TRADE REGULATION

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I. INTRODUCTION

A considerable number of developments have occurred under the Combines Investigation Act[1] during the four and a half years between the completion of the last Survey[2] in mid-1973 and the end of 1977.

On a personnel level, Robert Bertrand was appointed to succeed David Henry[3] as the new Director of Combines Investigation and Research. J. J. Quinlan, long the Deputy Director of Investigation and Research, was appointed Chairman of the Restrictive Trade Practices Commission[4] (which, however, has been remarkably dormant during the years under review).

The number of combines cases—both instituted and finally decided by the courts—has increased markedly in recent years. With a few notable exceptions, however, the bulk of the litigation still underscores the general ineffectiveness of the Act in stopping restraints on competition. This impotence results from three principal causes: first, from defects in various technical provisions in the Act; secondly, from the difficulties experienced by courts in deciding cases involving complicated economic issues; and, thirdly, from the characterization of combines legislation as "criminal law" in order to ensure its constitutional validity.[5]

The implementation of the Stage One amendments[6] in January 1976,[7] indicates Parliament's desire to strengthen the Act. Further reforms are on the horizon in the form of the Stage Two amendments,[8] which have been twice introduced into the House of Commons. The Government has also appointed a Royal Commission to investigate the

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[1] R.S.C. 1970, c. C-23, *as amended by* R.S.C. 1970, c. 10 (1st Supp), s. 34; R.S.C. 1970, c. 10 (2nd Supp), s. 65; 1974-75-76 c. 76; 1976-77 c. 28, s. 9.

[2] *See* Arnold, *Trade Regulation, Annual Survey of Canadian Law — Part 2*, 6 OTTAWA L. REV. 567 (1974). *See also* Leavy, *Market Power and Public Policy: A Comparison of North American and European Legislation*, 9 OTTAWA L. REV. 1 (1977); Stanbury, *Penalties and Remedies Under the Combines Investigation Act*, 14 OSGOODE HALL L.J. 575 (1976); Goff & Reasons, *Corporations in Canada: A Study of Crime and Punishment*, 18 CRIM. L.Q. 468 (1975-76).

[3] Who was appointed to the High Court of Ontario on February 15, 1973.

[4] As of January 1, 1978, he has resigned from this position.

[5] *See* Hogg & Grover, *The Constitutionality of the Competition Bill*, 1 CAN. BUS. L.J. 197 (1975-76), who suggest that the Act could also be valid under both the trade and commerce power and the peace, order and good government clause in s. 91 of the British North America Act.

[6] An Act to amend the Combines Investigation Act and the Bank Act and to repeal an Act to amend an Act to amend the Combines Investigation Act and the Criminal Code, S.C. 1974-75-76 c. 76, assented to on December 15, 1975, to come into force on January 1, 1976.

[7] Except the provisions relating to services, which came into effect later on July 1, 1976. *See* 110 Can. Gazette, Pt. I, 239 (Jan. 17, 1976).

[8] *See* Part VII *infra*.

concentration of industry which may recommend structural changes in the Canadian economy.[9]

This article follows the pattern adopted in previous Surveys, and will consider the following topics separately: *Horizontal Restraints on Trade*; *Mergers and Monopolies*; *Vertical Restraints on Trade*; *Miscellaneous Matters*; *The Stage One Amendments*; *Proposed Stage Two Amendments*.

As in the past, this Survey does not consider the misleading advertising provisions of the Combines Investigation Act. Nor does it refer to other legislation or jurisprudence dealing with consumers' rights, restrictive covenants, marketing boards,[10] regulatory agencies, the Foreign Investment Review Act,[11] copyrights, patents or other types of intellectual property. It does not examine the provisions of the Anti-Inflation Act[12] or other attempts by the Government to control the economy. In a broader sense, however, all of these topics could properly be termed "Trade Regulation".

II. Horizontal Agreements

One of the principal purposes of the Combines Investigation Act is to maintain effective competition in Canada, thereby maximizing both production and the efficient allocation of resources. Section 32[13] of the Act prohibits the most obvious forms of anti-competitive behaviour:

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[9] Appointed on April 22, 1975, by P.C. 1975-879. The Commissioners are Robert Bryce (Chairman), former Secretary to the Cabinet and former Deputy Minister of Finance; Pierre Nadeau, a businessman from Montreal; and R.W.V. Dickerson, a lawyer from Vancouver who was formerly a member of the staff of the Carter Royal Commission on Taxation, and the chairman of the Task Force which developed proposals for the recent Canada Business Corporations Act, S.C. 1974-75-76 c. 33.

[10] Stage Two, if enacted in its present form, will require federal boards and marketing agencies to consider the effect of their actions on competition. *See* text accompanying notes 224 & 225, *infra*.

[11] S.C. 1973 c. 46.

[12] S.C. 1974-75-76 c. 75.

[13] S. 32 provides as follows (as of July 1, 1976):

32. (1) Every one who conspires, combines, agrees or arranges with another person
(a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product,
(b) to prevent, limit or lessen, unduly, the manufacture or production or a product, or to enhance unreasonably the price thereof,
(c) to prevent, or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance upon persons or property, or
(d) to otherwise restrain or injure competition unduly,
is guilty of an indictable offence and is liable to imprisonment for five years or a fine of one million dollars or to both.

Before July 1, 1976, s. 32 provided as follows:

32. (1) Every one who conspires, combines, agrees or arranges with another person
(a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article,

conspiracies, combinations, agreements or arrangements in restraint of trade. However, section 32 (at least as it stood before the Stage One amendments in 1975[14]) has proven to be largely ineffective for two principal reasons. First, it treats as illegal only those conspiracies or agreements which *unduly* restrain trade. Whether a particular restraint on competition is "undue" is a question of fact for the trial judge to determine. Thus, as the Supreme Court of Canada held in *Regina v. Anthes Business Forms Ltd.*,[15] there can be no appeal by the Crown from an acquittal based on a finding that no undue restraint of trade was caused by an impugned agreement. Such a finding is one of fact alone, and not one of law from which an appeal lies.

Secondly, it is frequently impossible to prove the existence of such agreements or conspiracies.[16] May the Crown adduce evidence about the relationship of the accused in the particular market so that the court may infer that there must have been an agreement to limit competition? Or does evidence of anti-competitive behaviour lead directly to a conviction, without any need to eke out the existence of any agreement? These questions arise from the concept of "conscious parallelism", which has been borrowed from economic theory, and which has been used by courts in the United States.

Conscious parallelism frequently exists in an oligopolistic market[17] for a homogeneous product.[18] The prices charged by all producers in a market tend to be identical, due to normal market pressures.[19] As a result, the price of a homogeneous product in an oligopolistic market tends to reach the same level, almost by osmosis. Trial and error,

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(b) to prevent, limit or lessen, unduly, the manufacture or production of an article, 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 an article, or in the price of insurance upon persons or property, or

(d) to restrain or injure trade or commerce in relation to any article,

is guilty of an indictable offence and is liable to imprisonment for two years.

[14] The Stage One amendments added the following qualification to the judicial interpretation of "unduly" in s. 32:

32. (1.1) For greater certainty, in establishing that a conspiracy, combination, agreement or arrangement is in violation of subsection (1), it shall not be necessary to prove that the conspiracy, combination, agreement or arrangement, if carried into effect, would or would be likely to eliminate, completely or virtually, competition in the market to which it relates or that it was the object of any or all of the parties thereto to eliminate, completely or virtually, competition in that market.

See S.C. 1974-75-76 c. 76, s. 14 (2).

[15] 28 C.P.R. (2d) 33n (S.C.C. 1977), *aff'g* 10 O.R. (2d) 153, 20 C.P.R. (2d) 1 (C.A. 1975), *dismissing an appeal from* 19 C.C.C. (2d) 294, 16 C.P.R. (2d) 216 (H.C. 1974) (Grant J.).

[16] *See, e.g.*, Regina v. Allied Chemical Ltd., *infra* note 123.

[17] *I.e.*, a market in which there are few producers.

[18] *I.e.*, a product which is undifferentiated. Thus, the product of one manufacturer is essentially interchangeable with that produced by another manufacturer: *e.g.*, cement, sugar, light bulbs, sulphuric acid, gasoline.

[19] Assuming there were identical transportation and other costs. *See also* Regina v. Atlantic Sugar Refineries Ltd., *infra* note 36, at 97.

however, in setting prices is costly and inefficient. There is, therefore, naturally some pressure in such markets to find a better method of determining the uniform price. On the one hand, members of the market may simply conspire to fix prices, although such an agreement would probably[20] be illegal under the Combines Investigation Act. On the other hand, one of the producers might emerge as a price leader, whose prices the other producers simply adopt. The legal question is whether the existence of a price leader in a particular market necessarily indicates either an express or tacit agreement to restrict competition[21] contrary to the Act.

This question has only recently been vigorously argued before the Canadian courts. During the period under review, there were at least four cases in which the existence of conscious parallelism formed an essential part of the Crown's case against the accused. In each case, there was a homogeneous product, a small number of producers, and substantial evidence of identical (or remarkably similar) prices over a long period of time. The courts, in all of these cases, consistently adopted the view that evidence showing the existence of conscious parallelism was only relevant for the purpose of proving that the parties must indeed have agreed to limit competition. This is a conclusion which may or may not flow from the mere presence of consciously parallel activity. The mere existence of conscious parallelism, therefore, is no offence under the Act.

Both of these problems (proving an agreement and determining whether it unduly restrains competition) must be borne in mind in considering the following cases, reported during the period under review.

A. *The Armco Case*

Re The Queen & Armco Canada Ltd.[22] is the only case in which conscious parallel pricing activity was held to demonstrate the existence of an agreement between the accused, thereby resulting in a conviction.

The accused were charged[23] with having conspired to prevent or lessen competition in the market for corrugated metal pipe in Ontario between 1962 and 1967. Prior to 1962, the market for this type of pipe (which is used largely for culverts) had been marked by considerable price competition, and by the entrance and demise of numerous producers.

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[20] Unless a court held such an agreement was not an undue restraint on competition in the circumstances.

[21] Either as to price or market share.

[22] 24 C.P.R. (2d) 145 (C.A. 1975), *modifying* 6 O.R. (2d) 521, 17 C.P.R. (2d) 211 (H.C. 1975) (Lerner J.). *See also* Regina v. Armco Canada Ltd. (2), 8 O.R. (2d) 573, 19 C.P.R. (2d) 273 (H.C. 1975) (sentence).

[23] Under s. 32(1)(c) of the Act.

In 1961, the Corrugated Steel Pipe Institute was established. It directed much of its efforts to devising some method by which price stability could be brought to the industry to eliminate what its members perceived to be "cutthroat competition" and to achieving orderly marketing, without contravening the Combines Investigation Act.[24] The method adopted was an "open price policy" under which each firm openly set out its prices (including discounts and terms of credit) in written or printed form, and made these available to all customers, competitors and the public. The officers of the Institute emphasized that each company must arrive at its price list entirely on its own, without agreement with, or coercion by, anyone else in the industry, so that the equalization of prices, if it occurred, would be the result of the natural forces of known competition. In fact, after one false start,[25] the prices in the industry did become remarkably stable from December 1963, until late summer of 1967.[26] There was no direct evidence of any actual agreement between individual members of the industry, and the question before Lerner J. was whether the conscious parallelism created by the open price policy implied a tacit agreement among the accused to limit competition with respect to price.

The existence of a trade association such as there was in this case is not *per se* an offence in Canada.[27] Nor is there any apparent limitation on the freedom of members of a particular industry to trade critical information about price or costs among themselves. Yet each of these may provide an excellent vehicle for members of an industry to encourage an incipient oligopoly to materialize. Admittedly, the mere existence of an oligopoly does not necessarily constitute an offence under section 32. On the other hand, it is an entirely different matter to state that the artificial creation of an oligopoly can never constitute such an offence.

As Lerner J. pointed out,[28] there was no proof of an express agreement or arrangement[29] between any two of the accused to limit prices. Therefore:

> *If there is to be a finding of guilt on the part of the accused, it must be from inferences drawn from the evidence which satisfies me beyond a reasonable*

[24] Various members of this industry had previously pleaded guilty to an offence under the Act following a report by the Restrictive Trade Practices Commission in 1957.

[25] The first attempt by Robertsteel (Canada) Ltd. to establish an open price policy in June, 1963, failed largely because Armco continued to discount and set its own prices. Armco was the largest company in the industry, and the first to produce helically formed pipe (at substantially lower costs than that produced by other methods). Initially, Robertsteel was the price leader under the second open price scheme, but in 1965 Armco cheated on the equal price policy by supplying to a construction company at a price lower than published. Thereafter Armco was the price leader.

[26] When the City of St. Catharines complained to the Director of Investigation and Research about the virtually identical prices.

[27] Yet note how many of the cases surveyed here involved trade associations!

[28] 6 O.R. (2d) 521, at 568, 17 C.P.R. (2d) 211, at 258 (H.C. 1974).

[29] Lerner J. referred to the English Court of Appeal's decision in British Basic Slag Ltd. v. Registrar of Restrictive Trading Agreements, [1963] 1 W.L.R. 727, [1963] 2 All E.R. 807 (C.A.), for a discussion of what constitutes an "arrangement": *supra* note 28, at

> *doubt that an arrangement or agreement was effected.* Such inferences must be consistent only with the establishment of an illegal or unlawful arrangement or agreement and inconsistent with any other rational conclusion. . . . [T]he onus is upon the Crown to prove the offence alleged beyond a reasonable doubt, which burden of proof does not shift, remaining upon the prosecution until the end of the trial.[30]

Lerner J. did not treat the mere existence of conscious parallelism in a particular market as being either a necessary, or a sufficient, ingredient for an illegal conspiracy under section 32 of the Act. Rather, the test under section 32 requires there to be a "conspiracy, combination, agreement or arrangement". This may or may not be proved by the existence of conscious parallelism in a market. On the facts as proved in the *Armco* case, Lerner J. held that:

> It would offend one's common sense after reviewing the history which I detailed earlier in this judgment, not to arrive at the irresistible conclusion and beyond a reasonable doubt that an *arrangement* was finally achieved between the members of the Institute to have . . . price "leadership" and "followership". With the difficulty experienced over the first 10 or 11 months of 1963, in "educating" the industry, the sudden achievement of open price policy within two weeks of publication of the Robertsteel price list on December 2, 1963, could only occur if there was an *arrangement or agreement*. The many warnings, admonitions and exhortations of Campbell, Russell, Yeo, Turney, Craig and Allan that each company was to arrive at its own independent conclusion without collusion or coercion from other members of the industry reminds one of the line from Hamlet: "The lady doth protest too much, methinks."[31]

The learned judge's appreciation of the evidence convinced him that there was in fact an agreement to restrain trade, and not purely accidental parallel activity in the industry. Accordingly, he convicted the accused, and this decision was upheld by the Ontario Court of Appeal.[32]

It is important to note the narrowness of the *ratio decidendi* in *Armco,* which, after all, concerned a particularly strong case of conscious parallelism. Indeed, the accused had taken steps to ensure that an incipient oligopoly would in fact materialize. *Armco* did not concern what might be termed a "natural" oligopoly, which none of the parties sought to bring about, but which simply occurred due to market forces. As Lerner J. correctly indicated, the mere existence of conscious parallel pricing does not necessarily constitute an offence under the Act: some sort of agreement or arrangement must be demonstrated. Thus

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583, 17 C.P.R. (2d) at 273. This reference was criticized by the Court of Appeal, *supra* note 22, at 152-55 and in particular at 153, where Houlden J.A. stated: "As has been pointed out, for s. 32(1)(c) there must be the mutual arriving at an understanding or agreement, and under the *British Basic Slag* test, this element of mutuality is not necessarily present."

