TRADE REGULATION

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I. INTRODUCTION

This survey will deal with developments under the Combines Investigation Act [1] which occurred between the summer of 1971, the completion date of the last annual survey [2] and the summer of 1973, the completion date for this survey. As the length of this survey indicates, the period under consideration has not been a productive one in terms of the substantive law of trade regulation.

For organizational purposes the developments in the period under consideration will be dealt with under basically the same subject headings as the previous survey: horizontal restraints, monopoly and merger, vertical restraints and miscellaneous matters.

Hanging over the entire period, of course, is the spectre of the proposed Competition Act. The history of the Act is not a promising one for those concerned about law reform in the area of trade regulation, especially competition policy. The former Bill C-256 [3] was given first reading in the House of Commons on June 29, 1971. The bill stimulated strong opposition almost immediately from the Canadian business community [4] and as a result, the Minister of Consumer and Corporate Affairs indicated that the bill would not be enacted as it was first read in the House of Commons. [5] But the Minister did state that a revised Competition Act would be reintroduced in the Autumn of 1972. Parliament was then prorogued on September 1, 1972 as a result of a federal election and the bill was not reintroduced. However, when Parliament reconvened in January 1973, the Government restated in the Speech from the Throne its intention to "introduce legislation establishing a competition policy to preserve and strengthen the market system upon which our economy is based." [6] At the end of the summer, the legislaion[6a] still had

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

[2] Arnold, *Annual Survey of Trade Regulation*, 5 OTTAWA L. REV. 526 (1972). This article sets out the author's view of and justification for the scope of a survey of trade regulation. This survey will adhere to the same basic format as the last survey.

[3] 115 H.C. DEB. 7434 (June 29, 1971).

[4] The Globe & Mail (Toronto), Sept. 27, 1971 at 11, col. 3; The Financial Post, Jan. 29, 1972 at 3, col. 3; 1972 H.C. DEB. 69

[5] REPORT OF THE DIRECTOR OF INVESTIGATION AND RESEARCH, COMBINES INVESTIGATION ACT 1972 at 10.

[6] 117 H.C. DEB. 4 (Jan. 4, 1973).

[6a] On November 5, 1973 Bill C-227 "An Act to amend the Combines Investigation

not been introduced.

II. Horizontal Restraints

The jurisprudence under section 32 is clear that illegal horizontal restraints are agreements or arrangements which have as their purpose the virtual elimination of competition [7] or the substantial lessening of competition. [8] But while section 32 is relatively clear, it is also ineffective. Since the constitutional basis for the exercise of federal power in respect of the Combines Act is the criminal law power, the Crown is obliged to prove beyond a reasonable doubt both the existence of an agreement and the fact that if it was carried out the agreement would have the effect of unduly lessening competition. The result is that section 32 prohibits only collective monopoly where the agreement is obvious and for the most part written. [9] The Restrictive Trade Practices Commission is not limited by the criminal burden of proof and as a result it has been more ready than the courts to confront the problem of inferring an agreement from conduct. [10] In its only report in the period under consideration the RTPC considered this problem once again in respect of the sale of draught beer in the city of Toronto.[11]

The Director of Investigation and Research alleged that a number of public houses or beer parlours and the Toronto Hotel Association agreed in January, 1968 to raise the price of a glass of draught beer to 20 cents, contrary to section 32(1) (c) of the Combines Act. There were approximately 130 public houses in Metropolitan Toronto at the time in question [12] and 66 of these belonged to the Toronto Hotel Association.[13] Prior to 1968 the sale of draught beer both in respect of quantity and price was regulated by the Liquor Licence Board. A glass of draught beer had to contain 7.6 fluid ounces and had to be sold for 15 cents. [14] Pursuant to submissions by the Ontario Hotel and Motel Association with which the Toronto Hotel Association is affiliated, [15] the Government of Ontario on December 19th, 1967

Act and the Bank Act and to repeal an Act to amend an Act to amend the Combines Investigation Act and the Criminal Code" was given first reading in the House of Commons, 117 H.C. DEB. 7505 (Nov. 5 1973).

[7] Howard Smith Paper Mills Ltd. v. The Queen, [1957] Sup. Ct. 403, 8 D.L.R.2d 499; 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).

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

[9] See Arnold, *supra* note 2, at 538.

[10] See Pricing Practices in the Pencil Industry, 31 Restrictive Trade Practices Commission Reports, (1964) (hereinafter cited as RTPC) and The Metal Culvert Industry, Ontario and Quebec, 52 RTPC (1970).

