TRADE REGULATION

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I. INTRODUCTION**

Canada's policy with regard to trade regulation is often said to be attributable to the influence of its American neighbour. Despite this fact, however, Canada has been very hesitant to act in this area. The main anti-combines legislation is said to have been adopted primarily to appease constituents, and as a consequence the government has always been reluctant to enforce these provisions. Indeed, one would think that our country is in need of a favourable trust and merger policy in order to enable large concerns to be organized and operated from within the country. This, however, may be a double-edged sword which would also enable foreign corporations to grow in size within our system and which might eventually endanger our price structure.

On the other hand, efforts made by other governments in recent years, particularly in France and in the United Kingdom, have resulted in a number of planned and rationalized mergers and associations of existing concerns which thus far have seemed to be successful. The purpose of this policy, of course, is to provide competition, both at home and on the international market, with American corporations. The merger frenzy that has been observed in the United States in recent years has not, however, produced successful ventures, and the rate of failures has been sufficiently high to warrant investigations by the American government and hesitations on the part of the business community.[1]

In Canada, the enforcement of anti-trust legislation, and, for that matter, the anti-trust policy itself, has never been, as in the United States, a characteristic of our governments' programmes, and it has on occasion been admitted that there were equally valid reasons for having anti-combines provisions on the one hand and for not enforcing them very strictly on the other. In analyzing this "political tight-rope walking"[2] and with respect

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[1] See Carroll, *What Future for the Conglomerate?*, 47 HARV. BUS. REV. 4 (1969 No. 3); Kitching, *Why do Mergers Miscarry?*, 45 HARV. BUS. REV. 84 (1967 No. 6) and Exhibit I, *id.* at 87-90.

[2] G. ROSENBLUTH & H. THORBURN, CANADIAN ANTI-COMBINES LEGISLATION *1952-1960* 96 (1963).

to the North American economic system which is so dependent on world-wide financial crises, as the General Agreement on Tariffs and Trade discussions and the gold crisis have shown, one is rather uncertain about what solutions would appear to be acceptable. The vast majority of our industry is already controlled by foreign capital and interests, and it would seem futile to approve of the growth of such enterprises from a purely Canadian point of view, even if we directly benefit from such activity. Although we need some form of control from a prices and cost of living point of view, still it is necessary to provide incentives for local business to develop and for local investors to be more active and interested in local industries, instead of investing in foreign businesses and importing foreign capital.

The pragmatism of the present government in Canada may provide hopes of a better policy for the economy, but at the same time it has left everyone in some doubt as to what is coming next. The internal political situation in Canada has also been a source of uncertainty in recent times, particularly in eastern Canada, and the general movement of enterprises and capital may not, for those reasons, reflect the true economic situation. From those points of view, the year 1968 may be described as rather quiet and average in the field of trade regulation, particularly because we are still awaiting the report of the Economic Council on mergers and fusions which may have a decisive influence on the immediate future of the regulation of trade and commerce in Canada. On the other hand, there has been legislation, administrative, and judicial activities which are worth reviewing and to which the remainder of this study will be devoted.

II. Recent Legislation

Two acts of importance were introduced in the current session[3] of the Parliament of Canada: the Anti-dumping Act,[4] which follows the changes in the General Agreement on Tariffs and Trade, and the Hazardous Products Act,[5] which indirectly affects trade and commerce as a result, for example, of the restriction that the act may impose on the marketing of certain goods. Other acts were amended and will be reviewed where necessary.[6]

1. *The Anti-dumping Act*

The new Anti-dumping Act[7] was adopted as a result of the "Kennedy Round" in the General Agreement on Tariffs and Trade, in order to adjust the

[3] 1968-69, 1st Session, 28th Parliament of Canada.

[4] Bill C-146, Anti-dumping Act, 1968-69, passed by the House of Commons, December 18, 1968, H.C. Deb. at 4133 (1968-69).

[5] Bill S-26, Hazardous Products Act, 1968-69, passed by the Senate February 13, 1969.

[6] See *infra* Part II.

[7] Bill C-146, Anti-dumping Act, 1968-69.

law with respect to those areas where injury is likely to take place. The act is limited to those areas which are more susceptible of being affected, while other areas are left unprotected, which indicates that the government is prepared to deal with dumping cases as they arise. Thus, imports at prices which are "dump prices" will be allowed in such cases that are not regulated.

The basic notion of dumping in the Canadian act means allowing goods to enter into Canada at a price which is less than their normal value (or where their normal value exceeds the export price of the goods), in circumstances where the dumping of such goods causes material injury to the production of similar goods in Canada or is materially retarding the establishment of the production of such goods in Canada. [8]

In the past, the Canadian rule on anti-dumping was criticized on the ground that it was not consistent with the General Agreement on Tariffs and Trade definition, which also defined dumping as importing goods from another country at less than their normal value, but regarded it as an evil only when material injury is caused or threatened to domestic production or when the establishment of domestic production was materially retarded. The old Canadian legislation defined dumping in much the same way, but restricted the application of duties on dumped imports to classes of goods made in Canada, while there was no formal or explicit requirement that domestic (Canadian) production be injured or that there be a threat or injury. In those cases, where made-in-Canada goods were concerned, there was an implied rule of injury because any anti-dumping action could only be taken where there was an already established Canadian industry and production. [9]

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[8] *Id.* §§ 3 and 8 read as follows:

3. There shall be levied, collected and paid upon all dumped goods entered into Canada in respect of which the Tribunal has made an order or finding, before the entry of the goods, that the dumping of goods of the same description

(*a*) has caused, is causing or is likely to cause material injury to the production in Canada of like goods, or

(*b*) has materially retarded or is materially retarding the establishment of the production in Canada of like goods,

an anti-dumping duty in an amount equal to the margin of dumping of the entered goods.

. . . .

8. For the purposes of this Act,

(*a*) goods are dumped if the normal value of the goods exceeds the export price of the goods; and

(*b*) the margin of dumping of any goods is the amount by which the normal value of the goods exceeds the export price of the goods.

[9] *See* § 39 of the Customs Act, Can. Stat. 1958 c. 26, § 1, *as repealed by* Bill C-146, § 36(2):

§ 39. (1) Where the Minister is satisfied that material injury has been or may be caused to any industry in Canada, or any portion thereof, by reason of the importation of any new or unused goods or class of such goods at a value for duty less than the cost of production thereof, plus a reasonable amount for gross profit, he may so report to the Governor in Council, and, notwithstanding anything in this Act, the Governor in Council may order that the value for duty of those goods or that class of goods shall be increased to an amount equal to the cost of production thereof

Canadian industries were therefore protected whether or not imports caused or threatened injury. On the other hand, since regulations required that in order to obtain protection by way of dumping duties, Canadian industries had to supply at least ten per cent of the market for such goods as were imported, new or weak industries were thus left unprotected.

The net effect of the old legislation is yet uncertain. It has been suggested that, in view of the protection that was offered to their goods, quite unnecessarily in some cases, Canadian industries may have been raising their prices above the normal profit level, a possibility which is strengthened by the complaints made by some of our trading partners. [10] It may also be possible that exporters, by reducing their prices as a result of the new Canadian legislation, will force Canadian industries to do the same by way of increased competition on the local markets.

