to lessen competition unduly can nonetheless escape liability if careful and sophisticated economic analysis is required to so find, and thus a plaintiff could not establish that the defendants should have known that the effect of their agreement was to lessen competition unduly; other cases suggest that, regardless of the potentially anticompetitive effect of an agreement, it will not be condemned if it affects only a small part of a market. Moreover, there are cases where the defendants’ economic power is indeed insufficient to lessen competition unduly, yet their agreement injures the plaintiff without offering any benefit to consumers or the economy as a whole. In such cases, the common law has traditionally found the restraints to be unreasonable, and there is no warrant to deny recovery for loss or damage to victims under Canadian law.

The main reason why one cannot state with confidence that the *Competition Act* does in fact serve to accurately delineate between socially beneficial and socially harmful agreements is that the state of the law concerning the *Act* is quite unclear. Earlier restrictive judicial definitions of section 45, which had required proof of virtual monopoly power and a subjective intent to lessen competition, have been overruled by recent Parliamentary amendments to the statute. In its current form, however, the section has been subject to only one authoritative interpretation by the Supreme Court of Canada, *R. v. Nova Scotia Pharmaceutical Society (PANS)*.⁴⁷

In their careful review of this decision, Presley Warner and Michael Trebilcock conclude that section 45 is both overbroad and underinclusive as a legislative effort to delineate between beneficial and harmful arrangements.⁴⁸ To the extent that, as the Supreme Court made clear, the section does not permit consideration of all efficiency arguments in favor of a restraint,⁴⁹ the *Act* is arguably overbroad. However, recognition of common law tort liability will have no effect on the statute’s overbreadth. Litigants who, but for *Mogul Steamship*, would be able to recover for violation of the tort of conspiracy, will be able to do so anyway under the *Gagnon/Westfair Foods* line of authority. To the extent that the *Act* is underinclusive, however, permitting recovery for socially harmful agreements that are unreasonable restraints of trade at common law but would not be held to be agreements that lessen competition unduly in violation of the *Competition Act* promotes sound public policy.

⁴⁶ *Competition Act*, *supra* footnote 14, s.45.

⁴⁷ *Supra* footnote 29.

⁴⁸ P.L. Warner & M.J. Trebilcock, “Rethinking Price-Fixing Law” (1993) 38 McGill L.J. 679 at 690.

⁴⁹ *PANS*, *supra* footnote 29 at 650.

Warner and Trebilcock's conclusion that the section is underinclusive seems correct. Because the provision is a criminal statute, with a commensurately high burden of proof, price-fixers can still escape liability by persuading the fact-finder that they lacked the requisite *mens rea* for the offense. In *PANS*, the Supreme Court held that the Crown must prove that the accused knew or should have known that the agreement would have the economic effect of lessening competition unduly.⁵⁰ Although Gonthier J., commented that proof of subjective intent to reach a trade-restraining agreement with rivals will usually mean that "the Crown could, in most cases, establish the objective fault element,"⁵¹ in fact the defendants in that case were acquitted on remand because the trial judge found there was no objective anticompetitive intent. He noted that the case was extraordinary in that it required him to engage in extensive analysis to determine that competition had been lessened unduly in the context of an unusual market situation — pricing significantly affected by the government as a regulator, the willingness of purchasers to negotiate collectively with the defendants, prices set as maxima, purchasers achieving success in negotiating some key terms, and disagreement between two respected economists as to the economic effects of the arrangement.⁵²

The substance of the common law of restraint of trade is based almost entirely on the notion that restraints are unreasonable if broader than reasonably necessary to protect the legitimate interests of the parties.⁵³ This principle reflects the common law's recognition that many parties who have legitimate and socially desirable reasons to agree with each other regarding some aspect of their business can also harm society by assenting to overly broad restrictions on their ability to continue to compete in other respects. Sports law restraints provide a useful example.⁵⁴ In case after case, courts applying the common law standard (either directly, or as reflected in the United States through an antitrust statute) have heard and rejected testimony, often supported by experts, that

⁵⁰ *Ibid.* at 660. See P.S. Crampton & J.T. Kissack. "Recent Developments in Conspiracy Law and Enforcement: New Risks and Opportunities" (1993) 38 McGill L.J. 569 at 584 ("there is now significant scope for parties to agreements falling outside of this category [of obviously anticompetitive schemes] to avoid conviction by raising a reasonable doubt as to whether they were aware or ought to have been aware that the effect of the agreement entered into would be to prevent or lessen competition unduly").

⁵¹ *PANS*, *supra* footnote 29 at 660.

⁵² *R. v. Nova Scotia Pharmaceutical Society (No. 3)* (1993), 120 N.S.R. (2d) 304 at 338-39 (S.C.T.D.). See also *R. v. Clarke Transport Canada, Inc.*, (1996), 130 D.L.R. (4th) 500 (Ont. Gen. Div.) (defendants acquitted despite 11 year cartel because, in court-defined market, they lacked power).

⁵³ See cases cited at footnote 3, *supra*.

⁵⁴ I use sports cases because they provide a good analogy based on developed case law in other jurisdictions, rather than to suggest that sports leagues restraints are among those that the *Competition Act* underenforces. Actually, the *Act* contains a specific provision governing sports leagues, and, as I argue in a forthcoming article, the standards under s.48 of the *Competition Act* (prohibiting conspiracies "to limit unreasonably the opportunities for any other person to participate, as a player or competitor, in professional sport," having regard to "the desirability of maintaining a reasonable balance among the teams or clubs participating in the same league") and the common law are the same.

severe restraints on competition among owners for players' services are necessary to maintain competitive balance and the continuing viability of the game.⁵⁵ It is far from certain, however, that the same result would have been reached if, as in *PANS*, the defendants could show that their agreement occurred in the context of an "unusual market situation," that concessions had been made to players, and that economists disagreed as to the effect of the restraints.

