TRADE REGULATION

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I. INTRODUCTION

Delineating the content of a survey of a broad topic such as trade regulation must be, to a large extent, the arbitrary decision of the author. It seems to me that the Combines Investigation Act, [1] the problems with which it attempts to deal and the jurisprudence with respect to it, are central to any general discussion of trade regulation. As a result, this survey will deal with the developments under the Combines Act which occurred between the spring of 1969, the completion date of the last annual survey [2] and the summer of 1971, the completion date for this survey. Basically, I intend to analyze the combines cases and the *Reports of the Restrictive Trade Practices Commission* which have been published in the above mentioned period. Rather than deal with each case or report by itself, I have organized the paper under the following subject matter headings: the scope of the Combines Act, horizontal restraints, monopoly and vertical restraints.

This general approach to the content of the annual survey has one important exception. I do not intend to deal with the recent developments with respect to misleading advertising even though the primary legislative provisions dealing with the problem are contained in the Combines Act. [3] The problem of misleading advertising is essentially a matter of consumer protection. [4] It affects the relationship between a retailer or producer and the consuming public but it has very little effect on competition between retailers or producers. Moreover, regulating misleading advertising will not contribute to the achievement of the traditional goals of competition policy, economic efficiency, the diffusion of economic power and fair competitive behaviour. [5] In short, I do not think that provisions with respect to misleading advertising belong in a statute dealing primarily with competition as a means of promoting economic efficiency. For those readers who are inter-

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[1] CAN. REV. STAT. c. C-23 (1970).

[2] Caron, *Annual Survey of Trade Regulation*, 4 OTTAWA L. REV. 272 (1970).

[3] CAN. REV. STAT. c. C-23, §§ 36-37.

[4] Regina v. Colgate-Palmolive, 3 D.L.R.3d 707, at 709, 57 Can. Pat. R. 221, at 223 (Ont. County Ct. 1969): "This legislation is the expression of a social purpose, namely the establishment of more ethical trade practices calculated to afford greater protection to the consuming public. It represents the will of people of Canada that the old maxim *caveat emptor*, let the buyer beware, yield somewhat to the more enlightened view *caveat venditor*—let the seller beware." *See also* Regina v. Miller's T.V. Ltd. 56 Can. Pat. R. 237 (Man. Magis. Ct. 1968).

[5] ECONOMIC COUNCIL OF CANADA, INTERIM REPORT ON COMPETITION POLICY 6 [hereineafter referred to as INTERIM REPORT]; C. KAYSEN & D. TURNER, ANTI-TRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS (1959) [hereinafter cited C. KAYSEN & D. TURNER].

ested in misleading advertising there are two relatively recent articles on the subject. [6]

Undoubtedly, the two most important developments with respect to the Combines Act in the period under review were the publication of the *Economic Council of Canada's Interim Report on Competition Policy* in July 1969 and the introduction in the House of Commons of the new Competition Act. [7] Where the recommendations of the Economic Council and the provisions of the proposed Act become relevant to the analysis of a particular subject I will mention them and perhaps attempt to superficially assess their significance. However, I will not attempt any detailed analysis of either the interim report or the new bill since to properly deal with all the changes which they propose would require another full-length article. [8] Also, there is the possibility that the bill as first read in the House of Commons will not closely resemble the bill finally passed.

II. The Scope of The Combines Act

The Combines Act only applies to "articles that may be the subject of trade or commerce," [9] it does not apply to the rendering of services except where the act specifically provides for it. [10] Difficult questions arise concerning the application of the act to industries in which both articles and services are involved in varying degrees. In the past few years a number of cases have raised these difficult questions in a variety of contexts. [11] These cases have been the subject of comment elsewhere [12] and will not be examined in great detail here.

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[6] Cohen, *Misleading Advertising and the Combines Investigation Act*, 15 McGill L.J. 692 (1969); Swan, *Misleading Advertising: Its Control*, 9 Alta L. Rev. 316 (1971); Quinlan, *The Combines Investigation Act—Misleading Advertising and Deceptive Practice*, 5 Ottawa L. Rev. *infra*.

[7] Bill C-256, 115 H.C. Deb. 7434 (June 29, 1971). [hereinafter referred to as Bill C-256].

[8] The Interim Report has already been the subject of two articles: Fulda, *Proposed Changes in Canadian Combines Legislation: Some Comparative Comments on the "Interim Report on Competition Policy,"* 8 Osgoode Hall L.J. 415 (1970); McDonald, *Canadian Competition Policy: Interim Report of the Economic Council of Canada*, 15 Antitrust Bull. 521 (1970).

[9] Can. Rev. Stat. c. C-23, § 2 (1970).

[10] Regina v. Electrical Contractors Ass'n of Ontario, [1961] Ont. 265, at 278, 27 D.L.R.2d 193, at 206. "The argument that 'there is nothing wrong in persons associating, even for the deliberate purpose of eliminating competition or increasing the price for their services' requires this definite qualification and proviso: that persons may associate lawfully for the purpose of increasing the price for their services providing, however, they do not conspire, combine, agree or arrange to prevent, limit or lessen unduly competition in any respect prohibited by s. 411."

[11] Regina v. Beamish Construction Co., 65 D.L.R.2d 260, 53 Can. Pat. R. 43 (Ont. 1967); Regina v. Canadian Coat and Apron Supply Ltd., [1967] Can. Exch. 53, 52 Can. Pat. R. 189; Regina v. Canadian Warehousing Ass'n, 1 D.L.R.3d 501, 56 Can. Pat. R. 234 (1968); Regina v. J. W. Mills & Son Ltd., [1968] Can. Exch. 275, 56 Can. Pat. R. 1.

[12] See Report of the Director of Investigation and Research, Combines Investigation Act 27-30 (1968) [hereinafter referred to as Director's Report]; Caron, *Annual Survey of Trade Regulation*, 4 Ottawa L. Rev. 272 (1970); Hinnegan, *The 'Services Exemption' Under the Combines Investigation Act*, 19 U. Toronto L.J. 234 (1969).

The appeal of the defendants in the *Mills* case, the Exchequer Court decision which was the subject of comment in last year's annual survey, has now been decided by the Supreme Court of Canada. [13] It will be recalled that the defendants were freight forwarders in British Columbia whose business involved the consolidation of different types of imported goods into carload lots for shipment by rail to eastern importers. This consolidation service was essential for eastern importers because it allowed them to reduce their transportation costs significantly. Since the railways were prohibited from consolidating goods, [14] the importers had to do it themselves or use the defendants' services. In fact, the defendants' services were used almost exclusively. The defendants admitted that they handled approximately eighty-five per cent of all import pool car traffic and that at least eighty per cent of all goods imported from the Orient moved to eastern Canada by way of rail. [15] The defendants were charged under section 32(1)(*a*) with limiting unduly the facilities for transporting imported goods and under section 32(1)(*c*) with limiting unduly competition in the transportation of those goods. Mr. Justice Gibson of the Exchequer Court found the defendants guilty and his reasons for judgment represent the most sophisticated legal-economic analysis of a combines case made to date by a Canadian court. [16]

On appeal to the Supreme Court, the defendants relied almost exclusively on the contention that their conspiracy related only to services and not to the "facilities for transporting" or the "transportation of an article." [17] They argued that since they neither owned the imported goods nor the physical means of transportation, the Combines Act did not apply to their activities. [18] Mr. Justice Laskin, who wrote the Supreme Court's reasons for judgment, rejected the defendants' argument as Gibson had done in the Exchequer Court. Gibson reasoned that there was nothing in the language of section 32 which required the ownership of the transported goods or of the transportation facilities as an element of the offence; therefore, the section applied to those service industries which "touched and concerned" articles and the defendants were engaged in such an industry. [19] The Supreme Court agreed in large part with the Exchequer Court, although it phrased its interpretation of the scope of section 32 in a slightly different way. With respect to section 32(1)(*c*), Laskin stated that "it extends to those who are in a position to use or command transportation services for the carriage of goods in transit." [20] It was the charge under section 32(1)(*a*) which gave the Supreme Court the most difficulty. The defendants argued that "facilities for transporting" referred only to the physical means for transporting articles.

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[13] J. W. Mills & Son Ltd. v. The Queen, [1971] 1 Can. Crim. Cas. Ann. (n.s.) 420, 64 Can. Pat. R. 7.

[14] *Id.* at 424, 64 Can. Pat. R. at 10.

[15] *Id.* at 422, 64 Can. Pat. R. at 9.

[16] Regina v. J. W. Mills & Son Ltd., [1968] 2 Can. Exch. 275, 56 Can. Pat. R. 1.

[17] *Supra* note 13, at 423, 64 Can. Pat. R. at 10. The defendants also raised the propriety of an amendment to the indictment allowed by the Exchequer Court. The Supreme Court rejected this ground of the appeal summarily since the defendants in their opinion had suffered no prejudice as a result of the amendment.

[18] *Supra* note 13, at 424, 64 Can. Pat. R. at 11.

[19] *Supra* note 16, at 279, 56 Can. Pat. R. at 5.

[20] *Supra* note 13, at 425, 64 Can. Pat. R. at 12.

Because "the physical means of transport were intimately involved," [21] however, the Court interpreted "facilities" to include the operations of the defendants.

With respect to section 32(1)(*c*), the decision in *Mills*, based on the statutory construction of the section advanced by Gibson and Laskin, makes a great deal of sense. Since there does not appear to be a rational basis for the exemption of services from the statute, [22] the statute should be interpreted to include as many service activities as possible without stretching the words unreasonably.

Gibson's approach to this problem seems to be the most sound. The statute, according to him, applies to all service industries which touch or concern articles and as a result, only those service industries which are solely concerned with services are exempt from the provisions of the statute. [23] It is difficult to know from Laskin's judgment in *Mills* whether he would extend the scope of the statute as far as Gibson. In his dissent in the *Beamish* case, [24] however, Laskin made it quite clear that conviction could result under section 32 even though the service element of the particular business was predominant; if articles were necessary elements of the business it was immaterial that they were subordinate elements.