The *dumping margin* is calculated as being the amount by which the normal value of the goods exceeds the export prices of the goods, [11] and the dumping duty equals the margin of dumping. Therefore, the two amounts that have to be determined are the normal value of goods, [12] and the export prices of goods [13] (or the prices at which the goods are entering the domestic market). Generally speaking, the normal value of goods is determined by the usual value as specified for duty under the Customs Act. The Anti-dumping Act provides for a number of criteria for such determination: (a) the fact that the transaction was made at arm's length, or that the exporter and the purchaser are not associated; (b) that the sale is made in the ordinary course of trade for home consumption under competitive conditions; (c) the value of such goods for the period of time during which they were sold, as prescribed by the regulations and (d) according to the place from which the goods were shipped to Canada under normal conditions of trade. [14]

The act also provides for an adjustment of the *normal value* of the goods according to the circumstances under which the parties have dealt with each other, that is, "as adjusted by allowances . . . to reflect the differences in the terms and conditions of sale, in taxation and other differences relating to

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> plus a reasonable amount for gross profit, having regard to the gross profit generally earned in that trade in the country of export, to be determined in the manner prescribed in section 37.
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> (2) The Governor in Council may at any time revoke an order made under subsection (1) and, unless sooner revoked, an order made under subsection (1) expires at the end of one year after the making thereof.

§ 40A(7) of the Customs Act, Can. Stat. 1958 c. 26, § 1 is also *repealed by* the Anti-dumping Act, Bill C-146, § 36(3) (1968-69). Section 6(1)-(9) of the Customs *Tariff*, CAN. REV. STAT. c. 60 (1960) is *repealed by* Bill C-146, § 37(1) (1968-69), *as well as* § 6A(3) Can. Stat. 1955 c. 51, § 1 of the same act by Bill C-146, § 37(2) (1968-69); a new § 7(1a)-(1c) is *added to* the act by Bill C-146, § 37(3) (1968-69). New §§ 3(8) and 9 are *added to* the Tariff Board Act by Bill C-146, § 38(1), (2) respectively (1968-69).

[10] *E.g.*, the United States, the United Kingdom and Japan.

[11] Bill C-146, § 8 (1968-69). *See supra* note 8.

[12] *Id.* § 9.

[13] *Id.* § 10.

[14] *Id.* § 9(1).

price comparability between the sale of goods to the importer in Canada and the sales by the exporter of like goods but with no other allowances . . . ." [15] The new act thus enables the minister to exercise more flexibility in the determination of normal value. Whereas under the old legislation the normal value was generally regarded as being the lowest actual value at which the goods were traded under substantially similar circumstances, the new act enables the minister to look into the circumstances of the sale and determine the normal value of the goods in the light of the actual contract. Thus, the minister may consider whether the purchaser is actually nearer the manufacturer than is normally the case on the exporter's market and thus avoids paying profits to some other intermediary; whether the sale is made at a discount to the importer; or whether the sale is made under such other terms or conditions as would result from the fact of exporting such goods. Discounts and other price differentials do not have to exist as between the exporter and the importer only. They may exist as a result of competitors' prices on the domestic or on the export market, and the lowest price available under the conditions set out in section 9 will be used in determining the normal value of goods. A survey of the market will provide a basis for such discounts and variations in price.

Further, it is possible under present regulations to calculate the price differential in view of services rendered by the importer. If, for example, the importer acts as a distributor as opposed to a dealer, he may enjoy a greater discount or reduction in the price of goods on account of his function as distributor. The normal value of the goods will, therefore, be adjusted to the distributor's price, which includes the normal discount value and such proportion of the value which is attributable to his function as distributor (handling, warehousing, insurance, service, sales and others).

The best basis for determining the normal value of goods exported is the current market conditions and the prices and rates actually used by competitors. However, this is not always practicable, and in a number of cases, information is not available or simply does not exist. To assist the minister, the act provides [16] for ways of supplying evidence with respect to the normal value of goods. This figure will ordinarily be based on the value of goods as sold by the exporter on his own domestic market, but as some exporters deal mainly on the export market, proof of domestic prices is often difficult to supply. Thus, the minister (deputy-minister) will determine the normal value on the basis of sales made in the commercial region nearest to the place of the sale, or of sales made by other vendors in the country of export. [17] As a final resort, sales made by the exporter to importers in any other country other than Canada will be used as a basis for calculation of the normal value, if no other basis is available. [18] These new provisions enable the administration to use a more pragmatic and realistic basis in the

[15] *Id.*
[16] *Id.* § 9(2)-(5).
[17] *Id.* § 9(2).
[18] *Id.* § 9(5).

determination of normal value than the artificial means of calculation that were used before. The end result should be more consistent with actual practice.

Next is the determination of the *export price of goods.*[19] The act provides that the export price is the lesser of the exporter's sale price or the importer's purchase price for the goods,[20] notwithstanding any invoice or affidavit to the contrary, and adjusting it to exclude all charges which may arise after their shipment direct to Canada.[21] On the other hand, in view of the fact that the importer may be acting as distributor or dealer, and that there may be different ways of evaluating the profit or compensation of the importer, particularly if exporter and importer are financially related or are not dealing at arm's length, there may be some difficulties in ascertaining the actual export price of the goods.

It was not always clear in the past what the export price of goods was, especially on account of the number of industries that were importing goods on a parent-subsidiary relationship basis, and although the act allowed some adjustment for discounts and other rebates such as quantity reductions, the discretion of the minister was not very wide. Section 10 of the new act affords greater discretion and power to the minister where he is of the opinion that the declared export price[22] is unreliable because the sale has taken place between associated persons, or by reason of a compensatory arrangement made between the parties (namely the manufacturer, vendor, exporter, importer or other) which affects the price, the sale, the net return or the net cost of the goods. In such cases, where the minister can establish that the imported goods were resold in Canada at arm's length, the export price may be calculated, according to section 10(2)(*c*) and (*d*), from the price for which the goods are resold at arm's length, less an allowance for costs, duties imposed under the customs tariff, charges for shipment in Canada, and profit, in the manner prescribed by regulation.

The discretion that the minister now enjoys with respect to price arrangements and export prices will allow a greater scrutiny of inter-corporate dealings of which there is an endless variety. The discretion is left within the good judgment of the minister, who may investigate and decide that prices, that may seem reasonable as of now, are not acceptable and that the goods are being dumped as a result of an inter-corporate incentive or capitalization plan. The subsidizing of subsidiaries' purchase of imported goods or other methods of passing either goods or accounts between corporations will now be open to scrutiny and may result in a better price scale in Canada.

Apart from providing new ways of calculating the normal value and export price of goods, the act introduces an *injury test* which will change the

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[19] *Id.* § 10.
[20] *Id.* § 10(1)(*a*) & (*b*).
[21] *Id.* § 10(1).
[22] *Id.* § 10(2).

dumping position of many goods. Since the old legislation provided for the imposition of dumping duties, regardless of whether the imports were injurious as long as Canadian manufacturers supplied at least ten per cent of such goods on the Canadian market, dumping duties were often imposed, and protection afforded, where it was not needed, while small industries did not receive the same protection. The "injury test" in the new act will likely reduce the "protection" that many goods were afforded, where no injury results from imports at a reduced price, and competition is likely to increase conversely up to the level where the export price is likely to cause material injury to our domestic production. Previously, the anti-dumping duty was applied automatically and acted as a deterrent as well as a remedy to the dumping of goods. Whether the new test is really going to increase competition and tend to force a reduction of prices remains to be seen, but it would appear that the general effect of the act should produce such a result.

