PRICE FIXING, MARKET SHARING AND THE PUBLIC INTEREST: THE ATLANTIC SUGAR CASE

by
G.B. Reschenthaler*
and
W.T. Stanbury**

One does not have to be a balletomane to realize that several individuals can coordinate their behaviour perfectly without ever speaking or even touching. The rhythm of the music, the experience of sharing the same stage, and sensitivity to the actions and reactions of others can produce graceful and coordinated behaviour. While detailed choreography is useful, with experienced dancers and some practice, it is unnecessary. The same is true for the managers of large enterprises when a handful of firms jointly account for a large proportion of a market. In the case of ballet, the dancers, by coordinated effort, are able to produce a work of art, occasionally "a joy forever." But in an industrial setting, consciously parallel action can be an unlovely thing - resulting in high prices, excess profits and the stifling of competition. Whether consciously parallel market sharing must lead to these economic consequences was a central question in the recently decided Atlantic Sugar case in which three firms appear to have agreed on market shares for almost three decades.[1]

The competition policy history of this industry is of some importance. In 1962 the same big three sugar refiners pleaded guilty to lessening competition unduly between 1950 and 1953. Each was fined $25,000 and made subject to an Order prohibiting repetition of the behaviour resulting in the offence.[2] Public attention was again drawn to the industry in 1971 when a Tariff Board report revealed that the Canadian refiners' margins exceeded that of their American counterparts in eight of the nine years between 1961 and 1970.[3]

In the present case, the Trial Judge found that there was no evidence of a formal or overt agreement on prices. He accepted the

---

* Professor, Faculty of Business Administration and Commerce, University of Alberta.
** Director, Regulation and Government Intervention Program, The Institute for Research on Public Policy and Associate Professor, Faculty of Commerce and Business Administration, University of B.C.

We are indebted to Judy Bradley for exemplary secretarial services.

proposition that, "the price of the [homogeneous] product must inevitably be the same."[4] He noted that price competition would lead to identical prices, but "the process might be costly and is certainly inefficient." In his view,

> There are two ways to avoid it. Firstly, by the members of the industry conspiring to fix prices, which is illegal, or by the members of the industry making a conscious effort to parallel the prices of the leader.[5]

The Trial Judge did find that an unwritten tacit agreement or understanding existed among the firms to maintain historic market shares, and that the shares were successfully maintained over many years. Nevertheless, the judge found that the agreement to share markets was not "arrived at with the intention of unduly preventing or lessening competition."[5a] He did express concern that a new system of pricing sugar jointly adopted by the three eastern Canadian refiners in 1960 permitted them to amass huge profits in offshore subsidiaries from trading in raw sugar futures.[6] He noted that these profits were beyond the reach of the Department of National Revenue, but this was not a consideration in his judgment. The Trial judge did not note, however, that this also resulted in a severe understatement of the true profitability of the Canadian sugar companies. This acquittal was reversed on appeal.[7] However, the Supreme Court of Canada on July 18, 1980, restored the Trial Court's decision.

On appeal, the Supreme Court of Canada was asked, in the words of Mr. Justice Estey who dissented, whether the law tolerates, "the strange sight of the three accused sharing virtually all the eastern Canada sugar market in constant proportions for eleven years and thereafter sharing ninety percent of the market in the same proportions for another fourteen years."[8] The Supreme Court of Canada in a 6 to 1 decision ruled that, although there was a tacit agreement to maintain almost constant market shares between 1960 and 1973 and that competition was lessened, it was not lessened unduly.[9] Thus the law will tolerate long-term agreements on market shares.