To be sure, some trenchant criticisms have been leveled against the trial court's approach in *PANS*. The *Competition Act* specifically provides that "it is not necessary to prove that the parties intended that the conspiracy ... have an effect [of lessening competition unduly]."⁵⁶ Moreover, the notion that reasonable entrepreneurs had no reason to know that boycotts designed to boost their bargaining position would have an anticompetitive effect is "particularly troublesome."⁵⁷ However, this decision remains the law for now; as long as Charter concerns would seem to require some *mens rea*,⁵⁸ defendants apparently will continue to be able to persuade the fact-finder that the complexity of the market precludes a finding that they should have known that the effect of their agreements would be significantly anticompetitive.

Courts have consistently interpreted the *Competition Act*'s prohibition on agreements "lessening competition unduly" to require proof that the restraint affects a large percentage of the relevant market. This too means that the *statute* does not cover all socially harmful restraints. Consider *R. v. Metropolitan Toronto Pharmacists Association*.⁵⁹ In that case, the defendants — who included most of the pharmacies in the Toronto metropolitan area — were acquitted despite undisputed evidence that they had succeeded in pressuring Green Shield, a dental insurer, to withdraw plans to cut reimbursements for a dispensing fee to pharmacies as part of health coverage for union workers. The evidence included a call by a pharmacy association official to a union official stating that local pharmacists would not honor the Green Shield card, and a successful appeal to members to refuse to deal with Green Shield, including the following:

There are many prescription plans which will pay you your usual and customary price. You must opt out of any plan which attempts to set their own prices. Green Shield is the first and I urge you to set an example to other plans... [O]pt out of Green Shield Today.⁶⁰

⁵⁵ See, e.g., *Eastham, Buckley, and Blackler*, *supra* footnote 10 (common law); *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. Minn. 1976); *McNeil v. National Football League*, 1992-2 Trade Cas. (CCH) ¶ 69,982, at 68,771-72 (D.Minn.) (*Sherman Act*).

⁵⁶ *Competition Act*, *supra* footnote 14, s.45(2.2).

⁵⁷ R. Janda & D. Martin Bellemare, "Canada's Prohibition against Anti-Competitive Collusion: The New Rapprochement with U.S. Law" (1993) 39 McGill L.J. 620 at 666-67.

⁵⁸ *PANS*, *supra* footnote 29 at 659 (citing *R. v. Vaillancourt*, [1987] 2 S.C.R. 636 at 652).

⁵⁹ (1984), 3 C.P.R. (3d) 233 (Ont. H.C.).

⁶⁰ *Ibid.* at 241.

Following this appeal, ninety percent of the association's members jointly submitted their resignations from the Green Shield Plan. Nevertheless, the defendants were acquitted because the court found the relevant economic market to be prescription drugs covered by insurance plans in Ontario, and Green Shield held but 2% of the market.⁶¹

On the basis of the facts as described by the court, it is difficult to imagine that the Toronto pharmacists' boycott was designed to achieve efficient business practices, especially because, if Green Shield's terms were unsatisfactory or unremunerative, each individual pharmacy could presumably have resigned on its own without the need for collusion. But the common law would have considered any such efficiencies offered by the defendants. Otherwise, the common law would find that the restraint was not justifiable, even if Green Shield held a small percentage of the market. The common law prohibition is sound (and, but for *Mogul Steamship*, would be actionable) for good reason because, as the quoted memorandum indicates, the defendants were seeking to make an example of Green Shield to serve as a credible threat to other insurers with more significant market shares; in such a case, the practices would indeed harm efficiency.

It is not my purpose here to critique the current state of judicial interpretation and application of the conspiracy provisions of the *Competition Act*. While some pro-defendant decisions might well have been decided the other way, the fact remains that section 45 of the *Competition Act* is a criminal statute and criminal statutes are to be construed narrowly.⁶² Moreover, there are precedents suggesting that when the basis for a civil action is the imputation of criminal behaviour, although the plaintiff need not shoulder the burden of proving the violation beyond a reasonable doubt, there are "degrees of proof" within the standard of reasonable probability, and that in cases such as these a "degree of probability which is commensurate with the occasion" is required.⁶³ Because of these interpretations, it is clear that the *Competition Act* does not accurately delineate between socially harmful and socially beneficial agreements among firms that may restrain trade.

Although the *Competition Act's* predecessor was initially enacted, in part, due to dissatisfaction with the common law's evolving doctrine on restraint of trade,⁶⁴ today the common law does a much better job of distinguishing between socially harmful and socially beneficial agreements. Group boycotts to increase fees, overbroad agreements among joint venturers, and the joint and targeted refusals to do business with one purchaser of services would all appear to be unreasonable restraints of trade at common law as well as socially harmful

⁶¹ *Ibid.* at 249.

⁶² E. A. Driedger, *The Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983) at 207.

⁶³ See *Hanes v. Wawanesa Mutual Insurance Co.*, [1963] S.C.R. 154 at 161, (quoting *Bater v. Bater*, [1950] 2 All E.R. 458 at 459 (Denning L.J.)).

