

ANTICOMPETITIVE AGREEMENTS UNDER THE COMBINES INVESTIGATION ACT: AN EVALUATION

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I. Introduction

Conspiracies or agreements which have the effect of restricting competition are governed primarily by s. 32 of the *Combines Investigation Act*.¹ Section 32(1) reads:

Everyone 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.

In essence the legislation prohibits only those agreements which, if carried out, would restrain competition unduly in the relevant market.

This paper assesses the efficacy of both s. 32(1) and Bill C-29² (which would amend s. 32 in certain respects) in meeting the goals of competition policy. The goals or ends sought to be achieved by legislation prohibiting anti-competitive conspiracies are easy enough to state. The victim of a conspiracy is likely to emphasize the transfer of income effect: as a result of, say, a price-fixing conspiracy, he will have paid a higher price than he would have absent the conspiracy. To him the extra amount which he has paid represents private taxation. Academic economists and public policy makers are more likely to stress the importance of achieving allocative efficiency. To them the primary ill effect of cartels and the like is the long-term misallocation of resources in the economy. If anti-competitive agreements or combinations can be implemented with impunity, then the accompanying restriction of output necessary to maintain or raise prices will cause too few of society's productive resources, relative to demand, to be utilized in the cartelized sector. Conversely, relatively too much in the way of resources will be allocated to those sectors characterized by competition.³ Other scholars point out that the transfer of income often associated with cartelization is in fact over-emphasized. They conclude that one of the

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1. R.S.C. 1970 c. C-23 as amended [hereinafter referred to as CIA].

2. "An Act to amend the *Combines Investigation Act* and the *Bank Act* and other Acts in consequence thereof", Bill C-29, 32nd Parl., 2nd Sess., First Reading, April 2, 1984.

3. For example, this was stressed in the Economic Council of Canada's *Interim Report on Competition Policy* (1969). See also F. Scherer, *Industrial Market Structure and Economic Performance* (1970), chapter 2 and P. Samuelson, *Economics* (9th ed., 1973), chapter 26.

major effects of price fixing is to divert energies from price to non-price competition. According to this analysis, while prices will be raised by a price-fixing conspiracy, much of the extra income which would otherwise accrue to the conspirators will be eaten up by the extra costs associated with non-price competition, for example, advertising, product differentiation and so forth. This is the so-called "x" inefficiency of which some economists write.⁴ While different from traditional notions of allocative inefficiency, its existence provides additional motivation for attempting to deter anti-competitive agreements. Other reasons sometimes put forth as a justification for antitrust legislation include the populist notion of discouraging agglomerations of power, not for any economic reasons, but as an end in itself.⁵

The point is that there is ample enough justification for a prohibition of *harmful* anti-competitive agreements. At the same time it is neither practicable nor desirable to prohibit *all* agreements which have a negative impact on competition. Some such agreements either have only a *de minimus* effect on competition or else the legitimate commercial purposes to be served by the agreement far outweigh whatever anti-competitive effects exist.

For example, on the sale of a business it is common for the vendor to covenant that he will not compete with the buyer in the business sold. Such covenants are permitted under our private law as long as the restraint of trade clause is limited in time and purports to operate only in the area where the business sold had been carried on. They are in fact quite necessary in effectuating sales of businesses since the buyer often pays a sum of money exclusively for the goodwill of a business. Since this goodwill consists largely of the name of the business and the association by clients with that name and location, the goodwill purchased by the buyer would be expropriated if the vendor could operate in the vicinity and solicit his former clients. It is true that there is a negative impact on competition; the vendor is restrained by agreement from operating where he formerly did. Nevertheless, whatever anti-competitive effects exist are more than outweighed by the beneficial effects of the restraint. There are many other examples of agreements of this type, ranging from joint venture agreements to "exclusive" clauses in shopping centre leases.

It can be seen, then, that some legal mechanism must be found which deters the truly offensive conspiracy or agreement while permitting the beneficial or innocuous. Not only that, but if the law is to be truly effective in this regard, it must be certain enough so that firms do not inadvertently run afoul of the law or, equally bad, refrain from engaging in desired business activity out of an abundance of caution.

There are different approaches that can be taken in seeking to accomplish these policy objectives. In the United States the analogous provision

4. See for example, R. Posner, *Antitrust Law, An Economic Perspective* (1976), chapter 2.

5. See for example, Kaysen and Turner, *Antitrust Policy* (1959) at 17, 18 where this motivation is articulated though not adopted.

to s. 32 of the *Combines Investigation Act* is s. 1 of the *Sherman Act*,⁶ which reads:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal...