It is where the minister finds that export prices are likely to cause material injury to domestic production that anti-dumping action will be taken. The two criteria contained in section 3 [23] for finding anti-dumping actions are (a) the causing of material injury to production, and (b) the retarding of the establishment of production in Canada. [24]

The act remains silent on any further definition or notion of "injury," and thus this will have to be determined by the Anti-dumping tribunal. [25] The tribunal has the necessary power to investigate each case and ascertain the facts in order to conclude whether there is any "injury." [26]

The Anti-dumping Tribunal is composed of not more than five members to be appointed by the Governor in Council [27] for a period of seven years, holding office on a full-time basis during good behaviour and subject to removal for cause. Subsequent sections provide for the organization and administration of the tribunal, including a requirement concerning the filing of an annual report by the tribunal to the Minister of Finance, relating to the activities of the tribunal for the past year. [28] There has, in the past, been some criticism directed against many of our tribunals, whether common or administrative, especially with respect to the degree of competence that should be required from a judge hearing a commercial case, whether from a trade, tax, combines or trademarks point of view. This tribunal could avoid this type of criticism if the nominations are made on the ground that persons appointed to the tribunal must have some first hand knowledge of international trade and price determination, or at least the capability of absorbing such knowledge.

On the other hand, the tribunal will have to face a number of difficulties in the fulfilment of its duties, especially with respect to the application of the

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[23] *Id.* § 3, *supra* note 8.
[24] *See also* § 16 of the Anti-dumping Act, Bill C-146 (1968-69).
[25] *See id.* § 21.
[26] *See id.* § 16.
[27] *Id.* § 21(1).
[28] *Id.* § 32; *see generally*, §§ 21-32.

"injury test." The act leaves the tribunal with all the necessary discretion to determine when and whether Canadian production is or is likely to be materially injured by dumped imports, and whether such imports have materially retarded the establishment of Canadian production.[29] But what criteria is the tribunal to use for that purpose? Will the injury be evaluated from the end result of the operation? Will it be necessary that production be reduced, or simply that profit margins are narrowed? Will a reduction in the value of stock market securities be sufficient, or will it be necessary to show that Canadian producers have had to leave that area of the market, or have become insolvent or have been forced into bankruptcy? Will a slight reduction in production or profits be acceptable as evidence of injury, or will it be necessary for the local industry to show reduction in employment or consumption of goods, or for the local community to show signs of economic loss? The act indicates that the tribunal will have to take fully into account the provisions of article 4 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade,[30] in considering any question relating to the production of goods or the establishment of production in Canada. Foreign and international precedents will be used here, but some uncertainty remains as to the extent of the notion of "injury." It has been thought, however, that the new legislation will not permit more dumping than before, but will allow a rationalization of prices of imported goods. Where prices can be lowered without materially affecting local production, no anti-dumping duty will be imposed. As has been pointed out, the new act will afford more protection to new and small domestic industries.

There remains the problem for Canadian industries to produce evidence that dumped imports are causing or threatening injury to their production. It should be noted that industries as a whole, and not just individual companies, must be injured before anti-dumping action can be taken. This is generally understood as including the domestic manufacturers who supply all or a major portion of domestic production, in economic and market areas, regions or units. Thus, it would not be wise to consider Canada as a whole for this purpose, in view of the regionalization of certain industries or markets. Yet, it may be difficult to gather the evidence required for persuading the tribunal that anti-dumping action be taken, owing to the lack of information or machinery within our local corporations which would be necessary to show that domestic production is materially threatened or actually injured.

The *procedure* leading to the imposition of anti-dumping duties has also been modified. Previously, the levy of such duties was not always made according to regulation, since investigations were not usually introduced under the old legislation until a complaint was received by the minister, and customs officers were not always in a good position to ascertain whether goods were dumped because they lacked sufficient information. The act now

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[29] *Id.* §§ 3 and 16.

[30] Signed in Geneva, Switzerland on June 30, 1967; *see* § 16(4) of the Anti-dumping Act, Bill C-146 (1968-69).

provides for a more elaborate procedure, [31] which takes the following lines:

(i) The (deputy) minister may [32] commence an investigation on his own initiative or on receipt of a complaint if he is of the opinion that there is evidence that goods are being dumped and that the dumping is causing injury. [33] Subsequently, he must then give notice of the investigation to interested parties and to the *Canada Gazette*. [34] He may also, after receiving a complaint, decide not to initiate an investigation, in which case he must give notice of his decision to the complainant and give his reasons for not investigating. [35]

When an investigation has been initiated, the minister may terminate it if he is satisfied that there is no dumping, or that the margin of dumping or the volume of dumped goods is negligible, or that the dumping has not caused any material injury to Canadian production, provided, in the latter case, that he has not referred the injury aspect to the tribunal, [36] and that he has given notice of the termination. [37]

In all cases, the minister or the complainant may refer to the tribunal the matter of injury, in order that it may establish whether there is any evidence of injury as a result of the dumping of goods. [38] In these instances, the tribunal shall render its advice on this question as soon as possible. [39] This reference to time is the only one at this stage of the procedures, since the department and the complainant retain complete discretion in the matter.

(ii) Once investigations have been initiated but not terminated, [40] the minister is required to make a preliminary determination of dumping with respect to specific goods, and give notice and reasons for his decisions to all parties concerned, [41] if he is satisfied that goods have been dumped and that the margin of dumping and the volume of goods is not negligible. He then has three months from the date of his preliminary determination of dumping to make a final determination. [42] Before the final decision is rendered, all goods of the same description that enter into Canada before the final decision will bear a provisional dumping duty equal to the margin of dumping of such goods. The payment of duty on subsequently imported goods is made in cash or by posting security and is eventually refundable, except for the duty

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[31] *See id.* §§ 13-20.

[32] Throughout the Anti-dumping Act, the term "Deputy Minister" has been used, as referring to the Deputy Minister of National Revenue for Customs and Excise, *id.* § 2(1)(*b*), while the term "Minister" refers to the Minister of National Revenue, *id.* § 2(1)(*h*); for more simplicity, the word "minister" has been used throughout the text here. Section 13(1) uses the word "shall" initiate an investigation, *id.*

[33] See the more complex text, *id.* § 13(1).

[34] *Id.* § 13(5).

[35] *Id.* § 13(2).

[36] *Id.* § 13(6).

[37] *See id.* §§ 13(5) & 13(7)(*a*).

[38] *Id.* §§ 13(3) and 13(7).

[39] *Id.* § 13(8).

[40] *Under id.* § 13(6).

[41] *Id.* §§ 14(1) & 14(2).

[42] *Id.* §§ 14(2)(*d*) & 17(1).

payable when the final determination has been made. [43]

(iii) The tribunal, thus, has a period of three months following the notice of a preliminary determination of dumping by the minister, during which it must make an inquiry into the dumping and the injury that may result, and make an order or finding. The nature of the matter may require declaring the goods that are affected, the source of supply and the country of export. The tribunal may, in the cases where a preliminary determination of dumping has been made, direct the minister to initiate an investigation where there is evidence of dumping and injury with respect to goods to which the preliminary determination applies. [44] The rules set out in the General Agreement on Tariffs and Trade will direct the investigation of the tribunal, [45] which then must forward its report to all concerned [46] within the required three-month period.

(iv) Upon receiving an order or finding from the tribunal, the minister shall make a final determination of the normal value and the export price of dumped goods so as to establish the margin of dumping. This also involves a final determination of the goods themselves, as described in the report of the tribunal. [47] An assessment order will thereupon be issued for an anti-dumping duty equal to the margin of dumping which must be paid in respect of the goods. Collection of duties will involve refunds of provisional payments made under the preliminary determination of dumping. Section 4 provides that the actual anti-dumping duty, equal to the margin of dumping, shall not exceed the provisional duty that has been collected upon the entry of the goods into Canada.