[30] *Supra* note 28, at 568, 17 C.P.R. (2d) at 258 (emphasis added). Lerner J. applied the rule in *Hodge's* case, 2 Lew C.C. 222, 168 E.R. 1136 (1838). This was approved by the Court of Appeal: *supra* note 22, at 155-56.

[31] *Supra* note 28, at 569, 17 C.P.R. (2d) at 259 (emphasis added).

[32] *Supra* note 22.

each case depends upon its facts; and there is no logical inconsistency in the approach which yielded convictions in the *Armco* and *Canadian General Electric*[33] cases on the one hand, but acquittals in the *Canada Cement Lafarge*,[34] *Aluminium Co.*,[35] *Redpath Sugar*,[36] and *Anthes Business Forms*[37] cases on the other. These latter cases do reveal that the Combines Investigation Act is not always an efficient weapon for dealing with the economic problems created by oligopolies. A solution to this problem is unlikely to be forthcoming until after the report of the Royal Commission on the Concentration of Industry, which should have canvassed the economic problems created by oligopolies as well as possible solutions.

B. *The Electric Large Lamp Case*

In *Regina v. Canadian General Electric Ltd.*,[38] the three largest Canadian manufacturers[39] produced approximately 95% of the electric large lamps[40] used in Canada. For all intents and purposes, electric large lamps made by one manufacturer are identical and may be substituted for those made by other manufacturers.

Following a report by the Restrictive Trade Practices Commission in 1971,[41] two charges[42] were brought against the accused with respect to

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[33] Regina v. Canadian Gen. Electric Ltd., 15 O.R. (2d) 360, 29 C.P.R. (2d) 1 (H.C. 1976).

[34] Regina v. Canada Cement Lafarge Ltd., 12 C.P.R. (2d) 1 (Ont. Prov. Ct. 1973), where Judge Camblin of the Criminal Division of the Ontario Provincial Court discharged the accused at a preliminary inquiry into charges of having agreed to lessen competition unduly in the sale of cement.

[35] Regina v. Aluminum Co. of Canada, 29 C.P.R. (2d) 183 (Que. C.S. 1976).

[36] Regina v. Atlantic Sugar Refineries Ltd., 26 C.P.R. (2d) 14 (Que. C.S. 1975). *Note*: Just before this Survey went to press, the Quebec Court of Appeal (on March 14, 1978) allowed the Crown's appeal, and entered convictions against the accused in the *Sugar* case.

[37] *Supra* note 15.

[38] *Supra* note 33.

[39] Canadian General Electric Company Ltd. ("*CGE*"), Westinghouse Canada Ltd. ("Westinghouse") and GTE Sylvania Canada Ltd. ("Sylvania").

[40] A term describing incandescent, fluorescent and mercury lamps.

[41] Dated January 14, 1971.

[42] Since the period in question commenced before amendments were passed on August 10, 1960, count one in the indictment was based on the Act as it stood before that date, while counts two and three were based on the Combines Investigation Act, R.S.C. 1970, c. C-23. The accused manufacturers were also charged with having conspired with each of their distributors (a vertical conspiracy) to restrain trade unduly. Pennell J., *supra* note 33, at 406, 29 C.P.R. (2d) at 48, held that this had not been proven beyond a reasonable doubt, and dismissed these charges in the following terms:

> It would perhaps be enough to sustain the charge if agents knowing that concerted action was contemplated and invited by the three accused, gave their adherence to the scheme and participated in it. This case was not here. There is not sufficient evidence of knowing participation of agents in an anti-competitive price sales plan. In the view I take of the facts before me, there were not two offences under s. 32 of the *Combines Investigation Act* but one conspiracy and therefore one offence.

the period from 1959 to 1967. They were charged with being parties to an illegal conspiracy or agreement to lessen competition unduly, contrary to section 32(1)(c) of the Act, and also with having operated a monopoly contrary to sections 2 and 33.[43]

Prior to 1959, there had been strong price competition in the Canadian market for electric large lamps. In 1959, *CGE* published its price and discount list, together with details of the consignment system[44] which it used for distributing its products. The other accused, Westinghouse and Sylvania, subsequently adopted and published essentially similar details. In 1961, *CGE* started to quote the prices for its lamps on a net basis, thereby eliminating the necessity for its consignees to calculate the discounts applicable to various types of purchasers. Both the accused followed suit shortly thereafter. Subsequently, the prices for these lamps became uniform throughout the market; and substantially identical prices were quoted on various public tenders submitted by the three accused (or their agents). There was also some evidence that the accused prevented their distributors from deviating from the published lists;[45] and, in one case,[46] forced a distributor who did undercut the published price to donate his profits on that transaction to charity.

Pennell J. recognized that the products in question were substantially identical in quality and interchangeable, and that the market for electric large lamps in Canada was an oligopoly. His Lordship held, however, that the mere existence of an oligopoly is neither a defence to a charge of conspiracy, nor an offence *per se* under the Act.[47] He went on to hold that the publication of the price lists so far in advance of actual changes in price permitted the accused simultaneously to adopt substantially identical prices. This was used by the accused as a deliberate market strategy. Indeed, His Lordship held that the continual checks by each firm on prices of the others went far beyond any

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[43] For a discussion of the monopoly charges, *see* text between notes 153 & 161, *infra*.

[44] If Stage Two is enacted in its present form, the new Competition Board would have the power to determine whether consignment marketing arrangements are in fact anti-competitive; and if so, to order their termination. *See* Part VII *infra*.

[45] For a related case *see* Philippe Beaubien & Cie. v. Canadian Gen. Electric Ltd., 30 C.P.R. (2d) 100 (Que. C.S. 1976).

[46] Referred to by Pennell J., *supra* note 33, at 389, 29 C.P.R. (2d) at 31.

[47] *Id.* at 387, 29 C.P.R. (2d) at 29:

> I shall not labour the law of conspiracy. The position of the three accused . . . rests basically on a case of price conscious parallelism. Put in another way, the argument amounts to this: the consignment system set up by the sales plan through which the accused enforced their published price lists and segmented the market, is an accepted legal form of contract, that the form of the contracts and the practice under them make [their distributors] genuine agents of the accused; that large lamps are homogeneous products; that no buyer will pay more for the product of one seller than he will for that of another; that in any market the seller must adjust his own price to meet the market price or retire from the market altogether; and that conscious parallelism is not sufficient as a matter of law to support a charge of conspiracy.

legitimate purpose,[48] but was designed, rather, to ensure strict adherence to the published prices.[49]

The trial judge did not doubt that the executives of the accused companies were truthful in categorically denying any knowledge of an agreement:

> I am not unmindful that a number of management executives of the accused categorically denied any knowledge of an agreement or arrangement. The *bona fides* of the witnesses may be acknowledged and the force of the Crown's case suffer no serious impairment. It is not the identity of the entire cast of players which is important; it is whether . . . the evidence proves . . . an agreement among the accused.[50]

Mr. Justice Pennell nevertheless held that, on a fair assessment of all the evidence, it had been proved beyond a reasonable doubt that there was an agreement among the accused to introduce and maintain an industry sale plan, thereby eliminating and suppressing price competition among themselves. In other words, the identity of prices throughout the period in question pointed to some sort of arrangement or tacit agreement among the accused not to compete, and was not the natural result of competitive market forces. This is precisely the approach to conscious parallelism adopted by Lerner J. in *Armco*.

Pennell J. then considered the second ingredient to an offence under section 32: did this "agreement" *unduly* prevent or lessen the purchase, sale, or supply of electric large lamps in Canada? After referring to the previous jurisprudence as to what constitutes an "undue" restraint on trade for the purpose of section 32,[51] he held[52] that the mere fact that Canadian prices of these lamps rose during the eleven-year period in question, while the prices of similar lamps in the United States fell, was not in itself indicative of an undue restraint on trade in Canada. Nor did any benefits accruing to the accused or their agents justify otherwise unlawful restrictions on competition. The mere fact that consignment arrangements are not illegal *per se* does not necessarily mean that the use of consignments could *never* constitute an unlawful agreement in restraint of trade under the Act, for:

> It is not the form of the combination or the particular means employed but the result to be achieved that the *Combines Investigation Act* condemns. It is not

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[48] Such as purchasing lamps from each other, or knowing what price to meet in a competitive market.

[49] Indeed, the accused withheld or delayed supplies to agents who deviated from the published prices, and threatened to cancel their agencies. *See also* the *Beaubien* case, *supra* note 45.

[50] *Supra* note 33, at 395, 29 C.P.R. (2d) at 37-38.

[51] *Id.* at 396-98, 29 C.P.R. (2d) at 38-40. Reference was made to Regina v. Abitibi Power & Paper Ltd., 36 C.R. 96, 36 C.P.R. 188 (Que. B.R. 1960); Regina v. Anthes Business Forms Ltd., *supra* note 15; Rex v. Elliott, 9 O.L.R. 648, 9 C.C.C. 505 (C.A. 1905); Weidman v. Shragge, 46 S.C.R. 1n, 2 D.L.R. 734 (1912); Howard Smith Paper Mills Ltd. v. The Queen, [1957] S.C.R. 403, 29 C.P.R. 6; Regina v. J.J. Beamish Constr. Ltd., [1968] 1 O.R. 5, 53 C.P.R. 43 (C.A. 1967); Container Materials Ltd. v. The King, [1942] S.C.R. 147, [1942] 1 D.L.R. 529.

[52] *Supra* note 33, at 398, 29 C.P.R. (2d) at 40-41.

> of importance whether the means used to accomplish the unlawful objectives were in themselves unlawful or lawful; acts done to give effect to a conspiracy may be in themselves wholly innocent acts. Nor is it necessary that participants should agree on everything in order to agree on enough things to make them parties to a conspiracy. Upon the strength of the consignment system the accused could effectively police the price, terms and conditions of sale on the great majority of large lamps being sold in Canada. The effect of the industry sales plan is plain. Price competition was stifled.[53]

Pennell J. then noted that the price of a homogeneous product is clearly the most important aspect of competition. Indeed, it is the only real aspect of competition that is in any way beneficial to the public where such a product is involved. Even in a strongly competitive situation, however, one would expect the price of a homogeneous product to be identical throughout the market—precisely the same result which occurs where there is either a natural oligopoly or one resulting from an illegal conspiracy. How does one prove that there is not, in fact, full competition in a market where there are identical prices? Unless there is evidence that prices are in fact higher under the illegal agreement[54] than they would have been under full competition (though they may be uniform throughout the market in both cases), how can it be shown that the illegal agreement inflicts an undue lessening of competition contrary to the Act?

Pennell J. accepted testimony, tendered by the accused, to the effect that economists generally consider the following four criteria in determining whether there is "effective" competition[55] in an oligopolistic market for a homogeneous product: (i) ease of entry into the industry; (ii) number and size of competitors; (iii) genuine independence of rivals within the market; and (iv) absence of predatory practices. The court noted that it would not have been easy for a competitor to enter this industry. Even though the capital requirement for a new factory would not be exceedingly large, a new entrant would require a distribution system on a sufficiently large scale to be able to operate as efficiently as the three firms already in the market, and this would be extremely expensive. The trial judge noted that no competitor had in fact entered the Canadian market until 1967, when Phillips purchased the Service Lamp Company, which was a very small, independent competitor of the three accused. Indeed, the third accused, Sylvania, when it entered the Canadian market prior to the indictment period, had not chosen to establish its own distribution network, but instead had affiliated with Northern Electric Ltd., a well established company with

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[53] *Id.* at 402-403, 29 C.P.R. (2d) at 44-45.

[54] Although Pennell J. held that evidence that Canadian prices were higher than those for similar lamps in the United States was irrelevant. *See id.* at 398, 29 C.P.R. (2d) at 40-41.

[55] As opposed to *pure* competition on the one hand, or an illegal agreement among the oligopolists on the other.

branches throughout the country. Pennell J., therefore, concluded that the historical evidence simply did not indicate that entry into this market was easy.[56] Similarly, he held that the evidence negated the existence of the other three indices of "competition" in this oligopolistic market, concluding that:

> *the inferences naturally flowing from the whole of the evidence establish that the accused had arrogated to themselves the power to carry on their activities virtually unaffected by the influence of competition.* The competition offered by the domestic suppliers and foreign competitors, actual and potential, was minimal at best. Having regard to the combined market share of the accused, the structure of the market, the nature of the product and the restriction fostered by their distribution system, the purpose and object to the agreement of the accused was "undue" within the interpretation of that word as stated by Cartwright J. in the *Howard Smith* case.[57]

The reader should note that Pennell J. accepted the "Cartwright Heresy" that requires the virtual abolition of competition before there is an "undue" (and therefore illegal) restraint of trade. While the virtual abolition of competition may be a sufficient condition for the court to hold that an agreement has unduly lessened competition, the jurisprudence subsequent to Cartwright J.'s judgment in *Howard Smith*[58] clearly rejects such a high standard as a necessary feature for an agreement to be illegal under section 32.[59]

C. *The Cement Cases*

Cement is a homogeneous product produced by a small number of firms in any given geographic area. Its market, therefore, is likely to be oligopolistic, and it is not surprising that three separate cases involving cement manufacturers were reported during the period under review.

As previously noted,[60] Judge Camblin of the Ontario Provincial Court at the preliminary inquiry dismissed the charges in *Regina v. Canada Cement Lafarge Ltd.*,[61] where the accused had been selling on tenders at identical prices between 1955 and 1972. Although His Honour recognized that there was obviously conscious parallelism in the industry, he held[62] that the Crown's evidence would not convince a prudent person that the accused had, in fact, agreed to limit competition. Thus, the mere existence of conscious parallelism does not *ipso facto* prove collusion, and the latter is necessary for an offence to be created under

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[56] Compare this approach with that taken by Ruttan J. in the *Allied Chemical* case, *infra* note 123.