This very general and, at first glance, rather sweeping piece of legislation was soon interpreted to prohibit only those agreements which were unreasonable in the circumstances. This was known as the "rule of reason".⁷ In subsequent decisions it was held that some types of agreements, for example, price-fixing, were *per se* unreasonable.⁸ Thus, through a combination of the "rule of reason" and the *per se* rules, those agreements which are perceived to be always harmful or never beneficial, are clearly prohibited, leaving unreasonableness as the criterion for determining the legality of agreements in which the effects on competition are more elusive.

In contrast, under the *Combines Investigation Act*, the only agreement among competitors which can be said to be *per se* illegal is bid-rigging, a very specific type of price-fixing agreement.⁹ All other types of agreements which restrain competition, including price-fixing, are illegal only if they restrain competition *unduly*. Canadian anti-combines law thus emphasizes a criterion-oriented approach as opposed to the *per se* emphasis in the United States.

In order to properly assess whether the Canadian approach is meeting the objectives of deterring truly anti-competitive conspiracies and of promulgating clear guidelines for business behaviour, an analysis of the law is necessary. In recent years, judgments by the Supreme Court of Canada in *Aetna Insurance v. The Queen*,¹⁰ *Atlantic Sugar Refineries v. Attorney General of Canada*¹¹ and *Jabour v. Law Society of British Columbia*¹² have had a significant impact on the application of s. 32. These judgments, particularly *Atlantic Sugar*, have already engendered much commentary with scholars disagreeing on the most basic of issues. This has resulted in considerable confusion and uncertainty as to the state of the law.

My purpose in writing this article is, hopefully, not to add to this confusion but to emphasize that the law is not nearly as uncertain or as weak as a perusal of the literature would lead one to believe.

The major issues raised by s. 32 fall into four categories: the nature of agreement or conspiracy, the legal meaning of "unduly", the *mens rea* requirement and the scope of the regulatory exemption. These are reviewed and considered in parts two through five of this paper. Part VI is a general assessment of the law's effectiveness in light of the recent cases and the general aims of anticombines policy in Canada.

6. 1890, 15 U.S.C.A. 1.

7. See *Standard Oil Co. v. U.S.* (1911), 221 U.S. 1 and *U.S. v. American Tobacco Co.* (1911), 221 U.S. 106.

8. *U.S. v. Trenton Potteries Co.* (1927), 273 U.S. 392; *U.S. v. Socony-Vacuum Oil Co.* (1940) 310 U.S. 150.

9. A special prohibition of bid-rigging is enacted in s. 32.2 of the CIA.

10. (1977), 15 N.R. 117, 34 C.C.C. (2d) 157, 20 N.S.R. (2d) 565, 30 C.P.R. (2d) 193.

11. (1981), 32 N.R. 562, 54 C.C.C. (2d) 373, 115 D.L.R. (3d) 21.

12. [1982] 5 W.W.R. 289, 37 B.C.L.R. 145, 66 C.P.R. (2d) 1, 137 D.L.R. (3d) 1.

As of the date of writing, Bill C-29 which would amend s. 32 in certain respects has been introduced in Parliament. While it is uncertain whether or not Bill C-29 will receive third reading, it is likely that even if it does not, some form of the Bill will ultimately be reintroduced. The changes proposed in Bill C-29 will, to the extent that they affect s. 32, be assessed in this paper.

II. The Requirement of Agreement: Conspiracy, Tacit Agreements, and Conscious Parallelism

One of the most vexing problems for Canadian competition law and policy arises from pricing behaviour in oligopolistic markets; such pricing behaviour is often characterized by conscious parallelism. The economic and legal literature describing conscious parallelism is voluminous and need not be considered in depth here.¹³ Nevertheless, for the benefit of readers without an extensive background in economics, a brief description of the problem will be given. It is useful to outline initially the dynamics of pricing and output in the perfectly competitive market of economic theory as well as that of the absolutely monopolistic market of economic theory.

In the perfectly competitive market composed of many sellers and buyers the market price is set by the sellers acting in competition with each other. Any single seller knows that any limitation in his output can have only a *de minimus* effect on market-wide supply, which along with market wide demand establishes the market price. A restriction in output by one seller acting unilaterally will not pay; the price attainable will be the same. Each seller takes the market price as given and adjusts his output in order to maximize his profits.

On the other hand, in a monopoly, output may be less and the price higher than that prevailing in a perfectly competitive market. Since the monopolist is the sole source of industry-wide supply, the monopolist's decision on the level he produces will have an impact on the market price. Because of this the monopolist will take into account the effect which his level of output will have on price. Accordingly, if the monopolist desires to maximize profits, economic theory suggests that he will do so by producing less and obtaining a higher price than that which would have resulted if the market were perfectly competitive, assuming the absence of significant economies of scale.