Section 5 provides that where there has been a considerable importation of like dumped goods in the period of ninety days ending on the day when the minister has made a preliminary determination of dumping, the anti-dumping duty that is payable with respect to the goods that were the object of the determination shall extend to such other like goods imported before, in an amount equal to the margin of dumping of the previously imported goods. This is likely to take place where manufacturers of consumer goods clear their end of season stock and flood the local market with masses of imports within a few days or weeks. The retroactivity of anti-dumping duties applies only to such cases of considerable importation of goods. In the case of goods that are imported after the final determination has been made, the port officer will implement the order and apply the anti-dumping duties if he determines the goods are of the same class as covered by the order. Further difficulties will be dealt with by the department.

(v) The final determination by the minister is "final" and conclusive, [48] except for two circumstances: the minister may, under section 18(4), change

[43] *Id.* § 15(1) & (2).
[44] *Id.* § 16(2).
[45] *Id.* § 16(4).
[46] *Id.* § 16(5).
[47] *Id.* § 17.
[48] *Id.* § 17(1).

the determination of the description of goods, or re-appraise the normal value on the export price of any goods if (a) he has been asked to do so by an importer who has asked for a re-appraisal by a customs appraiser under section 18(1)-(3) and wants this re-appraisal to be reviewed by the minister; (b) the importer or exporter has made any misrepresentation or committed a fraud in entering the goods; (c) it follows from a decision of the Tariff Board, the Exchequer Court or the Supreme Court of Canada; (d) in any other case, within two years of the date of entry of the goods, where he deems it advisable. An additional duty or a refund would take place according to the result of the re-appraisal by the minister. [49]

(vi) Appeals from the minister's decisions are provided for in the act. First, a party must appeal to the Tariff Board within sixty days from the date on which the decision was made. The new act extends appeals to the Tariff Board not only with respect to the normal value of goods but also concerning the export price. [50] A party could, therefore, appeal on either or on both grounds. This flexible procedure on appeal coincides with the new discretion that is given to the minister in the determination of normal value and export prices. Further appeals to the Exchequer Court and to the Supreme Court of Canada are provided for [51] in the usual way. There is no appeal from the decisions of the tribunal on the matter of "injury," although the tribunal may, at any time, review, rescind, change, alter or vary its own order or finding, or re-hear any matter. [52] The no-appeals rule will probably permit the avoidance of lengthy procedures and harassment, while the possibility of a review by the tribunal itself is likely to avoid the freezing of the tribunal's own opinions and to allow a greater adaptation to changing circumstances.

The new act is, therefore, significant because it introduces an "injury test" which may change considerably the old automatic anti-dumping duty, increase protection in favour of smaller industries, increase competition in the large and healthy industries, reduce the number of instances where the anti-dumping duty is actually imposed and collected, force related corporations and parties not dealing at arm's length to review their financial structures and pricing arrangements, bring more logic to the department's rulings instead of arbitrary decisions, and lead to more conformity with foreign and international legislation and precedents.

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[49] *Id.* § 18(5).

[50] *Id.* § 19.

[51] *Id.* § 20.

[52] *Id.* § 31; § 30(3) provides that orders and findings of the tribunal are not subject:

> [T]o review or to be restrained, removed or set aside by *certiorari*, prohibition, *mandamus* or injunction or any other process or proceeding in the Exchequer Court on the ground
> (*a*) that a question of law or fact was erroneously decided by the Tribunal; or
> (*b*) that the Tribunal had no jurisdiction to entertain the proceedings in which the order or finding was made or to make the order or finding.

2. *Customs Tariff and Customs Act*[53]

As a result of the Anti-dumping Act, the Customs Act has been amended to reflect the substantial changes in the regulation of dumping activity. Those amendments purport mainly to repeal sections that are no longer applicable and to adjust other sections to the new Anti-dumping Act.[54] The Tariff Board Act[55] has also been amended in order to reflect generally the effect of other acts, including the Anti-dumping Act.[56] The provisions relating to the export and import prices and to the fair market value of goods entering Canada have been replaced by the new sections on margin of dumping, normal value and export price.[57] The Customs Tariff has also been amended to embody the tariff changes that resulted from the General Agreement on Tariffs and Trade (Kennedy Round) which consisted mainly of reducing the number of classes and items under the tariff, and of changes in the rate of duty which need not be reviewed here.[58] A new section is being added to the Customs Tariff whereby a surtax will be imposed in such cases where goods imported into Canada threaten serious injury to Canadian producers. The rate will be determined by the Governor in Council, and will be set so as to be sufficient to prevent such injury.[59]

3. *Hazardous Products Act*

The act to prohibit the advertising, sale and importation of hazardous products[60] will have a definite impact on the manufacturing and trading of goods. This indirect form of trade regulation can be seen as part of a larger plan to regulate the types of goods that reach the market and to afford more protection to consumers.

The basic purpose of this act is set out in section 3, whereby the sale, advertising or import of goods described in the schedule (Part I: Jequirity beans, articles for children painted with a liquid containing more than 0.50% (total weight) of lead and other liquid materials having a flash point of less than 0°F) is prohibited in all cases; other goods (Part II: bleachers, cleansers, polishes, glues and other materials containing a variety of chemicals) are also affected by the prohibition, except as authorized by regulation.

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[53] CAN. REV. STAT. c. 58 & c. 60 (1952) respectively.

[54] As a result of the new Anti-dumping Act, Bill C-146, §§ 36, 37 & 38 (1968-69), the following sections of the Customs Act are affected: §§ 39 & 40A(7) are *repealed*; §§ 35(2)(*b*), (*c*), and §§ 35-41A are *amended;* §35(2)(*d*) is *added*.

[55] Can. Stat. 1960-61 c. 18, § 1(2).

[56] Anti-dumping Act, Bill C-146, § 19 (1968-69).

[57] Sections 6(1)-(9) & 6A(3) of the Customs Tariff, CAN. REV. STAT. c. 60 (1952) *as amended* Can. Stat. 1955 c. 50 respectively, are *repealed by* Bill C-146, § 37.

[58] Bill C-131, An Act to amend the Customs Tariff, §§ 2(1)(*m*) and (*n*) are *added*; § 10A is *added*; § 13(1) is *amended*; §§ 15A, 18 and 19 are *added*; Schedule A is *reduced*; Schedules B and C are *amended*. *See* the *Resolutions* concerning the Customs Tariff tabled by the Minister of Finance on October 22, 1968, following General Agreement on Tariffs and Trade, *supra* note 30.

[59] Section 7(1a) *found in* Anti-dumping Act, Bill C-146, § 37(3) (1968-69).

[60] Bill S-26, 1st Session, 28th Parliament of Canada (1968-69), passed by the Senate February 13, 1969.