[57] *Supra* note 33, at 405, 29 C.P.R. (2d) at 47 (emphasis added).

[58] *Supra* note 51.

[59] The Cartwright Heresy is considered in the discussion of the *Aetna Insurance* case, *infra* note 103.

[60] *Supra* note 34.

[61] *Id.*

[62] *Id.* at 17.

the Act. This is perfectly in accord with Lerner J.'s approach in convicting the accused in the subsequent *Armco* case.[63]

In both *Regina v. Ocean Construction Supplies Ltd.*[64] and *Regina v. A.B.C. Ready-Mix Ltd.*,[65] the accused pleaded guilty to charges of forming illegal conspiracies in the pricing of cement, contrary to section 32. These cases, therefore, dealt primarily with the principles to be followed in sentencing.

In the *Ocean Construction* case, McKay J. of the Supreme Court of British Columbia levied fines totalling $432,000 on three separate counts relating to periods of approximately ten years. He reached this sum having regard to the following factors:[66] first, the period of the conspiracy and the length of time each accused was a party thereto; secondly, the geographic area involved, and the value of the consumption of the product in that area; thirdly, the share of the market enjoyed by each accused; fourthly, the size of the companies involved;[67] fifthly, the need to impose a penalty that would provide a real deterrent, and that would be more than a minor cost of doing business for the accused;[68] and, finally, the destruction of documents and other evidence of lack of co-operation by the accused with the prosecuting authorities. These fines were upheld by the Court of Appeal[69] which noted that, in any event, "[s]entencing cannot be approached as an arithmetic problem."[70] Nevertheless, although the fines imposed were substantial in absolute terms, there was no evidence as to any excessive profits made by the accused as a result of the illegal agreement. It is difficult, therefore, to determine whether the fines were in proportion to the benefit gained by the accused through their illegal activity.

In the *A.B.C.* case, Osler J. of the High Court of Ontario imposed an aggregate fine of $245,000 on the twelve conspirators who all pleaded guilty.[71] His Lordship reached this amount by noting that the accused had co-operated in furnishing all the information requested by the prosecution, and that the illegal agreement had not resulted in either

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[63] *See* text between notes 22 & 32, *supra*.

[64] 15 C.P.R. (2d) 224 (B.C.S.C. 1974), *aff'd* 22 C.C.C. (2d) 340, 18 C.P.R. (2d) 166 (C.A. 1974).

[65] 17 C.P.R. (2d) 91 (Ont. H.C. 1972).

[66] *Supra* note 64, at 229.

[67] *Cf.* the judgment in Regina v. Browning Arms Co. of Canada, *infra* note 164.

[68] Fines for offences under the Act may be deductible expenditures for the purpose of calculating profits (and hence income tax) under s. 9 of the Income Tax Act, R.S.C. 1952, c. 148, *as amended by* S.C. 1970-71-72 c. 63 and subsequently. *See* Rolland Paper Ltd. v. M.N.R., [1960] C.T.C. 158 (Ex.), dealing with legal fees incurred in unsuccessfully defending a charge under the Combines Investigation Act; and Day & Ross Ltd. v. The Queen, [1976] C.T.C. 707 (F.C. Trial D.), where fines under a different statute were held to be deductible. *But see* Luscoe Products Ltd. v. M.N.R., 16 Tax A.B.C. 239, 57 D.T.C. 32 (1956).

[69] 22 C.C.C. (2d) 340, 18 C.P.R. (2d) 166 (B.C.C.A. 1974).

[70] *Id.* at 342, 18 C.P.R. (2d) at 169 (Seaton J.A.).

[71] The charges were brought under s. 32(1)(c).

unduly increased prices or excessive profits.[72] Unfortunately, the reported judgment does not indicate how Mr. Justice Osler determined that the illegal agreement had such benign economic consequences.

In both *Ocean Construction* and *A.B.C.*, prohibition orders were also granted.

D. *The Aluminum Case*

Extruded aluminum is also a homogeneous product, and there are few producers and suppliers of unprocessed aluminum for extrusion. Not surprisingly, this oligopolistic market attracted the attention of the Director of Investigation and Research in the early 1970's.[73] His report to the Attorney General of Canada under section 15(1) of the Act[74] led to the laying of an information in February 1973, containing two charges under section 32. These charges, however, were dismissed at the preliminary inquiry in May 1975.

The Attorney General subsequently preferred an indictment charging five[75] accused with an illegal agreement to raise the price of extruded aluminum by 1.2 cents per pound immediately following an equivalent increase in the price of unprocessed aluminum ingots in June 1968. The principal defendant, Alcan, controlled both the supply of unprocessed ingots and the largest share of the market for extruded aluminum. It published price lists which were freely available to customers and competitors alike.

Rothman J. of the Quebec Superior Court acquitted the accused,[76] holding that there was no evidence of any agreement or conspiracy among them to lessen competition. Not only was there substantial competition in the market both before and after the rise in price, but the prices charged by the various competitors were not identical for all customers—facts strikingly unlike those in most of the other cases

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[72] *Supra* note 65, at 95. He also alluded to the fact that none of the defendants had previous convictions and that guilty pleas resulted in substantial savings to the public purse.

[73] ANNUAL REPORT OF THE DIRECTOR OF INVESTIGATION AND RESEARCH FOR THE YEAR ENDING MARCH 31, 1976, at 21.

[74] S. 15 provides as follows:

> 15. (1) The Director may, at any stage of an inquiry, and in addition to or in lieu of continuing the inquiry, remit any records, returns or evidence to the Attorney General of Canada for consideration as to whether an offence has been or is about to be committed against this Act, and for such action as the Attorney General of Canada may be pleased to take.
>
> (2) The Attorney General of Canada may institute and conduct any prosecution or other proceedings under this Act, and for such purposes he may exercise all the powers and functions conferred by the Criminal Code on the attorney general of a province.

[75] The accused were Aluminum Co. of Canada; Reynolds Extrusion Co.; Indalex Ltd.; Kaiser Aluminum and Chemical Canada Ltd.; and Daymond Ltd.

[76] *Supra* note 35.

considered in this Survey. Indeed, in this case, the simultaneous increase in the price of extruded aluminum throughout the market could easily be explained by the fact that the cost of the unprocessed aluminum ingots was a substantial component in the price of extruded aluminum and, even in the most competitive market, it would only be natural to expect the price of such a processed product to increase by at least the same amount as the increase in the price of its principal input.

E. *The Sugar Case*

Perhaps the most celebrated decision during the period under review was Mackay J.'s acquittal in *Regina v. Atlantic Sugar Refineries Ltd.*[77] of four eastern Canadian sugar refineries on charges of unlawfully conspiring: (i) to lessen competition;[78] and (ii) to raise prices unreasonably[79] between 1960 and 1973. This judgment provoked the then Minister of Consumer and Corporate Affairs, André Ouellet, into an attack on the Superior Court Judge, for which the Minister was held to be in contempt of court and fined.[80]

An examination of the facts in the case leads this reviewer to conclude that Mackay J.'s judgment was in accord with the previous jurisprudence on section 32 and, in particular, consistent with Lerner J.'s treatment of conscious parallelism in the *Armco*[81] case, to which he referred.[82]

The Crown's case on the charge of restraining competition involved four allegations. First, it was alleged that the accused had conspired to prevent raw sugar from reaching certain Canadian consumers[83] by coercing India to limit its exports to Canada and not to sell directly to Canadian users; second, that, in 1964, the accused persuaded South African sugar suppliers not to sell to a new sugar refinery[84] which was being established in eastern Canada; third, that the accused had agreed on a price for sugar in Canada by adopting a formula based on the London daily price for raw sugar, which was unrelated to the actual

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[77] *Supra* note 36.

[78] Under s. 32(1) (c).

[79] Under s. 32(1) (b).

[80] *See Re* Ouellet (1), 34 C.R.N.S. 234, 67 D.L.R. (3d) 73 (Que. C.S. 1976), and *Re* Ouellet (2), 28 C.C.C. (2d) 360, 34 C.R.N.S. 256 (Que. C.S. 1976) (sentence), where Mr. Ouellet was given a suspended sentence, placed on probation and ordered to apologize to Mr. Justice Mackay and pay $500 towards the costs of the counsel appointed *ad hoc*. This was varied by the Court of Appeal in *Re* Ouellet (1 & 2), 72 D.L.R. (3d) 95 (1977). The appellate court removed the required apology, because it would not be given willingly, and converted the $500 from a payment of costs into a fine (although Mr. Ouellet was still required to bear some costs). The Minister had temporarily resigned from the Federal Cabinet in order to prosecute his appeal; he has since returned in another portfolio.

[81] *Supra* note 22.

[82] *Supra* note 36, at 98.

[83] Wineries and candy manufacturers.

[84] Cartier Sugar Ltd., established in 1963.

world market price of sugar. This pricing system arose from an agreement between the accused and the Commonwealth sugar producers' cartel, and was implemented by using an open pricing system based on Redpath's posted prices. This system permitted the accused to quote future prices for the sugar they supplied. Finally, the Crown alleged that the accused had endeavoured to maintain their traditional shares in the market, with the result that competition had been unduly impaired.

Mackay J. acquitted the accused on the basis that the evidence did not indicate beyond a reasonable doubt that the accused were parties to any conspiracy. Although the entirety of the judgment is worthy of close study, his treatment of the problem of conscious parallelism is particularly relevant to this Survey.

Refined sugar is clearly a homogeneous product. It is produced in Canada by only a few refiners, who are substantially protected by tariffs from foreign competition. The prices of each refiner closely parallel those of all the others, and the market is clearly oligopolistic. As Mackay J. noted: "[t]he question then is whether . . . the uniform price lists resulted from an agreement between the accused."[85] The agreement is a *sine qua non* for a conviction under section 32; mere price leadership by the industry leader, and a conscious effort by other members of the industry to follow its prices, will not suffice — even though such conscious parallelism may equally result in an undue prevention of competition.[86]

Mackay J. agreed[87] that the existence of conscious parallelism might well create an inference that there was in fact an agreement or arrangement to fix prices. But he went on to hold that such an inference may be rebutted where there is evidence that the conformity in prices was not arrived at by collusion, a statement which differs slightly from a *dictum* of Lerner J. in *Armco*.

The Crown's case simply foundered on its inability to surmount the evidentiary requirement for a conviction. This is likely to remain a problem as long as the constitutionality of combines legislation rests upon Parliament's criminal law power with its attendant higher burden of proof. Criticizing the judge's appreciation of the evidence in such cases, therefore, is not likely to make the Act as a whole more effective — even though the Crown has now won its appeal in the *Redpath* case.[88]

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[85] *Supra* note 36, at 96.

[86] *Id.* at 97.

[87] *Id.* at 98.

[88] The appeal had been heard by the Quebec Court of Appeal, but judgment had not been rendered when this Survey was completed. On March 14, 1978, the Court of Appeal allowed the Crown's appeal, entered a conviction of the accused, and remitted the case to Mackay J. for sentencing. The Court of Appeal's reasoning will be examined in the next Survey.

A far more productive approach would be to tackle the problem of conscious parallelism head-on. When is it undesirable? How can it be stopped? Is it a reflection of too much concentration in the Canadian economy? Should trade associations be prohibited? Are open price policies conducive to competition? Should a lower burden of proof, such as balance of probabilities, instead of beyond a reasonable doubt, be required for the Crown to demonstrate the existence of an illegal agreement under section 32?[89] Could the concept of an "arrangement" —presently proscribed by section 32—be developed to prevent a broader range of conscious parallelism than would be illegal under the *Armco* and *Atlantic Sugar* line of cases? Until these questions are answered, the conspiracy provisions of the Act are likely to remain relatively ineffective, except in the most blatant cases of outright agreements to restrict competition.

F. *The Business Forms Case*

The prosecution in *Regina v. Anthes Business Forms Ltd.*[90] was commenced after a report by the Restrictive Trade Practices Commission in 1970.[91] The accused were members of the Institute of Business Forms Manufacturers, established in 1942. Members of the Institute were required to disclose to each other the prices for any orders which differed from the price lists which each member was also required to file with the Institute. In fact, only two members made complete price lists, which was an expensive undertaking, and all the other corporations adopted these. The prices charged by various suppliers differed considerably, and there was open discounting from the published price lists.

Grant J. of the Ontario High Court acquitted[92] the accused on charges brought under section 32, with respect to the years 1942 to 1968. He gave four reasons. First, the parties only intended the 1942 agreement to apply to *completed* transactions.[93] Unlike the arrangement in the *General Electric*[94] case, there was no tacit agreement that new price lists would be circulated sufficiently in advance so that all producers could change their prices simultaneously. And, unlike the situation in *Armco*,[95] the price notification policy here was not a vehicle through

[89] Why does the constitutional characterization of the Act as criminal law necessarily imply that the burden of proof must be beyond reasonable doubt? Surely, the burden of proof is not the only hallmark of the criminal law. Alternatively, the Act (or any amendments to it) may be valid under other heads of federal legislative competence, such as trade and commerce or peace, order and good government: *see* Hogg & Grover, *supra* note 5.

[90] *Supra* note 15.

[91] Dated May 11, 1970.

[92] 19 C.C.C. (2d) 394, 16 C.P.R. (2d) 216 (Ont. H.C. 1974).

[93] In fact, the agreement was amended in 1948 to clarify that it only applied to completed transactions.

[94] *Supra* note 33.

[95] *Supra* note 22.

which future prices were controlled. Second, mere membership in the Institute was not illegal under the Act. Third, the Crown had not proven beyond a reasonable doubt that the whole course of events in the market necessarily indicated an agreement (tacit or otherwise) to restrict competition in the pricing of business forms. This was precisely the problem which confronted Mackay J. in the *Redpath Sugar*[96] case. Finally, even if an agreement to limit competition as to prices could be inferred from the conduct of the members of the Institute, Grant J. found that there had in fact been no undue lessening of competition resulting therefrom, and therefore no illegality under section 32.