The Canadian law on conspiracies and arrangements in restraint of trade traditionally has required that two things be proven beyond a reasonable doubt. First, that the accused made an agreement to lessen competition, and second, that the agreement lessened competition unduly. In the United States price fixing and market sharing agreements are subject only to the first part of this test. Section 1 of the Sherman Act of 1890, unchanged today, states very simply, "every contract, combination ... or conspiracy in restraint of trade or commerce among the several States ... is declared to be illegal."[10] The U.S. Supreme Court has repeatedly ruled that virtually all price fixing and market sharing agreements are illegal per se.[11] While the courts in the United States do consider the likely or actual effects of some restraints of trade, they have, since the 1890s, viewed agreements on prices and market shares as so intrinsically incompatible with the underlying philosophic foundations of a competitive free enterprise economy as to be categorically unacceptable.[12] Once an agreement is shown, or can be

inferred from the documentary and circumstantial evidence, a crime has been committed. The court need not inquire whether competition has been "lessened unduly" to use the words of the Combines Investigation Act.[13] These words are the rock upon which the Crown has foundered in recent combines cases.

It should be emphasized that in both countries, following the English common law on conspiracy, the existence of an agreement may be inferred from wholly circumstantial evidence. A direct or overt agreement need not be shown. The finding of a tacit agreement among the accused is enough for conviction in the U.S., but it meets only the first part of the two-part test for agreements in restraint of trade in Canada.

With the Atlantic Sugar decision, Canadian consumers should have little confidence in the ability of the federal government to successfully prosecute price fixing and market sharing agreements in many key industries. Businessmen should be concerned about the decision for two reasons; first, they may be customers of firms who have agreed to share markets or fix prices. Second, with a large stake in a market economy they must perceive that the long run health of the system is dependent on the public's faith that the system works fairly and efficiently. Businessmen who genuinely abhor greater intervention by government in the economy should support an effective competition policy - one that would make illegal per se market sharing or price fixing agreements or arrangements except those which are de minimus. Private cartelization is a prime candidate for public direct regulation of an industry's prices.

ISSUES RAISED BY THE DECISION

(a) What constitutes an undue lessening of competition?

The Atlantic Sugar decision raises basic questions about the enforceability of the present law. First, it establishes a new and extremely tough standard as to what constitutes an undue lessening of competition. An agreement by three companies lasting over 13 years to maintain their market shares where the three jointly accounted for over 90 percent of a market is not undue. This stands in sharp contrast, for example, to the Abitibi case decided in 1960.[14] There it was held that an agreement extending over eight years involving 18 companies, jointly accounting for 54 percent of the market, to establish the maximum price at which they would purchase pulpwood lessened competition unduly. There is a clear contrast, since - as we argue below - in the Atlantic Sugar case agreement on market shares requires, if it is to be effective, implicit agreement on price and other dimensions of competitive behaviour including the extent of discounting to be allowed.

The majority of the Supreme Court of Canada found that competition had been lessened in the sugar industry, but it had not been "suppressed" or "eliminated."[15] All price competition was not foregone. Some concessions were made to big buyers but the majority noted, "this would be adjusted so as to maintain the 'historical market share' as close as possible without any increase or diminu-

tion."[16] The majority appears to adopt the test ennunciated by Mr. Justice Cartwright in the Howard Smith case in 1957. Namely, for an agreement to be illegal, competition must be lessened to the point where "the participants in the agreement become free to carry on those activities virtually unaffected by the influence of competition."[17] While the Combines Investigation Act was changed effective January 1, 1976 to eliminate this interpretation[18], which was never the mainstream view of the Supreme Court of Canada or of the lower courts[19], the majority in Atlantic Sugar seem intent on holding to this very hard-to-meet test of what constitutes unduly.[20] The decision leaves little doubt that for undueness the court will continue to seek evidence of "elimination" of competition.

Of equal concern is the failure by Mr. Justice Pigeon and his colleagues to appreciate the quality of such competition that remained. For example, it is not uncommon for a few big buyers to get discounts from oligopolistic sellers while the great bulk of sales are made at list price to smaller (less powerful) buyers. Furthermore, as we have noted, the price lists adopted by all three refiners included a very large refining margin in comparison to refining margins in the U.S. Therefore, secret deviations from such a safe plane did not seriously erode profitability or the essential stability of prices. Indeed, if market shares were to be maintained, it was essential that some system exist to contain discounts to ensure that one firm did not take a major customer from another.