Obviously, if a monopolist can do better by selling less at a higher price, so could all the sellers in the perfectly competitive market if, by acting in concert, they each reduced output by a proportionate amount so as to have the cumulative effect of causing an increase in the market-wide price. If this happened, each seller would receive a proportionate share of monopoly-

13. For a more indepth analysis of the "conscious parallelism" problem readers are referred particularly to Turner, "The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal" (1962), 75 Harv. L.R. 655; F. Scherer, *Industrial Market Structure and Economic Performance* (1970), Ch. 5; R. Posner, *Antitrust Law, An Economic Perspective* (1976), c. 4; Hay, "Oligopoly, Shared Monopoly and Antitrust Law" (1982), 67 Cornell L.R. 439 and Stanbury and Reschenthaler, "Oligopoly and Conscious Parallelism: Theory, Policy and the Canadian Cases" (1977), 15 Osgoode Hall L.J. 617.

level profits instead of those prevailing at the competitive level. However in a competitive market this will not happen spontaneously; as noted, a decrease in output by one firm will have only a negligible effect or no effect at all on the market price since rivals cannot be assumed to act in a like manner.

If, however, each firm could be assured that all other firms would also restrict output, then the necessary effect on market-wide supply would occur and the fruits of monopoly level profits would be attained. One obvious method of achieving such an assurance is through an agreement among the erstwhile rivals, together with the introduction of mechanisms for ensuring that the agreement is observed and that no chiseling or cheating takes place. This explains the existence of cartels as well as the necessity of antitrust laws to make such agreements illegal.

In reality, there are almost no markets which are either perfectly competitive or absolutely monopolistic. In Canada much of the market structure in various industries can best be described as oligopolistic, that is, comprised of just a few sellers. It is in such oligopolistic market structures that the problem of conscious parallelism arises. Conscious parallelism is not a term of art and it can be better described than defined. Assume, for example, that instead of the single firm monopoly, there is a market composed of only three sellers. Further assume that they are initially pricing and producing at levels which would be attainable under a perfectly competitive market structure. Now, assume firm 'A' concludes that all firms in the market can increase their profits by raising their prices to those which would prevail in a monopolistic market. This would necessitate a decrease in output by each firm. Had the market been perfectly competitive any attempt by one firm to raise prices above that set by the market would fail since the increase would not be followed by rivals; there simply would be too many of them to expect concerted behaviour of this sort to occur. But if there are only a few, say three, sellers, a firm may raise its price in the expectation that its two rivals will find it in their best interests to do the same. It might arrive at this expectation as follows. If it raises its price and its rivals don't follow, it knows it will have to retract its price increase. If such occurs it will lose in the short run (and its rivals will gain) in terms of sales lost. On the other hand, the failure to follow the price rise will result in all firms losing in terms of long-run higher profit margins. Since in the long-run all firms are better off by following the announced price rise, firm 'B', if it acts rationally, will indeed follow firm 'A', but on the assumption also that firm 'C' will likewise follow. Each firm assumes and is "conscious" of the likely reactions and expectations of rivals when determining its own market behaviour. Accordingly, each firm in its market behaviour is conscious that other firms will act in a parallel fashion. Such inter-firm market behaviour is sometimes called *interdependent*. This would be in contrast to *independent* behaviour such as occurs in the perfectly competitive market where output decisions of an individual firm are dictated by the market and made without bringing into the calculus the likely reactions of competitors.

Conscious parallelism is also often contrasted with *collusive* behaviour under which the behaviour is arrived at through agreement. The distinction, however, between pure conscious parallelism and actual agreement is, as will become apparent, not an easy one to make and has perplexed scholars,

courts and legislative policy makers for a long time. After all, traditional notions of conspiracy refer to a meeting of minds arrived at through communication. When firm 'A' raises its price on the assumption that it will be followed, it is in a sense communicating with its rivals, and when the rivals do follow, are they likewise not communicating with the others? Can this not be classified as a tacit agreement? This will be discussed in more depth later.

As I see it the legal and policy issues raised by conscious parallelism are as follows:

(1) Is there in fact a distinction to be made between conscious parallelism and tacit agreements?

(2) If a distinction is to be made between the two, what is the best approach to conscious parallelism in terms of public policy?

I first propose to outline some of the main approaches to conscious parallelism, and then to inquire into the present state of Canadian law and various proposals to reform the law.