[11] Draught Beer, Metropolitan Toronto, 54 RTPC (1972).

[12] *Id.* 3.

[13] *Id.* 5. The Association's membership also included establishments which held liquor licenses other than public house licences. The total active membership of the Association was approximately 100.

[14] Ont. Regs. 42/65 s. 11.

[15] The Association's submission had been to allow public houses to sell the same quantity of draught beer for a minimum price of 20 cents.

ceased to regulate the price and quantity of draught beer sold in public houses. [16] On December 28, 1967, the Toronto Hotel Association met to discuss the implications of the lack of price regulation. There were 90 public houses represented at this meeting, of which 51 were members of the Association. [17] The Association's report of the meeting described the result as follows: "The majority of licencees attending that meeting individually concluded that in view of the higher cost of product and higher operating expenses, they would sell draught beer in the 9½ oz. 'bugle top' pilsener glass, used until the lifting of controls, for 20 cents." [18] This report is not in accord with the testimony of several persons before the Commission. According to those witnesses there was no clear consensus emerging from the meeting. [19]

What actually happened at the meeting adds an additional perspective to the case. The Association engaged a chartered accountant, with expertise in the area of hotel accounting, to provide what the Association termed "an academic lecture in accounting procedures." [20] In fact, the accountant discussed net profit using as examples two prices: first, a 20 cent 7.6 ounce glass and second, a 15 cent smaller glass. [21] Although several witnesses testified before the Commission that no consensus or agreement emerged from the meeting, by February, 1968, eighty-four of the ninety public houses represented at the meeting were charging 20 cents for a 7.6 ounce glass of beer. [22] However, it should also be pointed out that twenty-one of the thirty-one public houses investigated and not at the meeting were charging 20 cents for the same quantity of beer. [23]

The RTPC's assessment of the situation was completely inadequate. The parallel action according to the Commission could be explained in two possible ways. First, the uniform pricing could have been the result of an agreement among the majority of public houses in Toronto. [24] Such an agreement could be inferred from the conduct of the Association and from the meeting of December 28, 1967. Second, the general increase of 5 cents per glass could have been a natural reaction to cost increases shared by all public houses. [25] This latter explanation was, of course, the one advanced by the Association. The Commission accepted the Association's explanation for the uniform price increase on the grounds that the Association had not sought to obtain a consensus at the meeting. [26]

According to a prior Commission report an agreement may be found where there is "the disclosure of an intent shared by the parties" and "the

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[16] ONT. REG. 454/67.
[17] 54 RTPC 34.
[18] 54 RTPC 9.
[19] *Id.* 21-22, 33.
[20] *Id.* 29.
[21] *Id.* 16-18.
[22] *Id.* 34.
[23] *Id.*
[24] *Id.* 42.
[25] *Id.* 42-43.
[26] *Id.* 43.

mutual 'expectation' that the parties will act pursuant to this intent." [27] The Commission admitted that there was a mutual expectation that the price of a glass of draught beer would be increased to 20 cents; however, it felt that this expectation was based on the submissions to the Liquor Licence Board by the Ontario Hotel and Motel Association and not on anything which transpired at the meeting. [28] Since the Director's allegation related only to those public houses which attended the meeting, the Commission concluded that there was not sufficient evidence to support the allegation. [29] Initially, it might seem as if the Director would have been more successful had the allegation simply included the Ontario Hotel and Motel Association. However, the Commission went on to contradict itself by saying:

> Impliedly, the Association encouraged licensees to adopt a 20 cent price especially since it had forewarned them that The Liquor Licence Board might abolish the regulations rather than agree to an increase. The evidence does not disclose that by so doing there was an attempt at lessening competition. The rising costs of operating public houses must necessarily have led to increases in prices or reductions in the quantity served. [30]

The Commission's reasoning deserves some analysis. It is clear from the evidence that costs were rising. It is also clear that operating costs, salaries and beer, were increasing uniformly for all public houses. [31] But there was no evidence that other costs, especially capital costs, were increasing uniformly. [32] Nevertheless, the Commission was influenced by the convenience of the 5 cent increase. [33] However, this does not explain the fact that the price could have been kept constant and the quantity of beer in a glass reduced or the price could have been increased to 20 cents per glass and the quantity also increased. In fact, a few public houses adopted this course of action. [34] In summary, the Commission's conclusion with respect to the existence of an agreement would seem to be wrong. The almost complete uniformity of prices in an industry characterized by a large number of small sellers cannot be explained simply by common cost increases.