The Court of Appeal upheld[97] the acquittal and went on to note that the Crown can only appeal from an acquittal on an error of law. No appeal lies under the Act on a mere question of fact, nor on a mixed question of fact and law. The trial judge had specifically found (as a matter of fact) that the impugned agreement only applied to past transactions, and was not designed to establish prices for the future. Although the majority of the Court of Appeal held that the trial judge had indeed erred (in law) in requiring the Crown to prove that the accused had *intended*[98] the agreement to be used to lessen competition, nevertheless he had correctly acquitted the accused because, on the evidence as found, the agreement had not unduly prevented or lessened competition. Thus, although the question of what constitutes an "undue" restraint on competition under section 32(1)(c) is a question of law,[99] whether such an undue restraint would result from a particular agreement is a question of fact which lies completely within the purview of the trial judge. The Court of Appeal consequently held that it had no jurisdiction to hear the Crown's appeal from the verdict at first instance. This decision was upheld by the Supreme Court of Canada.[100] As a result, it will probably be very difficult in the future for the Crown to win an appeal from an acquittal in a conspiracy case.[101]

However, Arnup J.A. dissented from this view. He questioned whether the trial judge had incorrectly directed his mind to what the parties actually *did* instead of asking whether (assuming there was an agreement to lessen competition) the agreement would *if carried into effect* lessen competition unduly. For the offence under section 32 lies in

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[96] *Supra* note 36.

[97] 10 O.R. (2d) 153, 20 C.P.R. (2d) 1 (C.A. 1975). Gale C.J.O. and Houlden J.A.; Arnup J.A. dissented in part.

[98] *See* the discussion of the *Aetna Insurance* case in text between notes 105 & 122, *infra*.

[99] But, with respect, it is exceedingly difficult to state, as a matter of law, what is an "undue" restraint on competition. What, therefore, does it mean to say that what constitutes an "undue" restraint on competition is a question of law?

[100] *Supra* note 15.

[101] *See generally* the decision of the British Columbia Court of Appeal in Regina v. Allied Chemical Ltd., *infra* note 123.

the agreement, and not in the actual harm inflicted (or benefit conferred) on the public as a result thereof. As Arnup J.A. stated:

> The two questions are not the same. The second question is the appropriate one. . . . Where parties are alleged to have entered into an agreement that violates s. 32(1)(c) . . . evidence of what those parties actually did in carrying on their business may be highly relevant in determining what, if anything, they had agreed to do (or refrain from doing). It may also be relevant in determining whether an agreement, if found to have been made, would if carried into effect constitute an undue lessening of competition. But once it is found, on the whole evidence, that an agreement was made which, if carried into effect, would constitute a lessening of competition, and to an undue extent, it is not a defence of a charge under s. 32(1)(c) to lead evidence that what the parties *in fact* did after making the agreement was not an undue lessening of competition. [For e]vidence of that type [merely] goes to show that the parties did not carry out in practice the [illegal] agreement they had made.[102]

As this ambiguity went to the heart of the trial judge's reasoning, Arnup J.A. would have allowed the Crown's appeal on this point of law. A similar question arose in both the *Aetna Insurance*[103] and *Allied Chemical*[104] cases, discussed below.

G. *The Aetna Insurance Case*

The decisions of all three levels in *Aetna Insurance Co.*[105] raised interesting and difficult questions concerning the concept of undue restraint on competition.

One cannot determine what is an undue restraint without some idea of what constitutes "competition". And this necessarily requires one to define the market in question. How does the concept of an undue restraint on competition fit into section 32? Does the Act proscribe those agreements which *actually* restrain competition unduly? Or those which are *intended* to do so (whether or not this is actually accomplished)? Or those agreements which, if executed, would have that *effect*? Choosing which test to adopt necessarily determines what evidence (if any) is relevant to prove (or disprove) a charge under section 32. And this was the central issue in *Aetna Insurance*.

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[102] *Supra* note 97, at 159-60, 20 C.P.R. (2d) at 6-7. Arnup J.A., *id* at 160, 20 C.P.R. (2d) at 7, went on to say:

> I am not able to read the single crucial sentence [in Grant J.'s judgment at first instance] under consideration as a finding of fact that even if the respondents had made an agreement which, if carried into effect, would have constituted a lessening of competition, it would not have done so unduly.

The sentence in question reads as follows: "Even if *such an arrangement* did exist between the parties the court could not. . .determine that the same could be classed as undue" (emphasis added). *See* the trial decision in the *Anthes Business Forms* case, *supra* note 92, at 444, 16 C.P.R. (2d) at 266.

[103] Regina v. Aetna Insurance Co., 15 N.R. 117, 30 C.P.R. (2d) 193 (S.C.C. 1977), *rev'g* 12 N.S.R. (2d) 362, 23 C.P.R. (2d) 231 (C.A. 1976), *rev'g* 16 C.P.R. (2d) 116, 52 D.L.R. (3d) 30 (S.C. 1975). *See also* the order of the Nova Scotia Court of Appeal as to sentence: 13 N.S.R. (2d) 693 (C.A. 1975).

[104] *Infra* note 123.

[105] *Supra* note 103.

The accused belonged to the Nova Scotia Board of Insurance, which had been established in 1857 to determine the cause of a disastrous fire in Halifax (*i.e.*, why it had not been contained, and what could be done to improve fire-fighting in the city). Out of this developed a corps of inspectors who, over time, came to be relied upon by municipalities throughout the province to evaluate both fire risks and fire-fighting equipment. The evaluations of risk, in turn, came to be used by Board members to determine rates for fire insurance on virtually all property located within the province.

The Board's constitution required its members to be bound by its rates, supposedly to avoid unfair discrimination between risks of essentially the same hazards. It also required members to pay a common rate of commission to their agents. In theory, the Board's evaluation of risks and the corresponding table of premiums were only available to members. In practice, this information was generally available to non-members as well. Unlike the other cases noted in this Survey, the Board's by-laws contained penalties for deviation from the established rates.

The charges laid by the Crown covered an eleven-year span from January 1960, to the end of December 1970. During this period, some 55% to 70% of the fire insurance underwriters in Nova Scotia belonged to the Board. Members wrote between 65% and 80% of all the premiums for fire insurance in force during the period in question. The principal competition to the members of the Board came either from federal and international companies, such as Lloyds, or from companies who sold directly to the public and not through agents, such as Allstate. In total, seventy-three Board members were charged under section 32(1)(c) of the Act with unlawfully conspiring[106] to unduly prevent or lessen competition in the pricing of fire insurance for property within the province. This appears to be the first time insurance companies had been charged with an offence under the Act.

Unlike the cases previously discussed, there was undoubtedly an agreement among the accused. The central issue in the case was whether there was "undue" (and therefore illegal) restraint on competition caused by this agreement.

The trial judge, Hart J., noted that the good intentions of the parties in entering into the agreement were irrelevant to the charge.[107] He looked instead to whether there had in fact been an "undue" lessening

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[106] Among themselves, and with sixty-four other members who were not charged, as well as with the general manager of the Board.

[107] 16 C.P.R. (2d) 116, at 138-40, 52 D.L.R. (3d) 30, at 52-54 (N.S.S.C. 1974). The alleged benefits were: free inspection of property in the province; free advice about acquisition of fire-fighting equipment; lowering the long-run cost of insurance by providing these common services; stability in the industry. *Quaere* whether such evidence would be admissible on sentencing.

of competition as a result of the agreement. In other words, the illegality of the agreement depended upon the subsequent state of competition in the market. In light of the actual competition from non-members of the Board, His Lordship held that there had been no undue lessening of competition, and acquitted the accused. His judgment was reversed on appeal by a majority of the Appeal Division,[108] but was subsequently reinstated by the Supreme Court of Canada.[109]

According to Ritchie J., who wrote the opinion for the majority of the Supreme Court, the sole question on the appeal was "whether the agreement was entered into in order to prevent or lessen competition '*unduly*'".[110] This question focuses on the *purpose* for which the agreement was made; it does not refer to either its actual or probable consequences on competition. Nevertheless, the crux of the Crown's original appeal was whether the trial judge had erred in considering evidence as to the actual state of competition in the market after the impugned agreement in order to determine whether it was illegal. Ritchie J. approached this narrower question in the following terms:

> The fact that an agreement existed to prevent or lessen competition in the price of insurance does not of itself constitute an offence under this section; *the illegal character of the agreement lies in the fact that the prevention or lessening is undue* and it appears to me that the best if not the only way in which to determine this is by considering whether competition would be unduly prevented or lessened *if* the design evidenced by the agreement were carried into effect. *In my view, it is only by assessing what the result would be if the agreement were implemented that the elusive quality of undueness can be measured,* and it was for this reason that the learned trial Judge in the present case heard evidence as to the effect of the plan on free competition in the insurance business.[111]

Ritchie J. appears to be saying that the only agreements which are illegal are those which *in fact* prevent or lessen competition unduly. If this were correct, then evidence as to the state of competition in the market subsequent to the agreement would clearly be relevant to determine its illegality. Yet this runs counter to the long-accepted view that the crime under section 32—conspiracy—lies in the very fact of the agreement, and not in its successful execution. On the other hand, Mr. Justice Ritchie may mean that one must ask the hypothetical question: "If this agreement *were* carried out, would it result in an undue restraint on competition?" This question can be answered the moment the agreement is made, even before it is carried out, and thus before there is any evidence of what subsequently happens in the

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[108] 12 N.S.R. (2d) 362, 23 C.P.R. (2d) 231 (C.A. 1976). Cooper and Macdonald JJ.A.; Coffin J.A. dissented.

[109] *Supra* note 103. Ritchie, Martland, Pigeon, Dickson and Beetz JJ. for the majority; Laskin C.J.C., Spence and Judson JJ. dissented.

[110] *Id.* at 121, 30 C.P.R. (2d) at 201.

[111] *Id.* at 124-25, 30 C.P.R. (2d) at 204 (emphasis added).

particular market. Such evidence would then not only be unnecessary, but also irrelevant. Of course, what actually did occur in the market after the agreement may (or may not) be a good indication of what the effect of the agreement would have been had it been completely implemented (as was the case here). But it is a fallacy to suppose that the existence of some sort of competition after the agreement necessarily means that the agreement has neither lessened nor prevented greater competition—perhaps unduly. Ritchie J., however, avoided this conclusion by relying on the so-called "Cartwright Heresy":[112] so long as *any* competition would be left in the market after a restrictive agreement, it (by definition) cannot amount to an undue restraint. Therefore, whether such competition does exist is a question of fact for the trial judge alone to determine; and he is entitled to hear evidence on that point.

Chief Justice Laskin strongly dissented from this reasoning.[113] He first pointed out[114] that the "undueness" of an agreed restraint on competition is quite distinct from the question of whether any actual detriment has been inflicted on the public; the latter being relevant solely for determining the illegality of mergers or monopolies under section 33 of the Act.[115] Benefits arising out of a restrictive agreement are no defence to a charge of conspiracy under section 32, which is designed to protect competition pure and simple. Therefore, according to Chief Justice Laskin, the trial judge erred in considering the benefits allegedly resulting from the agreement when trying to determine whether it had unduly restrained competition. This alone, he said, was "enough to warrant an appellate court in setting aside the acquittal".[116]

Secondly, Laskin C.J.C. strongly criticized the trial judge's reference to the actual state of competition in the market after the agreement:

> [Hart J.] asserted that in order to determine whether the offence charged against the appellants had been committed he was obliged to determine "whether or not there had been any undue lessening of competition". This ignores the fact that the charge is one of conspiracy. It is not an ingredient of the offence that proof must be made that competition was in fact lessened unduly. Even assuming (although the trial judge nowhere says so) that proof of an actual lessening of competition might provide support for a finding that there was a conspiracy to that end and that it was directed to an undue lessening, the absence of any proof of actual lessening of competition, let alone proof of an undue lessening, does not conclude the matter against the Crown.[117]

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[112] From the judgments of Cartwright and Kellock JJ. in Howard Smith Paper Mills Ltd. v. The Queen, *supra* note 51.

[113] Judson and Spence JJ. concurring.

[114] *Supra* note 103, at 129-34, 30 C.P.R. (2d) at 194-98.

[115] *Id.* at 132, 30 C.P.R. (2d) at 196. *Cf.* the discussion of the *Irving* case, between notes 135 & 143, *infra*.

[116] *Supra* note 103, at 134, 30 C.P.R. (2d) at 198.

[117] *Id.* at 135, 30 C.P.R. (2d) at 198.

This was thus "a major error" because, on a charge of conspiracy, the effect does not matter if the object is unlawful.

Thirdly, Chief Justice Laskin held that the trial judge erred in holding that the accused "did not *intend* their agreement to have the effect of virtually relieving them of the influence of free competition".[118]

On the contrary, as the Chief Justice noted, proof of *mens rea* is satisfied by the very fact of agreement. The illegality lies in the effect of the agreement if it were carried out. Thus, it is no defence for the accused to plead that they did not *intend* their agreement to restrict competition unlawfully.

Finally, the Chief Justice criticized[119] the trial judge's determination of the market affected by the agreements. He noted that it is not necessary for the Crown to prove that there has been an undue lessening of competition *throughout the province* nor the creation of a virtual monopoly. In fact, the Board members controlled a substantial portion of the insurance issued in Nova Scotia, and the agreement certainly restricted competition among themselves. On this basis, the Chief Justice would have held that the agreement contemplated an undue lessening of competition and would have upheld the conviction, notwithstanding the existence of some other competition in the market. By comparison, Ritchie J. specifically rejected[120] the definition adopted by the majority of the Court of Appeal which states that wherever a "meaningful segment of the insurance industry"[121] is shown to be involved in the agreement, then the lessening of competition is undue, and therefore the agreement is illegal. According to Ritchie J., the effect of an agreement restricting competition must be measured by reference to the entire market, and not only a portion thereof. This is consistent with his adoption of the heretical Cartwright notion that an agreement is only undue if it obliterates virtually all competition in the market. In light of the fact that Parliament has now by statute rejected this interpretation of "undue",[122] it is difficult to predict how the majority of the Supreme Court of Canada would decide a similar case in the future.

Yet there are also problems with Chief Justice Laskin's analysis. How does one determine what is the "true object" of an agreement? What happens if an agreement has more than one object? What happens if the restraint on trade is only incidental to the true object of the agreement? How does one know when the object of the agreement is to

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[118] *Id.* at 136, 30 C.P.R. (2d) at 199 (emphasis added).

[119] *Id.* at 137, 30 C.P.R. (2d) at 200.

[120] *Id.* at 127, 30 C.P.R. (2d) at 206. *See also* Ritchie J.'s statement: "I am of the opinion that the charge here laid is one relating to the fire insurance industry as a whole within the Province and it is not made out by proving that a particular group within the industry have agreed with each other to abide by rates promulgated by the Board": *id.* at 129, 30 C.P.R. (2d) at 207.

[121] *Supra* note 108, at 415, 23 C.P.R. (2d) at 272.

[122] *See supra* note 14.

unduly lessen competition? How much lessening of competition is lawful?