A. The Orthodox Approach

In a seminal article, Donald F. Turner, then a professor at the Harvard Law School, set out the orthodox position on conscious parallelism.¹⁴ A summary of Professor Turner's views is as follows:

(a) As a matter of "linguistic definition", oligopolistic interdependence ought to be considered as falling within "the scope of the term agreement". In a now famous passage, Professor Turner noted:

I also find considerable appeal as a general matter, in defining "agreement" for purposes of *Sherman Act* law in terms of interdependence of decisions, if for no other reason than that it seems to me to be a clearer and more workable standard than any other standard, of acceptable scope, which requires something more. Once one goes beyond the boundaries of explicit, verbally communicated assent to a common course of action — a step long since taken and from which it would not seem reasonable to retreat — it is extraordinarily difficult if not impossible to define clearly a plausible limit short of interdependence...¹⁵

In short, Turner recognized the logical impossibility of distinguishing tacit agreements from mere oligopolistic interdependence:

Perhaps a line can be drawn, but it would seemingly be too thin to be a workable principle of law, and be only productive of confusion.¹⁶

(b) While recognizing that oligopolistic interdependence constituted an agreement, Turner then argued that such "agreements" ought to be treated differently than other tacit agreements under the antitrust laws. If the interdependent conduct in question merely constituted rational exploitation of an oligopoly position, then in spite of characterizing the mutual conduct as an agreement he would not characterize it as an *illegal* agree-

14. Turner, "The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal" (1962), 75 *Harv. L.R.* 655.

15. *Ibid.*, at 683.

16. *Ibid.*

ment. His reasoning is twofold. First, it is unfair to make such behaviour illegal when the individual firm can as a rational economic entity hardly do otherwise. A firm confronted with the announced price increase of a competitor can hardly be expected to refrain from following, if in the long run, acting rationally, it will be more profitable for the firm to do so. A firm acting in the above manner is not behaving much differently from firms in the perfectly competitive market:

Both are pricing their products and determining their output so as to make the highest profit, or suffer the least loss, that can be obtained in the market conditions facing them. The rational oligopolist simply takes one more factor into account — the reactions of his competitors to any price change that he makes. He must take them into account because his competitors will inevitably react. They will inevitably react, for example, to a price cut on his part because otherwise the price cut will make a substantial inroad on their sales; if, for example, there are only three producers of equal size and a price cut by one doubles his sales, the sales of each of his two competitors will be cut in half. The rational seller in an industry with a very large number of competitors does not calculate their reactions to a price cut by him, because they are not likely to be sufficiently affected by the price cut to react; if, for example, there are one hundred producers of equal size, a doubling of sales by one, evenly drawn from his competitors, would cut their sales by only one ninety-ninth. To repeat, it can fairly be said that the rational oligopolist is behaving in exactly the same way as is the rational seller in a competitively structured industry; he is simply taking another factor into account, which he has to take into account because the situation in which he finds himself puts it there.¹⁷

The second reason for not making mere interdependent pricing behaviour illegal is that it would inevitably lead the courts into price regulation, an undesirable consequence. After all, besides a declaration that the behaviour in question is illegal, there must be some guidance in the law as to what firms can in fact do. If it was desired to push pricing down to competitive levels, this would mean that an injunction or in Canada, an order of prohibition, would have to define competitive levels. This would necessarily involve some court or other tribunal in the equivalent of public utility type regulation.¹⁸

While Turner would not have subjected “mere” conscious parallelism to prohibition under the *Sherman Act*, he was not prepared to recommend that its economic consequences be simply ignored by law makers and regulators. He recommended two positive steps that ought to be taken to ameliorate the problem. First, while criminal prohibition and enjoinder of interdependent pricing behaviour might neither be desirable nor feasible, Turner suggested that interdependent decision making in respect of other matters could, and indeed ought to be enjoined. He suggested that if the interdependent behaviour in fact entrenched or augmented market power, as opposed to merely being the rational exploitation of such power, then if the conduct could indeed be effectively enjoined, it ought to be. Thus:

... parallel interdependent decisions to adopt rigid delivered price systems, to indulge in practices patently exclusionary of competitors, and to impose resale price maintenance, may appropriately be condemned on a conspiracy charge.¹⁹

17. *Ibid.*, at 665, 666.

18. *Ibid.*, at 669, 666.

19. *Ibid.*, at 681.

An aspect of this suggested approach can be seen in past proposals to amend the *Combines Investigation Act*, by rendering joint monopolization subject to regulation. Joint monopolization is normally defined in such proposals as the entrenchment or augmentation of market power either through agreement or through interdependence.²⁰

A second implication of Turner's approach is that since attacking conscious parallelism itself is not easily done, all reasonable attempts ought to be made to inhibit the creation of market structures which predispose firms to oligopolistic interdependence. This, of course, means an emphasis on anti-trust law and policy.²¹

Turner's article was perhaps the first to incisively illuminate the difficulties in utilizing what is basically a legal concept, conspiracy, in dealing with an economic problem, oligopolistic interdependence. His policy conclusions, however, still necessitate making a distinction between "pure" conscious parallelism and "tacit agreements", a distinction which has bedevilled Canadian courts. There is, however, a suggestion that conscious parallelism could in some circumstances be evidence, albeit not conclusive evidence, of conspiracy:

The conclusion that non-competitive oligopoly pricing is not unlawful means that mere interdependence of basic price decisions is not conspiracy. In these cases, therefore, something more in the way of "agreement" must be shown; in other words, the evidence must point to actual agreement, prior understanding, or at least prior communication of, say, the price that will be quoted in a particular uncertain bargaining situation, or of the method by which the price quotation will be determined. Parallelism will tend to prove that "something more" exists only if the other evidence in the case suggests that the hypothesis of lawful oligopoly pricing — non-competitive prices resulting simply from recognized interdependence — does not account for all the facts. If that hypothesis is equally plausible on the facts, a case should be dismissed for the time-honoured reason that a party with the burden of proof cannot be allowed to obtain a verdict or judgment that can be reached only by speculation.

Other evidence may well suggest something more than conscious parallelism, even in markets with "few" sellers, and even though, in the absence of other evidence, the fewer the sellers the more likely it is that repeated instances of non-competitive pricing might have come about without actual agreement. Even in markets with few sellers, a fairly sudden change in pricing patterns is ground for suspicion. Agreement is indicated if prices have suddenly become much more stable, over the same range of conditions, than in past years or months. Similarly, identical bids on non-standardized items raises strong if not a conclusive presumption of prior communication, since without communication, there would be no way, even for the most psychic sellers, to determine the basis on which the competitors would compute the price offers. And in general, any facts which would indicate uncertainty as to how competitors would determine their price quotations make the appearance of identical prices strong evidence of intercommunication, if not actual agreement, and thus of plainly unlawful conspiracy. The immunization of pure oligopoly pricing from the *Sherman Act* which I have argued for here does not extend to agreements or understandings designed to convert an imperfect oligopoly pricing pattern into a perfect one by eliminating uncertainties.²²

20. See for example, "An Act to amend the Combines Investigation Act and to amend the Bank Act and other Acts in relation thereto or in consequence thereof", Bill C-13, 30th Parl., 3rd Sess., First Reading, Nov. 18, 1977 and a government working paper "Proposals for Amending the Combines Investigation Act, A Framework for Discussion", 1981. Bill C-29 *supra* n. 2, the most recent proposal to amend the Act contains no joint monopolization provisions.

21. See Kaysen and Turner, *Antitrust Policy*, (1959).

22. *Supra* n. 14, at 672, 673.

It requires a very sophisticated court to weigh such evidence. Typically, in Canada, conscious parallelism as a theory is raised as a defence. Together with the criminal burden and standard of proof it is often enough to make acquittal mandatory.

B. Conscious Parallelism As Tacit Agreements

Richard A. Posner advocates a very different approach to oligopoly pricing. His main contention is that the pricing behaviour which Turner describes as "mere" interdependence, and thus non-culpable, amounts in reality to a tacit agreement. Posner uses an example familiar to contracts lawyers to emphasize his point:

There is no distortion of accepted meanings in viewing tacit collusion as a form of concerted rather than unilateral activity. If seller 'A' restricts his output in the expectation that 'B' will do likewise, and 'B' restricts his output in a like expectation, there is a literal meeting of the minds, a mutual understanding, even if there is no overt communication. In forbearing to seek short-term gains at each other's expense in order to reap monopoly profits that only such mutual forbearance will allow, 'A' and 'B' are like the parties to a "unilateral contract", which is treated by the law as concerted rather than individual behaviour. If someone advertises in a newspaper that he will pay \$10.00 to the person who finds and returns his dog, anyone who meets the condition has an enforceable claim against him to the promised reward. The finder's action in complying with the specified condition is all the indication of assent that the law requires for a binding contract. Tacit collusion is similar: one seller communicates his "offer" by restricting output, and the offer is "accepted" by the actions of his rivals in restricting their outputs as well.²³

This is clearly substantively different from Turner's orthodox approach to interdependent oligopoly pricing.

Posner then argues in favour of an economic approach to ascertaining whether such tacit agreements exist. His approach consists of two elements:

- (1) An evaluation of those markets which are predisposed to price-fixing, and
- (2) An in depth evaluation of such markets to ascertain whether price-fixing as he defines it exists.

As a corollary of this rather "tough" approach to conscious parallelism, Posner argues that a much weaker anti-merger policy is needed.²⁴

In sum, Turner and Posner offer substantially different views on the legal characterization of oligopolistic interdependence.

A third approach somewhere between the positions of Turner and Posner is illustrated by the views of George A. Hay.²⁵

C. A Theory of Indirect Collusion

George A. Hay recognizes, as do Turner and Posner, the practical difficulty in arriving at near-monopoly-price stability through "pure" conscious parallelism. This difficulty arises both in establishing the consensus price level and in securing adherence to such a consensus price. Complicating

23. *Supra* n. 4, at 71, 72.