Although the Commission resolved the case on the basis that there was no agreement or arrangement it did go on to consider the question of undueness. The geographical market, the Commission concluded, was Metropolitan Toronto on the ground that all public houses "are in potential competition." [35] The reasoning is fallacious. The geographical relationship between buyers and sellers with respect to a commodity such as draught beer is smaller than the entire area of Metropolitan Toronto. [36] The Commission

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[27] Pricing Practices in the Pencil Industry, 31 RTPC 50 (1964).

[28] 54 RTPC 44. [29] *Id.* 46.

[30] *Id.* 45-46.

[31] *Id.* 39. The same labour contract governed approximately seventy public houses and the price of beer was a uniform one fixed by the Brewers' Warehousing Company.

[32] *Id.* 43. [33] *Id.*

[34] *Id.* 34-35. [35] *Id.* 39.

[36] A person who frequents a public house on the west side of Toronto, for instance, is unlikely to switch to another on the east side of the city in response to a small price increase. However, he may switch to another beer parlour in the immediate vicinity.

compounded its error by defining the product market as draught beer only. Bottled beer was excluded from the market on the basis of pasteurization, price and the manner in which it is served. [37] The crucial question as to whether bottled beer should be included in the market is whether persons drinking draught beer would substitute bottled beer in response to an increase in price of draught beer. This question would have to be thoroughly investigated before any conclusions could be reached. Since the price of bottled beer, especially bottled beer purchased for consumption at home, is competitive with draught beer the Commission would appear to be wrong in excluding it from the market without additional evidence.

After defining the market the Commission went on to consider the undueness of the arrangement. It is difficult to understand the Commission's reasoning from the cursory analysis it gave to the question. The Commission stated that the uniform increase in prices was justified by the industry-wide increase in costs and concluded that "[It] is difficult to conclude that the general adoption of the price of 20 cents in itself was so undue in the circumstances as to result in clear detriment to the public interest." [38] The Commission's conclusion appears to be largely unsupported. The jurisprudence is clear that if the purpose of the agreement or arrangement is the undue lessening of competition in fact then the agreement is unlawful even though it may be justified in some broader meaning of the public interest. [39] Therefore, on the Commission's definition of the market there was obviously a substantial lessing of competition, since over 90 per cent of the public houses involved adopted the common price. [40]

Although no cases were reported during the period under review it should be pointed out that a conviction by way of a guilty plea was obtained against twelve companies supplying ready mixed concrete in the city of Toronto. [41] In addition, orders of prohibition under section 30 of the Combines Act were obtained in four instances to prevent violations of section 32 of the Act. [42] Finally, several matters discussed in the previous survey were at various stages of legal proceedings. [43]

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[37] *Id.*

[38] *Id.* 46.

[39] Container Materials Ltd. v. The King, [1942] Sup. Ct. 147, at 152, [1942] 1 D.L.R. 529 at 533; Howard Smith Paper Mills Ltd. v. The Queen, [1957] Sup. Ct. 403, at 411, 8 D.L.R.2d 449, at 457.

[40] It should be noted here that it could be argued that the agreement did not lessen competition at all since there had been no pre-existing price competition. This argument was raised and rejected in Regina v. B.C. Professional Pharmacists Society, 17 D.L.R.3d 285, at 297-298 (B.C. Sup. Ct. 1970), 64 Can. Pat. R. 129, at 143. See Arnold, *supra* note 2, at 538-39.

[41] REPORT OF THE DIRECTOR OF INVESTIGATION AND RESEARCH 1972, at 20-21.

[42] *Id.* 21-23.

[43] These matters include electric large lamps, metal culverts and business forms. The Director's application for an order of prohibition against retail gasoline outlets in Sudbury pursuant to the RTPC report on the matter was withdrawn because of the *Hemlock Park Co-operative Farm* case. See *infra* pp. 6-35.

III. Monopoly and Mergers

There was one significant development with respect to the monopoly and merger provisions of the Combines Act in the period under review. In addition, one case is pending with respect to monopoly and mergers which could make a significant contribution to Canadian jurisprudence.

The Alberta Supreme Court very recently issued a prohibition order against Canada Safeway Limited in respect of violations of the monopoly provisions of the Combines Act. [44] The order is designed to accomplish two things: first, to limit the company's future expansion at least in the short run and second, to regulate potentially anticompetitive conduct by the company. The first objective is accomplished in two ways. Canada Safeway cannot open more than one new store in Calgary and Edmonton in the next three and a half years. Nor can it acquire competitors or new sites for retail outlets in those two cities for the next five years. The company's competitive conduct is limited in three ways. First, the company is prohibited for six years from selectively lowering prices to undercut competition; prices must be lowered uniformly in all outlets. Second, the company's advertising budget has been reduced considerably until 1978. [45] Third, the company is prohibited from negotiating leases with shopping centres which exclude its competitors. Such provisions in existing leases were declared invalid.