On the one occasion in 1958 when surreptitious price cutting by Redpath reduced Atlantic's market share, it retaliated as did St. Lawrence, the third largest firm in the eastern sugar industry.[21] After a brief price war, in the words of the Trial Judge, all three "settled down to a policy of maintaining their traditional market shares."[22] Other evidence of the almost completely controlled state of competition is the fact that when Cartier, which became a captive supplier-subsidiary of Steinberg's, entered the industry with about six percent of total capacity at the time, the big three were able to "move over" and thereafter maintain the same shares of the remaining ninety-odd percent of the market.[23] In short, the competition that remained, given the tacit agreement on market shares, was very limited in extent and of a "safe" type - certainly insufficient to destabilize the smoothly coordinated market sharing arrangement. Following this decision, it appears the Crown, in order to prove that competition has been lessened unduly, must show that virtually no competition existed.

(b) The need to prove intent to lessen competition unduly

The Atlantic Sugar decision reinforces the Supreme Court's 5 to 3 decision in Aetna Insurance[24] in 1977 which altered the law with respect to whether or not the Crown is obliged to prove that the accused entered an agreement with the intent to lessen competition unduly. Previous decisions of the Supreme Court of Canada (e.g., Weidman v. Shragge, Stinson-Reeb, Singer, Belyea/Weinraub, Container Materials and Howard Smith[25]) had required the Crown only to prove

that the accused entered an agreement whose effect, if carried out, is to lessen competition unduly. This position was reiterated in the minority judgment in Aetna written by the Chief Justice, who did not participate in the Atlantic Sugar decision. It was also the position taken by Mr. Justice Estey in his dissenting opinion in Atlantic Sugar.[26]

In fact, the majority's judgment in Aetna is very confusing because in it one can find support for both the "traditional" view and the "new" view of the need to prove intent to lessen competition unduly. For example, Mr. Justice Ritchie, who wrote the majority opinion in Aetna, accepted as "an accurate assessment of the meaning of unduly as it has been construed in the various cases..." the following words of the Trial Judge in that case who said,

> what is criminal is an agreement that is intended to lessen competition improperly, inordinately, excessively, oppressively or one intended to have the effect of virtually relieving the conspirators from the influence of free competition.[27]

Yet, in the preceding paragraph (not quoted by Pigeon J.), Mr. Justice Ritchie stated that the burden on the Crown was to show that the accused "intended to enter into a conspiracy, combination, agreement or arrangement and, secondly, that the conspiracy ... if it were carried into effect would prevent or lessen competition unduly." Therefore, despite the confusion in the Aetna decision[28], the majority in Atlantic Sugar have reiterated the "new" view that "the offence lies in the agreement made with the intention to lessen competition unduly."[29] In doing so, the Supreme Court is setting a different and higher standard of proof in price fixing and market sharing cases than it has historically.

The evidence is clear that the Crown's record in conspiracy cases (i.e., those involving price fixing or market sharing agreements) has significantly changed in the late 1970s. As Table 1 indicates, between 1924 and 1975 the Crown won 90 percent of such cases. In cases concluded between 1975/76 and 1979/80 it won only 57 percent of conspiracy cases.[29a] In our view, the Aetna and the Atlantic Sugar decisions will make the Department of Justice reluctant to prosecute S. 32 cases in the future. If this does not occur, we would predict an even lower conviction rate in the 1980s than we observed in the 1970s.