⁶⁴ *Weidman v. Shragge* (1912), 46 S.C.R. 1 at 15-16 (Idington J.).

agreements. Thus, permitting common law actions in addition to statutory actions under the *Competition Act* would ensure that victims of socially harmful cartel behaviour are compensated and that such conduct is deterred.⁶⁵

Finally, common law actions for conspiracy to restrain trade unreasonably are justified by a third category of cases, clearly not covered by the *Competition Act* — where the defendants have agreed to restraints that are not so significant as to be socially harmful, but do not have sufficient benefits to be socially beneficial. A typical case would involve concerted anti-competitive and economically inefficient conduct where the defendants' counsel was able to demonstrate that the market structure precluded the defendants from exploiting consumers through higher prices.⁶⁶ Such a case is explainable on the basis that the actors perceived, incorrectly as it turned out, that their conduct would give them market power.⁶⁷ While the social welfare effects of such conduct, in

⁶⁵ Some, but not all, anticompetitive coordinated behaviour may fall within Part VIII of the *Competition Act* as matters reviewable by the Competition Tribunal. These might include agreements that are overbroad but arguably ancillary to a legitimate joint venture and take the form of refusals to deal, consignment selling, exclusive dealing, tied sales, abuse of dominant position, or delivered pricing. See *Competition Act*, *supra* footnote 14, ss.75-80. The *Competition Act* remains underinclusive, however, for several reasons. First (although this issue is currently being reconsidered for possible legislation), only the government's chief competition enforcement official — the Director of Investigation and Research — may bring matters before the Tribunal for review, and the DIR has limited resources. Second, although the case law from the Tribunal is limited, observers expect that significant market power would have to be demonstrated for the Tribunal to take action (Janda & Bellemare, *supra* footnote 57 at 671), while the common law has routinely found restraints of trade to be unreasonable-as-overbroad without the need for such a showing. For a discussion on potential errors in identifying socially harmful conduct based on market definition, see footnote 66, *infra*. See also Ross, *supra* footnote 22 at 72, 104-06, 195 & n.23, 268-69.

⁶⁶ I would not include *Metropolitan Toronto Pharmacists*, *supra* footnote 59, in this category. There, the evidence (see text accompanying footnote 60 *supra*) clearly suggested that Green Shield (the boycott victim) was being set up as an example for others, with an expected exploitive marketplace effect.

⁶⁷ One could argue that, absent very clear evidence that the market structure did not confer market power on the defendants, those in the industry are better judges than those who wear robes in courtrooms as to whether market power was present. See *Brook Group v. Brown & Williamson Tobacco*, 113 S. Ct. 2578 (1993) (U.S.S.C.). The majority rejected the plaintiff's theory that the defendant's pricing was anticompetitive because it was designed to eliminate the plaintiff and then permit the remaining firms to engage in oligopoly pricing, describing the plaintiff's theory as supposing that the defendants would engage in an "anticompetitive minuet [that] is most difficult to compose and to perform." *Ibid.* at 2590. The dissent responded, that "the professional performers who had danced the minuet for 40 to 50 years would be better able to predict whether their favorite partners would follow them in the future than would an outsider who might not know the difference between Haydn and Mozart." *Ibid.* at 2605. (Stevens J., dissenting).

It is not clear, from Justice Gonthier's discussion of the relationship between conduct and market structure in *PANS*, whether Canadian courts applying section 45 will side with the *Brook Group* majority or dissent on this question. Certainly, though, where the conduct is not blatantly anticompetitive, a full rule of reason case, with the plaintiff being forced to prove significant market power, might be required in civil cases brought under s.36 of the *Competition Act* (Janda and Bellemare, *supra* footnote 57 at 671).

strictly economic terms, is neutral, wealth has been transferred from the victims to the “carteleers.” Considering the evolution of the tort of conspiracy to injure and its relationship to the doctrine emanating from the *Schoolmaster’s Case*, discussed in Part I, it is apparent that conspiracies to injure by inefficient and anticompetitive means are not privileged and should be treated just like interference with contract, stealing customer secrets, and other economic torts that may not confer market power on the wrongdoer but are nonetheless actionable.

III. *Concerns About Labour Conspiracies*

A major impediment to the evolution of the tort of conspiracy to include anticompetitive cartel behavior is the concern that the tort might then be used, as it had been in the past, as a tool to crush organized labour. Indeed, this was the decisive point for some even in 1892.⁶⁸ I do not believe that it is decisive today. Although there is some irony in my conclusion that collective action by workers is not tortious but collective action by employers or sellers is — in light of the much-criticized history which accomplished for a time the reverse — I reach this conclusion for several reasons. This history of the common law’s evolutionary treatment of collective action by workers demonstrates the truth of Justice Oliver Wendell Holmes, Jr.’s assertion, discussed below, that liability for conspiracy to injure inevitably depends on the court’s view of the social utility of the defendants’ conduct. As I also discuss below, regardless of the views held by current and future Supreme Court justices about the social utility of various types of collective action by workers, the narrowing of the tort of conspiracy in *Mogul Steamship* provides no significant protection for workers: justices sympathetic to organized labour will obviously not be inclined to find liability; those hostile to unions have many other tools available to impose liability; and those without strong opinions on the subject will find that public policy, as reflected in contemporary labour relations legislation and the lessons of excessive judicial involvement in labour relations, counsel against the use of this tort as a weapon against organized labour.

One year after *Mogul Steamship*, the English Court of Appeal ruled in *Temperton v. Russell* that a boycott imposed by a labour union was done “with malice” and was thus actionable.⁶⁹ In a Massachusetts case where the majority

⁶⁸ *Mogul Steamship*, *supra* footnote 4 at 47 (Lord Bramwell). In addition, Lord Hansen relied upon principles of tort law set forth in treatises on trade unions to find that the cartel’s practices were not actionable. *Ibid.* at 59-60. See also *United Mine Workers v. Gibbs*, 383 U.S. 715 at 732 (1966) (the “tort of ‘conspiracy’ is poorly defined, and highly susceptible to judicial expansion; its relatively brief history is colored by use as a weapon against the developing labor movement”).