24. *Ibid.*, at 78 et seq.

25. Hay, "Oligopoly, Shared Monopoly and Antitrust Law" (1982), 67 Cornell L.R. 439.

factors which create this difficulty include such things as large numbers of firms, their size and distribution, product differentiation, "lumpy" sales, secret sales, etc. In order to circumvent these barriers to "pure" conscious parallelism, firms may engage in formal collusion, characterized by direct communication of the consensus price and of an intention to adhere to it. These are of course adequately dealt with, at least in theory, under American antitrust law. Likewise, the same can be said of formal agreements which are not "facially anti-competitive", for example, agreements to use particular pricing systems and to exchange information. In the United States formal agreements of the latter type have resulted in much jurisprudence and the prospects of such agreements being enjoined either under the *per se* rule or under the rule of reason is quite high. The same cannot be said in Canada.²⁶

Hay then describes certain practices which facilitate the attainment of a consensual price and of an understanding to adhere to it. These facilitating practices fall short of constituting formal collusion. Nevertheless, these practices involve "specifically avoidable" acts, and hence resemble formal collusion as opposed to pure conscious parallelism under which the pricing decisions are *compelled* as a matter of economic rationalism.²⁷ Hay calls these specifically avoidable acts indirect collusion. Examples of such avoidable acts include the parallel though not formally agreed upon adoption of delivered pricing systems,²⁸ "augmented" price leadership,²⁹ publication of outstanding orders and price quotations and "most favoured customer" clauses.³⁰

Hay argues that a meeting of minds on a price arrived at through avoidable acts should be culpable. Formal agreement is, however, only one type of avoidable act. The others he categorizes as indirect collusion, and accordingly, they should also be illegal.

D. Conscious Parallelism Plus

In the Canadian context, Stanbury and Reschenthaler have proposed that conscious parallelism "plus" become a reviewable trade practice.³¹ Their approach is similar to Hay's in recognizing that while not much can be done about "pure" conscious parallelism, something can be done about

26. See Nozick, "Open Pricing Agreements and the Dissemination of Data Under the Combines Investigation Act" (1979), 17 Alta. L.R. 210.

27. *Supra* n. 25, at 468.

28. Bill C-29 2nd Sess., 32nd Parl., First Reading April 2, 1984: in proposed s. 31.42 would add a new reviewable trade practice of delivered pricing. Delivered pricing is defined as the refusal to allow a customer to take delivery at a point where the supplier makes delivery to other customers. It would only be reviewable if engaged in by a major supplier or where it is otherwise widespread in a market. Orders under this section would not require F.O.B. plant pricing. They would however allow buyers to take action which could break down the anticompetitive aspects of multiple basing point systems.

29. *Supra* n. 25, at 453, 454. Augmented price leadership refers to conduct which facilitates the establishment of the consensus price. One example is the price leader's publication of a price change well in advance of the effective date.

30. *Ibid.*, at 455, 456. A most favoured customer clause guarantees that a customer receives as low a price as any other customer. It is easy to see why buyers want such clauses in their contracts. However, according to Hay sellers in oligopolistic markets like such clauses as well. Their widespread existence deters sellers from engaging in selective price chiselling which can assist in breaking down oligopolistic coordination. As well the very existence of such clauses is one way in which a seller can communicate to rivals that they are to be trusted, that they will not secretly engage in chiselling.

31. Stanbury and Reschenthaler, "Oligopoly and Conscious Parallelism: Theory, Policy and the Canadian Cases" (1977), 15 Osgoode H.L.J. 617.

certain factors which predispose the markets to conscious parallelism and which in general facilitate it. They suggest a number of conduct and performance factors, which when found with persistent conscious parallelism would be reviewable. They recognize the limitations of injunctive orders:

Injunctive orders, in theory, prevent the use of conduct plus factors, but businessmen will find other means of coordinating their behaviour.³²

They therefore advocate orders aimed at the purpose of these "plus" factors. This, however, seems very close to the type of injunction which Turner warned either meant engaging in direct price regulation or asking firms to act irrationally.