While the court order appears to be far reaching and effective, it should be noted that the assumption underlying it is that Canada Safeway has not yet acquired a very strong monopoly position. If it has, simply prohibiting future anticompetitive conduct by the company will not likely restore competive conditions to the retail grocery industry in western Canada. [45a] To do so would require reorganizing Canada Safeway into a number of smaller units with less market power. Courts are generally reluctant to grant such a drastic remedy because of the difficulties involved in framing it in detailed fashion. However, if other remedies are meaningless the court should not be deterred by the difficulty of its task. Since the facts of the case are not fully available, it is impossible to evaluate the propriety of the court's order.

A prosecution was commenced in 1972 against K. C. Irving Ltd. as a result of its acquisition of the University Press of New Brunswick. It was alleged that the merger gave K. C. Irving Ltd. a monopoly in the publication of English language daily newspapers in the province of New Brunswick. [46] Pursuant to the prosecution the government applied for and received seven search warrants against four publishing companies and three individuals. [47]

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[44] See Financial Times of Canada, Sept. 24, 1973, p. 21, col. 1.

[45] *Id.* The company's 1974 advertising budget cannot be more than sixty per cent of its 1973 advertising budget.

[45a] There is an indication in the reasons for judgment of Mr. Justice Moore that Canada Safeway had not acquired an overwhelming market share. The Queen v. Canada Safeway Ltd., (S.C. Alta. 1973) (unreported).

[46] See Report of the Director of Investigation and Research 1972, at 29.

[47] The companies were K. C. Irving Ltd. and three other publishing companies controlled by it. The individuals were K. C. Irving, president of K. C. Irving Ltd., and Michael Wardell and Ralph Costello, neither of whom were identified.

K. C. Irving Ltd. brought an application to quash the warrants on the ground that search warrants could only be issued for offences under the Criminal Code and not the Combines Act. The argument is based on section 443 of the Criminal Code which authorizes search warrants in respect of "any offence against this Act." [48] The Supreme Court of New Brunswick rejected this argument since section 27 of the Interpretation Act [49] provides that all provisions of the Criminal Code relating to indictable offences are applicable to all federal statutes which establish indictable offences. [50] The question is a difficult one and the Court relied primarily on earlier cases to resolve the matter. [51] The difficulty arises from the fact that the Combines Act itself contains a number of provisions for the production of documents and other similar evidence. [52] These provisions are not as strong and effective as the provisions for search warrants under the Criminal Code and it can be argued that the Criminal Code provisions are inappropriate for crimes of an economic nature.

When it is finally decided the Irving case could be a very important one. There have been very few monopoly and merger cases decided under the Combines Act and the law is in a confused and underdeveloped state. [53] Moreover, the case involves the rather special area of mass communications. Other forms of mass media, radio and television, are regulated by the Canadian Radio-Television Commission and as a result federal competition policy with respect to monopoly and mergers does not apply. [54] Therefore, it is important that the same competitive standard be applied to newspapers as to the electronic media even though there is this jurisdictional difference. It will also be interesting to see if the court considers the problem of concentration in the communications industry generally or restricts its analysis to newspapers.

IV. Vertical Restraints

The only two cases involving vertical restraints [55] and reported during the period under consideration, both involved the practice of resale price maintenance. Under section 38 of the Combines Act, persons selling or supplying articles are prohibited from affecting or attempting to affect the price at which the article is resold by any other person. Neither case adds much to

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[48] Can. Rev. Stat. c. C-34 (1970).

[49] Can. Rev. Stat. c. I-23 (1970).

[50] *Re* K. C. Irving Ltd. and The Queen, 4 Can. Pat. R.2d 120.

[51] *See* Imperial Tobacco Sales Co. v. Attorney-General for Alberta, [1941] 2 D.L.R. 673, (Sup. Ct. Alta.); Regina v. Campbell, 46 D.L.R.2d 83 (Ont. Ct. Ap. 1964).

[52] *See* §§ 9-12 and 40-46.

[53] See Ison, *The Legal Misconception of Monopoly*, 2 U.B.C.L. Rev. 89 (1964).

[54] See Regina v. Canadian Breweries Ltd., [1960] Ont. 601, 126 Can. Crim. Cas. Ann. 133. See also Henry, *The Combines Investigation Act and Mass Media*, 8 Osgoode Hall L.J. 147, at 152-153.