⁶⁹ [1893] 1 Q.B. 715 (C.A.). Lord Esher, M.R., acknowledged that the union officials were not “actuated in their proceedings by spite or malice against the plaintiff personally in the sense that their motive was the desire to injure him, but they desired to injure him in his business in order to force him not to do what he had a perfect right to do” — to carry

followed the British distinction between business and labour conspiracies, Justice Holmes dissented, reasoning that the common law privileged the intentional infliction of damage through competitive rivalry because such damage was regarded as "justified." In determining which conduct was justified (simply lowering prices to undercut a pre-existing monopoly was recognized as justified in the *Schoolmaster's Case*) and which conduct was not (using force or the threat of force is well-recognized as actionable), Holmes recognized that the "true grounds of decision are considerations of policy and of social advantage."⁷⁰ Thus, the explanation for the *Schoolmaster's Case* is that "free competition is worth more to society than it costs."⁷¹ In Holmes' view:

on his business in a manner inconsistent with union rules. *Ibid.* at 725-26. Of course, the reason that the unions sought to force Temperton "not to do what he had a perfect right to do" was to further the economic self-interest of workers, but that did not prevent their Lordships from finding *Mogul Steamship* distinguishable.

⁷⁰ *Vegeahn v. Guntner*, 167 Mass. 92, 44 N.E. 1077 at 1080-81 (1896) (dissenting op.). This aspect of the Holmes J., dissent seems to have become accepted in American common law. See, e.g., *Willis v. Santa Ana Community Hospital Association*, 58 Cal. 2d 806, 376 P.2d 568 at 570, 26 Cal. Rptr. 640 (1962):

There is an established principle at common law that an action will lie where the right to pursue a lawful business ... is intentionally interfered with either by unlawful means or by means otherwise lawful when there is a lack of sufficient justification. [citing cases] Whether there is justification is determined not by applying precise standards but by balancing, in the light of all the circumstances, the respective importance to society and the parties of protecting the activities interfered with on the one hand and permitting the interference on the other.

As a learned expert on the restraint of trade doctrine has written, permissible justifications for conspiracies that injure trade have been affected by "political and economic factors, the balance of industrial power between labour and management, and current ideas on how far the law should interfere in competitive and industrial struggles. But these influences have never been considered by the courts in any very explicit or sustained way." J.D. Heydon, *Economic Torts*, 2d ed. (London: Sweet & Maxwell, 1978) at 24. This is so even though "in difficult cases justice can only be attained by policy reasoning." *Ibid.* at 25.

A similar approach was taken 40 years ago by a then recent law school graduate who now sits on Canada's highest tribunal. The concerted secondary boycott in *Crofter* and the group boycott in *Mogul Steamship* were justified in order to stabilize their respective industries, while the vindication of personal pride by the conspirators in *Huntley v. Thornton*, [1957] 1 All E.R. 234 (Ch.) was not "worthy of protection." J. Sopinka, "Extra-Contractual Aspects of Canadian Professional Football" (1955) U. Tor. Fac. L. J. 38 at 48.

A full analysis of Justice Sopinka's concern, *ibid.*, that the prevention of a ruinous price war in the Canadian Football League justified the restraints of trade agreed to by team owners is beyond the scope of this article. See S.F. Ross, "Monopoly Sports Leagues" (1989) 73 Minn. L. Rev. 643 at 725-33 (no evidence that ruinous competition has existed or is likely to occur in professional sports). For present purposes, it should suffice to suggest that the substantive common law of restraint of trade is sufficiently flexible to uphold those restraints reasonably necessary to achieve team owners' legitimate goals, and there is no reason why players should not be able to sue to challenge those restraints which are, to use Sopinka's words, not "worthy of protection." See Sopinka, *ibid.* at 48 ("has the player, the object of the agreement, any remedy when caught in the injustice of its operation or is he a mere pawn in a lawless game?").

⁷¹ *Vegeahn, ibid.* at 1080.

One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return. Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way. I am unable to reconcile *Temperton v. Russell* and the cases which follow it, with [*Mogul*].⁷²

The result Holmes advocated came to Westminster a half-century later. In *Crofter Hand Woven Harris Tweed Co. v. Veitch*,⁷³ the House of Lords "virtually eliminated" the tort of conspiracy for labour activities.⁷⁴ This decision ended a half-century where "trade unionists were branded as tortfeasors for taking collective action to promote their interests [while] business interests behaving in a similar fashion were applauded as promoting the values of free enterprise,"⁷⁵ the result of Lord Chancellor Halsbury's successful efforts to pack the bench with conservative law lords in order to achieve this result.⁷⁶

Although the British lords seem reluctant to acknowledge the inherent need to use policy in determining which sort of intentional injuries to business interests are actionable in tort,⁷⁷ Rand J. was more explicit in explaining why in 1950 it was "established beyond controversy" in Canada that "concerted abstention from work for the purpose of serving the interest of organized labour is justifiable conduct." Unlike tortious conduct, Rand noted, collective action by labour strengthened "a recognized and accepted social interest."⁷⁸

As the Saskatchewan Court of Appeal explained, the Canadian common law has looked to the policies reflected in legislation that "make it clear that combinations of employees and their concerted action have gone from being largely repressed, to partially tolerated, to positively sanctioned."⁷⁹ In contrast, the policies reflected in both the substance of the common law of restraint of trade and anti-combines legislation has made it clear that combinations of businesses that unduly lessen competition have gone from being completely repressed to partially tolerated, to completely tolerated, to positively prohibited.⁸⁰

⁷² *Ibid.* at 1081 (citations omitted).