A major difference between their proposals and those of Hay is that Hay would treat these facilitating practices, which he calls "indirect collusion", as generally culpable whereas Stanbury and Reschenthaler would make their facilitating practices, which they call "plus" factors, reviewable only. A reviewable trade practice is generally legal until enjoined by the Restrictive Trade Practices Commission.³³

E. The Legal Status of Conscious Parallelism in Canada

The law relating to conscious parallelism, or at any rate, "pure" conscious parallelism, is at one and the same time easy to state and impossible to apply. The law is quite clear that pure conscious parallelism does not constitute an agreement, arrangement or conspiracy under s. 32 of the *Combines Investigation Act*. In *R. v. Canada Cement Lafarge Ltd.*,³⁴ Camblin Prov. Ct. J, in discharging the accused at a preliminary inquiry, referred to a speech given by D.H.W. Henry when he was Director of Investigation and Research under the *Combines Investigation Act*, drawing a distinction between pure conscious parallelism and conscious parallelism accompanied by collusion and found that "... the resulting prices set by the companies are the result of conscious parallelism . . .".³⁵ Likewise, in *R. v. Aluminum Co. of Canada Ltd.*³⁶, the accused were discharged at a preliminary inquiry, the Court applying the judgment in the *Canada Cement* case as well as the now famous speech of Mr. Justice Henry. In *R. v. Armco*,³⁷ the Ontario Court of Appeal rejected an attempt by the trial judge to define "arrangement" in a way that would encompass pure conscious parallelism.³⁸ Lerner J., in the course of his judgment, had applied the definition of "arrangement" set forth in an English case, *British Basic Slag Ltd. v. Registrar of Restrictive Agreements*:

... When each of two or more parties intentionally arouses in the others an expectation that he will act in a certain way it seems to me that he incurs at least a moral obligation to do so. An arrangement as so defined is therefore something "whereby the parties to it accept mutual rights and obligations".

32. *Ibid.*, at 697.

33. Bill C-29 would transfer jurisdiction over reviewable trade practices to the courts.

34. (1973), 12 C.P.R. (2d) 12.

35. *Ibid.*, at 17.

36. (1975), 22 C.P.R. (2d) 216 (Preliminary Inquiry).

37. (1976), 13 O.R. (2d) 32, 30 C.C.C. (2d) 183, 70 D.L.R. (3d) 287, 24 C.P.R. (2d) 145 (C.A.).

38. (1974), 6 O.R. (2d) 521, 21 C.C.C. (2d) 129, 17 C.P.R. (2d) 211 (trial).

... it is sufficient to constitute an arrangement between A and B, if (1) A makes a representation as to his future conduct with the expectation and intention that such conduct on his part will operate as an inducement to B to act in a particular way, (2) such representation is communicated to B, who has knowledge that A so expected and intended, and (3) such representation or A's conduct in fulfillment of it operates as an inducement, whether among other inducements or not, to B to act in that particular way.³⁹

The Court of Appeal rejected Lerner J.'s definition of arrangement, holding that:

... for s. 32(1)(c) there must be the mutual arriving at an understanding or agreement and under the *British Basic Slag* test, this element of mutuality is not necessarily present.⁴⁰

However the trial judgment was affirmed since it was found that Lerner J. had indicated that the more orthodox test for conspiracy had been satisfied.

While conscious parallelism is legal and while Canadian courts have rejected attempts to define "agreement, arrangement or conspiracy" in such a way as to embrace conscious parallelism, the law in Canada was always clear, at least before *Atlantic Sugar*, that "tacit agreements" could result in convictions and were thus to be distinguished from pure conscious parallelism. Thus, in *Armco*, Lerner J. convicted the accused and his judgment was upheld by the Court of Appeal on the basis of his finding of a "tacit agreement". See also *R. v. Canadian General Electric*.⁴¹ This attempt to distinguish between conscious parallelism and tacit agreements gives rise to some thorny legal problems. For one thing, Canadian courts have never really described just how tacit agreements differ from conscious parallelism. Sometimes the trial judge reviews the evidence and then finds on the totality of the evidence that the pricing behaviour and conduct that has occurred is more than mere conscious parallelism and constitutes a "tacit agreement".⁴² (Sometimes the adjective "tacit" is dropped but the finding is clearly based on circumstantial evidence.) In other cases the trial judge finds that, given the criminal standard and burden of proof and the legality of conscious parallelism, there is not sufficient proof of conspiracy to either convict the accused or commit them to trial, as the case may be.⁴³ There may occasionally be reference to the necessity of finding some sort of communication among the accused before even a tacit agreement can be found.⁴⁴ This, however, is not terribly helpful since communication among firms also occurs in cases of pure conscious parallelism — in fact some form of non-verbal communication is necessary before conscious parallelism can occur. Thus one judge's conscious parallelism may be another judge's tacit agreement.

In sum, the orthodox legal position in Canada is that conscious parallelism is immune from prosecution under s. 32 whereas tacit agreements are not. However, there is also no judicial description of precisely how to

39. [1963] 1 W.L.R. 727 at 739, 747.

40. *R. v. Armco* supra n. 37, C.C.C. at 192, C.P.R. at 153.

41. (1976), 15 O.R. (2d) 360, 75 D.L.R. (3d) 664 (H.C.).