Violations of the section are punishable as summary offences or indictable offences, [61] and procedures of inspection, search, seizure and forfeiture are outlined in the act. [62] Of particular interest is the authority given to the Governor in Council to make regulations under the act, and specifically (a) to authorize the sale, advertising and importation of goods under Part II of the schedule, (b) to determine the powers and duties of inspectors and analysts with respect to search, seizure and detention of substances and products, and (c) to add to or delete from the schedule any product or substance as is necessary. [63] Such changes to the schedule are subject to review by a board of review created especially for the purposes of the act. [64]

An important element of this act is found in section 10, whereby the minister may request that a manufacturer disclose the formula, composition or chemical ingredients of a product or substance, and any other information as the minister deems necessary for the purpose of determining whether the product is likely to be a danger to public health or safety. The possible consequences of this section are extraordinary as trade secrets have heretofore been jealously kept by manufacturers, and disclosure to a government agency is not a very popular idea. When one thinks of all the goods that could be brought under this act, from tobacco to toys, the effects of disclosure are formidable, if strictly enforced. The application of the act does not extend to products covered by the Explosives, Food and Drugs, Pest Control Products or Atomic Energy Control Acts. It should, however, be valuable in the protection of the community from a number of goods that are threatening public health or safety on a short or long range basis. Penalties imposed under the act (imprisonment for three to twenty-four months and, or, fines of five hundred to one thousand dollars) should normally be sufficient, under good administration, to act as a deterrent. It will be interesting to follow the progress and evolution of this legislation and analyze its scope after a period of operation. Combined with other legislation relating to consumer protection, it should form a good basis for a rationalized regulation of trade from a consumer's point of view.

4. *Combines Investigation Act*

The Combines Investigation Act has been augmented by the transfer to it of the provisions of the Criminal Code dealing with misleading information. The new section 33D of the Combines Investigation Act [65] reproduces the old section of the Criminal Code. The change was made following proclama-

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[61] *Id.* § 3(3): "(3) Every person who violates subsection (1) or (2) is guilty of (*a*) an offence and liable on summary conviction to a fine of one thousand dollars or to imprisonment for six months or to both fine and imprisonment; or (*b*) an indictable offence and liable to imprisonment for two years."

[62] *Id.* §§ 4, 5 and 6.

[63] *Id.* §§ 7 and 8.

[64] *Id.* § 9.

[65] CAN. REV. STAT. c. 314, § 33 (1952), *as amended by* Can. Stat. 1960 c. 45, § 13; § 306 was the relevant section *transferred* from the Criminal Code.

tion of recent Criminal Code amendments which now make the Department of Consumer and Corporate Affairs responsible for the enforcement of the law relating to misleading advertising. The new section 33D goes along with existing section 33C which prohibits misleading representation with regard to the ordinary price of an article.

The change came as a result of the recommendation by the Economic Council of Canada and by the Special Joint Committee of the Senate and House of Commons on consumer credit (prices). In announcing this, the minister has pointed out that few cases have been tried with respect to misleading advertising, but that the department will now be preparing test cases with the "utmost care."

During the current session of Parliament, three bills have been introduced in order to amend the Combines Investigation Act, but at the time of this survey, none of them have been adopted. They are: (a) Bill C-2, relating to professional sports;[66] (b) Bill C-42, which falls within the consumer protection area and purports to give authority to the Director of Investigation and Research to investigate the increase of prices of commodities in order to determine whether the increase is justified in the public interest. The inquiry would involve an examination of books and accounts of traders and manufacturers, of their profits and losses, and of increases in wages and other costs;[67] (c) Bill C-31, which purports to strengthen the penalties for crimes committed in violation of the combine and monopoly laws. At present, there is no floor to the penalties; Bill C-31 provides for minimum penalties in the case of both first and subsequent offences,[68] and for an additional monetary penalty where the crime has resulted in financial injury to third parties. The additional penalty is measured on the basis of damages awarded by a civil court and consists of an amount equal to the amount so awarded, in addition to other costs and fines. There is a limitation period of two years on this section, which applies to crimes arising from offences under the Combines Investigation Act and under sections 411 and 412 of the Criminal Code.[69]

Section 38A is a new section which extends the provisions of section 38(e) in those cases where a corporation commits an act contrary to the provisions of the Combines Investigation Act. That is, if a director, manager or agent of the corporation participates, positively or by way of negligence

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[66] *Id.* § 32(1) would be *amended to* § 32(1)(*e*) by Bill C-2, § 1 and would read: "(*e*) to limit or restrain the opportunity in Canada of persons to participate in or observe any professional sport intended to operate, or likely to operate, to the detriment or against the interest of the public, ..."

[67] Bill C-42, § 1 would *add* a new § 8A to the existing § 8 of the Combines Investigation Act, CAN. REV. STAT. c. 314 (1952).

[68] §§ 1, 2, 3, 4, 5 of Bill C-31 contain amendments for §§ 31(3), 32(1), 33, 33 A(1), 33B(2), 34(4); these would *repeal* all former legislation under the same §§ in the Combines Investigation Act, CAN. REV. STAT. c. 314 (1952) *as amended* since 1952.

[69] Bill C-31, § 7 would *repeal* § 35 of the Combines Investigation Act, CAN. REV. STAT. c. 314 (1952) and *substitute* § 35(1)-(4).

or omission in this type of act, he is then guilty of the same offence, personally and jointly with the corporation. The section is applicable to all offences and not simply to a list of restricted cases. [70]

III. Government Activities in the Past Period

The new legislation that was introduced in the past year constituted an effort by our government to adjust its national law to the internal trade situation, especially in view of the recent round of the General Agreement on Tariffs and Trade. As far as the Combines Investigation Act is concerned, this has been a less active period.

1. *Report of the Director of Investigation and Research (1968)*

As required by the act, [71] the Director of Investigation and Research must submit his annual report to the minister. It is worth noting here that, following the recent reorganization of departments in Ottawa, the minister now responsible for the administration of the Combines Investigation Act is the Minister of Consumer and Corporate Affairs. The authority thus has passed from the Department of Justice, to the Privy Council, to the Department of Consumer and Corporate Affairs, in an obvious and long needed effort to link the administration of various acts and agencies dealing with economic, financial and industrial matters. [72]

The activity of the department during the past period can be described as normal, as no particular economic sphere has been designated as one of special interest. The main subject of interest is the research being conducted by the Economic Council of Canada relating to mergers and trusts. [73] Meanwhile, the department enforces the present provisions of the act; the following paragraphs give a summary of its activities.

During the year 1968, following the report of a joint Royal Commission of the provinces of Alberta, Saskatchewan and Manitoba, the minister asked that an inquiry be made in the area of grocery stores, particularly the chain stores in the Prairies. The result of this inquiry has shown, however, that the price of groceries in the Prairies was not exorbitant and that profits, publicity or costs were not unreasonably high or expensive with respect to the position of the consumer. The whole area of food supplies in particular and retailing in general has been investigated but no finding has been made which would be regarded as a violation of the act.

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[70] Bill C-31, § 8 *adds* a new § 38A to the existing § 38 of the Combines Investigation Act, CAN. REV. STAT. c. 314 (1952).

[71] *Id.* § 44.

[72] *E.g.* combines, mergers, monopolies, restrictive trade practices, consumer affairs, corporations, securities, bankruptcy, insolvency, trade marks, patents and copyrights.

[73] *Infra* part III.