⁷³ *Supra* footnote 15.

⁷⁴ K. Ewing, "Rights and Immunities in British Labour Law" (1989) 10 *Comp. Lab. L.J.* 1 at 26.

⁷⁵ *Ibid.* at 2-3.

⁷⁶ Atiyah, *supra* footnote 23 at 365 [citing R. Stevens, *Law and Politics: The House of Lords as a Judicial Body, 1800-1976* (Chapel Hill, N.C.: University of North Carolina Press, 1978) at 92-94].

⁷⁷ See *Crofter*, *supra* footnote 15 at 465 (quoting *Allen v. Flood*, [1898] A.C. 1 at 129 (H.L.)) ("It is not for your Lordships to express any opinion on the policy of trade unions, membership of which may undoubtedly influence the action of those who have joined them").

⁷⁸ *Newell v. Barker*, [1950] S.C.R. 385 at 397.

⁷⁹ *Re Garry and Sherrit Gordon Mines Ltd.* (1987), 45 D.L.R. (4th) 22 at 57 (C.A.).

Many justices will no doubt share the policy preferences currently reflected in Canadian statutes — the *Competition Act* flatly prohibits collective action by businesses designed to use their combined economic power to increase monopoly profits, while federal and provincial legislation, including an express provision of the *Competition Act*,⁸¹ uniformly permits collective action by workers designed to use their combined economic power to improve wages and working conditions. Those on the Court who follow the view of Rand, J., that collective action strengthens a “recognized and accepted social interest,” will reason that *Crofter* continues to apply in Canada, even if *Mogul Steamship* does not.

Justices sympathetic to organized labour will bolster their reliance on legislation recognizing the value of labour unions and the disutility of business cartels with policy arguments that justify differential treatment for labour and commodity markets. As discussed in detail by Paul Weiler in his book, *Governing the Workplace*, unlike many business cartels, the actual level of competition in labour markets is significantly reduced by the presence of large corporations that pool capital of shareholders to wield significant countervailing power.⁸² The desire for long-term employment makes the deployment of labour resources to a particular employer more important for the worker than the seller of other non-human inputs.⁸³ Unlike sellers of commodities, a worker needs to place all her “eggs in one basket,” so “having a sense of security about what will happen in [her] current job is far more important than in virtually any other market setting.”⁸⁴ Moreover, work is not simply an economic function but a major source of personal identity and self-esteem.⁸⁵ Unlike Weiler’s hypothetical robots that could supplant workers (as he notes, we would not tolerate a cartel of robot suppliers to collectively bargain with General Motors⁸⁶), people need to be recruited, trained, and motivated for maximum productivity.⁸⁷

⁸⁰ See *Dyer’s Case* (1414), Y.B. 2 Hen. V, vol.5, pl. 26 (in rejecting a suit to enforce non-competition covenant, the judge notes “if the plaintiff were here he should go to prison until he paid a fine to the King”); *Mitchel v. Reynolds* (1711), 24 E.R. 347 (approving restraints if reasonable); *Mogul Steamship*, *supra* footnote 4 (courts can’t draw lines between reasonable and unreasonable competition as long as the firms’ conduct in their own self-interest); *An Act for the Prevention and Suppression of Combinations formed in restraint of Trade*, S.C. 1889, c.41 (criminalizing conspiracies that had the effect of unduly lessening competition).

⁸¹ *Competition Act*, *supra* footnote 14, s.4(1)(a) (exempting “combinations or activities of workmen or employees for their own reasonable protection as such workmen or employees”).

⁸² P. Weiler, *Governing the Workplace* (Cambridge, Mass: Harvard University Press, 1990) at 134.

⁸³ *Ibid.* at 140-41. Even in non-human contexts, courts have recognized the distortions in the marketplace that occur when a market participant is “locked-in” to a particular relationship from which it cannot extricate itself without significant cost. See *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992).

⁸⁴ Weiler, *supra* footnote 82 at 142-43.

⁸⁵ *Ibid.* at 143.

⁸⁶ *Ibid.* at 135.

⁸⁷ *Ibid.* at 146-50.

A different line of argument that is consistent with Weiler's thesis has been presented by Professor Kenneth Dau-Schmidt. His research concludes that a significant portion of the higher wages secured by unions through collective action, unlike higher prices secured by businesses through cartels, comes out of excessive employer profits and productivity increases associated with unionization. Moreover, in dividing the "cooperative surplus" that is gained from unionization, unions and management are likely to reach a collective bargain where wages and employment levels are economically superior to those that would exist in a purely competitive environment. Thus, governmental policies that protect collective action by workers may actually serve to maximize societal wealth.⁸⁸

Although, as a matter of theory, these arguments are controversial,⁸⁹ the distinction between labor and commodity markets is recognized not only by modern legislation (which generally prohibits cartels but permits the organization of labour unions) but also as a matter of common law tradition. For example, based largely on bargaining power concerns, restraints of trade ancillary to employment contracts are treated much more harshly by the common law than restraints of trade among firms ancillary to sales of businesses or joint ventures.⁹⁰ Thus, although the House of Lords decided *Crofter* based on the reasoning of *Mogul Steamship*, today the result in *Crofter* — that concerted agreements to withhold labour are not actionable under the common law — can be justified on the additional ground that the refusal of workers to perform labour is qualitatively different from the refusal of firms to sell or buy goods and services.