The position of Gibson and Laskin with respect to the services exemption provides an interesting contrast to the position of the Ontario Court of Appeal in the *Beamish* case. Technically, the court seemed to be in agreement with Gibson and Laskin. Section 32, it said, "does not touch or concern agreements or arrangements which relate solely to the provision of services" [25] and the precise holding of the case was that there was no evidence of any undue lessening of competition with respect to the articles involved. [26] However, the court had earlier stated that "the contracts in question are predominantly contracts for work and labour, in which the materials were supplied only incidentally." [27] The court allowed the predominance of the services aspect of the industry to affect its determination of whether there had been an undue lessening of competition. While professing that it was unnecessary to define the relevant market, [28] the court interpreted "supply", as used in section 32(1)(*c*), to mean "sources of supply" or "availability." [29] In effect, the court, in defining the relevant market in which to judge the lessening of competition, referred to a product market, [30] in the economic sense, of the articles incidentally involved in the

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[21] *Supra* note 13, at 426, 64 Can. Pat. R. at 13.

[22] INTERIM REPORT at 146.

[23] *Supra* note 16, at 279, 56 Can. Pat. R. at 5.

[24] Regina v. Beamish Construction Co., 65 D.L.R.2d 260, at 274, 53 Can. Pat. R. 43, at 56 (Ont. 1967).

[25] *Id.* at 266, 53 Can. Pat. R. at 49.

[26] *Id.* at 271-72, 53 Can. Pat. R. at 55-56

[27] *Id.* at 270, 53 Can. Pat. R. at 54.

[28] *Id.* at 271, 53 Can. Pat. R. at 55.

[29] *Id.* at 270-72, 53 Can. Pat. R. at 54-55.

[30] For a discussion of what is involved in the concept of the product market and its role in the definition of a relevant market see Regina v. J. W. Mills & Son Ltd., [1968] Can. Exch. 275, at 306-07.

business. The economic product market in the *Beamish* case was not the articles themselves, however, but the service of supplying those articles. The Court of Appeal made the mistake of allowing the legal concept of "article" to determine the economic concept of market—in particular, product market.

The mistake made by the court in the *Beamish* case was avoided in *Mills* partly because "transportation" rather than "supply" of goods was involved and partly because the analysis of the legal-economic issue was more sophisticated. Hopefully, *Beamish* will be limited to its facts. It was followed by the Restrictive Trade Practices Commission (hereinafter referred to as RTPC) in a recent report, *Road Paving in Ontario.* [31] The RTPC decision is explicable by the fact that the situation was almost identical to that of the *Beamish* case. In the paving of roads, the asphalt and stone chips are mixed in an asphalt plant and then transported to the road-bed to be applied, whereas in the surface treatment or resurfacing of roads, the asphalt and stone are carried to the road and mixed in the application. The RTPC pointed out this factual difference but found that it did not warrant distinguishing the case from *Beamish.* [32] One wishes that the RTPC had made a more sophisticated analysis of the problem than the *Beamish* case or that it had used the factual difference to reach a different conclusion. [33] However, given the *Beamish* case, the criticism of the RTPC's Report cannot be harsh.

The Supreme Court's interpretation of section 32(1)(*a*) in *Mills* is not as readily acceptable as its handling of section 32(1)(*c*). The Court saw section 32(1)(*a*) as being concerned with "maintaining competitive access" [34] to facilities for transportation. The difficulty with this interpretation is that an agreement which unduly limits competition in the transportation of an article will inevitably limit unduly the access to, or use of, the facilities for transporting that article. In other words, the violation of section 32(1)(*c*) will be a necessary and sufficient condition to a violation of section 32(1)(*a*). Such an interpretation makes section 32(1)(*a*) meaningless and allows the imposition of two penalties for what is essentially one offence. [35] It is also contrary to the *Container Materials* case [36] in which the defendants' conviction under section 32(1)(*a*) was quashed, even though the conviction under section 32(1)(*c*) was upheld. The better approach would seem to have been for the Court to limit section 32(1)(*a*) to agree-

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[31] 49 RESTRICTIVE TRADE PRACTICES COMMISSION REPORTS (1970).

[32] *Id.* at 30.

[33] By viewing the article as hot mixed asphalt the Commission could have defined a more limited product market than the Court did in *Beamish* since the sources of supply of hot mixed asphalt would have been fewer than the sources of supply of its component materials. Using this narrower market the RTPC might have been able to find an undue lessening of competition, although the evidence in the case concerning competitive effects is not very strong.

[34] J. W. Mills & Son Ltd. v. The Queen, [1971] 1 Can. Crim. Cas. Ann. (n.s.) 420, at 426, 64 Can. Pat. R. 7, at 13 (Sup. Ct.).

[35] The trial judge, Mr. Justice Gibson, imposed only one fine in the *Mills* case in spite of the two convictions.

[36] Rex v. Container Materials Ltd., [1941] 3 D.L.R. 145, 76 Can. Crim. Cas. Ann. 18 (Ont.).

ments unduly restricting the availability of the physical means of transportation, production and the other enumerated matters.

The *Beamish* case was relied on by the defendants in a recent case involving pharmacists in British Columbia.[37] The governing body of pharmacists, the Pharmaceutical Association of the Province of British Columbia, participated with the government of the province in a scheme for the provision of prescription drugs to welfare recipients. By 1966, pharmacists had become dissatisfied with their rate of remuneration under the scheme. It became apparent that the association, in representing the economic interests of pharmacists in negotiations with the government concerning remuneration, was exceeding its statutory powers.[38] As a result, a separate organization, the British Columbia Professional Pharmacists' Society, was established in 1968 to represent the economic interests of pharmacists in the province. When negotiations between the society, the association and the government failed in 1969, the Society recommended to all pharmacists in the province that they impose a one dollar surcharge on all prescriptions prepared for welfare recipients. The society and the association were indicted under sections 32(1)(*c*) and (*d*). The association was found not guilty on both counts of the indictment on the ground that there was insufficient evidence of any complicity on its part in the adoption of the one dollar surcharge.[39]

The society made a number of rather specious arguments based on the services exemption. It argued, first, that the government was bearing the cost of the articles involved in the preparation of prescription drugs before the one dollar surcharge was imposed and that, therefore, the extra dollar was only for services.[40] The court rejected this argument on the ground that the society's own publications referred to the one dollar as a price increase rather than a service charge.[41] Second, the society argued that there was no "sale" to welfare recipients as charged in the indictment since only a service was rendered; and, even if there was a sale, it was to the government not the welfare recipient.[42] The court rejected the argument on the ground that, given the purpose of the legislation,[43] the word "sale" in section 32 could be interpreted to include the transaction between the pharmacist and the welfare recipient. Moreover, the word "supply," which was also used in the indictment, covered the pharmacists' activities even if

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[37] Regina v. B. C. Professional Pharmacists' Soc'y, 64 Can. Pat. R. 129 (B.C. Sup. Ct. 1970). Only the services aspect of the case is discussed at this point. For a discussion of the other aspects of the case see the text accompanying notes 84-111 *infra*.

[38] The association's primary obligation was to protect the public interest. The Pharmacy Act, B.C. REV. STAT. c. 282 (1960).

[39] *Supra* note 37, at 137-38.

[40] *Id.* at 141.

[41] Because of the way in which the Court disposed of the defendants' primary argument with respect to services it had to dispose of this argument on this ground. Even if the $1.00 was a service charge the Court should have rejected it on the ground that the service charge affected the sale or supply of prescription drugs. This point is based on the argument developed in the text *infra* accompanying notes 49-59.

[42] *Supra* note 37, at 142.

[43] The Court never spelled out what it considered the purpose of the legislation to be or why it necessitated such an interpretation of "sale."

"sale" did not. [44] The society's third argument relating to the service exemption was that a prescription was not an article which was the subject of trade or commerce since it can only be sold by a pharmacist and is designed for only one person. [45] The *Canadian Warehousing Association* case [46] had, of course, resolved this point by literally interpreting the words "may be" in the statutory definition of "article" and the Supreme Court of British Columbia simply followed that case. [47]

The society's primary argument with respect to the services aspect of the case was that "a pharmacist in filling a prescription was rendering a professional service as opposed to supplying an article or commodity." [48] Mr. Justice Seaton of the Supreme Court of British Columbia rejected the society's argument on the ground that "those professional services are incidental to the supplying of the prescription. It cannot be said that in fixing prices of prescriptions one is fixing the price of labour in which the supply of the materials is only incidental." [49] Obviously, Seaton was applying the *Beamish* version of the services exemption, [50] even though he reached a different conclusion on the facts before him. While it is difficult to disagree with the result reached by Seaton, the method he used to reach it is subject to criticism. According to him, the question of whether the Combines Act applies to a particular service activity depends on an evaluation of the relative importance of the services and the articles involved in the rendering of those services. If the article is incidental to the service rendered, as was found in the *Beamish* case, the act does not apply; however, if the service is incidental to the articles, as was the finding in the *B.C. Pharmacists'* case, the act applies. There are two difficulties with this test. First, it is based on a misreading of the *Beamish* case. [51] The *Beamish* case did not decide that the Combines Act did not apply to the particular service industry in question because articles were only incidentally involved; but rather, it decided that, even though the act applied, there was no undue lessening of competition in respect of those articles. [52] Second, Seaton's test of the scope of the act with respect to services would allow some service activities, which should be covered by the statute, to escape it. The *Beamish* case is a good example, and it does not require much imagination to see a court finding the articles involved in the preparation of prescription drugs incidental to the services involved. Therefore, as was pointed out earlier, [53] since there is no rational basis for the services exemption, the better approach is to interpret the act

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[44] *Supra* note 37, at 142-43.

[45] *Id.* at 143

[46] Regina v. Canadian Warehousing Ass'n, [1968] 1 Can. Exch. 392, 54 Can. Pat. R. 35, *aff'd* [1969] Sup. Ct. 176, 56 Can. Pat. R. 234.

[47] Regina v. B.C. Professional Pharmacists' Soc'y, 64 Can. Pat. R. 129, at 143 (B.C. Sup. Ct. 1970).