[55] For a brief explanation of the term "vertical restraint," see Arnold, *supra* note 2, at 551.

the interpretation of section 38 since in both instances the defendants entered guilty pleas. As a result the only issues in the cases are the sentence and the question of whether or not a prohibition order should be granted against the defendants.

In *Regina v. Arrow Petroleums Ltd.*,[56] the defendant pleaded guilty to a charge of imposing resale price maintenance on its retail gasoline dealers. The facts of the case are not fully developed by the court, but it seems as if the company's purpose was to impose a maximum resale price. In fact, the company must have attempted to lower the retail price of its gasoline by specifying a price to its dealers. Such a price specification is clearly a violation of section 38.[57] However, if the company had simply specified a maximum price, there would not have been a violation of section 38.

The retail sale of gasoline has caused several antitrust or trade regulation problems in both the United States and Canada. In the last annual survey[58] comment was made on the RTPC *Report on Prices of Gasoline, Sudbury,*[59] in which the major oil companies used consignment selling to avoid the resale price maintenance provisions of the Combines Act. While the Commission strongly condemned the oil companies' system of consignment selling, it could find no violation of the Act since there had been no resale as required by section 38.[60] Arrow Petroleum in the present case has done essentially the same thing as the oil companies in the Sudbury case. It has attempted to control the price at which its dealers sell gasoline. The different results in the two situations make very little sense. Arrow can control the retail price of its gasoline if it sells to its dealers on consignment; however, it is very likely that Arrow, being substantially smaller than the major oil companies, does not have the financial resources to vertically integrate its distribution system. Bill C-256, if enacted, would have eliminated the notion of resale in section 38 and made price maintenance through consignment selling a violation.[61] In fact, it may be that Bill C-256 went too far in that regard since many instances of consignment selling are not offensive to competition policy.[62]

In *Regina v. Corning Glass Works of Canada Limited,*[63] the defendant pleaded guilty to violations of section 38(2)(*a*) which prohibits attempting to specify a resale price and section 38(2)(*e*) which prohibits attempting to specify a maximum discount at which an article may be sold. The evidence of the violations was overwhelming and the guilty plea was justified. The government attempted to argue that since the defendant had made such a clear and consistent practice of attempting to enforce resale prices in respect of its

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[56] 8 Can. Pat. R.2d 95 (Ont. Prov. Ct. 1972).
[57] At § 38(2)(*a*).
[58] Arnold, *supra* note 2, at 552.
[59] 48 RTPC (1969).
[60] *Id.* 33.
[61] At § 18.
[62] Arnold, *supra* note 2, at 553-554.
[63] 9 Can. Pat. R.2d 69 (Ont. Co. Ct. 1972).

products that the fine should be a substantial one and that a prohibition order against the defendant should be granted. [64] The Court rejected the government's argument. It imposed a fine of $3,250 and refused to issue a prohibition order. [65] According to the Court a prohibition order should only be issued if the illegal conduct will "not possibly but probably continue." [66] The Court felt first that since Corning products were widely distributed across Canada, the few instances of resale price maintenance produced by the government did not indicate a likelihood that the offences would be repeated. [67] Second, the Court felt that the defendant had a legitimate interest in an "orderly marketing policy" which included "that the suggested retail prices are followed . . . in order that the image of the products might be maintained at a high level as a prestige and gift line of cooking ware." [68] Given such a standard for the granting of prohibition orders, the result is that it will be very difficult for the government to get such orders.

It is interesting to note by way of comparison that in the *Arrow Petroleum* case, the Court also refused to issue a prohibition order. There the Court felt that there would be difficulties in enforcing the order and that it would give rise to disputes between Arrow and its retail dealers. [69] The facts of the case are so sketchy that it is impossible to properly assess the significance of the Court's decision with respect to the prohibition order.

V. Miscellaneous Matters

Most of the cases resolved judicially in the period under review were procedural rather than substantive in nature. Nevertheless, these procedural matters are very important in the area of competition policy where trials are often difficult to manage both from the point of view of length as well as subject matter. [70]

The most significant case decided in the last two years involved the method by which the government had to proceed in applying for a prohibition order under section 30(2) of the Combines Act. [71] The government sought to prohibit the defendant from attempting to affect the resale prices of its eggs. In support of the application the government alleged that the defendant had already committed one violation of section 34(2). These proceedings were