CHANGES NEEDED IN PUBLIC POLICY

What can be done to remedy the problem? First, the federal government should move immediately to change S. 32 of the Combines Investigation Act by removing the requirement that a price-fixing or market sharing agreement or arrangement lessen competition unduly. In short, Canada should adopt the approach that once an agreement has been shown an offence has been committed. This is now the case with respect to bid rigging (S. 32.2) and it, as we have noted, has long been the case in the United States. This per se approach was also proposed in S. 16 of the ill-fated Bill C-256, the proposed

Table 1

CONVICTION RATE IN CANADIAN COMBINES CASES, 1889-1980

Period: Year Ending March 31	Number of Cases Prosecuted[1]		Percentage of Cases Won by the Crown[2]	
	Total	Conspiracy	Total	Conspiracy
1890-1910	8	8	63	63
1911-1923	1	1	0	0
1924-1940	14	12	86	92
1941-1946	0	0	--	--
1947-1955	12	9	92	89
1956-1960	18	13	78	100
1961-1965	18	7	89	100
1966-1970	25	16	92	94
1971-1975[3]	37	15	89	87
1976-1980[3]	75[4]	21[5]	64	57

Notes

1. Includes conspiracy, merger, monopoly, price discrimination, price maintenance, and predatory pricing cases; excludes misleading advertising cases.
2. Includes cases in which a conviction was recorded resulting in a fine and/or fine and a Prohibition Order; also includes cases where the Crown only applied for and received a Prohibition Order.
3. In these years the cases were dated by the year in which they were concluded. In the previous years, the cases were dated by the year in which an Information was laid or indictment preferred. Overlap is virtually non-existant.
4. Includes 4 cases under appeal; 2 from convictions; 2 from acquittals.
5. Includes 2 cases under appeal; 1 from a conviction; 1 from an acquittal.

Sources: Paul K. Gorecki and W.T. Stanbury, "Canada's Combines Investigation Act: The Record of Public Law Enforcement, 1889-1976," in J.R.S. Prichard, W.T. Stanbury and T.A. Wilson (eds.) Canadian Competition Policy: Essays in Law and Economics (Toronto: Butterworths, 1979), pp. 189-190; tabulation by authors from the Annual Report of the Director of Investigation and Research, Combines Investigation Act, 1970/71 through 1979/80.

Competition Act of 1971.[30] Price-fixing and market sharing agreements are simply arrangements designed to undermine the competitive market place. They are a form of taxation imposed on buyers, be they consumers or other businessmen. They provide no benefits to the society as a whole. They should not be tolerated whatever the degree of lessening of competition. Should a proposed agreement have redeeming social virtue the parties involved always have the option of seeking Parliamentary sanction for an appropriate exemption. The need for an effective section in the law on price fixing and market allocation arrangements is imperative in Canada. Such arrangements have a particularly damaging potential in a relatively small domestic market insulated by high rates of effective protection and, where some submarkets are isolated geographically and, consequently, subject to high transportation cost barriers. Furthermore, because our generally highly-concentrated markets facilitate closely-coordinated action, the laws should be strict in prohibiting arrangements designed to fix prices or maintain market shares.

There is some support for amending the legislation along the line we propose. The Ottawa Citizen has editorially condemned the Act as "toothless." The Atlantic Sugar case shows that "the law has not kept pace with the times [and] that the old law doesn't suit modern circumstances."[31] The Montreal Gazette saw the decision as dealing a "tough blow [to] Canada's limited free-market economy." It called for Ottawa to introduce amendments to the legislation to "empower the judiciary to guarantee competition."[32]

Secondly, even if these two changes are made, there remains the central problem of the ability of firms in an oligopoly to closely coordinate their behaviour without the trappings of an agreement and in some cases without a tacit agreement. Until very recently, the inference of a tacit agreement based on purely circumstantial evidence required, not simply that the facts be consistent with the accused's guilt, but also that the inference be inconsistent with any other rational conclusion. The last test was the rule laid down in Hodge's Case in 1838.[33] In 1978, in The Queen v. Cooper,[34] the Supreme Court of Canada rejected this old rule and said that the test for a jury to make a finding of guilty on circumstantial evidence is that "they must be satisfied beyond a reasonable doubt that the guilt of the accused is the only reasonable inference to be drawn from the proven facts." This change makes the inference of a tacit agreement easier, but it does not change the basic law on conspiracy, which requires the finding of agreement among the accused.