[48] *Id.* at 139.

[49] *Id.* at 140-41.

[50] Seaton quoted the passage from the judgment in the *Beamish* case. See *supra* note 27.

[51] The Economic Council of Canada made the same error. See INTERIM REPORT 137.

[52] *See* text accompanying notes 23-30.

[53] *See* text accompanying notes 21-22.

to apply to all service industries in which articles are even marginally involved. Out of an abundance of caution, it should be pointed out that making service industries, in which articles are involved, subject to the jurisdiction of the Combines Act does not necessarily mean that convictions will result in every case.

As I have already indicated, there is no rational basis for the exemption of service industries from the Combines Act. The so-called exemption was introduced into the act in 1935 by way of a Senate amendment. The Senate reasoned that the act dealt with the restriction of trade and commerce and that services had nothing to do with trade and commerce. [54] Since 1935, criticism of the services exemption has been widespread. [55] The Economic Council of Canada in its *Interim Report on Competition Policy* confirmed definitely what everyone already knew. Because of the difficulty which the buyer has in shopping competitively with respect to services, because of the limited geographical size of many service markets, and because of the impossibility of returning an unsatisfactory product, the service sector of the economy is peculiarly susceptible to restrictive trade practices. [56] Furthermore, the services sector of the economy is not an insignificant part of the national economy as it may once have been. The Economic Council estimated that the service industries not covered by the Combines Act constituted approximately twenty per cent of the 1967 Gross Domestic Product on a net-value-added basis. [57] As a result of its findings, the Economic Council recommended, first, that per se offences under the revised act should be made applicable to "all commercial activities" [58] and second, that the civil jurisdiction of the proposed Competitive Practices Tribunal embrace "all economic activities, whether goods-producing or service-producing." [59] Both of these recommendations have been embodied in the new Competition Act, Bill C-256 which was recently given first reading in the House. [60]

Once it has been resolved to include service industries within the scope of the act a second question arises. Are there any service industries which, because of some peculiar characteristic, deserve to be exempted from the provisions of the act? Trade union activities and the activities of fishermen are two examples of such service industries which are exempt under the

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[54] H.C. DEB. 4310 (1935). The fact that the amendment was passed so casually probably indicates the lack of importance which the government attached to the entire act.

[55] Kilgour, *Grass Roots Regulation of a Private Enterprise Market Economy*, 45 CAN. B. REV. 764 (1967); Hinnegan, *The Services Exemption Under the Combines Investigation Act*, 19 U. TORONTO L.J. 234 (1969); INTERIM REPORT 133-158; H.C. DEB. 7808 (1968); DIRECTOR'S REPORT 27-30 (1968).

[56] INTERIM REPORT 144-46.

[57] *Id.* at 141. The Minister of Consumer and Corporate Affairs cited a figure of thirty-five per cent of gross national product. *See* H.C. DEB. 2808 (1968).

[58] *Supra* note 56, at 147.

[59] *Supra* note 56, at 148.

[60] Bill C-256, H.C. DEB. (*See* parts II and III).

present act [61] and whose exemption is continued in the proposed act. [62] Under the present act the exemption for fishermen only applies to fishermen in British Columbia. Under the proposed act, the exemption is broadened to include all fishermen and limited to activities which "are reasonably necessary for their protection as fishermen." The new Competition Act extends these specific exemptions to include certain agreements between insurance companies with respect to their non-life insurance business [63] and agreements between investment dealers as to the underwriting or primary distribution of an issue of securities. [64] It is difficult to assess the necessity of these exemptions and such an assessment is beyond the scope of this survey. The exemptions seem to be very narrow, only applying to agreements with respect to a limited number of activities. [65] However, the narrowness in which these specific exemptions have been framed may be misleading since there is a broad general exemption in the new act for regulated industries. [66] It is interesting to note that the Economic Council made no recommendations for the exemption of the provision of financial services. It suggested that agreements in this area, which would violate the new act, could only be tolerated if the public were protected by "appropriate regulatory legislation." [67]

The provisions of the proposed Competition Act do not apply to activities which are "expressly required or authorized" by federal, provincial or municipal enactment if such activities are "expressly required to be supervised and regulated, on a continuing basis" by a public body "that is charged with the duty of protecting the public interest." [68] Nor does the proposed act apply to the activities of the professions if they meet the same regulatory requirements. [69] Section 92 appears to have been based on the present jurisprudential exemption for regulated industries, [70] as declared by the *Canadian Breweries* case. [71] The test enunciated by Mr. Chief Justice McRuer in that case was that the Combines Act did not apply "[w]hen a

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[61] Combines Investigation Act, CAN. REV. STAT. c. C-23, § 4 (1970), An Act to amend An Act to amend The Combines Investigation Act and the Criminal Code, Can. Stat. 1966 c. 23, § 1.

[62] Bill C-256, § 89(1) (*a*) & (*b*).

[63] Bill C-256, § 90.

[64] Bill C-256, § 91.

[65] For the general insurance companies the exemption only applies to the collection, analysis, projection and dissemination of information relating to "claims, losses and loss adjustment expenses", and the preparation of model insurance contracts. Agreements for common premium rates or adherence to model contracts are specifically excluded from the exemption. With respect to the underwriting exemption for investment dealers, if the proposed Tribunal finds competition in the underwriting of a security has been unduly restricted it may enjoin the parties to the agreement from entering into an agreement which will likely restrict competition unduly.

[66] Bill C-256, § 92.

[67] INTERIM REPORT 156.

[68] Bill C-256, § 92(1).

[69] Bill C-256, § 92(2). The only difference between the regulatory requirements of subsections 1 and 2 of section 92 is that for purposes of subsection 2 the supervisory body is not required to be a public body.

[70] Competition Act, Explanatory Notes 129.

[71] Regina v. Canadian Breweries Ltd., [1960] Ont. 601, 126 Can. Crim. Cas. Ann. 133 (High Ct.).

Provincial Legislature has conferred on a Commission or Board the power to regulate an industry and fix prices, and the power has been exercised." [72]

There are obviously some potential differences between the *Canadian Breweries* test and the test of section 92 differences which may or may not be resolved by statutory interpretation. For example, it has been suggested that the minimum commission rates established by stock exchanges on securities transactions would be exempt under section 92 of the proposed act, [73] as it would probably be under the present act by way of the *Canadian Breweries* case. However, there are difficulties in applying section 92 to the Exchange commission rates to achieve this result. The Toronto Stock Exchange is not "expressly required or authorized" to fix commission rates on securities transactions although such action is within its general power. [74] Nor is the Ontario Securities Commission "expressly required" to regulate the commission rates adopted by the stock exchange, although it has the power to do so. [75] Generally, however, it can be said that section 92 adopts the same type of approach as the *Breweries* case; if a regulatory body has the power to regulate we will not look behind its regulation to see whether the public interest in competition has, in fact, been taken into account, or whether the anti-competitive conduct is essential to the operation of the regulatory scheme. But the public interest in competition is no less important because an industry happens to be subject to direct governmental regulation, and the simple fact of direct regulation does not assure protection of that interest.

I hesitate to suggest it in these days of fervent Canadian nationalism but the American approach to the problem of reconciling direct regulation and the antitrust laws is preferable to either the *Canadian Breweries* test or section 92 of the proposed Competition Act. According to American jurisprudence, if a body has been established with the power to make rules governing an industry and those rules violate the antitrust laws, the antitrust laws are only displaced if it is necessary to make the regulatory scheme work, and then only to the minimum extent necessary. [76] Applying this test to the example mentioned in the previous paragraph of minimum commission rates on securities transactions, the Exchange would be required to show that without minimum commission rates the purpose of the Toronto Stock Exchange Act would be frustrated. Nor does the possibility of review by an administrative agency displace the antitrust laws. [77] As one judge commented in a recent case: "the history of United States regulatory agencies in general, seems usually to record an ever-growing absence of the spirit required for vigourous enforcement of the antitrust laws. Rather it seems to demonstrate that shortly following the establishment of administrative procedures the regulatory agency usually becomes dominated by the industry

[72] *Id.* at 629, 126 Can. Crim. Cas. Ann. at 167.

[73] The Globe & Mail (Toronto), June 30, 1971 at B-4, col. 8.

[74] An Act Respecting The Toronto Stock Exchange, Ont. Stat. 1969 c. 132, § 10.

[75] The Securities Act, Ont. Stat. 1966 c. 142, § 139.

[76] Silver v. New York Stock Exchange, 83 Sup. Ct. 1246, at 1262, 373 U.S. 341, at 357 (1963).

[77] Thill Securities Corporation v. New York Stock Exchange, 433 F.2d 264 (1970).

which it was created to regulate." [78] And not only do most regulatory agencies not consider the competitive effect of the activities which they are reviewing but they are not required to do so.

In sum, the American approach is to allow exemption from the anti-trust laws only if the public interest in competition has been, or will be, in fact, protected. The Canadian approach, on the other hand, is very formal and legalistic. If the prescribed legal forms and structure are observed, then we will assume that the public interest in competition is protected. We will not look behind the structure to inquire whether that interest is, in fact, protected. [79] Unfortunately, past experience with our regulatory agencies does not justify such faith. [80]

III. Horizontal Restraints

The jurisprudence of the past two years has not been particularly fruitful with respect to horizontal restraints under section 32. Previous cases have established with certainty that an agreement which has, as its purpose, the virtual elimination of competition [81] or the substantial lessening of competition [82] will violate section 32. The actual competitive effects of the agreement and the economic power of the parties to it are irrelevant. [83] Despite the fact that the law on section 32 has been established with certainty, the application of that law to a particular set of facts is never certain. The single case and the three RTPC Reports with respect to horizontal restraints that were decided in this period raise some interesting peripheral legal questions as well as the general problem of applying the well-established test of section 32. In this section of the survey I will examine the issues raised by this case and reports and their resolution, and I will attempt to fit them into the existing Canadian jurisprudence on horizontal restraints.

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[78] *Id.* at 273.