No doubt, some Canadian jurists will share the views of many of their predecessors who demonstrated an antipathy toward organized labour. These judges would be quick to find that, if *Mogul Steamship* no longer applied in Canada, neither did *Crofter*, and would impose liability on unions absent express statutory protection. However, anti-union common law judges have always found ways to find unions liable absent express legislative immunity, and *Crofter*'s holding that a conspiracy to injure can be justified by economic self-interest provides little additional protection.

Parliament and a number of provincial legislatures have legislatively overruled pre-*Crofter* common law holdings that labour activities constituted tortious conspiracies to injure. For example, the federal *Trade Unions Act*

⁸⁸ K.G. Dau-Schmidt, "A Bargaining Analysis of American Labor Law and the Search for Bargaining Equity and Industrial Peace" (1992) 91 Mich. L. Rev. 419. See generally R.B. Freeman & J.L. Medoff, *What do Unions do?* (New York: Basic Books, 1984).

⁸⁹ For a libertarian argument in favor of treating labour markets like any other, see R.A. Epstein, "A Common Law for Labor Relations: A Critique of New Deal Labor Legislation" (1983) 92 Yale L.J. 1357. For an analysis of Weiler's arguments and additional arguments in favor of distinguishing labor and commodity markets, see M.H. Gottesman, "Wither Goest Labor Law: Law and Economics in the Workplace" (1991) 100 Yale L.J. 2767.

⁹⁰ Trebilcock, *supra* footnote 5 at 35.

provides that “‘trade union’ means such combination, whether temporary or permanent, for regulating the relations between workmen and masters, or for imposing restrictive conditions on the conduct of any trade or business, as would, but for this Act, have been deemed to be an unlawful combination by reason of some one or more of its purposes being in restraint of trade.”⁹¹

To be sure, without *Crofter*'s protection, workers in provinces without an express statutory exemption are potentially subject to liability for conduct that violates federal or provincial labour legislation. But *Crofter* provides no great shield here either. It simply applies *Mogul Steamship*'s principle that conspiracies to restrain trade are not actionable to labour conspiracies, reasoning that when unions “do not resort to unlawful acts they are entitled to further their interests in the manner which seems to them best, and most likely to be effectual”⁹² as a means toward “the legitimate promotion” of their interests.⁹³ To the extent that unions violate labour legislation, they have resorted to “unlawful” acts, are not legitimately protecting their interests, and are thus liable for conspiracy to injure if the damage is foreseeable. For example, in *Gagnon v. Foundation Maritime Ltd.*,⁹⁴ union organizers led a strike that shut down a construction project. The strike violated New Brunswick's *Labour Relations Act* because the provincial Labour Relations Board had not yet certified the union as a bargaining agent for the workers. The Supreme Court of Canada found the organizers liable for the tort of conspiracy because they had violated the statute.

In addition, notwithstanding *Crofter* and *Mogul Steamship*, anti-union judges have found unions liable for tortious inducement of breach of contract when disfavoured collective activities resulted in the disruption of business relationships secured by contract. Consider the oft-criticized decision by the Ontario Court of Appeal in *Hersees of Woodstock Ltd. v. Goldstein*.⁹⁵ The union organized a picket line at a retail outlet asking consumers not to purchase products made by a manufacturer with whom the union had a trade dispute. The Chief Justice of the Ontario High Court found no liability, concluding that the union had not conspired to induce the retailer to breach its contract with its supplier, that there was no conspiracy to injure based on *Crofter*, and that the informational picket established by the union was a protected common law right. The appeal was allowed, however, based on the appellate court's questionable conclusion that the picketing created the “unmistakable” inference

⁹¹ R.S.C. 1985, c. T-14, s.2. Similar statutes have been enacted in Alberta (*Labour Relations Act*, R.S.A. 1980, c. L-1.1, s.25(2)); British Columbia (*Labour Code*, R.S.B.C. 1979, c. 212 s. 89; Ontario (*Rights of Labour Act*, R.S.O. 1980, c. 456, s.3(1)); and Saskatchewan (*Trade Union Act*, R.S.S. 1978, c. T-17, s.28). More general language in Prince Edward Island's *Trade Union Act* has been construed as identical to the federal statute. *International Brotherhood of Elec. Workers, Local #1432 v. Summerside*, (1955) 1 D.L.R. (2d) 83 (P.E.I. S.Ct.).

⁹² *Crofter*, *supra* footnote 15 at 465.

⁹³ *Ibid.* at 447 (emphasis added).

⁹⁴ [1961] S.C.R. 435.

⁹⁵ [1963] 2 O.R. 81 (C.A.).

that the retailer was involved in some labour dispute and that consumers should stay away entirely, and that the benefit to the manufacturer's employees was negligible compared to the harm to the retailer.⁹⁶

It is not my purpose to rehearse the criticisms leveled against this opinion,⁹⁷ or to analyze Professor Weiler's critique of *Gagnon* for creating a statutory remedy where none was provided for by the legislature.⁹⁸ Rather, my point is that these cases illustrate the type of reasoning in which anti-union judges may easily engage in order to reach their desired results, regardless of the continuing validity of the *Crofter* decision. Anti-union judges bent on imposing liability on collective action by workers will likely find activity directed at the primary employer to be an illegal work stoppage under the governing labour relations statute (thus triggering liability for conspiracy to injure by unlawful means under *Gagnon*) and activity directed at secondary targets to constitute a tortious interference with contract (either a breach of the collective bargaining agreement between the secondary target and its own workers, or of sales agreements between suppliers or customers and the secondary target).⁹⁹ Thus, the injuries suffered by consumers and other victims of business conspiracies should not go unremedied because of a concern that *Mogul Steamship* and its progeny *Crofter* provide any significant protection for organized labour.