Therefore, in addition to adopting a per se rule for price-fixing and market sharing agreements, Canada needs to create a new "civil reviewable matter"[35] in recognition of the nature of modern industrial oligopolies. Firms in an oligopoly are interdependent.[36] What one does with respect to price or product strategy soon affects the others and vice-versa. "Solutions" arrived at by tacit bargaining and action-reaction experiences may not be agreements in the sense contemplated by the law on conspiracy. Yet such

solutions may be against the public interest if output is restricted, prices raised, excess profits earned, or inefficiency tolerated.

We have recommended previously that persistent conscious parallelism, when accompanied by one or more specified "plus factors," be made a civil reviewable matter either by the courts or a specialized quasi-judicial tribunal.[37] The plus factors would include such behaviour as long continued uniform prices, use of uniform basing points in a delivered pricing scheme, consistent advance notification of price changes without legitimate business justification, and such performance factors as persistent excess capacity, long term fixed market shares and systematic price discrimination.

Although only injunctive remedies are available under such a civil law provision, they may assist in lessening the ability of firms in an oligopoly to act on the recognition of their interdependence. Such remedies may result in price and output combinations closer to those that would occur under competitive conditions. The point is to ensure that potential dynamic factors that would make independent behaviour more attractive are not inhibited. We must make the coordination of behaviour among oligopolists about as reliable as the Canadian post office's promise of next-day delivery. It is important to note that our proposal has been endorsed by the Royal Commission on Corporate Concentration, which was generally hostile to changes in competition policy.[38]

If André Ouellet, Minister of Consumer and Corporate Affairs, wishes to do more than severely criticize the courts (for which he was convicted of contempt of court in 1976[39]), he should introduce new legislation in Parliament along the lines suggested above. He should, in addition, bring in new civil law provisions to deal with mergers to fill the huge gap in the law that was defined by the Supreme Court of Canada in the K.C. Irving case.[40] If the Minister merely decries the actions of the Supreme Court, but does nothing, Canadians will have witnessed yet another act of symbolic politics, or as it is colloquially known, "crocodile tears."

Notes

1. Atlantic Sugar Refineries et al. v. the Attorney General of Canada 16 C.R. (3d) 128, Supreme Court of Canada, July 18, 1980. It should be pointed out that the period specified in the indictment was January 1960 through May 1973. The earlier case in which the three refiners pleaded guilty covered the period 1950 to 1953, but the Restrictive Trade Practices Commission indicated that the conspiracy had extended over a considerable number of years (Report Concerning the Sugar Industry in Eastern Canada, Ottawa: RTPC, 1960, p. 9). In his dissenting opinion Mr. Justice Estey noted that "for almost a quarter of a century [the three refiners] remained in almost arithmetically perfect formation." For a discussion of competitive

behaviour in the sugar industry see, for example, W.T. Stanbury and G.B. Reschenthaler, "Oligopoly and Concious Parallelism: Theory, Policy and the Canadian Cases," Osgoode Hall Law Journal, Vol. 16, No. 3, 1977, pp. 644-651; Report by the Tariff Board (Ref. No. 146: Sugar) (Ottawa: Information Canada, 1971); Food Prices Review Board, Sugar Prices II: The Canadian Refining Industry (Ottawa: FPRB, 1975); Restrictive Trade Practices Commission, Report Concerning the Sugar Industry in Eastern Canada (Ottawa: RTPC, 1960). For a more sanguine view, see Bruce Mallen, "Collusion! Is Long Run Market Share Stability a Reflection?," The Business Quarterly, Vol. 41, No. 2, Summer 1976, pp. 28-36.

2. See Annual Report of the Director of Investigation and Research, Combines Investigation Act, for the year ended March 31, 1963 (Ottawa: Queen's Printer, 1963), p. 16.

3. Report by the Tariff Board, op. cit., p. 68, Table 24.

4. (1976) 26 C.P.R. (2d) 14 at p. 97 (decided December 19, 1975).

5. Ibid.

5a. Ibid., p. 103 (emphasis added).