[79] *Supra* note 71, at 629, 126 Can. Crim. Cas. Ann. at 167. "When a Provincial Legislature has conferred on a Commission or Board the power to regulate an industry and fix prices, and the power has been exercised, the Court must assume that the power is exercised in the public interest."

[80] The Liquor Control Board of Ontario in the famous *Canadian Breweries* case was acting as a rubber stamp and not protecting the public interest. See Jones, *Mergers and Competition: The Brewing Case* 33 C.J.E.P.S. 551 (1967). With respect to the securities industry which we have been using as an illustration, one example will indicate that the Ontario Securities Commission is not regulating the industry very vigourously, if at all. The OSC in 1967 approved the Toronto Stock Exchange's entire commission rate structure in one paragraph. The OSC did not consider the effect of the rates on competition; in fact it is quite probable that it did not even consider the public interest in general, since apparently the only evidence in the matter was provided by the Exchange. See OSC Bulletin, June 1967 at 15-18.

[81] Howard Smith Paper Mills Ltd. v. The Queen, [1957] Sup. Ct. 403, 8 D.L.R.2d 449; Container Materials Ltd. v. The King, [1942] Sup. Ct. 147, [1942] 1 D.L.R. 529; Regina v. Abitibi Power & Paper Co., 131 Can. Crim. Cas. Ann. 201, 36 Can. Pat. R. 188 (Que. Q.B. 1961).

[82] Regina v. J. W. Mills & Son Ltd., [1968] 2 Can. Exch. 275, 56 Can. Pat. R. 1.

[83] Regina v. Electrical Contractors Ass'n of Ontario, [1961] Ont. 265, 27 D.L.R.2d 193; Regina v. Faith, 51 Can. Pat. R. 126 (Ont. High Ct. 1966).

In the *B.C. Pharmacists* case, the services aspect of which was discussed earlier, [84] the Pharmacists' Society was charged with conspiring "with persons unknown" to unduly lessen competition in the sale or supply of prescription drugs to welfare recipients. [85] The one dollar surcharge was recommended to the society by one of its committees after negotiations with the government failed and was generally approved by the members. Thereafter, the society sent various communications to all pharmacies and all pharmacists recommending that they participate in the scheme to impose the one dollar surcharge. The society contended that the agreement was only to recommend the surcharge and not to impose it. [86] But the court found that "the agreement was to impose a one dollar price increase, and to strive to have this imposed at every pharmacy in the Province." [87]

The court's decision raises some interesting questions concerning the meaning of "agreement" in section 32. The court never states in its reasons for judgment who were the parties to the agreement. When the court says that the agreement was to impose the surcharge and to have it imposed province-wide, [88] it implies that the agreement was between the society and its members. Such a result is plausible if one views the committee which made the original recommendation to adopt the surcharge as the directing mind of the society because conspiracy requires "not merely two legal persons but two minds." [89] However, it is clear from the facts that the committee was not the directing mind of the society. The committee's recommendation was submitted to the members for approval by means of a formal vote. [90] Therefore, the society was nothing more than its membership and the case would seem to be an improper one for finding an agreement between the society and its members. It would have made more sense for the Crown to charge an agreement among the members of the society. Even this course of proceeding has difficulties which probably explain why the Crown chose to charge the society and not its members. First, the large number of defendants, who would have been prosecuted could have caused substantial practical difficulties in the conduct of the case. [91] Second, there seems to be a general reluctance to subject individuals to criminal punishment for violating economic regulations. [92]

On the facts, the court could also have found an agreement between the society and the pharmacists and pharmacies who were not members of

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[84] See text accompanying notes 37-39.

[85] Regina v. B.C. Professional Pharmacists' Soc'y, 64 Can. Pat. R. 129, at 135 (B.C. Sup. Ct. 1970). Actually the Society was also charged with conspiring with the Pharmaceutical Association as well; however, the Association was acquitted.

[86] *Id.* at 145.

[87] *Id.*

[88] *Id.*

[89] G. WILLIAMS, CRIMINAL LAW 861 (2d ed. 1961).

[90] *Supra* note 85, at 133-34. The court only describes the approval given by the Vancouver chapter of the society.

[91] *Supra* note 85, at 132-33. There were at least 700 members of the society.

[92] See Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423 (1963); Ball and Friedman, *The Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View*, 17 STAN. L. REV. 197 (1965); 4 H.C. DEB. 6843 (1910).

the society but who participated in the scheme to impose the surcharge. Such an agreement could have been inferred from the following facts: there was an invitation to all pharmacists in the province to engage in concerted action; each pharmacist knew that all other pharmacists had been invited to join in the scheme; a large measure of concerted action by the pharmacists was essential to the success of the scheme; [93] and there was actual participation in the scheme. The above factors are the very ones which American courts have traditionally used to infer agreements in the antitrust area. [94] The RTPC used basically these same factors to infer an agreement among the manufacturers of pencils. [95] There was no prosecution in the pencil case and, to my knowledge, there has never been a prosecution in a case where it would have been necessary to infer an agreement. In every combines case involving section 32 the agreement has been so explicit that it has not even been at issue. Once again, this phenomenon may be attributable to the general reluctance to impose criminal penalties for economic crimes. [96]

Following their argument that there was no agreement, the defendants argued that, even if there was an agreement, they did not possess the power to implement it. [97] In response to this contention, the court said that power to carry out the agreement was not an element of the offence but that, if it was, the defendants possessed the requisite degree of power since they controlled the pharmacies even if they did not own them. In certain communities, the court pointed out, "the agreement encompassed all or most of the pharmacies." [98]

Having found an agreement, the court turned its attention to the question of undueness and here the defendants made some forceful arguments. First, the defendants argued that, since there was no price competition between pharmacists prior to the agreement, the purpose of the agreement could not have been to eliminate competition. [99] The court handled this argument in a very unsatisfactory fashion. While it admitted that there was no price competition prior to the agreement, it pointed out that there were forms of competition other than price competition. [100] However, it neglected to point out that the agreement in question only affected price competition. The court went on to describe the competition which it saw being eliminated by the agreement as follows:

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[93] If welfare recipients could readily get their prescriptions from pharmacists not imposing the surcharge the other pharmacists would have to cease charging the $1.00 extra or suffer a loss of business.

[94] Interstate Circuit Inc. v. United States, 59 Sup. Ct. 467, 306 U.S. 208, at 226 (1939). "Each distributor was advised that the others were asked to participate; each knew that cooperation was essential to successful operation of the plan. They knew that the plan, if carried out, would result in a restraint of commerce . . . and knowing it, all participated in the plan."

[95] Pricing Practices in the Pencil Industry, 31 RESTRICTIVE TRADE PRACTICES COMMISSION REPORTS 50 (1964).

[96] *Supra* note 92.

[97] Regina v. B.C. Professional Pharmacists' Soc'y, 64 Can. Pat. R. 129, at 145 (B.C. Sup. Ct. 1970).

[98] *Id.* at 146.

[99] *Id.* at 143.

[100] *Id.* at 143.

> Where there is only one buyer, buyers combine, or, as here, for some other reason one body is in a position to control the price that will be paid in a certain market the sellers can sell or not sell at that price. If the price is too low many will refuse to sell and the price will be forced up. While that may constitute a limited form of competition it is a form that the buyers, the sellers and the public are entitled to see protected. [101]

In a monopsonistic situation there is price competition between the sellers. The sole buyer obtains the lowest price possible. He does not set a price at which he will always buy from any seller. But here, the government after negotiations with the association, set a price which was acceptable to the pharmacists. [102] In other words, there was no price competition before the agreement to impose the surcharge and therefore, that agreement relating only to price cannot have had the purpose of eliminating competition. Moreover, if the court's reasoning is applied to the implementation of the original scheme for providing drugs to welfare recipients it would have been a violation of section 32 as well, since it eliminated competition. Therefore, it would seem that, if the government had agreed to the price, there would have been no violation. When the government did agree, then the pharmacists could do nothing short of refusing to sell prescriptions to welfare recipients. This would seem to be one of those situations where the public interest in competition would not be jeopardized by allowing the pharmacists to bargain collectively with the government. [103]

Given that there was competition to be lessened, the defendants argued that it had not been lessened unduly, since not all pharmacies participated in the plan. [104] The court found that "if the agreement had been carried out it would have had the effect of virtually eliminating competition." [105] In other words, as was pointed out earlier, [106] the actual effects of the agreement or the capacity of the parties to carry it out successfully are irrelevant; the gist of the offence is in the purpose of the agreement. The agreement in question had a double purpose, as the court itself indicated: first, to impose a one dollar surcharge and second, to attempt to get non-member pharmacists to impose it also. [107] The former is an agreement to lessen competition; the latter is an agreement to try to do so. In its determination of undueness the court obviously saw the purpose of the agreement as being the latter one and its assumption is clearly justified. Here the only possible difference between an agreement to lessen competition and an agreement to attempt to do so is the power of the society to successfully carry out the agreements. It did have the power to impose the one dollar surcharge as far as its members were concerned but it did not have the same power with respect to non-members. Nevertheless, the jurisprudence is quite clear that

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[101] *Id.* at 143.

[102] *Id.* at 130.

[103] INTERIM REPORT 150.

[104] *Supra* note 97, at 146.

[105] *Id.*

[106] *See* text accompanying note 83.

[107] Regina v. B.C. Professional Pharmacists' Soc'y, 64 Can. Pat. R. 129, at 145 (B.C. Sup. Ct. 1970).

power is irrelevant. [108] Moreover, there is no social benefit in allowing persons to agree to attempt to lessen competition.

This case is exceptional from this point of view. In most cases, there will be an agreement to fix prices, for example, but it would be very difficult to prove an agreement to persuade others to do so. Most commercial enterprises would hesitate to use a press campaign to promote a price-fixing scheme as the society did here.