Not all of these problems have been caused by the courts. Surely Parliament ought to be able to devise a more clear-cut test of what is proscribed. Perhaps a good starting point would be to attack the presumed innocence of trade associations, to establish a central register of potentially restrictive agreements, and to require such agreements to be vetted administratively prior to their implementation for their effect on competition, instead of determining this matter afterwards by means of the criminal process. The Canadian law at present has neither the certainty of the American *per se* rules nor the flexibility of the administrative supervision of potentially restrictive agreements which exists in the United Kingdom. Instead, the Canadian courts have had to use an exceedingly vague and heavy-handed law to determine, in each case and *ex post facto,* whether or not to invoke the harsh penalties of the criminal law against the hapless accused.

H. *The Sulphuric Acid Case*

Judicial consideration was also given to the question of what constitutes undue restraint on competition in *Regina v. Allied Chemical Canada Ltd.*[123]

Allied Chemical was the sole producer of sulphuric acid in British Columbia. In 1961, Cominco implemented a new process at its smelters in Trail from which sulphuric acid was a plentiful by-product. This was sold profitably to the manufacturers of fertilizer. By 1963, however, the world price for fertilizer had seriously declined, thereby affecting the price which Cominco could obtain for its sulphuric acid. It therefore sought to switch its output to the other principal market for acid, pulp and paper mills which, until then, had been supplied almost exclusively by Allied. Rather than establishing its own marketing network to supply the pulp and paper industry with acid directly (and in competition with Allied), Cominco agreed to sell its entire output for the next twenty years to Allied. For its part, Allied agreed to split its profits with Cominco, to guarantee Cominco a minimum price for its acid, and to close and dismantle its own sulphuric acid plant.

Allied and Cominco were charged under both section 33 (monopoly)[124] and section 32 (two counts of conspiracy), but were acquitted on all charges. The Crown's Notice of Appeal was sub-

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[123] 24 C.P.R. (2d) 221, 69 D.L.R. (3d) 506 (B.C.S.C. 1975), *aff'd* 28 C.P.R. (2d) 261, 73 D.L.R. (3d) 767 (C.A. 1976).

[124] *See* Part III *infra.*

sequently quashed on the ground that no question of law was involved.[125]

It is important to note that here, as in the *Aetna Insurance* case, there was unequivocal evidence of an express agreement between the accused. This agreement clearly limited (indeed, eliminated) competition between Allied and Cominco, and had the effect of removing one major source of acid production. Nevertheless, Ruttan J. held that no undue lessening of competition contrary to section 32 of the Act had resulted.

His Lordship reasoned as follows. First, he held that the agreement did not prevent all competition. Rather:

> It related only to the two parties, and to the total supply required by one of them, Allied. There was certainly no thought given to other competitors because there were none on the scene at the time. Certainly, too, the parties hoped that Allied would increase its supply in the market. *They agreed not to compete inter se, but there was no agreement as to destroying other competition.* Allied had a continuing intention to capture as much of the market as it could, and fought competition when it arose or when it was threatened by meeting price with price and service with service; by relying upon its cheap supply of surplus acid and so won or retained markets in the south. They also lost markets in the north to competition furnished by Inland Chemicals.[126]

Secondly, in the eleven-year period to which the charges related, the price of sulphuric acid in British Columbia dropped from the highest to the lowest on the continent. The trial judge said that: "[i]f this be the result of failure to compete, the result can hardly be claimed to be undue."[127]

Thirdly, since Cominco derived its acid as a purely gratuitous by-product, the principal element of its delivered cost was transportation to the customer. The delivered price was substantially lower than Allied's cost of producing acid. Therefore, it was unrealistic to suppose that Allied would have continued to produce acid from its own facilities in the face of direct competition from Cominco.

Fourthly, there was no evidence that either Cominco or Allied had tried to restrict the amount of acid available, and thereby raise prices. Indeed, because of the nature of its supply, Cominco could not reduce it, and in fact over the years the excess increased.

Finally, the demand for sulphuric acid in British Columbia was largely determined by a few major industrial consumers[128] (principally

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[125] 28 C.P.R. (2d) 261, 73 D.L.R. (3d) 767 (B.C.C.A. 1976). *Cf.* the judgment of the Supreme Court of Canada in the *Anthes* case, *supra* note 15 (not referred to in the reported judgment of the British Columbia Court of Appeal). Note that the trial in *Allied* took place after Hart J.'s judgment, but prior to the Supreme Court of Canada's decision in *Aetna*, *supra* note 103. On the other hand, *Allied* was decided after both the trial and Court of Appeal judgments, but prior to the Supreme Court of Canada's decision in *Irving*, *infra* note 135.

[126] *Supra* note 123, at 249, 69 D.L.R. (3d) at 534 (emphasis added).

[127] *Id.* at 250, 69 D.L.R. (3d) at 535.

[128] And therefore the market was an oligopsony as well as an oligopoly.

the pulp and paper mills) who had the ability to manufacture their own requirements of acid, if necessary. And Inland Chemicals' plant in northern British Columbia, as well as producers in both Alberta and the State of Washington, could provide acid to Allied's customers if it raised its price inordinately; therefore, potential competition continued to exist.[129]

With respect, however, this reasoning can be criticized. First, as Chief Justice Laskin noted in his dissenting opinion in the *Aetna Insurance* case,[130] the mere fact that two suppliers who agree not to compete with each other do not also agree jointly to drive other competitors out of the market, does not necessarily mean that their agreement is not contrary to the Act. Rather, the relevant question is whether the agreement contemplates a substantial (or "undue") lessening of competition in the market. Therefore, the mere existence of other competitors (actual or potential) in the market after the agreement should not provide a complete defence to a charge under section 32. Of course, the trial judge must determine, as a matter of fact, whether the object of the agreement would amount to an undue restraint on trade. But the essence of the offence under section 32 lies in the agreement, and not in its successful implementation. Therefore, as noted above, evidence as to the existence of continued competition in the market after the agreement is, strictly speaking, irrelevant and inadmissible.[131]

Secondly, a secularly declining price does not necessarily indicate that an agreement has not unduly restrained competition, nor was designed to do so. It is, of course, true that a declining price will benefit consumers. But the relevant question under section 32 of the Act is whether the agreement aims to restrain competition unduly, not whether the public has in fact been harmed by it. Indeed, as even the majority of the Supreme Court of Canada recognized in the *Aetna Insurance* case, any resulting public benefit from the agreement is not, in itself, a defence to a charge under section 32. No doubt, the fact that the price of acid was reduced *as a result of the agreement*[132] may (or may not) be relevant in determining what the object of the agreement was (and whether it was undue). This clearly was the approach taken by Ruttan J.:

> It was when they discussed possible results if no agreement was reached, that the estimate of price drops through cutthroat competition came up. I have discussed this before in considering the monopoly count 1, but let me say again

[129] *Cf.* the *General Electric* case, *supra* note 33, where import duties meant that there was no effective competition from importers. *See also Redpath Sugar*, *supra* note 36, where substantially all of the sugar sold in eastern Canada was imported, and it was possible that foreign competitors not party to the alleged combine could import sugar into Canada. *But see Armco*, *supra* note 22, where prospective competition from importers was not an issue.

[130] *See* text accompanying note 119, *supra*.

[131] *See* text accompanying note 117, *supra*.

[132] But was this causal link established?

> that the price of $17 to $18 was not the reduction to a reasonable price. It would be a price where the public might benefit temporarily but one that would not remain static. When one company, in this case obviously Allied, was driven to the wall, or there was a takeover, or an agreement to supply as well as carry on independently, or an agreement such as now exists where Allied would stay on and Cominco would merely supply, in any one of these cases prices would rise again to a level to justify a reasonable profit. What that price would be is not in evidence. The Crown certainly agreed that $17 or $18 would cause both parties to lose money. The price that existed at the time of the agreement, $29, may not have been too far out of line, since it was close to the western United States price. The price set by Allied before Cominco came into the picture was stated by the Crown here to have been the highest in America. Whether or not that was true, the *price came down steadily thereafter* and eventually was the lowest in the continent at the end of the period of the charge. *If this be the result* of failure to compete, the result can hardly be claimed to be undue.[133]

Yet there are fallacies in this reasoning. On the one hand, the Act does not prohibit "cutthroat competition"; it prohibits agreements designed to restrain competition. On the other hand, falling prices do not necessarily indicate the continued existence of free competition. Prices may fall if competitors decide to compete more vigorously, taking lower profit margins. But unit prices may also fall if increasing demand for a product generates economies of scale in its production. Prices normally fall with technological innovations which lower the costs to one or more competitors. Indeed, one would clearly have expected the price of acid to fall when Cominco developed a plentiful new supply purely as a by-product of its smelting operations, at virtually no cost other than transportation. Thus, the mere observation that the price of acid decreased over the ten-year period does not necessarily indicate that the effect (let alone the object) of the agreement was not to restrain competition unduly. Certainly, the agreement was designed to, and did in fact, restrain competition between Allied and Cominco, who together controlled the bulk of acid sales in British Columbia.

Indeed, it is quite possible that the price of acid to the consumer would have been still lower if the agreement had not existed, even if "cutthroat competition" from Cominco had driven Allied from the market. After all, each made a profit. Presumably Cominco's pricing, resulting from its extremely low production costs, generated a sufficient rate of return on its investment to entice it to stay in the market, whether it sold to Allied or directly to the public. If Allied had left the market, Cominco could have continued to produce acid at the same price as it sold it to Allied. And consumers would have been better off because the price of Cominco's acid would not have included any element for Allied's profit. Of course, Cominco might then have been a monopolist (and liable to prosecution under section 33 of the Act) if it abused its position as sole supplier to the detriment of the public by

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[133] *Supra* note 123, at 250, 69 D.L.R. (3d) at 535 (emphasis added).

raising prices. Nevertheless, the mere fact of a secularly declining price does not necessarily indicate free competition in a market—and here certainly not between Allied and Cominco.

A similar criticism can be made of the trial judge's analysis of the difference between meeting existing competition and forestalling the entry of future competitors. He said that:

> In the circumstances of this case consultation on price or even a request for advice on price, does not constitute a *conspiracy*. As mentioned above, Allied was not bound by Cominco's opinion or advice, nor was Allied required to seek advice as a condition of supply. Moreover, no suggestion was put forth that such conspiracy, if it were one, was directed against the interests of the public. Price manipulation, particularly as here where the trend was downward, is the result of competitive forces, and can only be to the benefit of the public. To suggest that there is in these circumstances a distinction between "meeting" competition and "preventing" . . . competition, is a concept that I cannot grasp. Competition here is not prevented by destroying it, but by anticipating it and beating it before it succeeds. One is not required to wait until competitors get well established and then seek to meet them and their demands.[134]

Note that this quotation is inconsistent with the learned trial judge's previous statement that Cominco and Allied did not agree to drive all other competitors out of the market. It was clear from the evidence that Allied got Cominco to agree not to supply its cheap acid to any other competitor. Therefore, only Allied and Cominco could benefit from the latter's cheap and prolific source of acid. Effectively, this "non-intercourse clause" would severely hamper other competitors already in the market, and would strongly dissuade new competitors from entering it. The fact that Inland Chemicals successfully established its acid plant in Prince George, and Hooker penetrated the Vancouver market, does not necessarily mean that the effect of the agreement, let alone its object, was not to restrain trade in the market. Rather, the existence of these competitors raises a question as to the geographical market for acid in this case: was it British Columbia, western British Columbia, or only some much smaller area around each plant? We know that the cost of transportation was a very substantial part of the price of acid to consumers. This implies that each source of acid was effectively insulated by high transport costs from competition from acid from other sources. Economists call this a "local monopoly". The existence of local monopolies is not in itself economically inefficient, provided free competition exists at the fringes between the local monopolists. The fact, however, that there was such "fringe competition" between Inland and Allied on the one hand, and between Allied and Hooker on the other, does not necessarily permit one to conclude anything about the state of competition in the market served by Allied and Cominco after their agreement. Certainly, it eliminated the fringe competition between these two parties, and Cominco ceded its entire local monopoly to

[134] *Id.* at 251, 69 D.L.R. (3d) at 536.

Allied. But whether this represents an undue restraint on competition necessarily entails some consideration of the size and geographical nature of the *market* in which the competition is intended to operate. And this question was not well canvassed in the present case.

The real policy issue in the *Allied* case appears to be the following. If one party develops a plentiful supply of a good as a by-product to his main endeavours, is he bound to market that good himself in competition with the other suppliers? Must he go to the trouble and expense of establishing his own distribution network? Or may he dispose of the by-product to the other suppliers, getting what price he can for it? Does the legality of such an arrangement differ if he enters into an exclusive arrangement with the other supplier (Allied), becomes a partner for half of that supplier's profits, requires that supplier to destroy his own productive capacity, and agrees not to supply any other competitor in the market, even if he still has further by-product available? This, surely, is the critical economic question, although the legal analysis under section 32 of the Act focuses on whether the disembodied "object" of the agreement is to restrain trade "unduly".

III. Mergers and Monopolies

A. *The Irving Newspaper Case*

One of the most important decisions under the Combines Investigation Act in recent years was the judgment rendered by the Supreme Court of Canada in *Regina v. K.C. Irving Ltd.*[135] which considered the meaning of an illegal "merger" or "monopoly" under section 33.

There were five English language daily newspapers in New Brunswick: two morning and three afternoon or evening ones. K.C. Irving Limited, over time, acquired control of all the corporations publishing these newspapers; in 1968, it acquired control of the last one, The Daily Gleaner. The accused left editorial control of the five newspapers in the hands of their respective publishers and editors, without any attempt at central direction.[136] It was common ground that

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[135] 29 C.P.R. (2d) 83, 72 D.L.R. (3d) 82 (S.C.C. 1976), *aff'g* 20 C.P.R. (2d) 193, 62 D.L.R. (3d) 157 (N.B.C.A. 1975), *rev'g* 13 C.P.R. (2d) 115, 45 D.L.R. (3d) 45 (S.C. 1974). *See also* Reschenthaler & Stanbury, *Benign Monopoly: Canadian Merger Policy and the K.C. Irving Case*, 2 Can. Bus. L.J. 135 (1977). The period covered by the charges both antedated and postdated the amendments to the Act made in August, 1960. Charges for the earlier period were therefore laid under R.S.C. 1952, c. 314, s. 32 (not to be confused with the present s. 32, which deals with conspiracies), and under its successor, R.S.C. 1970, c. C-23, s. 33. Both charges related to the monopoly provisions in the Act.