6. Ibid., pp. 105-108.

7. (1978) 3 D.L.R. 221; 41 C.C.C. (2d) 209.

8. 16 C.R. (3d) 128 at 160, Dissenting Reasons of Mr. Justice Estey.

9. 16 C.R. (3d) 128 at 141, Reasons for judgment by Pigeon J. for the majority.

10. 26 Stat. 209 (1890) as amended, 15 U.S.C.A. (1977).

11. An excellent brief summary of the U.S. jurisprudence can be found in F.M. Scherer, Industrial Market Structure and Economic Performance (Chicago: Rand, McNally, 2nd edition, 1980), Ch. 19. See also L.A. Sullivan, Handbook of the Law of Antitrust (St. Paul: West Publishing, 1977), Ch. 3. A much more comprehensive treatment can be found in Phillip Areeda and Donald F. Turner, Antitrust Law, 6 Vols. (Boston: Little, Brown, 1978 and 1980), Vol. V. (1980.)

12. See Trans-Missouri Freight Association, 166 U.S. 290 (1897).

13. Section 32(1) of the Combines Investigation Act (R.S., c. C-23 amended by c. 10 (1st Supp.) c. 10 (2nd Supp.) 1974-75-76, c. 76) states:

> Every one who conspires, combines, agrees or arranges with another person

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

14. R. v. Abitibi Power & Paper Company Limited et al. (1961) 131 C.C.C. 201; 36 C.P.R. 188. See also R. v. Electrical Contractors Association of Ontario and Dent (1961) 37 C.P.R. 1 (includes both Trial and Appeal judgments) - Leave to appeal to the Supreme Court of Canada was refused.

15. 16 C.R. (3d) 128 at 140, Majority judgment.

16. Ibid.

17. Howard Smith Paper Mills Limited et al. v. The Queen [1957] S.C.R. 403 at 426.

18. Section 32(1.1) reads,

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

19. This point is made very clearly by the Chief Justice in his dissent in the Aetna Insurance case (1977) 34 C.C.C. (2d) 157.

20. It should be noted, however, that the period of the charge in the Atlantic Sugar case preceded the amendment to the Act. This was also the case in Aetna Insurance. Therefore, cases

tried under the new provision should not be subject to this interpretation.

21. Descriptions can be found in Stanbury and Reschenthaler, op. cit., p. 650; (1976) 26 C.P.R. (2d) 14 at 102; and in the Atlantic Sugar decision, 16 C.R. (3d) 128 at 134, Majority judgment.

22. (1976) 26 C.P.R. (2d) 14 at 102.

23. See Stanbury and Reschenthaler, op. cit., pp. 649-650.

24. Aetna Insurance Company and 72 Other Corporations v. The Queen [1978] 1 S.C.R. 731; (1977) 34 C.C.C. (2d) 157; 30 C.P.R. (2d) 193 (decided April 29, 1977).

25. The reports of these cases are as follows: (1912) 46 S.C.R. 1; [1929] S.C.R. 276; (1931) 56 C.C.C. 381; [1932] S.C.R. 279; [1942] S.C.R. 147; [1957] S.C.R. 403.

26. 16 C.R. (3d) 128 at 165.

27. [1978] 1 S.C.R. 731 at 748; emphasis added. The words are quoted in the Atlantic Sugar decision, Majority judgment, 16 C.R. (3d) 128 at 141. Note: the words "improbably, inordinately, excessively, oppressively" were first used as synonyms for unduly in 1903 and have been adopted ever since. See R. v. Elliott (1905) 9 C.C.C. 505 at 520.

28. The Director of Investigation and Research in his assessment of the Aetna decision, prior to the Supreme Court of Canada's judgment in the Atlantic Sugar case, did not view this issue to be of central importance. Rather the Director focussed on two other issues: (i) whether or not the Crown had to establish that the accused had a virtual monopoly before a finding of unduly lessening of competition could be made; and (ii) whether defence evidence of public benefit flowing from the agreement was admissible in determining whether the object of the agreement was to lessen competition unduly. In the Director's view, that "the majority judgment raises questions concerning the future enforcement and administration of the conspiracy provision" (Annual Report of the Director of Investigation and Research, Combines Investigation Act, for the year ended March 31, 1978 (Ottawa: Minister of Supply and Services, 1978), pp. 16-19 at p. 16).