Because of the broad purpose of the agreement it was unnecessary for the court to define the relevant market with much specificity. It assumed that the market comprised all pharmacists selling prescription drugs to welfare recipients in the province of British Columbia. [109] If the agreement had been restricted to the members of the society the question of market definition would have been very important. It is very likely that, in that case, the relevant markets would have been local markets, since buyers did not have access to geographically distant markets. Therefore, the case would have necessitated analysis of the effect of the agreement in many different markets. From the evidence, the agreement, if carried out, would have unduly lessened competition in at least some of these markets. [110]

The RTPC Reports in the last two years which deal with allegations of violations of section 32 all involve oligopolistic market structures. [111] In an oligopolistic market, parallel pricing by firms does not necessarily lead to the inference of an agreement to fix prices. It may simply be the result of independent but interdependent behaviour of the firms in the market. [112] Canadian courts have never grappled with the problem of oligopoly in the inference of an agreement because, as was pointed out earlier, [113] they have always been faced with express agreements. Not being required to stamp conduct as criminal, the RTPC has been more ready to confront the problem of oligopoly.

In the *Report on Business Forms* [114] fourteen firms, members of The Institute of Business Form Manufacturers, had arranged to have an "open price policy." Under this policy every firm was required to file its current price list with the Institute and to register any transactions which departed from the terms and conditions in the price list. [115] This information was available to other members on request and there was provision for investiga-

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[108] *See* text accompanying note 83.

[109] *Supra* note 107, at 147.

[110] *Supra* note 107, at 146.

[111] *The Report on Business Forms*, Quebec, 51 RESTRICTIVE TRADE PRACTICES COMMISSION REPORTS (1970). This Report concerned a straightforward agreement to fix tenders. Because of the primarily factual nature of the Report I have decided not to deal with it.

[112] KAYSEN & TURNER 150; J. BAIN, INDUSTRIAL ORGANIZATION 270-79 (2nd ed. 1968); P. AREEDA, ANTI-TRUST ANALYSIS: PROBLEMS, TEXT, CASES 217-21 (1967); R. CAVES, AMERICAN INDUSTRY: STRUCTURE, CONDUCT, PERFORMANCE 44-45 (2nd ed. 1967).

[113] *See* text accompanying notes 95-96.

[114] 50 RESTRICTIVE TRADE PRACTICES COMMISSION REPORTS (1970).

[115] *Id.* at 40.

tion by the institute of unregistered sales at variance with published prices. [116] However, there was nothing in the agreement to prevent a firm from departing from its published prices. Nevertheless, the Commission found that the entire arrangement "can only be construed as evidence of a common understanding to follow mutually acceptable pricing policies." [117]

The Commission's appraisal of the institute agreement was largely conclusory. It saw the purpose of the arrangement as being to reduce price competition and concluded that was sufficient for a violation of section 32. [118] But such a test would make the activities of most trade associations unlawful. The agreement here was not to fix prices; it was only to provide information to member firms. The statute itself specifically exempts from section 32 agreements with respect to certain types of information. [119] However, since the agreement among the business forms manufacturers was clearly not within this exemption, the question becomes: should it be treated like an outright agreement to fix prices? The RTPC never dealt with this question.

The first principle which emerges in dealing with this question is that the dissemination of information contributes to the efficient operation of the market, [120] even though it may tend to lead to price uniformity. Freedom of speech, in itself, is a right to which our society attaches considerable importance. Therefore, any rule which is developed with respect to information agreements should balance these costs and benefits. If the agreement makes the information available to the public and to buyers it is less likely to be a guise for price-fixing than if the information is restricted to the parties to the agreement. [121] The information required to be filed by the business forms manufacturers was available to "any other interested person." [122] If the agreement attempts to assure or coerce the adherence of the parties to their published price lists then it is in substance a price-fixing agreement. [123] What constitutes coercion in this situation is a difficult question. In the *Business Forms* case, the requirement that sales at variance with the list be registered would deter price-cutting. [124] An even clearer deterrent was the institute's procedure for investigating unregistered off-list sales. [125]

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[116] *Id.* at 36-43.

[117] *Id.* at 57.

[118] *Id.*

[119] The Combines Investigation Act, CAN. REV. STAT. c. C-23, § 32(2) (1970).

[120] *The Metal Culvert Industry, Ontario and Quebec*, 52 RESTRICTIVE TRADE PRACTICES COMMISSION REPORTS 19 (Opinion of the Director of Investigation and Research); Maple Flooring Manufacturers Ass'n v. U.S., 286 U.S. 563 (1925); KAYSEN & TURNER 149; R. CAVES, AMERICAN INDUSTRY: STRUCTURE, CONDUCT, PERFORMANCE 64 (2nd ed. 1967).

[121] KAYSEN & TURNER 150.

[122] 50 RESTRICTIVE TRADE PRACTICES COMMISSION REPORTS 68-69 (1970).

[123] KAYSEN & TURNER 150-51; Sugar Institute Inc. v. U.S., 297 U.S. 553, 56 Sup. Ct. 629 (1936).

[124] This is especially true in an oligopolistic market where a firm will only undercut his rivals if it can be certain they will not respond immediately. Therefore, caution must be exercised in allowing oligopolists to exchange price information.

[125] 50 RESTRICTIVE TRADE PRACTICES COMMISSION REPORTS 40-43, 54 (1970).

Because of this attempt to secure adherence to published prices, the result reached by the RTPC in the *Business Forms* case was probably correct.

The inference of an agreement with respect to prices from the exchange of certain information was also one of the important issues in the Commission's inquiry into the electric large lamps industry. [126] The Canadian electric large lamp market is shared by only three manufacturers, Canadian General Electric, Canadian Westinghouse and Sylvania. [127] Prior to 1959, all three manufacturers published almost identical price lists. However, actual pricing did not conform to the published lists. [128] In 1959, the largest manufacturer, General Electric, introduced a sales plan which attempted to specify the price of lamps to the various types of distributors and users. The plan, which was quickly adopted by Westinghouse and Sylvania, was so complex that price competition was not eliminated. [129] Therefore, in 1961, General Electric introduced a new sales plan which replaced the system of discounted list prices with a hierarchy of net prices. [130] The General Electric plan, was, of course, adopted by the other two manufacturers.

On the basis of these facts, there would not seem to be any violation of the act. However, the manufacturers went further to assure the successful operation of the sales plan. They communicated directly with one another about concluded sales and tenders to discover if a variation in price constituted a change in policy, [131] or to explain that a variation in price was not a change in policy. [132] On the basis of these communications, the Commission concluded that General Electric, Westinghouse, and Sylvania had conspired to unduly lessen competition in the sale and supply of electric large lamps. [133]

The essential issue in the case is whether the periodic communications between the manufacturers amounted to an arrangement to adhere to prices. The case is similar to the *Business Forms* case, but more difficult since there was no agreement here to exchange information about sales at variance with published prices. Certainly the voluntary explanations of price-cutting incidents can be no more a violation of the act than the voluntary announcement of a price list and an intention to adhere to it. Although the inquiries were infrequent, [134] it is not difficult to infer an agreement to adhere to published prices especially since the responses implied what price policy would be in the future. [135] It is probably true that the information received

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[126] *Electric Large Lamps*, 53 RESTRICTIVE TRADE PRACTICES COMMISSION REPORTS (1971).

[127] *Id.* at 2. Large lamps include lamps for both household and commercial uses. Lamps for special functions such as automobile headlights, vending machines and toys are not included.

[128] *Supra* note 126, at 7.

[129] *Id.* at 30.

[130] *Id.* at 35-36.

[131] *Id.* at 46-50.

[132] *Id.* at 53-54.

[133] *Id.* at 65.

[134] *Id.* at 47-48. The evidence of the manufacturers indicated that they contacted one another no more than six times a year.

[135] *Id.* at 63.

by way of these inquiries tended to make prices uniform. In the absence of such information, competitors in an oligopolistic market would perhaps respond to the incidental price cut by cutting their prices. [136] This limited price competition is the only price competition which exists in an oligopoly and therefore, everything should be done to make it possible. Unlike some trade information, [137] there would seem to be no benefit for the operation of the marketplace from this type of information exchange among competitors. Therefore, this information exchange should constitute a violation of the statute.

In the *Metal Culvert Industry* case [138] the RTPC dealt with another "open pricing policy." The manufacturers of metal culverts in Ontario and Quebec, through the Corrugated Metal Pipe Institute, attempted to get each manufacturer to publish independently a complete price list and to adhere to it. The six largest manufacturers had 87.1 per cent of the Canadian metal culvert market in 1963 and the largest, Armco, had 42.3 per cent. [139] In 1963, two directors of the institute conducted a study of the metal culvert industry and recommended that each manufacturer publish and adhere to its price lists. Later in 1963, one of the six largest manufacturers, Robertsteel, issued a price list and sent a memorandum to the institute concerning the basis on which the selling prices had been determined. [140] This price list was subsequently adopted by all manufacturers. [141]

This case is very different from the *Business Forms* case. In that case, the question was whether the express agreement amounted to a price-fixing agreement; here, the question is whether there is an agreement at all. [142] Was the uniformity of prices brought about by independent decisions of the various manufacturers or by some collusive arrangement among them? The Commission came to the conclusion that "the adoption of common prices in the manner described . . . demonstrates a mutuality of action by the producers . . . which amounted to an arrangement within the meaning of the Combines Investigation Act." [143]

Obviously, the Commission did not infer an agreement from the fact that prices were uniform but rather from the way in which they became uniform. They became uniform through a form of price leadership. Robertsteel issued a price list which was subsequently adopted by all manufacturers. Such price leadership is very common in markets characterized by oligopoly and no adverse inference should arise from it. But the Commission did not rely on this natural price leadership. It maintained that the discussions and studies conducted by the institute led to the establishment of the open price

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[136] It is more likely that they would wait for a clearer indication of a shift in the competitor's price policy.

[137] *See* text accompanying note 120.

[138] *The Metal Culvert Industry, Ontario and Quebec*, 52 RESTRICTIVE TRADE PRACTICES COMMISSION REPORTS (1970).

[139] *Id.* at 29-30. Figures were not given for the Ontario and Quebec markets alone.

[140] *Supra* note 138, at 33-34.

[141] *Id.* at 35.