[136] A question did arise, however, as to whether newspapers were "articles", since these alone were covered by the Act at the time. Limerick J.A. in the New Brunswick Court of Appeal differentiated between the alleged monopolization of newspapers as a financial object (which was subject to the Act because newspapers were objects of trade

New Brunswick was the proper market area within which to assess the existence of prohibited merger or monopoly.[137] On the evidence, Irving's acquisition of ownership of all five newspapers did not result in any change in the market areas served by the papers before their acquisition, nor was the concentration of ownership alleged to have been used so as to limit the circulation of any of the newspapers.

The accused were convicted at first instance by Mr. Justice Robichaud,[138] who relied heavily on *dicta* from previous cases concerning conspiracies to lessen competition unduly in order to determine what constituted "detriment to the public" for the purposes of the definition of an illegal monopoly or merger under sections 2 and 33 of the Act. This conviction was unanimously reversed by the New Brunswick Court of Appeal,[139] which judgment was unanimously upheld by the Supreme Court of Canada.[140]

The central question before the Supreme Court of Canada concerned the proper interpretation of a "merger" or "monopoly" as defined in the Act. Section 33 of the present Act makes it an indictable offence either to be a party to, privy to, or knowingly to assist in the formation of a merger or monopoly. Section 2 defines "mergers" and "monopolies" and, in effect, only taints with illegality those which have operated—or are likely to operate—to the detriment or against the interests of the public (whether as consumers, producers, or otherwise).

The Crown argued that the Court of Appeal had erred in holding that subsidiaries may be in competition with each other, and with their parent. The Crown's argument, of course, was aimed at persuading the court that the unification of ownership of competitors *necessarily* means a reduction in competition. The Supreme Court of Canada was not prepared to accept this premise.[141]

The Crown submitted further that prevention or lessening of competition is a result of unified control of a class of business within a market area, and may be a detriment or against the interest of the public. This is certainly so where the prevention or lessening of competition is "undue" and raises thereby a rebuttable presumption of detriment. If such a submission were accepted, then all the jurisprudence concerning conspiracies in restraint of trade under section 32 of

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and commerce) and the contents of newspapers (which he thought the legislation would not cover). Under the Stage One Amendments, now enacted, the Act applies to services (besides insurance, which has long been covered by the Act) as well as to things. Thus, this problem would probably not now arise.

[137] *Supra* note 135, at 89, 72 D.L.R. (3d) at 87.

[138] 13 C.P.R. (2d) 115, 45 D.L.R. (3d) 45 (N.B.S.C. 1974).

[139] 20 C.P.R. (2d) 193, 62 D.L.R. (3d) 157 (N.B.C.A. 1975).

[140] *Supra* note 135.

[141] *Id.* at 90, 72 D.L.R. (3d) at 89. As a result of this ruling presumably no charge of agreeing to unduly restrain competition could have been brought under s. 32, as subsidiaries would not be able to conspire with each other either.

the Act would also be relevant to charges of monopoly under section 33. And the utter lack of competition—at least under the Cartwright Heresy—is the hallmark of an undue (and therefore illegal) agreement in restraint of trade under section 32. If the Crown's submission were accepted, all monopolies would by definition be illegal under section 33 and lack of competition would be equated with detriment to the public.[142]

Chief Justice Laskin held on the facts that there had been no proof of any detriment to the public. He then sought to determine whether or not the absence of competition *ipso facto* constituted detriment as a matter of law. Although this situation may colloquially be called a "monopoly", he held that it did not necessarily follow that there was any detriment in the operation (or likely operation) of the newspapers. Thus, there was no illegal merger or monopoly under the Act. In short, mere lack of competition is not a sufficient requirement for the existence of an illegal merger or monopoly. While an agreement to completely control a particular market might well be an illegal conspiracy under section 32 because of its likely undue effect on competition, it would not necessarily constitute an *illegal* monopoly under section 33. For a monopoly to be illegal, it must either have operated to the detriment of the public, or be likely to do so. Therefore, while detriment to the public is not relevant to a charge under section 32, it is a *sine qua non* for the existence of an illegal monopoly under section 33. Whether a particular monopoly operates or is likely to operate to the detriment of the public is clearly a question of fact; detriment is not deemed to occur merely from the absence of competition. On this basis, Chief Justice Laskin rejected[143] the Crown submission that absolute control of the market raised a rebuttable presumption of detriment to the public which had not been rebutted in this case.

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[142] It is important to distinguish the relationship between lack of competition and undue restraint of trade (conspiracy, s. 32) on the one hand, and lack of competition and detriment to the public (monopoly, s. 33) on the other. Under the Cartwright Heresy, *total* lack of competition is necessary to establish undue restraint of trade. The presence of some competition, therefore, explains the acquittals in *Allied*, *supra* note 123, *Redpath Sugar*, *supra* note 36, and *Anthes*, *supra* note 15. On the other hand, *Irving*, *supra* note 135, establishes that total lack of competition does not necessarily mean that an alleged monopoly has acted to the detriment of the public, which is a question of fact. Confusion occurs because judges in conspiracy cases have frequently noted that actual benefit or detriment is irrelevant to a charge under s. 32. This has frequently been expressed by saying that any restraint on competition is a *detriment* to the public, which is entitled to full and free competition. For a detailed explanation of this problem in light of the cases, *see* Ruttan J.'s judgment in *Allied*, *supra* note 123, at 229-33, 69 D.L.R. (3d) at 514-18.

[143] *Supra* note 135, at 91-96, 72 D.L.R. (3d) at 90-94, making particular reference to Rex v. Container Materials Ltd., *supra* note 51; Regina v. Northern Electric Co., 24 C.P.R. 1, [1955] 3 D.L.R. 449 (Ont. H.C.); Regina v. Can. Breweries Ltd., [1960] O.R. 601, 34 C.P.R. 179 (H.C.); Eddy Match Co. v. The Queen, 109 C.C.C. 1, 20 C.P.R. 107 (Que. C.A. 1953).

B. *The Sulphuric Acid Case*

Monopoly charges were also brought in the *Allied Chemical* case,[144] where the accused were charged with having substantially controlled the manufacture, distribution and supply of sulphuric acid between 1961 and 1974 to the detriment of the public on the lower mainland and Vancouver Island areas of British Clumbia.

Although Allied was the sole producer of acid before the impugned agreement with Cominco in 1961, and had a "monopoly" in the colloquial sense of that word, the Crown did not allege that it had been used to the detriment of the public, and its legality was therefore not in question.[145] In any event, Ruttan J. noted[146] that there were other suppliers in both Canada and the United States who could easily have come into the market if Allied had abused its position. Thus Allied lacked that control of the market which—on the authority of the *Eddy Match* case[147]—was held to be an essential ingredient to the crime of monopoly under the Act.

This prospective competition, together with severe competition with other suppliers[148] at the fringes of Allied's territory, did not change after the agreement with Cominco. His Lordship therefore held that Allied and Cominco together did not control the market for acid, and noted that it was important to define the "market" to include at least all of British Columbia and not an artificially smaller area (such as the lower mainland or Vancouver Island)[149] which in fact was supplied almost exclusively by Allied. Even if Allied and Cominco could have been said to "control" the market for acid after the agreement, Ruttan J. went on

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[144] *Supra* note 123.

[145] *Id.* at 237, 69 D.L.R. (3d) at 522.

[146] *Id.* at 237, 69 D.L.R. (3d) at 523.

[147] *Supra* note 143, at 18, 20 C.P.R. at 122, where Casey J. said:

> When a group of companies engaged in the same business are alone in the field; when they work together as a unit; when they are free to supply the market or to withhold their product; when there is no restriction on the prices which they charge, save their own self-interest; when their freedom to exclude individuals as customers is restricted only by their interpretation of existing penal laws, then, by all normal standards, those companies are in control of the business in which they are engaged.

This passage was quoted by Ruttan J. in *Allied, supra* note 123, at 237, 69 D.L.R. (3d) at 522. *Quaere* whether Casey J. was defining the necessary requirements for control of a market to exist, or merely stating that the features he noted did exist in *Eddy Match, supra* note 143, were sufficient to indicate control.

[148] Particularly competition from Inland Chemicals at Prince George, outside the lower mainland area.

[149] *Supra* note 123, at 239-40, 69 D.L.R. (3d) at 524, quoting from Regina v. J.J. Beamish Constr. Co., *supra* note 51, where Laskin J.A. (as he then was) said:

> Clearly, the allegations of an indictment preferred...should indicate the *market* in which the conspiracy...is said to operate. It is obvious that a Court may be required to exercise a judgment on the evidence on whether the market specified in the indictment...has not been artificially limited to suit the available evidence. (Emphasis added)
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> But what criteria does one use in determining the appropriate market?

to hold[150] that they had neither used it to increase barriers to other competitors nor to cause detriment to consumers. Indeed, the price of acid fell in British Columbia while it rose in the United States. The Crown's real complaint, the trial judge said,[151] was not detriment in fact,[152] but potential future detriment: the public would not benefit from any substantial price reductions reflecting the extremely low cost of Cominco's acid and; no other competitors would be able to establish plants in the area. Based on the facts at trial, Ruttan J. concluded that the Crown simply had not proved these allegations. Consequently, he held that there was no illegal monopoly within the definition of the Act; and acquitted he accused.

It might be noted, in summary, that the *Allied* case was decided primarily on its facts (that is, whether there had been any detriment in fact resulting from the operation of the agreement over the fourteen years in question), unlike the *Irving* case which dealt with a question of law (*i.e.*,whether total abolition of competition *per se* constituted a detriment to the public under the monopoly sections in the Act).

C. *The Electric Large Lamp Case*

The accused in *Regina v. Canadian General Electric Ltd.*[153] were charged with being parties to an unlawful monopoly. Pennell J. noted that the case did not involve only a single accused being charged with having monopolized a particular market. Rather, it was the first case in Canada dealing with an alleged "shared monopoly" involving more than one company where the accused were not "connected in some way by common ownership or a contractual relationship".[154] His Lordship held that the definition of a monopoly in section 2 of the Act (as it now reads), indeed applies to "one or more persons", and a shared monopoly is therefore an offence under section 33.

A "monopoly" is defined under section 2 of the present Act as follows:

> "monopoly" means a *situation* where one or more persons either substantially or completely *control* throughout Canada or any area thereof the class or species of business in which they are engaged and have operated such business or are likely to operate it *to the detriment or against the interest* of the public, whether consumers, producers or others. . . .[155]

The first question was whether the accused in fact substantially or completely *controlled* the electric large lamp market, particularly where

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[150] *Supra* note 123, at 242, 69 D.L.R. (3d) at 527.

[151] *Id.* at 243, 69 D.L.R. (3d) at 528.

[152] Because the price had fallen substantially and, on the evidence, could not have profitably been lowered further.

[153] *Supra* note 33.

[154] *Id.* at 369, 29 C.P.R. (2d) at 11-12.

[155] Emphasis added.

there was no express agreement among them to operate their respective businesses in a co-ordinated manner to the detriment of the public. "Control" is not defined in the Act; and thus must be given its normal meaning.[156] Further, the mere existence of "control" of a market does not itself constitute an offence under section 33 as this section only refers to persons who are parties to, privy to, or knowingly assist in the formation of an illegal monopoly (as defined in section 2). Independent members of a market who in fact control it (so that there is a shared monopoly) only commit an offence if they knowingly act together in asserting this control. But what constitutes "knowledge" in these circumstances? Does section 33 require an agreement among the accused to *monopolize* the particular market? Or may "knowledge" of their control be inferred from a finding that there was an agreement among them to lessen competition unduly contrary to section 32? Pennell J. answered the latter question in the affirmative, and did not explore the more extended problem of what constitutes "knowledge" of monopoly control of a particular market in other circumstances.

The trial judge then considered the kinds of "detriment" to the public which make a monopoly illegal. First, he held that there is no requirement under section 33 that the "detriment" in a monopoly charge should be "undue". He pointed out that this juxtaposition had arisen as a result of the conspiracy cases where the concept of an "undue" lessening of competition has often been equated with "lessening competition . . . to the detriment of the public". However, while any interference with competition may well constitute a "detriment" to the public (and therefore constitute an offence under section 32 dealing with conspiracies in restraint of trade) there may be many detriments to the public which are not "undue". Indeed, section 33 does not prohibit only those monopolies which operate to the undue detriment of the public; it prohibits all monopolies which operate to the public's detriment. Neither section 33 nor section 2 (which together deal with monopolies) even contain the word "undue". Therefore, a different test applies to charges of monopoly than to those of conspiracy.

Concomitantly, however, Pennell J. held that on a monopoly charge (unlike a conspiracy charge) the accused were entitled to bring forth evidence of the proven benefits derived from the operation of their businesses. The court must weigh these benefits against the proven evils (including the loss of free competition) to determine if a *net* detriment has resulted from the monopolistic control of the market. He stated that: "[w]hether the act of those who control the market may be considered

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[156] And this he took from Casey J.'s judgment in *Eddy Match, supra* note 143 (quoted in note 147 *supra*). Pennell J. also noted that s. 2 refers to a "situation", which he held was intended by Parliament to refer to a broader concept of monopolistic arrangements than only those created by agreement. *Cf.* Lerner J.'s reference to the use of "arrangement" in s. 32 (dealing with conspiracies), which was criticized by the Ontario Court of Appeal, *supra* note 29.

detrimental is a question of fact for the Court to determine. Their acts must be considered in relation to the market and industry in which they are part."[157] The Crown, therefore, had to prove that the exercise of control by the accused over the electric large lamp market in Canada had either resulted in actual detriment to the public, or was likely to do so in the future. His Lordship indicated that it would need very persuasive evidence to establish that a monopoly which had not in fact been proven to have acted to the detriment of the public over an eight-year period, would be likely to do so in the future. Accordingly, he turned to the Crown's evidence that the shared monopoly had in fact operated to the detriment of the public during the period to which the charges related.[158]

This immediately raised the problem of whether the evidence which the court had admitted in finding the accused guilty of an unlawful conspiracy in restraint of trade under section 32 could also be admitted under section 33 to prove that the shared monopoly had acted to the detriment of the public over the same period of time. Pennell J. "hesitatingly" answered this question in the negative. He reasoned:

> The detriment which constitutes the offence must be shown to flow from the operation of the shared monopoly and not from collateral acts which might be the subject of another charge. The offence requires as a condition precedent that control be obtained. To gain control, the Crown must establish that the three accused were acting as a unit to create the situation associated with a monopoly. Proof of action as a unit (control) is founded in part upon evidence of identical bids. Obviously the accused, if acting as a unit, would tender identical bids. *To admit such evidence to prove both control and detriment would result in the creation of a per se offence of monopoly contrary to the Act.* I would read the Act so as to exclude such evidence of unlawful collateral agreements tending to prove formation of a monopoly as irrelevant to prove that the monopoly has operated to the detriment of the public.[159]

This indicates that the mere formation of a monopoly due to the agreement to control the market for the purpose of restriction of competition, may well be proof of an illegal conspiracy under section 32. This only proves, however, that the accused agreed to control the market, and not that any actual detriment (other than the limitation of competition) to the public flowed from such an agreement. In order to prove the existence of an illegal monopoly under section 33, one must look to other evidence for the actual operation of the agreement.