29. 16 C.R. (3d) 128 at 141.

29a. We note that the conviction rate in non-conspiracy cases fell from 91 percent in the first half of the 1970s to 67 percent in the latter half.

30. See W.T. Stanbury, Business Interests and the Reform of Canadian Competition Policy, 1971-75 (Toronto: Carswell/Methuen, 1977).

31. "Landmark of federal cowardice," Ottawa Citizen, August 12, 1980, p. 6. It sees the "ability of [the corporate] sector to stonewall competition legislation for 14 years is proof of the power it wields." One writer of a letter to the editor was more cynical. He argued that "the prime purpose of the Combines Investigation Act is to provide a veneer of competition while ensuring that the real thing is dead and buried" (Edward Rice, letter to the editor, Ottawa Citizen, July 31, 1980, p. 6).

32. "Open up the market place," Montreal Gazette, July 28, 1980, p. 8.

33. (1838) 2 Lewin 227; 168 E.R. 1136. The rule in Hodge's Case provides that when the proof of a conspiracy must be inferred from circumstantial evidence, the inferences drawn from the acts and words of the accused or their agents must be consistent only with the establishment of an illegal or unlawful arrangement or agreement and be inconsistent with any other rational conclusion.

34. [1978] 1 S.C.R. 860 at 881.

35. The phrase is that used for the civil law provisions in the proposed Stage II amendments to the Combines Investigation Act introduced in March (Bill C-42) and November 1977 (Bill C-13) but not passed. See J.W. Rowley and W.T. Stanbury (eds.) Competition Policy in Canada: Stage II, Bill C-13 (Montreal: The Institute for Research on Public Policy, 1978) and J.R.S. Prichard, W.T. Stanbury and T.A. Wilson (eds.) Canadian Competition Policy: Essays in Law and Economics (Toronto: Butterworths, 1979).

36. A more comprehensive discussion can be found in Stanbury and Reschenthaler, op. cit., and in Scherer, op. cit., Chapters 6 and 7.

37. Stanbury and Reschenthaler, op. cit., pp. 694-697.

38. Royal Commission on Corporate Concentration, Report (Ottawa: Minister of Supply and Services Canada, 1978), pp. 95-98. The Commission's views on competition policy are reviewed by the Bureau of Competition Policy; Stanbury and Waverman; and Skeoch, in P.K. Gorecki and W.T. Stanbury (eds.) Perspectives on the Royal Commission on Corporate Concentration (Toronto: Butterworths for The Institute for Research on Public Policy, 1979), Ch. 12, 10, 9.

39. Re Ouellet (No. 1) (1976) 67 D.L.R. (3d) 73; (1977) 36 C.R.N.S. 296.

40. R. v. K.C. Irving Ltd. et al. (1977) 32 C.C.C. (2d) 1; 72 D.L.R. (3d) 82; 29 C.P.R. (2d) 83. This case is discussed in G.B. Reschenthaler and W.T. Stanbury, "Benign Monopoly: Canadian Merger Policy and the K.C. Irving Case," Canadian Business Law Journal, Vol. 2, No. 2, 1977, pp. 135-168; R.J. Roberts, "The Death of Competition Policy: Monopoly, Merger and Regina v. K.C. Irving Ltd.," University of Western Ontario Law Review, Vol. 16, 1977, pp. 215-226. For more recent developments, see W.T. Stanbury, "Ken Thomson's latest acquisition underscores the laughable impotence of our merger laws," Canadian Business, April 1980, pp. 123-124; and Annual Report, Director of Investigation and Research, Combines Investigation Act for the year ended March 31, 1979 (Ottawa: Minister of Supply and Services Canada, 1979), pp. 13-25.