Finally, many Judges will have no pronounced policy preferences about union activities. These moderate jurists are likely to be persuaded that the current statutory scheme of labour legislation, and the history of judicial involvement in labour disputes in Canada, justifies continuing immunity for labour under the *Crofter* doctrine even if the self-interest defense of *Mogul Steamship* is no longer recognized for business cartels.

To the extent that workers and their unions engage in activities that are authorized by provincial labour legislation, these justices are likely to find that the legislation supplants the common law. (In contrast, as explained in Part IV, Canadian competition legislation expressly does not replace common law rights and remedies.) Indeed, my research has found no recent decision imposing liability on a labour union for conduct that involved neither a statutory violation

⁹⁶ See also *Retail, Wholesale & Dep't Store Union, Local 580 v. Dolphin Delivery, Ltd.*, [1986] 2 S.C.R. 573 (union enjoined for secondary boycott under common law, based on conspiracy to interfere with collective bargaining agreement between target and its unionized workers).

⁹⁷ See, e.g., H.W. Arthurs, *Case Comment*, (1963) 41 Can. Bar Rev. 573; P.C. Weiler, "The 'Slippery Slope' of Judicial Intervention" (1971) 9 Osgoode Hall L.J. 1 at 47.

⁹⁸ Weiler, *ibid.* at 44.

⁹⁹ Moreover, a government hostile to collective action by workers would find it much easier to simply enact anti-union legislation, triggering liability for its violation under *Gagnon*, than to follow Lord Halsbury's more difficult task of packing the judiciary with anti-union judges. See J.A. Manwaring, "Legitimacy in Labour Relations: The Courts, the British Columbia Labour Board and Secondary Picketing" (1982) 20 Osgoode Hall L.J. 274 (arguing that courts and legislatures reflect the same values and that labour boards do not act significantly differently than common law judges).

nor a breach of contract,¹⁰⁰ and provincial statutes providing exemption for liability have been held to preclude damages even when a strike is illegal under governing labour legislation.¹⁰¹

Canadian jurists have recognized that, historically, judges have not proven to be optimal arbiters of labour disputes. Because of the political, social, and economic questions involved, legislative creation of conciliation officers and boards, labour relations boards, and other administrative tribunals has proven to be superior methods of resolving disputes.¹⁰² After years of continuing lower court judicial activism in the labour area, the Supreme Court of Canada has clearly announced a doctrine of judicial restraint and deference to other dispute resolution tribunals.¹⁰³ This policy of deference was reaffirmed in the *Alberta Labour Reference*, Le Dain J., explaining that because employer and union obligations involved “a balance of competing interests in a field which has been recognized by the courts as requiring a specialized expertise,” the Court should not use a broad interpretation of the *Charter of Rights and Freedoms* to substitute its judgment for that of the legislatures and their designated tribunals.¹⁰⁴ These same policies will counsel restraint among those justices with no particular brief for or against organized labour if the Court were to consider a claim for tortious conspiracy to injure brought against a union that was acting lawfully under applicable federal or provincial labour relations legislation.

Because the doctrine of *Mogul Steamship* is necessarily based on policy questions concerning the desirability of practices in the marketplace that may injure competitors, suppliers of goods and services, or consumers; and because contemporary Canadian public policy clearly points to differential treatment of business cartels and labour unions; and because existing labour legislation already protects unions from tort liability for conduct consistent with labour law while subjecting unions to liability for conduct in violation of labour legislation,

¹⁰⁰ One explanation for this is that, certainly by comparison to the United States labour relations scheme, Canadian labour legislation tends to set forth fairly detailed procedural steps that unions must follow before commencing strikes or other concerted efforts that would injure employers. Thus, while in the United States it might be fair to characterize union conduct as falling in one of three categories — prohibited, legally protected rights, and permissible conduct that is neither prohibited nor expressly authorized by the National Labor Relations Act — the intermediate category is likely to be quite small in Canada.

¹⁰¹ *Canadian Training & Development Group Inc. v. Air Canada* (1986), 34 D.L.R. (4th) 137 at 143 (Ont. Div. Ct.).

¹⁰² *Re Public Service Employee Relations Act (Alberta Labour Reference)*, [1987] 1 S.C.R. 313 at 416 (McIntyre J.).

¹⁰³ *CUPE, Local 69 v. New Brunswick Liquor Corporation*, [1979] 2 S.C.R. 227. See P. Weiler, “The Charter at Work: Reflections on the Constitutionalizing of Labour and Employment Law” (1990) 40 U. Tor. L. J. 117 at 161.

¹⁰⁴ *Supra* footnote 102 at 391 (LeDain J.).

Further support for this restrained approach can be found in the views of British historians, who attribute the rise of the Labour Party and a significant diminution in respect for the House of Lords to that body’s anti-union activism at the turn of the century. See, e.g., Stevens, *supra* footnote 76 at 94-96.

concerns about labour relations should not inhibit the Supreme Court from permitting the continued evolution of the tort of conspiracy to injure to include business conspiracies in restraint of trade.

IV. *The Modesty of This Evolutionary Step*

In evaluating the propriety of the evolutionary step advocated here, it is important to recognize the relative modesty of the proposal. Creating tort liability for conspiracies to restrain trade does not change the substance of the common law, but only the availability of a common law remedy. As history has shown, both substantive and remedial considerations in this area have consistently reflected changing values and economic knowledge about the social welfare effects of different forms of business conduct. Thus, no novel course is advocated here. Even those who find my thesis to be dangerously innovative should recognize that the natural judicial hesitation to create legal remedies for social problems that can easily be addressed by the legislature carries less weight here, where the relevant legislation — the *Competition Act* and its predecessors — have explicitly preserved common law remedies.