But with respect, was the court correct on this point? Surely evidence proving that competition has been lessened may (or may not)

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[157] *Supra* note 33, at 410, 29 C.P.R. (2d) at 52.

[158] His Lordship also held that the court must determine whether the alleged monopoly has operated to the detriment of the public by looking at what has actually occurred in the market. No presumption of detriment arises from the mere fact that no competition exists. This is precisely the position which was subsequently adopted by the Supreme Court of Canada in *Irving, supra* note 135.

[159] *Supra* note 33, at 412, 29 C.P.R. (2d) at 54 (emphasis added).

also indicate a detriment to the public (other than the mere loss of competition, which may or may not be a sufficient detriment to constitute an illegal monopoly under section 33 of the Act). And, surely the frustration of public tenders, the existence of identical (and exhorbitant) prices, the restriction of the rights of agents, and the existence of predatory practices may well constitute detriments to the public, altogether apart from their tendency to prove the existence of an unlawful conspiracy in restraint of trade.

This proposition could be tested quite simply. Suppose, for example, there were not several manufacturers in the market who were accused of being shared monopolists, but only two. And suppose they agreed to restrict competition totally. Not only would this almost certainly amount to an offence under section 32 (even under the Cartwright Heresy, where virtual monopoly clearly constitutes an undue restraint on competition), but could also amount to an illegal monopoly under section 33. Of course, for a conviction under section 33, there must be proof that the public has on balance suffered a detriment as a consequence of the agreement. Surely there is no logical reason why the same agreement cannot constitute two separate offences, although perhaps only one conviction should be entered in such a case.[160]

The admissibility of the same evidence to prove charges of both conspiracy and monopoly is, therefore, clearly correct in principle; and Pennell J.'s statement on this point of law should be treated with caution. Alternatively, one can readily interpret his statement to mean that the evidence did not prove beyond a reasonable doubt that there had actually been any detriment to the public caused by the conspiracy, and accordingly there was insufficient proof of an illegal monopoly. For example, Pennell J. rejected evidence that the three accused had, in fact, operated a pervasive control of the market to the detriment of the public. First, there was no substantial evidence of any adverse effect flowing from the operation of the alleged monopoly on the remaining members in the market. All three of the accused supplied a fourth, smaller competitor with both finished products and components. Other manufacturers or suppliers were not forced to deal in the market in a particular way because of the actions of the alleged monopolists.

Secondly, while Pennell J. accepted evidence that the three accused (who controlled 95% of the industry) had agreed upon the prices which they wished to charge the public, he nevertheless held that this did not necessarily amount to an illegal monopoly because:

> to slide from a recognition of an agreement on uniform prices to an assertion of unreasonable prices is to read the evidence through the distorting lens of

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[160] *See* Ruttan J.'s criticism of the laying of alternate charges of conspiracy and monopoly in *Allied, supra* note 123, at 227, 69 D.L.R. (3d) at 511-12. *See also* Regina v. British Columbia Sugar Refining Ltd., 129 C.C.C. 7, 38 C.P.R. 177 (Man. Q.B. 1960).

> unwarranted inferences. A determination as to whether prices are unreasonable can be satisfactorily made only after a proper survey of the economic conditions in the industry. Subjected to that test, the evidence brought before the Court does not entitle me to arrive at the conclusion that the prices as fixed were unreasonable. Attempting the same inquiry in relation to the alleged price discrimination among customers, I come face to face at once with insufficiency of evidence.[161]

His Lordship made similar comments concerning the Crown evidence with respect to the alleged attempt by the accused to control imports, to discriminate against certain customers, and to eliminate product choice. On this interpretation, therefore, evidence of an illegal conspiracy in restraint of trade under section 32 is clearly *admissible* to prove that a shared monopoly has caused (or is likely to cause) a detriment to the public, thereby becoming illegal under section 33. But simply proving the existence of an illegal conspiracy does not necessarily prove the simultaneous existence of a detriment to the public; and merely interfering with competition is not *per se* a detriment to the public within the meaning of section 33 of the Act. Although there is no inherently legal or logical reason why evidence which is used to prove an illegal conspiracy contrary to section 32 of the Act cannot also be lead to prove actual (or likely future) detriment to the public, the existence of such detriment must still be proved beyond reasonable doubt—something which is frequently exceedingly difficult to do.

D. *Summary*

One might summarize the *Irving*, *Allied Chemical* and *General Electric* cases as follows. The abolition of competition in a particular market—whether accomplished by way of merger, by agreement, or otherwise—does not necessarily constitute an illegal monopoly. The hallmark of an illegal monopoly lies in the use of this market control to the detriment of the public. Whether such detriment exists is a question of fact, and it is not necessary, under the Act, for such detriment to the public to have already occurred as a result of the control of the market by the merger or monopoly. A conviction can be entered where future detriment to the public is likely to result from the merger or monopoly. However, given the courts' general reluctance to find (as a matter of fact) any detriments actually flowing from particular restraints, it is unlikely that they will be easily persuaded about hypothetical detriments which may arise only in the future.

The requirement of actual or prospective detriment to the public is one of the serious defects in the present law proscribing illegal monopolies or mergers. Economic and other social justifications can be

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[161] *Supra* note 33, at 414, 29 C.P.R. (2d) at 56.

made for almost any monopoly or merger. It is extremely difficult for a court to know on balance, whether a particular monopoly or merger, has operated (or is likely to operate) to the detriment of the public. This is particularly so if a net social view of the arrangement must be considered, and not just the detriment inflicted upon a particular group or sector of the public. In any event, such a balancing act is not easily accomplished within the framework of the criminal law, and would undoubtedly be better accomplished through either civil proceedings or by means of (prior) supervision by an administrative agency. Stage Two of the amendments to the Act is intended to strengthen its provisions against undesirable mergers and monopolies.[162]

IV. Vertical Restraints on Trade

The phrase "vertical restraint" refers to a limitation on the ability of one level of the economic hierarchy (for example, a retailer) to deal with goods or services received from or supplied to another level (for example, a manufacturer). Although the *Annual Report* of the Director of Investigation and Research indicates that there were numerous[163] complaints (and convictions) involving vertical restraints on trade, only three cases were reported during the period covered by this Survey.

A. *The Browning Arms Case*

In *Regina v. Browning Arms Co. of Canada,*[164] the accused pleaded guilty to four counts of attempting "to require and induce dealers in Southern Ontario to resell its product at prices specified by it or established by agreement contrary to section 38(2)(a) of the Combines Investigation Act".[165] The trial judge (whose decision apparently has not

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[162] For a discussion of these proposals *see* Part VII *infra.*

[163] *Supra* note 73. In particular *see* appendix II at 68, where five cases are listed.

[164] 18 C.C.C. (2d) 298, 15 C.P.R. (2d) 97 (Ont. C.A. 1974).

[165] *Id.* at 298, 15 C.P.R. (2d) at 98 (Brookes J.A.). S. 38(2) provided (in part) as follows:

> 38. (2) No dealer shall directly or indirectly by agreement, threat, promise or any other means whatever, require or induce or attempt to require or induce any other person to resell an article or commodity
>
> (a) at a price specified by the dealer or established by agreement.
>
> (4) Every person who violates subsection (2) or (3) is guilty of an indictable offence and is liable on conviction to a fine in the discretion of the court or to his imprisonment for a term not exceeding two years or to both.

This provision has been replaced by S.C. 1974-75-76 c. 76, s. 18. The new s. 38 provides (in part) as follows:

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

been reported) fined the accused $15,000 on each of the four counts, for a total of $60,000. The Ontario Court of Appeal, by a majority, reduced this fine to $2,500 per count, or $10,000 in all.

Brooke J.A., however, dissented; he would have increased the fine to $25,000 for each count. While he noted that there was no evidence of the amount of money involved when the accused prevented its retailers from price cutting,[166] he nevertheless pointed out that proper restitution really could not be accomplished here because the court only knew the total profits earned by the accused in the years to which the charges related. Accordingly, he said, "the Court must do its best to see to it that the fine is of sufficient quantum to take away any profit earned by reason of the criminal marketing scheme and, in addition, and of importance, to be a strong deterrent".[167]

Even the majority in the Court of Appeal recognized that the profit of the *accused* alone was not a sufficient guide for determining the size of the fine. After all, the accused was a Canadian subsidiary[168] of a very large public corporation in the United States; this was relevant in deciding the size of the (reduced) fine. The majority also considered the following factors in calculating the fine to be imposed: the scale of the accused's operations; the range of its products; the nature of the market; the number of its competitors; the size of its distribution network; and sentences which have been imposed in the past for similar offences.

B. *The Petrofina Case*

In *Regina v. Petrofina Canada Ltd.*[169] the accused was charged with three counts of attempting to induce certain of its lessees to resell gasoline and petroleum products in Sudbury at prices specified by the accused, contrary to section 38. The accused pleaded guilty to one of the three counts and the other two were withdrawn.

The lessee in question had experienced severe competition from a neighbouring independent dealer who had lowered his price for number two grade gasoline from 53.9 cents to 47.9 cents per gallon. Petrofina's representative advised the lessee that the latter could reduce his price to

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

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

[166] How would this be measured? By the extra cost incurred by customers in paying higher prices? Or by the excess profit earned by the accused? Would this depend upon whether the accused received a percentage of the retailers' profit?

[167] *Supra* note 164, at 300-301, 15 C.P.R. (2d) at 100.

[168] Compare the reasoning adopted by Dickson J. in *Black & Decker* discussed *infra* Part V, concerning the position of predecessor corporations in an amalgamation.

[169] 21 C.C.C. (2d) 315, 20 C.P.R. (2d) 83 (Ont. Dist. Ct. 1974).

49.9 cents per gallon, and would receive a subsidy from the accused for so doing. But the representative refused to permit the lessee to drop his price to 48.9 cents, and warned that the subsidy would be withdrawn if the latter sold below 49.9 cents. When the lessee in fact sold at 48.9 cents, Petrofina terminated his lease (although there may have been other reasons for the termination as well).[170]

Judge Loukidelis of the District Court accepted the guilty plea, and imposed the $15,000 fine largely as a deterrent both for the accused and other companies in the business. The trial judge also granted an order prohibiting similar conduct. Although His Honour agreed that the prohibition order should be limited to the same product, he did not limit its application to the particular lessee with respect to whom this charge arose. Because of the tight control which a supplier of gasoline can exert over a lessee of one of its stations, the judge granted the prohibition order even though the Crown had not shown that Petrofina would probably continue to set resale prices.[171]

C. *The Kito Carpet Cleaner Case*

The accused in *Regina v. Kito Canada Ltd.*[172] was the exclusive distributor of a particular brand of carpet sweeper, and was charged with four counts of resale price maintenance contrary to section 38. The charges arose out of Kito's agreements with its local distributors which prevented them from selling carpet sweepers to discount outlets or to chain stores without Kito's consent, and which bound the local distributors to follow Kito's prescribed prices.

Nitikman J., of the Manitoba Queen's Bench, rejected[173] the accused's defence that these parts of the distribution agreement had never been carried out, holding that the mere execution of the agreement indicated the *mens rea* necessary for the offence under section 32(1).[174] In light of the relatively small scale of the accused's operations, His Lordship imposed a fine of $2,500. Without giving reasons, he refused the order of prohibition which had been sought by the Crown.

This fine was increased to $6,000 by the Manitoba Court of Appeal,[175] where Chief Justice Freedman referred to the *Browning Arms* case to emphasize that the fine must not be a mere "licence fee", but should constitute a deterrent both to the accused and to others.

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[170] *E.g.*, it was alleged that the lessee was behind in his account, the cleanliness of his station had been questioned, and he had apparently not always been overly co-operative with Petrofina.

[171] *Supra* note 169, at 319, 20 C.P.R. (2d) at 87.

[172] [1976] 4 W.W.R. 189, 25 C.P.R. (2d) 145 (Man. C.A.).

[173] 22 C.P.R. (2d) 275 (Man. Q.B. 1975).

[174] *See supra* note 13. *Quaere* why s. 32 was relevant to a charge of resale price maintenance under s. 38.

[175] *Supra* note 172.

Freedman C.J.M. appeared to arrive at the figure of $6,000 by comparing Kito's assets[176] with those held by Browning[177] (which had been subject to a $10,000 fine). One might note the disproportion of the ratio of fines to assets in the two cases. The Chief Justice also declined to grant an order of prohibition because the accused had in fact discontinued business by the time the appeal had been heard.

It is worth noting that O'Sullivan J.A., in his concurring judgment, strongly criticized the historically low level of fines for convictions for resale price maintenance in the following terms:

> My reason for concurring in allowing the appeal is that I think that $2,500 is so low that it cannot be described even as a very moderate fine. I would be surprised if the legal bill which the company will be called on to pay arising out of this case does not far exceed $2,500.[178]

Finally, O'Sullivan J.A. also held that the prohibition order should not be granted against the corporation because there was no evidence that the company would continue to breach the law. In any event, he would not have granted a prohibition order against the officers, directors, servants, or agents of the corporation, because they may not have been aware of the illegal practices,[179] and because their involvement in the affairs of the company may have been minimal. Furthermore, it would be unfair for them to be bound by such a prohibition order without having knowledge of the application for prohibition.

V. Miscellaneous Matters

A. *Privileged Documents*

In *Re Director of Investigation & Research & Shell Canada Ltd.*,[180] the Federal Court of Appeal rejected an application[181] to review the decision by Hughes J. of the Ontario High Court,[182] dismissing an application by the Director of Investigation and Research for an order under section 10(5)[183] of the Combines Investigation Act directing Shell Canada Ltd. to deliver certain documents to the applicant.

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[176] $856,000.

[177] $3,500,000.

[178] *Supra* note 172, at 196, 25 C.P.R. (2d) at 151.

[179] *Id.* at 197, 25 C.P.R. (2d) at 152.

[180] 18 C.P.R. (2d) 155, 55 D.L.R. (3d) 713 (F.C. App. D. 1975), *aff'g* 17 C.P.R. (2d) 287 (Ont. H.C. 1974) (Hughes J.).

[181] Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10, s. 28. *Quaere* whether the decision by Hughes J. was of a judicial or quasi-judicial nature, or merely administrative. *See* Howarth v. National Parole Bd., [1976] 1 S.C.R. 453, 50 D.L.R. (3d) 349 (1974).