The administration of section 33A[74] relating to *unfair trade practices* has followed its usual course, and no special change is to be reported. Following the policy of the department, it is now common and frequent for industries and representatives of the department to have extensive talks before the implementation or introduction of new trade schemes and practices, and thereby to ascertain in advance whether a given programme, if entered into, would result in prosecution. One particular inquiry into the production of pipes in Western Canada[75] was concluded, and a number of cases of false publicity were reported to the Attorney-General.[76]

Similar comments could be made with respect to the administration of section 34 of the act, relating to *resale price maintenance*, where no new report has been submitted, two inquiries have been discontinued, two cases were tried (*W. E. Coutts Co.* and *Philips Industries Ltd.*) and two more cases were instituted as a result of previous reports.[77]

The area of mergers, coalitions, trusts and combines has traditionally been the core of this legislation. At the moment, in view of the research that is being conducted by the Economic Council of Canada, there is some uncertainty as to the value of existing provisions, and substantial changes are expected. In the meantime, the administration of sections 32 and 33 has been carried on, and the commission has produced two reports of inquiries; one, concerning the plywood industry in Ontario and Quebec, and the other the production of cast-iron piping in Western Canada. A number of cases have been initiated as a result of reports by the commission or as a result of direct recourse to the Attorney-General, some of which will be reviewed in Part IV of this survey.[78] In addition, a number of inquiries have been discontinued.[79] The inquiry relating to the activities of the Bell Telephone Co. and Northern Electric Co. is still in progress, and the report has not been filed at this time.

2. *Research by the Economic Council of Canada Relating to Merger*

Mergers and conglomerates have taken an important share of the commission's interest in recent years. The number of mergers has risen in this country, as, for example, it has in the United States. A special merger register has been kept since 1960, in which not only mergers are recorded, but also other forms of corporate reorganizations such as, purchase of all or part of the shares of one corporation by another where control may change hands; purchase of a substantial part of assets, or division of assets; purchase

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[74] Combines Investigation Act, CAN. REV. STAT. c. 314 (1952) *as amended by* Can. Stat. 1960 c. 45, § 12.

[75] Report of the Director *re* the Anthes Imperial Ltd. October 10, 1967.

[76] *Id.* at 61-66.

[77] *Id.* at 68-70.

[78] Some of the areas covered include plumbing, sugar, road paving materials, packaging, cartons, phosphorus and chemicals, insecticides, plywood, transportation, pool cars, lathing and plastering.

[79] *E.g.*, House furniture, electrical equipment, hardware.

of control of Canadian companies by foreign corporations; and other mergers, consolidations or amalgamations which may have some effect on Canadian enterprises and on the Canadian market. Earlier research has permitted the creation of another registry where all mergers that have taken place since 1945 are recorded, and interdepartmental procedures have also been taken so as to permit exchanges of information between the various agencies that are involved in corporate activity.

The report of the Economic Council of Canada has yet to be filed, and it is presently hoped that it will be submitted during the year 1969. The terms of reference of the council are very broad: it covers the whole area of mergers, combines, monopolies and restrictive trade practices, and also that of patents, trade marks, copyrights, and consumer affairs. Much is expected from this report, which follows a similar inquiry in the United States, and it is thought that stricter regulation will be proposed with respect to mergers and conglomerates, although one can only speculate at this time on the actual recommendations of the council.

IV. Recent Cases

There were not many cases reported in the past year. Some of the most interesting will be commented upon briefly in the following paragraphs.

1. *The Queen v. J. W. Mills & Son* [80]

The *Mills* case was referred to the Exchequer Court by the Attorney-General under section 41A of the Combines Investigation Act. The indictment against the five corporations contains two counts alleging offences contrary to section 32(1)(*a*), which makes it an offence to conspire, agree, combine or arrange "to limit unduly the facilities for transporting, . . . or dealing in any article," [81] and to section 32(1)(*c*), making it an offence to conspire "to prevent or lessen unduly competition in the . . . transportation . . . of an article . . . ." [82] The period prescribed was between January 1, 1956 and August 1, 1966. The indictment refers to the undue limitation of facilities for transporting articles imported from designated areas in the Orient into British Columbia and *which could be* transported by railway cars, each car ordinarily containing a pool shipment of two or more different kinds of the said articles, at east bound import freight rates, to points in Canada, east of the Manitoba-Ontario boundary. [83] Three of the five corporations

[80] [1968] 2 Can. Exch. 275.

[81] Combines Investigation Act, Can. Rev. Stat. c. 314, § 32(1)(*a*) (1952), *as amended by*, Can. Stat. 1960 c. 45, § 13 which states: "Every one who conspires, combines, agrees or arranges with another person (*a*) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article, ..."

[82] *Id.* § 32(1)(*c*) which states: "[T]o 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 . . . ."

[83] [1968] 2 Can. Exch. 275, at 319.

have been found guilty under two counts and fined accordingly.[84]

The court in this case had to determine whether the evidence under the two counts was sufficient to establish *beyond a reasonable doubt* that there was an *agreement* to carry into effect *an anti-competitive trade practice* that took effect in a *relevant competitive market* and had the required element of *undueness* referred to in section 32(1)(*a*), limiting the facilities for transporting articles; and in section 32(1)(*c*), preventing competition in the transportation of articles.

The facts are rather complex. They stemmed from a rate war between Leimar-Forwarding Company (Leimar)[85] and J. W. Mills & Son (Mills) (and a parent company referred to here as Kuehne) relating to the transportation of imported "articles" from British Columbia to Ontario and Quebec.[86] An agreement was entered into by the two parties following their rate war, and in thereby establishing a rate between them, the two shared the market and acted to prevent competitors from entering into their business. The action centres around this agreement. The other accused, Denning Freight Forwarders Ltd. (Denning) and Johnston Terminals Ltd. (Johnston) were at some time involved in a similar transportation business, trying to get a share of the market, and the case arose from certain practices that were adopted in the course of the rate war and competition. Evidence was shown that Denning, as result of another price war staged against him by Leimar and Mills, had approached the Restrictive Trade Practices Commission in order to obtain relief and had instituted a civil action for damages for conspiracy against Mills and Leimar. This action was settled by Leimar and Mills under such terms that, in lieu of damages, Denning would be paid a commission of fifteen per cent on business contracted for five years after which, if not renewed (for a period of one further year), Denning was free to re-enter the freight forwarding business. On the basis of this evidence, Denning was regarded as not having committed an offence.[87]

This case is of interest in so far as it contains a number of considerations on the notion of a market and on the meaning of the word "unduly" in section 31 of the Combines Investigation Act. As pointed out by Mr. Justice Gibson, the courts have in many instances tried "to define 'unduly' but in none of the cases have the Courts laid down any specific portion of the relevant market that must be accounted for by the parties to any anticompetitive trade practice or policy to prove an offence has been committed."[88] It is also pointed out that there has been no reference to what the Canadian courts mean by "competition" except that it must be "free competition."[89] On

[84] *Id.* at 275-76; the total fine was 20,000 dollars.

[85] *Also referred to as* Overland Import Agencies Ltd.

[86] Mills was a subsidiary of Kuehne and Nagel of Hambourg, which also owned Kuehne & Nagel (Canada) Ltd.

[87] [1968] 2 Can. Exch. at 310.

[88] *Id.* at 302-03.

[89] *Id.* at 303, and *id.* at 305: "[There is also no legal definition capable of describing the shape of competition.This is a changing matter (as for example, new products may come into direct competition, or service requirements re-arrange the geographical nature of a particular market]."

the other hand, the courts have relied on the notion of market in order to determine the quality of competition. Two elements are, therefore, to be examined more closely, that is, the market structure and the behaviour or conduct of participants.