[142] *Id.* at 54.

[143] *Id.* at 57.

policy.[144] While these studies obviously played some part in the establishment of the uniform prices they hardly amounted to an agreement to adopt uniform prices. The Commission may have been influenced by its previous report on the metal culvert industry which found that uniform prices had "resulted from meetings, discussions and agreements on prices."[145] It should be noted that there was some evidence in the 1970 report of express agreements on prices in the province of Quebec.[146] However, there was no such evidence with respect to the Ontario market, and the Commission did not base its decision for the Ontario market on the Quebec agreements.[147] It would appear, therefore, that with respect to Ontario, the evidence in the case would not support the inference of an agreement given the oligopolistic structure of the market. Uniform prices are to be expected in such a market and the defendants should not be punished for the almost inevitable result of the market structure unless there is an agreement. Where there is an agreement, the defendants know they must stop agreeing and if they are convicted of a violation of section 32 a court may prohibit them from agreeing again.[148] But the RTPC in its *Report* gives the manufacturers of metal culverts little guidance as to what conduct will be tolerated. Discussing industry pricing policies would not seem to be a violation in itself, nor would the oligopolistic market structure or the price leadership. In such a situation, for a court under section 31 to prohibit them from ever again agreeing to adopt uniform prices would be meaningless.

It must be noted that the metal culvert manufacturers employed a delivered pricing system. Under this system, Ontario was divided into three zones and Quebec into five.[149] In each of these zones, a buyer would pay the identical price for a particular product regardless of his geographical proximity to the manufacturer's plant. The Director of Investigation and Research did not allege that the delivered pricing system was a violation of section 32. Nevertheless, the Commission, both in its present report,[150] and in the earlier report,[151] analyzed the economic effects of the delivered pricing system.[152] They found that delivered pricing deprived the nearby buyer of his natural advantage[153] and caused an inefficient use of transportation resources in that buyers have no incentive to buy from the nearest source.[154] Although the Commission did not mention it, delivered pricing may also

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[144] *Id.* at 55-56.

[145] *Report Concerning the Manufacture, Distribution and Sale of Metal Culverts and Related Products*, RESTRICTIVE TRADE PRACTICES COMMISSION REPORTS 152 (1957).

[146] 52 RESTRICTIVE TRADE PRACTICES COMMISSION REPORTS 40-44 (1970).

[147] *Id.* at 57.

[148] The Combines Investigation Act, CAN. REV. STAT. c. C-23, § 30(1) (1970).

[149] *Supra* note 146, at 49.

[150] *Id.* at 49-52.

[151] *Supra* note 145, at 116-25.

[152] *See generally, Price Systems and Competition: The Basing-Point Issues*, 58 YALE L.J. 426 (1948-49); Clark, *Basing Point Methods of Price Quoting*, 4 C.J.E.P.S. 477 (1938).

[153] *Supra* note 145, at 123.

[154] *Id.* at 123-24.

distort buyer location.[155] It also facilitates higher prices in an oligopolistic market. By allowing each seller to quote the same price to every buyer regardless of location, delivered pricing excludes the limited concealed price-cutting which leads to lower prices generally.[156]

The Commission saw clearly the role of the delivered pricing system in securing stable and uniform prices in the industry. In assessing its competitive significance, the Commission found the delivered pricing system to be "incidental to the competition-lessening arrangements"[157] and detrimental to the public interest. Therefore, according to the Commission, the delivered pricing system in itself could not have been the basis for finding an agreement within the meaning of section 32. Canadian courts have never considered the validity of a delivered pricing scheme under section 32.[158] In the United States, however, delivered pricing systems have been held to constitute violations of the anti-trust laws in a number of cases.[159]

Without proof of some overt explicit agreement, it is very difficult to infer an agreement from the existence of a delivered pricing system in a particular industry. Such a situation could possibly result from the independent awareness of each firm in the market of the mutual benefits to be derived from such a system.[160] Therefore, the Commission was probably justified in not finding an agreement from the existence of the delivered pricing system. But the Commission was not justified in recommending that the metal culvert manufacturers be required to offer buyers a bona fide f.o.b. plant price as an alternative to the delivered price.[161] Simply because the delivered pricing system is incidental to an agreement which violates section 32 does not justify prohibiting the delivered pricing system. Two things can be said in defense of the Commission's recommendation. First, delivered pricing, unlike parallel pricing, generally causes undesirable economic consequences for other markets.[162] Second, a meaningful remedy, an f.o.b. plant price, is available with respect to delivered pricing which is not available with respect to parallel pricing. To stop oligopolists from parallel pricing would require either a restructuring of the market or the continuous supervision of prices in the industry. In short, government inter-

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[155] P. AREEDA, ANTI-TRUST ANALYSIS: PROBLEMS, TEXT, CASES 224 (1967); *Price Systems and Competition: The Basing-Point Issues*, 58 YALE L.J. 426, at 437-38 (1948-49).

[156] *Price Systems and Competition: The Basing Point Issues*, 58 YALE L.J. 426, at 437 (1948-49).

[157] 52 RESTRICTIVE TRADE PRACTICES COMMISSION REPORTS 59 (1970).

[158] In Regina v. B.C. Sugar Refining Co., 32 W.W.R. (n.s.) 577 (Man. Q.B. 1960) a delivered pricing system was unsuccessfully attacked as one of the detrimental effects of a merger.

[159] Federal Trade Comm'n v. Cement Institute, 333 U.S. 683, 68 Sup. Ct. 793 (1948); Federal Trade Comm'n v. National Lead Co., 352 U.S. 419, 77 Sup. Ct. 502 (1957); Triangle Conduit & Cable Co. v. Federal Trade Comm'n, 168 F2d 175 (7th Cir. 1948) *aff'd* 336 U.S. 956 (1949). Compare Crouse-Hinds Co., 46 F.T.C. 1114 (1950).

[160] Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655, at 674-75 (1961-62).

[161] *Supra* note 157, at 59.

[162] *See* text accompanying notes 152-55.

vention with respect to parallel pricing is impossible. While government intervention with respect to delivered pricing is practical and desirable, it is important to realize that these considerations are irrelevant to the determination of whether or not there is an agreement. [163]

Bill C-256, following a recommendation of the Economic Council, [164] authorizes the new Competitive Practices Tribunal to prohibit delivered pricing. [165] The bill defines "delivered pricing" to be the practice of refusing to allow the purchaser to buy at the lower of the f.o.b. plant price or the delivered price unless the refusal is based on reasonable conditions generally imposed by the seller. [166] There are two difficulties with this definition of delivered pricing. First, it is not explicitly stated that a seller must allow a purchaser to provide his own transportation. Second, it would not seem to cover a situation such as the metal culvert industry where the manufacturers offered f.o.b. plant prices which did not fully reflect the transportation savings to the manufacturers. [167] In general, however, the proposed Competition Act has responded in an intelligent fashion to the problem of delivered pricing. There is no requirement that the delivered pricing scheme be the result of an agreement. But not every delivered pricing system used by an individual manufacturer has the undesirable economic and competitive consequences that result from industry wide use of delivered prices. Therefore, it makes sense to give the tribunal discretion to prohibit an individual from using delivered prices. Perhaps the statute should provide a list of the general economic and competitive considerations which the tribunal would use to determine whether a particular case of delivered pricing should be prohibited.

IV. MONOPOLY

Canadian law with respect to monopolies is in a very confused and underdeveloped state. [168] According to the statute, two things are required for a monopoly: the substantial or complete control of a business and the operation or the likelihood of the operation of that business to the detriment of the public. [169] In the only case [170] which has been decided under the monopoly provision, it was not clear whether "control" was to be defined by reference to a company's market share or its market power. [171] The same case by means of a circular argument found that the fact of control

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[163] *Supra* note 160, at 676-77.

[164] INTERIM REPORT, 120-22.

[165] Bill C-256, § 37(*e*).

[166] Bill C-256, § 42.

[167] 52 RESTRICTIVE TRADE PRACTICES COMMISSION REPORTS 49-50.

[168] *See generally*, Ison, *The Legal Misconception of Monopoly*, 2 B.C. L. REV. 89 (1964).

[169] Combines Investigation Act, CAN. REV. STAT. c. C-23, § 2 (1970).

[170] Eddy Match Co. v. The Queen, 109 Can. Crim. Cas. Ann. 1, 20 Can. Pat. R. 107 (Que. Q.B. 1953).

[171] *Id.* at 17-18. One commentator states that *Eddy Match* interpreted "control" to mean "the liability to prevent effective entry into the market." *See* R. GOSSE, THE LAW ON COMPETITION IN CANADA 213 (1962). There is no basis for such a reading of the case.

gave rise to a presumption of public detriment which had to be rebutted by the defendants. [172] This *Eddy Match* test of public detriment is inconsistent with the test set up by the *Morrey* case. [173] That case, decided under the old "combines" section, [174] held that it was not enough to prove that competition had been lessened; the Crown had to go farther to show that the lessening of competition was detrimental to the public interest. [175] Nor is *Eddy Match* consistent with *Canadian Breweries* in the meaning which it gives to public detriment. In the latter case, it was held that public detriment had the same meaning as "unduly" in section 32. [176] In other words, once it has been established that competition has been unduly lessened, "injury to the public is conclusively presumed." [177]

The RTPC has been somewhat more consistent than the courts in their handling of monopolies. Generally, the Commission has required something more than control. In its *Report on Ammunition* [178] it pointed to an abuse of the monopoly power; in the *Report on the Phosphorous and Sodium Chlorate Industries* [179] it pointed to behaviour by the monopolist which excluded potential competition.

Into this legal context I will attempt to place the recent developments with respect to monopoly. The RTPC *Report on Trade Practices in the Phosphorous Products and Sodium Chlorate Industries* in 1966 led to a prosecution of the Electric Reduction Company of Canada Limited. [180] The company pleaded guilty to charges under the merger and monopoly provisions of the Combines Act. In imposing sentence Mr. Justice Stark of the Ontario High Court of Justice commented on the meaning of monopoly as follows:

> In this case the offence is not in the mere fact of a merger nor in the mere fact of a monopoly, both of which situations can arise as a matter of fact by any number of circumstances. Sometimes these circumstances are fortuitous . . . but . . . it must be clear to any businessman or business company that in that case especially strict standards of conduct are required and

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[172] *Supra* note 170, at 20-21.