This course is therefore clearly distinguishable from the path rejected in *Board of Governors of Seneca College v. Bhadauria*.¹⁰⁵ In that case, the plaintiff sought to redress an alleged violation of the *Ontario Human Rights Code* provisions prohibiting employment discrimination based on national origin. Foregoing the detailed and comprehensive administrative procedures set forth in the legislation, the plaintiff persuaded the Ontario Court of Appeal to create a new tort protecting a job applicant “against unjustified invasion of his or her interest not to be discriminated against in respect of a prospect of employment on grounds of race or national origin,” based on the policies expressed in the Ontario legislation.¹⁰⁶ The Supreme Court allowed the appeal and restored the trial judgment for the defendant.

The Supreme Court was reluctant to create a “new” intentional tort without precedent in any common law jurisdiction, declining to “create by judicial fiat an obligation solely on the basis of a breach of a statute which itself provides comprehensively for remedies for its breach.” On the other hand, the Court distinguished cases where legislation does not prescribe a regulatory enforcement authority, except perhaps by penal sanction (citing railway legislation).¹⁰⁷

As is obvious from the Court’s reasoning, there are two significant ways in which recognition of a tort remedy for conspiracy to restrain trade differs from recognition of a tort of nationality-based employment discrimination. First, in

¹⁰⁵ [1981] 2 S.C.R. 181 [hereinafter *Bhadauria*].

¹⁰⁶ *Ibid.* at 182.

¹⁰⁷ *Ibid.* at 188-89 (citing *Halifax & South-Western R. Co. v. Schwartz*, [1913] 47 S.C.R. 590 (liability for damage to plaintiff’s property was found because the railway violated a statute requiring it to keep a right-of-way clear of combustible material)).

contrast to *Bhadauria*, judicial innovation is sought here not to create a new tort but rather to declare that, within the category of conspiracies to injure that are actionable as “unlawful” are those that have already been declared to be unenforceable on public policy grounds because of restraint of trade.¹⁰⁸ Indeed, the innovation is less far-reaching than that, for, while no other common law jurisdiction recognized liability for the challenged acts in *Bhadauria*, England, Australia and New Zealand all grant equitable relief, albeit not tort damages, for conspiracies to restrain trade.¹⁰⁹ The tort at issue in *Bhadauria* would be analogous to the tort advocated here only if the common law had immunized employers for liability for hiring decisions for decisions made for what common law judges agreed were legitimate reasons. In such a case, it is probable that Laskin, C.J.C., would have recognized that attitudes about racial discrimination in the previous century had been supplanted in this one, relying in part on the Ontario legislation.

Second, statutory prohibitions on conspiracies that unduly lessen competition, like the statutes relating to railroad safety cited by Laskin, C.J.C., as providing the basis of tort liability, employ solely judicial sanctions. Indeed, in enacting the *Competition Act*, Parliament expressly distinguished between conspiracies that unduly lessen competition, which are subject to criminal and civil sanctions, and other forms of business conduct that are only subject to challenge via administrative proceedings.¹¹⁰

Finally, and most important, while the “bold” effort of the Court of Appeal in *Bhadauria* was “foreclosed by the legislative initiative which overtook the existing common law,”¹¹¹ the *Competition Act*, the relevant legislative initiative here, explicitly provides that “nothing in this Part shall be construed as depriving any person of any civil right of action.”¹¹² As the Manitoba Court of Appeal recognized in *Westfair Foods Ltd. v. Lippens Inc.*,¹¹³ “[t]he *Competition Act* cannot be classified as having overtaken the common law and foreclosed all common law remedies or civil actions.”¹¹⁴ Rather, “the remedy offered under the *Competition Act* is merely supplementary to the existing rights of action under the common law....”¹¹⁵

¹⁰⁸ See *ibid.* at 188 (finding “a narrow line between founding a civil cause of action directly upon a breach of a statute and as arising from the statute itself and founding a civil cause of action at common law by reference to policies reflected in the statute and standards fixed by the statute”).

¹⁰⁹ See cases cited in footnote 10 *supra*.

¹¹⁰ Davies, Ward & Beck, *Competition Law of Canada* (New York: Matthew Bender, 1994) §1.02[1].

¹¹¹ *Bhadauria*, *supra* footnote 105 at 204.

¹¹² *Competition Act*, *supra* footnote 14, s.62.

¹¹³ *Supra* footnote 42.

¹¹⁴ *Ibid.* at 341.

¹¹⁵ *Ibid.* at 345.

In *Buckley v. Tutty*,¹¹⁶ the Australian High Court wrote:

The law treats unreasonable restraints as unenforceable because it is contrary to the public welfare that a man should unreasonably be prevented from earning his living in whatever lawful way he chooses and that the public should unreasonably be deprived of the services of a man prepared to engage in employment. It would indeed be a strange weakness in the law if it afforded no protection to a person who was against his will subjected in fact to an unreasonable restraint of trade.

Although the Court, following English precedent, went on to grant declaratory and injunctive relief, the law — emanating from the old, *laissez faire*-induced House of Lords decision in *Mogul Steamship* — remains weak when tort liability in damages for conspiracy to injure is not available to victims of unreasonable trade restraints. While the House of Lords maintains a modern hostility to this tort, the more enlightened justices of the Supreme Court of Canada have pursued a different course. A logical step in this different course would be to remedy completely the “strange weakness in the law” and allow victims of cartels to obtain tortious relief in damages against their wrongdoers.

¹¹⁶ (1971), 125 C.L.R. 353 at 380 (Aus. H.C.).