In *Mills*, the market structure has been examined very closely, and the court has drawn a list of components which must be looked at in the determination of a market. The law contains no definition of the "market," and thus it is left to the judgment of the court based on the evidence before it in each instance. The boundaries of the market have to be determined in each case, because the "undueness" of the participants' activity could not otherwise be weighed. Gibson lists the components of a relevant market, [90] though stating that the list is not exhaustive, as follows: (a) product substitutability; (b) actual and potential competition; (c) geographical area; (d) physical characteristics of products or service (it is to be noted that the court, on the basis of section 32(1)(*a*) and 32(1)(*c*), [91] rejected the contention of the accused that they were not in the business of "transportation," but that they supplied "services" only for a fee, since they did not own the transportation facilities or handle the goods themselves); (e) end uses of products; (f) relative prices of goods or services; (g) integration and stages of manufacture; (h) methods of production or origin. Additional features and indicators of the structural characteristics of a relevant market for the purpose of testing whether or not strong monopoly elements could endure (in weighing whether or not "undueness" could be proven) were also listed as follows: [92] (1) the number and concentration of competition; (2) barriers to entry; (3) geographical distribution of buyers and sellers; (4) differences in the degree of integration of competition; (5) product differentiation; (6) countervailing power; (7) cross-elasticity of demand.

The court ruled that Mills, Leimar and Kuehne were guilty under section 32. There was, in the judge's view, no substitute services for the business carried on by the accused, that is, alternate services such as ship or air transportation did not exist in the same "market" as the surface transportation provided by the accused's business. Thus, within the "relevant market," there was no other service. In addition, there were high "barriers of entry" to the alleged relevant market. Evidence showed that potential competition could not get into the market. This was illustrated by the fact that Denning almost went bankrupt in trying to do so and that Johnston succeeded only, in the circumstances, to get about five per cent of the market. Further, practices used by Mills and Leimar, such as the "operation clobber" [93] directed against Denning and other competitors, succeeded in keeping newcomers out of the market. Other facts were also established in evidence:

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[90] [1968] 2 Can. Exch. at 306-07.

[91] Combines Investigation Act, CAN. REV. STAT. c. 314, §§ 32(1)(*a*) and (*c*) *as amended by* Can. Stat. 1960 c. 45, § 13; [1968] 2 Can. Exch. at 279.

[92] [1968] 2 Can. Exch. at 307-08.

[93] As appeared from letters exchanged between Mills and Leimar, [1968] 2 Can. Exch. at 288-89 and 315.

> Fourthly, the evidence established that in relation to this alleged relevant market (*a*) where the buyer of these services required transportation without regard to time, he used water transportation; (*b*) where the buyer required fast transportation he used ship-rail or in some cases trucks; (*c*) that the truckers did not have the benefit of O.C.P. rates; (*d*) that the accused Leimar, Mills and Kuehne & Nagel (Canada) Limited agreed to use all possible measures to exclude trucks and other freight forwarders from the market; (*e*) that the agreement between the accused Leimar, Mills and Kuehne & Nagel (Canada) Limited was to exclude all competitors including truckers; (*f*) that the railways were not real competitors because of Railway Rule 43, among other things; (*g*) that the importers (who could not take advantage of the tariff) were not real competitors; (*h*) that the airlines were not real competitors; (*i*) that at the best time, the truckers serviced only 20 per cent of the market; (*j*) that many importers preferred railway transport over truck (door to door) deliveries; (*k*) that all substitutes were imperfect and that the competitors (outside of pool cars) were not true competitors; (*l*) all of the customers of the freight forwarders resided in Ontario and Quebec, mainly in Toronto and Montreal; (*m*) that O.C.P. rates, incidental benefits, and preferential rail rates were available only to persons residing in points east of the Manitoba-Ontario boundary; (*n*) that the combination of transportation by ship and rail provided speedy transit (as compared to water transportation) and economical rates; (*o*) that while water transportation was cheaper than ship-rail transportation, that when speed of delivery was important, that the customer used ship-rail transportation; (*p*) that apart from water transportation that the only substitute for "mixed pool car" was transportation by truck; and (*q*) that apart from very large importers, it was impossible for the average importer to obtain the benefit of the preferential rail rate unless he used the services of a pool car consolidator. [94]

With respect to the competitive feature of the case, that is, the behaviour or conduct of the participants in the relevant market, the court also restated the basic legal position which is, in effect, that the 1960 amendment to the Combines Investigation Act now makes it necessary for the court to consider as evidence the "devices" which are employed by the parties to an alleged conspiracy and which may relate to prices, quality or quantity of production, markets or customers, channels or methods of distribution or other devices, the effect of which would be to restrict a person from entering into or expanding a business in a trade or industry. [95] The court noted that behaviour or conduct features are not clearly distinct from the market structure features, and that the analysis of behaviour of sellers frequently calls for consideration of the conduct of buyers as well. [96]

In the particular case at hand, there was sufficient proof that an agreement or conspiracy had taken place between Leimar, Mills and Kuehne to "fix prices; to divide the markets and customers between themselves; to control the channels of distribution; and to prevent people from entering this service

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[94] *Id.* at 315-16.

[95] *Cf.* Combines Investigation Act, CAN. REV. STAT. c. 314, §§ 32(2)(*a*)-(*g*) and 32 (3)(*a*)-(*d*) (1952) *as amended by* Can. Stat. 1960 c. 45, § 13; [1968] 2 Can. Exch. at 309.

[96] [1968] 2 Can. Exch. at 309.

industry; to restrict Denning from entering into or expanding a business in this service industry; and also to restrict Johnston . . . from expanding their business in this service industry." [97]

Discussing the defence's argument, the court pointed out that the fact that there was a ceiling above which it was impossible to raise prices does not affect the conduct of the accused. As is true in all combines cases, every monopoly is faced by ceilings, created either by governmental regulation or by the effect of the market, where customers will turn to substitutes. Further, the fact that under the theory of oligopoly, prices would have been the same in the long run is also irrelevant — persons are not entitled to engage in anti-competitive trade practices or policies just because the end result will be the same if all things are equal. [98] Thus, the use of devices by the accused had the criminal element of "undueness" so as to constitute an offence under section 32.

It is thought that the remarks made in this case with respect to the notion of a relevant market will be valuable for some time in the examination of such cases of conspiracy relating to the restriction of business in a trade or industry.

2. *The Queen v. Canadian Warehousing Association* [99]

The only point at issue here was whether the words "household goods" fall within the definition of "article" in section 32(1)(*c*) and 2(*a*) of the Combines Investigation Act. [100] Against the contention of the Canadian Warehousing Association, the court held that the general *purpose* of the legislation (Combines Investigation Act) as supported by judicial precedents, "is to put a particular limit (*viz.*, not to 'conspire, combine, agree or arrange with another person . . . to prevent, or lessen, unduly, competition in the production . . .' etc.) on a party's right to contract in so far as it affects competition . . . [101] 'in the business of manufacturing, producing, transporting,

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[97] *Id.* at 317.

[98] *Id.* at 317.

[99] [1968] 1 Can. Exch. 392 (1967).

[100] Combines Investigation Act, CAN. REV. STAT. c. 314 (1952) *as amended by* Can. Stat. 1960 c. 45, §§ 13 & 1. The relevant *amended* §§ read as follows:

> 32(1) Everyone who conspires, combines, agrees, or arranges with another person
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> . . . .
>
> (*c*) to prevent, or lessen, unduly, competition in production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of an article, or in the price of insurance upon persons or property, or . . . .
>
> 2. In this Act,
>
> (*a*) 'article' means an article or commodity that *may be* the subject of trade or commerce;
>
> . . . .

(Emphasis added.)