[173] Regina v. Morrey, 6 D.L.R.2d 114 (B.C. 1956).

[174] CAN. REV. STAT. c. 314, § 2 (1952). Under this section a monopolist was simply charged with being party to a "combine". An essential ingredient of the offense was that the "combine" had been operated to the public detriment. Therefore, cases decided under this section which did not involve monopoly, are still relevant to the meaning of "public detriment". *See* R. GOSSE, THE LAW ON COMPETITION IN CANADA 180-81 (1962).

[175] *Supra* note 173, at 118. *See also* Regina v. B.C. Sugar Refining Co. Ltd., 129 Can. Crim. Cas. Ann. 7, 38 Can. Pat. R. 177 (Man. Q.B. 1960) in which it was held that the Crown had to show that a merger resulted in more than control. The Crown had to show it also resulted in "excessive or exorbitant profits or prices" to satisfy the public detriment requirement.

[176] Regina v. Canadian Breweries Ltd., [1960] Ont. 601, at 605, 126 Can. Crim. Cas. Ann. 133, at 139 (High Ct.).

[177] Howard Smith Paper Mills Ltd. v. The Queen, [1957] Sup. Ct. 403.

[178] *Report Concerning the Manufacture, Distribution and Sale of Ammunition in Canada*, 1 RESTRICTIVE TRADE PRACTICES COMMISSION REPORTS (1959).

[179] *Trade Practices in the Phosphorus Products and Sodium Chlorate Industries*, 41 RESTRICTIVE TRADE PRACTICES COMMISSION REPORTS (1966).

[180] Regina v. Electric Reduction Co., 61 Can. Pat. R. 235 (Ont. High Ct. 1970).

> must be met by any such business, and they are not entitled to protect and preserve that monopolistic situation by unfair means, by buying up all existing competition, by entering into agreements and arrangements so that that situation of monopoly can be preserved at all costs. [181]

While the comment is clearly dictum it does indicate a preference for the test of monopoly applied by the RTPC as opposed to the *Eddy Match* test. [182] This preference emerges even more forcefully from the prohibition order granted by the court under section 31(1). The prohibition order did not attempt to dissolve the merger or break up ERCO's monopoly. Rather it prohibited the conduct to which the RTPC had pointed as excluding potential competition. [183] Therefore, the court recognized that not all monopolies in the economic sense of the word should be prohibited. Some monopolies may result from a competitive situation by virtue of what Judge Learned Hand termed "superior skill, foresight and industry." [184] Because of the difficulty of rebutting the presumption of public detriment the likely result of the *Eddy Match* test would be the prohibition of all monopolies.

The RTPC *Report on Electric Large Lamps* raises a number of interesting issues with respect to monopoly. First, it raises for the first time the question of whether the monopoly provisions of the act apply to an oligopolistic situation. The Director alleged that General Electric, Westinghouse and Sylvania were parties to a monopoly. [185] The Commission noted that monopoly originally referred to a market with a single seller. Citing a publication of the Organization for Economic Co-operation and Development which defined monopoly as "a market situation in which an enterprise or a number of enterprises acting in concert control such a large proportion of the market in a certain product that they can fix prices and terms of trade to a large extent without regard to competitors," [186] the Commission found that General Electric, Westinghouse and Sylvania were acting in concert to control the market in electric large lamps. [187] And since section 2(*f*) did not require concerted action it must have been violated. The Commission thus avoided a very controversial point. Its recommended remedy was essentially that the three manufacturers stop acting in concert. [188] Such a remedy could have been based on the Commission's finding of an agreement between the three manufacturers. [189]

Second, the Commission's analysis of the question of control would seem to suggest it was applying a market share rather than a market power

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[181] *Id.* at 236-37.

[182] *See* text accompanying notes 170-72.

[183] *See* DIRECTOR'S REPORT 52-53 (1970).

[184] U.S. v. Aluminum Co. of America, 148 F.2d 416, at 430 (2d Cir. 1945).

[185] *Report on Electric Large Lamps*, 53 RESTRICTIVE TRADE PRACTICES COMMISSION REPORTS 60 (1971).

[186] ORGANIZATION FOR EUROPEAN CO-OPERATION & DEVELOPMENT, GLOSSARY OF TERMS RELATING TO RESTRICTIVE BUSINESS PRACTICES 15 (1965).

[187] *Supra* note 185, at 68.

[188] *Id.* at 76.

[189] *See* text accompanying notes 131-33.

test. Since the three companies involved very likely had substantial market power, it is uncertain which criterion of control the Commission applied. However, the Commission did analyze the question solely in market share terms. It referred only to the insignificant sales of imported lamps and a fourth manufacturer;[190] it did not discuss the extent to which these two sources of potential competition were a restraint on the market power of the accused corporations despite the fact that it was represented to the RTPC that the potential competition of imports was a much more significant factor than the actual amount of imports.[191]

Third, the Commission's treatment of the public detriment problem does nothing to resolve the confusion in the law with respect to monopolies to which I referred earlier.[192] The Commission began with a very clear application of the *Eddy Match* test: "The monopoly situation created by the concerted actions of the three lamp manufacturers deprived the public of Canada of the benefits of free competition in the supply and sale of electric large lamps and was, consequently, detrimental to the public interest."[193] However, in proceeding to illustrate high prices and substantial profits in the electric large lamp industry[194] the Commission seemed to be applying the test of the *Sugar Refining* case.[195] Because the RTPC used the agreement between the three manufacturers to make its finding of control, it could not point to the same agreement as evidence of public detriment in the way that the *Report on the Phosphorous and Sodium Chlorate Industries* had done.[196] But since the remedy in both cases goes only to prohibiting the agreement and not to breaking up the monopolistic control, the result in both cases is the same.

Bill C-256 alters significantly the statutory law with respect to monopolies. Section 17 prohibits any person from intentionally engaging in exclusionary practices for the purpose of controlling a market or from intentionally engaging in behaviour designed to put himself alone or with others in a "monopoly position."[197] "Monopoly position" is defined to mean substantial

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[190] *Supra* note 185, at 68.

[191] *Id.* at 4.

[192] *See* text accompanying notes 168-79.

[193] *Supra* note 185, at 68. Technically this text is based on the *Canadian Breweries* case since there is no suggestion here of a rebuttable presumption of public detriment as there was in *Eddy Match*. However, the court in *Eddy Match* never enunciated how the presumption could be rebutted. Moreover, it is unlikely that it could ever be rebutted given the jurisprudence under the old "combines" section.

[194] *Report on Electric Large Lamps*, 53 RESTRICTIVE TRADE PRACTICES COMMISSION REPORTS 69-74 (1971).

[195] Regina v. B.C. Sugar Refining Co., 129 Can. Crim. Cas. Ann. 7, 38 Can. Pat. R. 177 (Man. Q.B. 1960).

[196] *Trade Practices in the Phosphorus Products and Sodium Chlorate Industries*, 41 RESTRICTIVE TRADE PRACTICES COMMISSION REPORTS (1966).

[197] Bill C-256, § 17. 17. No person and no affiliated companies, partnerships, or sole proprietorships shall

> (a) for the purpose of completely or substantially controlling a market, willfully engage in behaviour that is intended
>
> (i) to eliminate a competitor,

or complete control of a business or accounting for all or substantially all of a commodity or service in a particular market by a person or persons acting in concert. [198] In addition, any person or persons in a "monopoly position" may be prohibited by the proposed Competitive Practices Tribunal from engaging in exclusionary practices to extend or entrench their monopoly. [199] The proposed act, thus, distinguishes between exclusionary practices by a person in a monopoly position and exclusionary practices by a person attempting to acquire a monopoly. The latter are prohibited completely; the former may be prohibited. The Economic Council noted the same distinction but recommended that both would be factors considered by the Tribunal in its assessment of mergers and trade practices; [200] it recommended no provision to deal with monopolies per se.

Bill C-256 does make a number of improvements on the present law with respect to monopolies; however, it also raises some difficult problems. It clarifies the question of the application of the monopoly provisions to an oligopolistic market situation, since under the proposed section 41 more than one person can only be in a monopoly position if they are "acting in concert or apparently in concert." On the other hand, the phrase "apparently in concert" would seem to raise additional problems. Since every oligopoly gives the appearance of concerted action something more than the appearance should be required. In defining monopoly in terms of market share and market power, Bill C-256 also resolves the problem resulting from the use of the word "control" in the present section 2(*f*). However, there is a strong policy argument that a substantial market share is only relevant as a necessary condition of market power and that, by itself, it is not enough to warrant governmental intervention. [201] Section 17 which deals with the acquisition of monopoly by improper means relies too much on the intention to monopolize. On a strict reading of subsection (*a*) there is no requirement that a person have any market power. Since the practices enumerated in section 17(*a*) are not all clearly anti-competitive, competitive behaviour which the statute in general purports to encourage will be prohibited. For instance, behaviour which is intended to "eliminate a competitor" with the purpose of acquiring a monopoly may include aggressive competitive behaviour which we are trying to encourage. Subsection (*b*) of section 17 is even worse in this regard since it applies only to behaviour that is intended to put a person in a monopoly position as defined by section 41. The

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(ii) to prevent the entry of a person into the market, or the expansion within a market of the business of a person who carries on his business or profession in the market, or
(iii) to deter or prevent any other person from engaging in competitive behaviour; or

(b) willfully engage in behaviour that is intended to place him, either alone or together with one or more other persons, in a monopoly position within the meaning of section 41.

[198] Bill C-256, § 41. Unlike the present section 2 of the Combines Investigation Act there is no exception under the proposed section 41 for monopolies resulting from the ownership of patents, trademarks, copyrights or industrial designs.

[199] Bill C-256, § 37(*d*) & (*g*).

[200] INTERIM REPORT 129.