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[64] *Id.* 73.
[65] *Id.* 77.
[66] *Id.* 74.
[67] *Id.* 76-77.
[68] *Id.* 75.
[69] 8 Can. Pat. R.2d 95, at 96.
[70] Regina v. Canadian Breweries Ltd., [1960] Ont. 601, 126 Can. Crim. Cas. Ann. 133 (Ont. H.C. 1960) provides a good example of these difficulties. An American case, United States v. Morgan, 118 F. Supp. 621 (S.D.N.Y. 953) is an even more incredible example. The trial occupied 309 courtroom days and approximately 100,000 pages of material were printed in connection with the litigation.
[71] Regina v. Hemlock Park Co-operative Farm Ltd., 5 Can. Pat. R.2d 101 (Sup. Ct. 1972).

instigated on October 23, 1969 in the Exchequer Court by way of an information signed by the Attorney-General of Canada. The defendant made no answer to the information and after the requisite period of time the Attorney-General applied for judgment. At the same time the defendant filed a consent to the order of prohibition dated June 16, 1969.

In spite of the defendant's consent, Gibson, J. dismissed the government's application for judgment. His reasoning was as follows:

> Proceedings under section 31(2) of the Combines Investigation Act are criminal proceedings commenced by "Information."
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> No special rules for criminal proceedings have been adopted by The Exchequer Court of Canada. Therefore, the only rules that can be resorted to are those contained in the Criminal Code of Canada.
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> "Information" for the purpose of proceedings under section 31(2) of the Combines Investigation Act means "Indictment" under the Criminal Code of Canada. (See section 2(20) of the Criminal Code.) It is not an "Information" of the type that is sworn before a Justice of the Peace or a Magistrate.
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> "Information" within the meaning of The Exchequer Court Rules (see Rule 3) as they presently exist, is in the nature of a pleading and is confined to civil proceedings. [72]

On the appeal to the Supreme Court of Canada the defendant was not represented and its position was presented by an *amicus curiae.*

Not suprisingly, the Supreme Court allowed the appeal. The issue presented to the Court was the rationalization of two inconsistent federal statutes, the Criminal Code [73] and the Combines Act. Section 506(2) of the Criminal Code provides that "No criminal information shall be laid or granted", and section 2(20) defines "Information" to mean "Indictment. [74] On the other hand, section 44(4) of the Combines Act provides that "In any case where sub-section 2 of section 31 is applicable the Attorney General of Canada or the Attorney-General of the province may in his discretion institute proceedings either by way of an information, under that subsection or by way of prosecution". The Court conceded that the information under section 44(4) of the Combines Act was a criminal information. However, the Court went on to conclude that "in the Combines Investigation Act, Parliament has inserted provisions derogating from the usual rules of the criminal law." [75] The fact that the Exchequer Court's Rules did not provide for criminal proceedings was not a ground on which that Court could refuse to exercise the jurisdiction conferred upon it by the Combines Act. [76] The Court also reasoned that there was no substantial prejudice to the defendant

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[72] *Id.* 103.

[73] CAN. REV. STAT. c. C-34 (1970).

[74] For a brief explanation of the origin and nature of criminal informations see 1 STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND, at 294-97.

[75] Regina v. Hemlock Park Co-operative Farm Ltd., 5 Can. Pat. R.2d 101, at 104.

[76] The Supreme Court referred to Rule 2 of the Exchequer Court Rules and Forms which permits the Court to determine practice and procedure in any proceedings for which it is not otherwise provided.

as a result of the use of the information and that therefore, the proceedings could not be deemed invalid. [77]

In short, the Supreme Court found that the explicit provisions of the Combines Act prevailed over the more general rules of the Criminal Code. The result would seem to make sense. Proceedings under section 44(4) enable the government to prevent potentially irreparable competitive harms both quickly and efficiently. Even from the businessman's point of view, injunctive proceedings may be salutary. A merger, for instance, might better be prevented at the outset than negated after the fact. It is also much easier in a situation such as a merger for a court to fashion a judicial remedy before rather than after the merger is consummated. [78] It should also be noted that, while the defendant is denied the protection of a grand jury indictment, he is offered some protection by the fact that the proceedings can only be instituted in the new Federal Court or a superior court of criminal jurisdiction. [79]

A second miscellaneous matter dealt with by the courts in the period under review concerned the solicitor-and-client privilege. [80] In his investigation of Canada Safeway Limited, a large supermarket chain in western Canada, the Director of Investigation and Research applied for an order under section 10(5) of the Combines Act, granting him access to various business premises of Canada Safeway. The Director had previously secured a certificate from the Restrictive Trade Practices Commission allowing him to enter Safeway's premises for the purpose of copying or taking away documents for further examination.