[101] Applying the courts' concept of "free competition"; Container Materials, Ltd. v. The King, [1942] Sup. Ct. 147, at 152.

purchasing, supplying, selling, storing or dealing in articles,' [102] 'that may be the subject of trade or commerce.' [103] " [104] The limits prescribed by section 32(1)(*c*) [105] would not affect the present case. It follows, therefore, "that in interpreting the meaning of the word 'article' . . . the widest meaning of 'may be' [106] should be employed, so as to include all articles or commodities which are tangible things, generally, whether or not they have left the stream of commerce, so to speak, such as 'household goods' in this case, which normally would be in private ownership and not for sale." [107]

This interpretation of the word article from the point of view of the purpose of the act is a sensible one, and it may provide a long term basis for the general interpretation of this legislation so as to exclude from its application those terms and cases only as are explicitly and specifically excluded.

3. *The Queen v. Canadian Coat & Apron Supply Ltd.* [108]

This case was the first litigation to take place before the Exchequer Court of Canada under the Combines Investigation Act, as amended in 1960, when the Exchequer Court was constituted as a Superior Court of Criminal Jurisdiction for the purpose of trying certain offences contrary to the act. [109] The case related to an alleged conspiracy "to prevent, or lessen unduly, competition in the rental or supply in . . . Montreal of . . . towels, uniforms, ..." [110]

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[102] *Cf.* § 2(1)(*aa*) Combines Investigation Act, CAN. REV. STAT. c. 314 (1952), *as amended by* Can. Stat. 1960 c. 45, § 1.

[103] *Cf.* § 2(*a*), *supra* note 100.

[104] [1968] 1 Can. Exch. 392, at 395-96 (1967) (Gibson, J.).

[105] *Cf.* § 32(1)(*c*), *supra* note 100.

[106] *Cf.* § 2(*a*), *supra* note 100.

[107] [1968] 1 Can. Exch. at 396.

[108] [1967] 2 Can. Exch. 53.

[109] Section 41A, Combines Investigation Act, CAN. REV. STAT. c. 314 (1952), *as amended by* Can. Stat. 1960 c. 45, § 19(1), which reads as follows:

> (1) Subject to this section, the Attorney General of Canada may institute and conduct any prosecution or other proceedings under section 31 or Part V, except section 33c, in the Exchequer Court of Canada, and for the purposes of such prosecution or other proceedings the Exchequer Court has all the powers and jurisdiction of a superior court of criminal jurisdiction under the *Criminal Code* and under this Act.
>
> (2) The trial of an offence under Part V in the Exchequer Court shall be without a jury.
>
> (3) For the purposes of Part XVIII of the *Criminal Code* the judgment of the Exchequer Court in any prosecution or proceedings under Part V of this Act shall be deemed to be the judgment of a court of appeal and an appeal therefrom lies to the Supreme Court of Canada as provided in Part XVIII of the *Criminal Code* for appeals from a court of appeal.
>
> (4) Proceedings under subsection (2) of section 31 may in the discretion of the Attorney General be instituted in either the Exchequer Court or a superior court of criminal jurisdiction in the province, but no prosecution shall be instituted in the Exchequer Court in respect of an offence under Part V without the consent of all the accused.

[110] [1967] 2 Can. Exch. at 53.

The court found, upon the evidence, that the parties were guilty of a conspiracy under section 32 of the act. In the judgment, two items of interest are to be found. First, there is a review of the terms and vocabulary used in the statute. "Prevent" and "lessen" competition, for example, do not mean "extinguish" absolutely; those words can also be used in the sense of "hinder" or "impede." The word "unduly" can, therefore, be appropriately construed with "prevent" or "lessen," and thus it is not necessary that the Crown prove a monopoly or virtual monopoly under the act. [111] "In restrictive trade cases, the norm or standard of what is 'due' [and therefore 'undue'] will vary from case to case, being dependent on what degree of 'market power' is proven by the evidence adduced." [112]

> In Canadian jurisprudence there has not been established a hypothetical reagent in restrictive trade cases such as this; but perhaps the hypothetical reagent in cases under section 32(1)(*c*) of the Act should be equated with the respective norm or standard applicable to a person competing in each such respective category of market power in which none have conspired, combined, agreed or arranged with another person. [113]

Further, Mr. Justice Gibson adds an interesting digression on the meaning of some terms which are used by both lawyers and economists; such terms as "monopoly," "pure competition," "duopoly," "oligopoly," "monopolistic competition" [114] are words the meaning of which remains unclear in some cases. The judge concludes that "competition" as used in the act, and said to mean "free competition" by the courts, is not to be identified with "pure competition" as defined by economists (a situation in which no seller or buyer has any control over the price of his product — a fictitious situation), but rather with "monopolistic competition" as meant by economists (a category of market in between monopoly and competition — which are not mutually exclusive alternatives), which is a combination of the two. [115]

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[111] *See* Regina v. Elec. Contractors Ass'n of Ontario, 131 Can. Crim. Cas. Ann. 145, at 159-60 (Ont. 1961); [1967] 2 Can. Exch. 53, at 63.

[112] [1967] 2 Can. Exch. 53, at 64.

[113] *Id.*

[114] *Id.* at 65-67.

[115] *Id.* at 67; *see also id.* at 65-66 and 67-70. On the *per se* rule, Justice Gibson says the following:

> The alternative to the application of the *per se* rule is the application of what is sometimes called the rule of reason.
>
> The application of the *per se* rule involves a presumptive conclusion that a specified course of action is in violation of the law, and therefore it carried with it a refusal to examine the effects. And the rule is predicated on the premise that the facts established in the evidence, that is the market situation or course of conduct complained of, permit a legitimate inference as to effects.
>
> The application of the rule of reason requires an examination of the actual and probable effects of an alleged violation in order to determine whether in fact a violation has occurred. In other words, where this rule is relevant from the evidence and analysis as to the economic significance on the market of a course of action, the determination is made as to whether or not there has been a violation of the law.
>
> The difference between the application of the *per se* rule and the

Secondly, there is a discussion of the meaning of the term "supply" as it arose in this case. The accused were carrying on a business of towels, aprons and uniforms (*inter alia*) rental; however, the category of "rental" was only added to the act on August 10, 1960, and the conspiracy was alleged to have taken place between January 1950 and September 30, 1960. Therefore, the defence submitted that in so far as the "rental" aspect was made an essential ingredient of the offence, it had to be limited to those two months in 1960. The court, however, held that what the accused stood charged with, concerned the "supply" of articles within the meaning of the word "supply" as used in the Combines Investigation Act, and that the word "supply" as so used, and in its grammatical sense appropriate to the facts of this case, refers to what was done at all material times in this case, and it also includes the usual dictionary meaning of "rental." Further, what was described as being done in the case was not a "service" outside the scope of the Combines Investigation Act but consisted of a business of supplying articles within the terms of the act and therefore the offence was properly described in the indictment. [116]

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application of the rule of reason is essentially therefore, a difference in the detail of evidence required in establishing a deviation from a standard or norm in order to permit an inference concerning effects.

But it should be noted (in relation to this understanding of the Courts that the public interest is what must be protected), that the difficulty in inferring economic effects from market situations or business practices lies in the fact that in a given case, in determining whether or not the public interest is being protected, that there may be two kinds of effects, namely (i) excessive market power concentrated in the hands of a relatively small group, and (ii) efficiency.

Id. at 69-70.

[116] [1967] 2 Can. Exch. 53, at 54; *see* § 32(1)(*c*), *supra* note 100.