[182] 17 C.P.R. (2d) 287 (Ont. H.C. 1974), where Hughes J. acted as a *persona designata* under s. 10 of the Combines Investigation Act.

[183] S. 10 provides as follows:

> 10. (1) Subject to subsection (3), in any inquiry under this Act the Director or any representative authorized by him may enter any premises on which the Director believes there may be evidence relevant to the matters being

Section 10 of the Combines Investigation Act authorizes the Director to enter any premises on which he believes there may be evidence relevant to offences covered by the Act, provided that the search has been previously authorized by a member of the Restrictive Trade Practices Commission.[184] Shell Canada disputed the Director's right to examine, copy, or take away from its premises certain documents which otherwise would be subject to solicitor-client privilege if an attempt were made to tender them as evidence in court.

Hughes J. rejected the Director's construction of section 10 of the Act, and held that the statutory provision must be construed in light of the normal common law presumption of solicitor-client privilege. Dissatisfied with this ruling, the Director sought judicial review of the decision before the Federal Court of Appeal, which in turn effectively affirmed the trial judge's interpretation of section 10. This decision, taken together with that in the earlier *Canada Safeway* case,[185] should now put the meaning of this part of the Act beyond doubt.

B. *The Black & Decker Case*

Since the last Survey in 1974,[186] the Supreme Court of Canada has reversed the decision of the Ontario Court of Appeal in *Re Black & Decker Manufacturing Ltd. & The Queen*[187] and reinstated the approach

> inquired into and may examine any thing on the premises and may copy or take away for further examination or copying any book, paper, record or other document that in the opinion of the Director or his authorized representative, as the case may be, may afford such evidence.
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> (2) Every person who is in possession or control of any premises or things mentioned in subsection (1) shall permit the Director or his authorized representative to enter the premises, to examine any thing on the premises and to copy or take away any document on the premises.
>
> (3) Before exercising the power conferred by subsection (1), the Director or his representative shall produce a certificate from a member of the Commission, which may be granted on the *ex parte* application of the Director, authorizing the exercise of such power.
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> (4) Where any document is taken away under this section for examination or copying, the original or a copy thereof shall be delivered to the custody from which the original came within forty days after it is taken away or within such later time as may be directed by the Commission for cause or agreed to by the person from whom it was obtained.
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> (5) When the Director or his authorized representative acting under this section is refused admission or access to premises or any thing thereon or when the Director has reasonable grounds for believing that such admission or access will be refused, a judge of a superior or county court on the *ex parte* application of the Director may by order direct a police officer or constable to take such steps as to the judge seem necessary to give the Director or his authorized representative such admission or access.

[184] S. 10(3).

[185] *Re* Director of Investigation & Research & Canada Safeway Ltd., 6 C.P.R. (2d) 41, 26 D.L.R. (3d) 745 (B.C.S.C. 1972).

[186] *See* Arnold, *supra* note 2.

[187] *Sub nom.* The Queen v. Black & Decker Mfg. Ltd., [1975] 1 S.C.R. 411, 13 C.P.R. (2d) 97 (1974), *rev'g* 10 C.P.R. (2d) 154, 34 D.L.R. (3d) 308 (Ont. C.A. 1973), *rev'g* 9 C.P.R. (2d) 129 (Prov. Ct. 1972).

adopted by the Provincial Court. Thus, the amalgamation of an accused with another corporation—thereby arguably forming a new legal "person"—is no defence to a charge under the Combines Investigation Act. As Dickson J. noted in his judgment for the unanimous Supreme Court of Canada, section 137 of the Canada Corporations Act,[188] governing the amalgamation of corporations, does not extinguish the predecessor corporations nor create "new" successor corporations. Therefore, the amalgamating corporations remain liable after amalgamation to prosecution for criminal offences alleged to have been committed before the amalgamation. This result is clearly correct, and meets the criticisms expounded by Professor Arnold in the last Survey.

An echo of this reasoning may be detected in the British Columbia Court of Appeal decision in *Regina v. Ocean Construction Supplies Ltd.*,[189] where a change in ownership of the shares of the accused corporations was held to be irrelevant to the quantum of the fine levied for offences previously committed under the Act.

VI. The Stage One Amendments

As Professor Arnold pointed out in the last Survey, the spectre of substantial amendments to the Combines Investigation Act has existed since Bill C-256 was first read in the House of Commons on June 29, 1971. That Bill ran into heavy opposition from the Canadian business community, and was eventually withdrawn by Mr. Basford, then Minister of Consumer and Corporate Affairs. As a result, the Government decided to reform the Act in two separate stages.

After a number of false starts,[190] the Stage One amendments finally became law on January 1, 1976, although the extension of the Act to service industries was delayed for a further six months.[191]

Stage One implemented the following important amendments to the Act:[192]

1. The extension of the Act to cover all services, and not just the provisions of insurance (a particular service) and goods, which have long been covered by the Act. Exactly how effective this extension will be remains to be seen. After all, Chief Justice McRuer's judgment in the *Canadian Breweries* case[193] has been taken to be authority for the proposition

[188] R.S.C. 1970, c. C-32.

[189] *Supra* note 69.

[190] Two federal elections intervened between the introduction of Bill C-256, 28th Parl., 3rd sess., 1970-71-72, and the version of Stage One which was finally enacted.

[191] *See supra* note 7.

[192] *See* Kaiser, *The New Competition Law: Stage One*, 1 CAN. BUS. L.J. 147 (1975-76), for an excellent and more complete discussion of the changes brought about by Stage One.

[193] *Supra* note 143.

that there cannot be an offence under the Act whenever the impugned actions have been authorized by provincial legislation. Many services (particularly professional ones) are governed (or at least authorized[194]) by provincial laws. Others could easily be brought under such an umbrella.[195] While, therefore, Parliament probably could have constitutionally specifically reversed the *ratio* of *Canadian Breweries,* it has not done so in Stage One. As a practical result, therefore, the extension of the Act to services is not likely to have much economic effect.

2. The extension of the role of the Restrictive Trade Practices Commission to permit it to review the competitive effect of five specified particular trade practices: refusals to sell, consignment sales, exclusive dealing, tied sales, and market restrictions.[196]
3. A strengthening of the prohibition on price maintenance.[197]
4. Implementation of a procedure by which the Restrictive Trade Practices Commission may require Canadians not to comply with foreign judgments or corporate directives which adversely affect competition in Canada.[198]
5. The creation of a new private civil action for breaches of the Act[199] as well as provision for interim injunctions in certain cases.[200]
6. Granting jurisdiction to the Federal Court of Canada to hear charges under the Act brought against corporations, whether or not the latter agree to that court's jurisdiction.[201]
7. A clarification of the concept of an "undue restraint" on competition.[202]

Although it is too early to tell whether these amendments will increase the effectiveness of the law relating to competition in Canada, the purpose of implementing them is clearly set out in the Department of

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[194] *E.g.*, under the Ontario Law Society Act, R.S.O. 1970, c. 238, where the provincial legislature has made the Bar a statutory monopoly but retained very little control or supervision over its actions, effectively making it a law unto itself. Is it correct, therefore, to conclude that the Bar necessarily always acts in the public interest, so that the policy behind the Combines Investigation Act is inapplicable to the Bar's rules and activities? Yet this is the conclusion one is driven to if one accepts the *ratio decidendi* in the *Breweries* case, *supra* note 143.

[195] *See* McKeown, *How the Conspiracy Provisions of the New Competition Law Affect the Professions and Services,* 2 CAN. BUS. L.J. 4 (1977).

[196] *See* Part IV.1 of the Act, *as amended by* S.C. 1974-75-76 c. 76, s. 12 (Matters Reviewable by Commission).

[197] S. 38.

[198] Ss. 31.5, 31.6, 31.7, 32.1.

[199] S. 31.1.

[200] S. 29.1.

[201] S. 46.

[202] S. 32.1(1).

Consumer and Corporate Affairs' explanatory "blue book" entitled *Proposals for a New Competition Policy for Canada; First Stage.*[203] This work remains a key source for understanding both the Stage One and proposed Stage Two amendments to the Act.

Whether all of these amendments are constitutional[204] remains to be seen, particularly in light of the recent Supreme Court of Canada decisions in *MacDonald v. Vapour Canada Ltd.*,[205] *Quebec North Shore Paper Co. v. Canadian Pacific Ltd.*,[206] and *McNamara Construction (Western) Ltd. v. The Queen.*[207]

VII. The Proposed Stage Two Amendments

Just as this Survey was being completed, the Government reintroduced Stage Two of the amendments to the Act.[208] This second version differs substantially from the first draft[209] tabled in Parliament earlier in 1977, and these changes undoubtedly reflect both the evolution of the present Government's thoughts on competition policy and the acute economic difficulties now facing Canada.

Symbolically, the Stage Two amendments would change the name of the present legislation to the "Competition Act",[210] thereby indicating the proposed expansion of its scope.

Much of Stage Two concerns the Government's new approach to mergers.[211] The amendments would abolish the present criminal sanctions for unlawful mergers[212] (although these are retained for illegal monopolies[213]). Instead, the Bill would grant jurisdiction to a new body, the Competition Board,[214] to determine[215] whether mergers having

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[203] (2nd. ed., 1973).

[204] *See* Hogg & Grover, *supra* note 5.

[205] 22 C.P.R. (2d) 1, 66 D.L.R. (3d) 1 (S.C.C. 1976).

[206] 9 N.R. 471, 71 D.L.R. (3d) 111 (S.C.C. 1976).

[207] 13 N.R. 181, 75 D.L.R. (3d) 273 (S.C.C. 1977). *See* Hogg, Comment, 55 CAN. B. REV. 550 (1977).

[208] Bill C-13, 30th Parl., 3rd sess., 1977 (introduced by the Minister, Mr. Allmand, on November 18, 1977).

[209] Bill C-42, 30th Parl., 2nd sess., 1976-77 (introduced by the Minister, Mr. Abbott, on March 16, 1977). The purpose of the proposals in this original version of Stage Two is outlined in the Department's publication PROPOSALS FOR A NEW COMPETITION POLICY FOR CANADA: SECOND STAGE (1977).

[210] Cl. 2.

[211] Cls. 3, 29. The former would repeat the present definition of *merger* in s. 32 of the Act, while the latter sets out the proposed powers of both the Board and the Competition Policy Advocate in dealing with mergers.

[212] Cl. 34, which deletes the reference to merger in s. 33 of the Act.

[213] Cl. 34 changes the definition of *monopoly* in s. 33 of the Act. In addition, Cl. 29 adds ss. 31. 72 and 31.73 to the Act, defining *monopolization* and *joint monopolization* and empowering the new Board to make orders with respect to these phenomena under Part IV.1 of the Act.

[214] Cls. 3, 13.

[215] Cl. 29, adding s. 31.71.

economic significance[216] should be prohibited because of their effect in lessening competition when compared to any prospective gains in efficiency which might reduce costs or permit Canadian industry to become more effective. Following the example of "advance rulings" which are informally available from the Department of National Revenue in taxation matters, Stage Two would specifically permit the Competition Policy Advocate[217] (whose role is analogous to that of the present Director of Investigation and Research but with considerably broader powers) to approve mergers on a voluntary advance clearing basis.[218] If this procedure were not followed by the participants in a prospective merger, the Advocate could refer the legality of the accomplished merger to the Board, but not later than six months after the Advocate had been officially notified of the economic union (or, in special cases up to a year after notification).[219]

The new Board will, in addition, take over most of the functions of the present Restrictive Trade Practices Commission.[220] It will consist of a maximum of seven permanent and five associate members[221] (instead of the four members now constituting the R.T.P.C.). The Board's control of mergers would give it a primarily adjudicative function, instead of the merely investigative one now performed by the R.T.P.C. The Board would thus have substantial civil jurisdiction to deal with anti-competitive activities. Regrettably perhaps, all orders of the Board with regard to mergers, specialization agreements, monopolization or joint monopolization, would be subject to annulment by the Governor in Council,[222] that is, by the Cabinet, and not by Parliament or by way of an appeal on the merits to the courts.

The proposed amendments would permit a representative to launch a class action for damages suffered by persons in a situation similar to his, who are allegedly affected by violations of the Competition Act.[223] Significantly, however, the Government has dropped the previous proposal whereby the Competition Policy Advocate would himself have been able to launch an action where each individual's damage claim was small, and the large size of the class affected did not warrant the administrative cost of a class action.

Stage Two would extend the right of the Competition Policy Advocate to appear before federal regulatory agencies, giving him all the

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[216] Defined as more than 20% of the market. *See* cl. 29, setting out proposed s. 31.71(2).

[217] *See* Cls. 3, 7, as well as cl. 19, which would add s. 27.2.

[218] Cl. 29, adding s. 31.71(19).

[219] Cl. 29, adding s. 31.71(22).

[220] Hereinafter referred to as "R.T.P.C.".

[221] Cl. 13, amending s. 16.

[222] Cl. 31, adding s. 31.91. However, the Governor in Council may only exercise this right of review within sixty days of the decision by the Board.

[223] Cl. 37, adding ss. 39.11, 39.12 (proposed Part V.1). *See also* cl. 24, amending s. 31.1 (implemented by Stage One).

rights of an interested party in intervening before these bodies.[224] Unfortunately, Stage Two does not (and perhaps constitutionally could not) grant the Advocate the right to appear before provincial regulatory bodies. Nor does it put the same onus on these bodies as it does on their federal counterparts,[225] to carry out their respective mandates in a manner that would have the least restrictive effect on competition. In light of the increasing importance of provincial legislation on activity having economic consequences, this *lacuna* will undoubtedly hamper the effectiveness of the Act.

Interestingly, Stage Two attempts to reduce the anti-competitive effect of the employment of a basing-point pricing system. The proposed amendments make it an offence for a supplier to refuse to allow a customer to take delivery of the goods supplied at any point where that supplier makes delivery to other customers. Moreover, delivery must be on the same terms that the customer could expect if he were located at that other point.[226] This should have desirable effects in increasing price competition.

Whether in fact the proposed Stage Two amendments will be enacted by Parliament and, if so, in what form, remains to be seen. It is still too early to tell whether the final amended and consolidated Competition Act will provide an effective judicial and administrative weapon to encourage greater competitive activity in Canada. And it is also too early to tell whether the Bryce Royal Commission on the Concentration of Industry will recommend any major structural changes to the Canadian economy, and whether these in turn will also be implemented by Parliament. The future direction of the law of Trade Regulation in Canada should be clearer by the time the next Survey is prepared.

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[224] Cl. 19, adding s. 27.1.
[225] Cl. 6, adding s. 46.
[226] Cl. 36, adding s. 38.1.