However, entry had been denied by Canada Safeway. [81] On the application, Canada Safeway argued that the Director had no authority to copy or seize written communications between itself and its solicitors. The Director argued that section 10 allowed for no such exception and that even if it did, the proper time to claim the privilege was when the Director attempted to introduce such evidence at trial.

The Supreme Court of British Columbia refused to give the Director access to documents which were covered by the solicitor-client privilege. The privilege was so important, according to the Court, that only an express statutory exclusion could destroy it. Since section 10 said nothing about the solicitor-client privilege, it was not meant to be excluded. [82] Moreover, since evidence illegally obtained was not necessarily inadmissible for that reason it

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[77] See Combines Act s. 3.

[78] See Kaysen and Turner, Antitrust Policy 242-43.

[79] At § 46(4).

[80] *Re* Director of Investigation and Research and Canada Safeway Ltd., 6 Can. Pat. R.2d 41 (B.C. S.C. 1972).

[81] Under § 10 of the Combines Act the Director must first get this certificate allowing him to enter. It is only if the Director is denied entry that he must apply to a superior or county court judge for an order directing a police officer to take necessary steps to provide the Director with access to the premises in question.

[82] *Re* Director of Investigation and Research and Canada Safeway Ltd., 6 Can. Pat. R.2d 41, at 45.

was proper for Canada Safeway to invoke the privilege at the time the Director made application for the order. [83]

A related issue of privilege was raised by the case of *Corning Glass Works of Canada Limited v. The Queen.* [84] In a prosecution for a violation of the resale price maintenance provision of the Combines Act, the appellant company applied for an order of prohibition to prevent the trial Judge from hearing the evidence of the corporation's officers. The basis of the company's argument was that the company could not be forced to incriminate itself. In dealing with the matter, the Ontario Court of Appeal distinguished between two privileges; first, the privilege of an accused to refuse to testify and second, the privilege of a witness not to answer a question if the answer will incriminate the witness. [85] Having done so, the case was easily decided by reference to the well established principle of company law that a corporation is an entity separate and distinct from its directors and its shareholders. [86] The company's officers could not refuse to testify since they were not accused; nor could they refuse to answer questions on the ground that the answers would incriminate the company since the company was not the witness. [87] The result it that both privileges which the court enunciated are only available to natural persons and not to corporations. While it is possible to justify the result on the ground that when a company is incorporated, all the disadvantages as well as the advantages of the incorporated form must be accepted, [88] it is rather conclusory. Wigmore supplies a more satisfactory justification for denying the privilege to corporations:

> The policies underlying the privilege . . . do not require that the privilege apply here. The privilege guards, firstly, against the abuses of physical compulsion which are likely to grow out of the license to interrogate. This danger is of course not applicable where the accused is not a human being but only an artificial entity. Secondly, the privilege reflects a sentiment that requires the government to bear the entire burden on building a criminal case against an accused. This sentiment . . . is almost entirely confined to flesh-and-bone individuals. [89]

Since the only penalty which can be imposed on a corporation in respect of criminal conduct is a fine and not the imprisonment of either directors or officers,[90] Wigmore's rationale would seem to be satisfactory.

Another interesting issue involving corporate existence was dealt with in the case of *Re Black and Decker Manufacturing Company Limited v. The Queen.* [91] In that case three companies, one of them being Black and Decker

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[83] *Id.*

[84] 65 Can. Pat. R. 250 (Ont. 1970).

[85] *Id.* 252.

[86] Salomon v. Salomon, [1897] A.C. 22 (1896). It should be emphasized that the Court never actually referred to company law principles concerning corporate personality in its decision.

[87] Corning Glass Works of Canada Ltd. v. The Queen, 65 Can. Pat. R. 250, at 254.

[88] Tunstall v. Steigmann, [1962] 2 All E.R. 417, at 425 (C.A.).

[89] WIGMORE, EVIDENCE § 2259a, at 353 (McNaughton rev. 1961).

[90] CRIMINAL CODE § 623.

[91] 10 Can. Pat. R.2d 154 (Ont. 1973).