[201] KAYSEN & TURNER 101.

behaviour need not be improper from the point of view of competition policy; it could include, for example, the obtaining of a patent or aggressive competitive conduct.

V. Vertical Restraints

The various stages in the production and distribution of goods are commonly referred to as levels of production. The relationship of firms operating at different levels in the production process is visualized as a vertical one. There are many techniques by which firms at one level of the production process have attempted to control the conduct of firms on different levels. Among them are resale price maintenance, price discrimination, tying arrangements, and exclusive dealing arrangements. Only the first two techniques have been specifically prohibited by the Combines Act. [202] Other vertical restraints are only prohibited if they unduly lessen competition as provided in section 32.

Two recent RTPC reports raise the same vertical restraint problem: the use of consignment selling by agents to avoid the statutory prohibition of resale price maintenance.

In the *Electric Large Lamps* case, [203] other aspects of which were described earlier, [204] the Director alleged that General Electric, Westinghouse, and Sylvania had engaged in resale price maintenance in violation of section 34. The evidence indicated that after August 1963, the three manufacturers distributed lamps for the commercial and industrial market by placing them on consignment with firms whose business was usually not restricted to the sale of lamps. [205] Other lamps mainly for household use were distributed by chain stores and other merchandisers who were not on consignment. The consigned distributors were instructed by the other manufacturers as to the prices at which they could sell the various types of lamps and price-cutting by them was treated by the manufacturers as a very serious matter. The evidence showed a number of incidents prior to August 1963 where a manufacturer refused to supply a distributor who did not abide by the established prices. [206] After August 1963 no such incidents were shown with respect to the distributors who were not on consignment. [207]

The RTPC found that the attempts to control the prices of distributors not on consignment constituted violations of section 34. However, because of the lapse of time and the adoption of consignment selling since the violations, the Commission recommended no further action against the companies. [208] With respect to the distributors on consignment, the Commission said that since "in the legal sense, they did not 'resell' lamps" there could be no violation of section 34. [209]

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[202] Can. Rev. Stat. c. C-23, §§ 34, 38 (1970).
[203] 53 Restrictive Trade Practices Commission Reports (1971).
[204] *See* text accompanying notes 126-33.
[205] *Supra* note 203, at 17. Sylvania did not adopt consignment selling until 1963.
[206] *Id.* at 56-59.
[207] *Id.* at 61.
[208] *Id.* at 62.
[209] *Id.* at 61.

In the RTPC *Report on Prices of Gasoline, Sudbury*, [210] service station operators were alleged to have agreed to increase the price of gasoline in violation of section 32(1)(*c*). [211] In response to the entrance of unbranded gasoline outlets into the Sudbury area, some of the large petroleum companies introduced consignment selling in order to control the retail price of gasoline. [212] In October 1964, 156 out of a total 255 dealers in the Sudbury area were on consignment. [213] Although the commission rate originally established by Imperial Oil was satisfactory to the dealers, it was soon reduced and as a result, the Imperial Oil dealers became dissatisfied. In October 1964, the gasoline dealers through their trade association increased the retail price of gasoline by two cents per gallon. The oil companies generally deprived the dealers of this price increase by increasing the wholesale cost of the gasoline to the dealers, whereupon the dealers responded by another one cent increase. The oil companies did not respond to this price increase. [214] Therefore, the net effect of these events was that the retail price of gasoline had increased by three cents per gallon and the profit margin of the dealers on consignment had increased by a somewhat smaller amount.

The Commission found that the dealers had agreed to lessen competition unduly in violation of section 32(1)(*c*). However, it recommended that repetition of the offense be prevented by a judicial restraining order and that no prosecution of the parties be undertaken. [215] The basis for this recommendation was the Commission's view that the underlying cause of the violation was the strict control exercised by the oil companies over the dealers. [216] The Commission condemned the system of consignment selling used by the oil companies and recommended that "the legislation should be so classified that there will be no doubt of its capacity to deal with consignment selling practices which are detrimental to the public interest." [217]

These two RTPC Reports provide an interesting contrast to two strikingly similar American cases on the subject of consignment selling. In *United States v. General Electric Co.*, [218] General Electric's distribution system was attacked as being in substance resale price maintenance since the so-called agents were in fact independent businessmen. The United States Supreme Court analyzed the legal relationship between the parties and concluded it was a genuine agency. In *Simpson v. Union Oil*, [219] however, the Supreme Court condemned a petroleum company's consignment method of distribution as being a "device . . . to cover a vast gasoline distribution system, fixing prices through many retail outlets." [220] The Court distinguished

[210] 48 RESTRICTIVE TRADE PRACTICES COMMISSION REPORTS (1969).

[211] *Id.* at 1.

[212] *Id.* at 5.

[213] *Id.* at 9.

[214] *Id.* at 21-29. It should also be noted that most of the consignment contracts were cancelled by the oil companies as a result of the initial dealer price increase.

[215] *Id.* at 36.

[216] *Id.*

[217] *Id.* at 33.

[218] 272 U.S. 476, 47 Sup. Ct. 192 (1926).

[219] 377 U.S. 13, 84 Sup. Ct. 1051 (1964).

[220] *Id.* at 21.

the *General Electric* case on rather specious grounds and in effect overruled the earlier decision. [221]

The important thing to learn from these cases is that legal analysis under the Combines Act should not end once it is discovered that a manufacturer sells on consignment. In both RTPC *Reports*, the Commission concluded that since the goods were received on consignment by the dealers there was no resale. The Commission did not consider whether the relationship between the manufacturer and the dealers in the circumstances of the two cases was in substance an agency relationship for purposes of competition policy. Simply because the parties entitled their relationship an agency relationship does not make it such for purposes of the Combines Act. On the other hand, not all price control through consignment selling should violate the Combines Act; a person who sends a painting to an art dealer to be sold should be able to set a minimum price at which it may be sold. [222] Nor should price control of employees violate the statute. But, where the consignees own and operate places of business, where they perform distribution services which, from the customer's point of view, do not differ from those provided by ordinary merchants, and where they are part of a vast distribution system, price competition among them should be preserved. [223]

Despite the recommendations of the RTPC in its report on gasoline prices in Sudbury, the Economic Council did not recommend any legislative changes to deal with the problem of consignment selling. In fact, it saw no necessity for altering section 34 except with respect to the defences the section provides. [224] In Bill C-256, however, the resale price maintenance provisions of section 34 have been changed substantially. The notion of resale which was so critical in the RTPC Reports is gone. Section 18 of Bill C-256 provides that no person engaged in business shall attempt to influence the price at which any other person sells a commodity or refuse to supply any other person because of the price at which he sells a commodity. [225] The

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[221] Rahl, *Control of an Agent's Prices: The Simpson Case—A Study in Antitrust Analysis*, 61 N.W. L. REV. 1, at 11 (1966).

[222] Simpson v. Union Oil Co., 84 Sup. Ct. 1051, at 1055-56, 377 U.S. 13, at 17-18 (1964).

[223] *Supra* note 221, at 15.

[224] INTERIM REPORT at 104.

[225] Bill C-256 § 18.

> 18. (1) No person engaged in the business of producing or supplying a commodity within or without Canada or who has, within or without Canada, the exclusive rights and privileges conferred by a patent, trade mark, copyright or industrial design shall, either directly or indirectly,
> (a) by any means whatever, whether taken within or without Canada, attempt to influence upward, or to discourage the reduction of, the price at which any other person engaged in business in Canada sells or offers for sale or advertises for sale a commodity within Canada; or
> (b) refuse to supply a commodity to any other person engaged in business in Canada because of the low price at which the other person
> (i) has previously sold or offered for sale or advertised a commodity within Canada, or
> (ii) proposes to sell or offer for sale or advertises a commodity within Canada.

prohibition does not apply to persons who are directors, officers or employees of the same company, partnership or sole proprietorship. Since the exception for employees is the only exception to the section, a literal reading of section 18 leads to the conclusion that price maintenance through consignment selling will be prohibited. Moreover, section 16 of the proposed act provides in part that no person shall agree to fix a minimum price at which a service or commodity shall be supplied. [226] Therefore, literally, consignment selling is once again prohibited. But, the proposed Competition Act, if it is literally interpreted, goes too far in its prohibition of consignment selling since as was noted earlier, [227] many uses of consignment, even by those engaged in business, are not offensive to competition policy. Consignment selling should be an exception to the outright prohibition of price-fixing and resale price maintenance. The proposed Competitive Practices Tribunal should assess the competitive significance of consignment selling in each particular case and decide in each particular case whether it should be prohibited. In short, I am suggesting that consignment selling be added to the list of trade practices in section 37 which the Tribunal may prohibit.

VI. Conclusion

Bill C-256 certainly marks a crisis in Canadian competition policy. Hopefully, it will mark a turning point. The Combines Act has been ineffective in almost every respect. The proposed Competition Act, on the other hand, would appear to be a much more vigorous piece of regulatory legislation. Most important, the concept of undueness, which prevented the Combines Act from being effective, is not present in the proposed act. [228] Nevertheless, while it is one thing for an academic lawyer to approve the principles and general direction of a piece of legislation, it is quite another thing for the politicians to approve it. The pressure of the Canadian business community has yet to be brought to bear upon the proposed Competition Act; the chances of success for Bill C-256 are far from certain. [229]

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[226] Bill C-256 § 16. 16. (1) No person shall conspire, combine, agree or arrange with another person,

> (a) to fix or determine, in any manner whatever, the minimum price or any other term or condition at or upon which any commodity or service will be supplied or the maximum price or any other term or condition at or upon which a commodity or service will be acquired by such persons to or from any other person, whether determined or undetermined.

[227] *See* text accompanying notes 222 and 223.

[228] *Supra* note 226.

[229] There can be little doubt that the Canadian business community is opposed to the proposed Act. *See* The Globe & Mail, Sept. 27, 1971 at 11, col. 3. For an incredibly reactionary view of competition policy see Younger, *A Fresh Look at the Combines Investigation Act*, 34 Bus. Quarterly 75 (1969).