Manufacturing Company Limited, amalgamated under the Canada Corporations Act [92] to form a new company called Black and Decker Manufacturing Company Limited. After the amalgamation, the old company was charged with several violations of the resale price maintenance provisions of the Combines Act. [93] The defendant moved to quash the information on the ground that the old company had ceased to exist and that the new company was not responsible for the criminal acts of the old company. The motion was dismissed on the ground that it was improper to decide the issue until the merits of the case had been resolved. [94] The defendant appealed to the Court of Appeal and the Court decided that it would be more efficient to determine the issue before a substantial amount of time was wasted at trial. [95]

The defendant's argument was based on the statutory provisions with the respect to amalgamations. Section 137 of the Canada Corporations Act provides in part as follows:

> (13) Upon the issue of letters patent pursuant to subsection (11), the amalgamation agreement has full force and effect and
>
> (a) the amalgamating companies are amalgamated and are continued as one company (in this section called the "amalgamated company") under the name and having the authorized capital and objects specified in the amalgamation agreement;
> and
>
> (b) the amalgamated company possesses all the property, rights, assets, privileges and franchises, and is subject to all the contracts, liabilities, debts and obligations of each of the amalgamating companies.
>
> (14) All rights of creditors against the property, rights, assets, privileges and franchises of a company amalgamated under this section and all liens upon its property, rights, assets, privileges and franchises are unimpaired by the amalgamation, and all debts, contracts, liabilities and duties of the company thenceforth attach to the amalgamated company and may be enforced against it. 1964-65, c. 52, s. 41; 1967-68, c. 9, s. 8.

The effect of these provisions, according to the defendant is to bring to an end the existence of the amalgamating companies and to create a new separate and distinct entity which is not responsible for the criminal "liabilities" of its predecessors.

The defendant company also relied heavily on the case of *Regina v. Beamish Construction Co. Ltd.* [96] In that case one of the amalgamating companies was charged with price fixing in violation of section 32 of the Combines Act. Mr. Justice Jessup resolved that, on the basis of language in the

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[92] CAN. REV. STAT. C-22 s. 137 (1970).

[93] Regina v. Black and Decker Manufacturing Co. Ltd., 9 Can. Pat. R.2d 129 (Ont. Prov. Ct. 1972).

[94] *Re* Black and Decker Manufacturing Co. Ltd. v. The Queen, 10 Can. Pat. R.2d 154, at 156-57.

[95] *Id.* 157.

[96] 59 D.L.R.2d 6, 50 Can. Pat. R. 97 (Ont. 1966).

Ontario Corporations Act [97] identical to that in section 137 of the Canada Corporations Act, the amalgamating companies had ceased to exist. Furthermore, the new company was not responsible for the criminal liabilities of its predecessors since the provincial government could not constitutionally legislate with respect to criminal matters. [98] Therefore, the charge was dismissed.

The Ontario Court of Appeal decided that the term "liabilities" in section 137 of the Canada Corporations Act did not include criminal liabilities. The Court reasoned that the other terms used in the section were all of a commercial nature and therefore, "liabilities" should be interpreted likewise.[99] In addition, the Court referred to the French language version of the statute where the word used clearly indicated only commercial liabilities and not criminal liabilities. [100] The defendant's appeal was therefore allowed.

The result in the *Black and Decker* case is probably wrong. However, even more disturbing is the fact that the result was reached only on the basis of a semantic conclusion as to the meaning of the word "liabilities". In a case as important as this one for the purposes of competition policy, if not other areas, there should definitely have been some consideration given to the policies involved in the two possible interpretations of the term "liabilities." The trial judge who originally dismissed the defendant's motion resolved the policy issue as follows: "I think it would be creating an escape hatch for a criminal liability or for any company faced with a criminal action to amalgamate with some company." [101]

The Court should not facilitate the use of the corporate form to avoid criminal responsibility. On the other hand, it could be argued that the shareholders of the innocent amalgamating company or companies should not be penalized by a fine levied against the new company in respect of a criminal violation by one amalgamating company. Had they known that the assets of the guilty amalgamating company would be reduced by a fine, they may not have agreed to the amalgamation. The problem is certainly a difficult one. However, that difficulty should not excuse the Ontario Court of Appeal from seriously analyzing the problem rather than reaching a conclusion simply on the meaning of relevant words.

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[97] ONT. REV. STAT. c. 71, § 96 (1960). The § is now ONT. REV. STAT. c. 89, § 114 (1970). The corresponding § in the Ontario Business Corporations Act, ONT. REV. STAT. c. 53 is § 117(4) (1970).

[98] Regina v. Beamish Construction Co. Ltd., 59 D.L.R.2d 6, at 11; 50 Can. Pat. R. 97, at 102.

[99] *Re* Black and Decker Manufacturing Co. Ltd. v. The Queen, 10 Can. Pat. R.2d 154, at 161.

[100] *Id.*

[101] Regina v. Black and Decker Manufacturing Co. Ltd., 9 Can. Pat. R.2d 129, at 131.