42. For example, *R. v. Armco*, supra n. 38.

43. For example, *R. v. Cement LaFarge*, supra n. 34; *R. v. Aluminum Co. of Canada*, supra n. 36; *R. v. Atlantic Sugar Refineries* (1975), 26 C.P.R. (2d) 14 (Que. S.C.).

44. For example, *R. v. Canadian General Electric* supra n. 41.

differentiate between the two. While the Courts have not done so it is possible to describe the legal relationship between conscious parallelism and tacit agreements. There appear to be three possibilities:

(1) Tacit agreements encompass the same behaviour as conscious parallelism. If this is so, the law is in a state of logical and legal contradiction. This would certainly explain the inconsistency in the results of the Canadian cases as well as the continuing puzzlement over what the Supreme Court of Canada *really* intended to say about the matter in *Atlantic Sugar*. This possibility is not as far-fetched as one may first think. After all, Turner long ago pointed out that what economists describe as conscious parallelism is in fact an agreement, albeit of a different sort from illegal conspiracies.⁴⁵ Further, Posner goes beyond that and in fact refers to conscious parallelism as tacit agreements, not just as a matter of semantics, but as a question of substance.⁴⁶

(2) A second possibility is that “tacit agreements” describes the same behaviour as “overt or express agreements” does, except that the *proof* consists of inferences from circumstantial evidence. If this is so, the defining criterion of agreement is the same for tacit and overt agreements and could normally be described as a common state of mind arrived at through some sort of communication. The problem here is that if non-verbal communication is found to be sufficient communication with regard to establishing a tacit agreement, how then does it differ from the communication that occurs under pure conscious parallelism? If something more than non-verbal communication is required, then almost certainly some sort of reciprocity would be involved — for example, I’ll follow you if you follow me — that is, something in the nature of a contractual bargain.

(3) A third possibility is that the concept of “tacit agreements” really describes and is the same as Hay’s description of “indirect collusion”.⁴⁷ In that case, the orthodox legal position in Canada would render express agreements illegal under s. 32. In addition, something *substantively* different from overt agreements, namely conscious parallelism, plus specifically avoidable types of behaviour which facilitate conscious parallelism, would fall under the heading “tacit agreements” and would also be illegal. This obviously is not the Canadian position as expressed in the cases. It is however possible to conjecture that this is what must have been intended, albeit in a somewhat inchoate form.

With these possibilities in mind, consider the Supreme Court of Canada’s latest words on the matter in *Atlantic Sugar*.⁴⁸ At this juncture only the facts and the judgment relevant to the issues of conscious parallelism and tacit agreements will be examined.

The accused, the three largest sugar refiners in Eastern Canada, were charged under s. 32(1) of the *Combines Investigation Act*. The Crown alleged

45. *Supra* n. 14 and accompanying text.

46. *Supra* n. 23 and accompanying text.

47. *Supra* n. 25 and accompanying text.

48. *Supra* n. 11.

that there was an agreement to fix prices and also that there was an agreement among the accused to adhere to certain market shares in terms of percentages. The trial judge recognized that conscious parallelism is not illegal and apparently understood the dynamics of conscious parallelism. He found that there was no agreement to adopt identical pricing formulae and price lists, but rather that such conduct was mere conscious parallelism. In regard to the allegation that there was a market sharing agreement he found a "tacit agreement" to maintain market shares but that "... it has not been shown that this agreement was arrived at with the intention of unduly preventing or lessening competition".⁴⁹ Accordingly, the accused were acquitted at trial. The Quebec Court of Appeal reversed the trial judge and convicted the accused on the grounds that the trial judge had misdirected himself on the necessity of proving an intention to lessen competition unduly in respect of the tacit market sharing agreement.⁵⁰ It is only the conviction on the tacit market sharing agreement that was before the Supreme Court of Canada.

In a confusing and somewhat cryptic judgment that has provoked much controversy, the Supreme Court of Canada reversed the Court of Appeal and restored the acquittal. Various commentators have emphasized different aspects of the judgment in trying to ascertain what the court really held in the case. Some have postulated that the Court acquitted because of the *mens rea* or intention requirement, that is, the Crown had not proved an intention to lessen competition *unduly*.⁵¹ This would have marked a dramatic change in the law. Others have argued that the reason for the acquittal was the failure to prove undueness in fact.⁵² Yet a third possibility is that the court found that "tacit agreements" or at any rate the tacit agreement as found in this case did not even constitute a conspiracy under the *Com-bines Investigation Act*.⁵³

It is, of course, possible that the Supreme Court of Canada based its decision on more than one of the above factors. My own assessment is that the "tacit agreement" and "undueness in fact" facets of the case were the reasons for the acquittal and that no change was intended in the law in respect of the *mens rea* requirement. It is important to note the precise words used by Pigeon J. when he referred to tacit agreements and conscious parallelism:

It must be accepted that a conspiracy may be effected in any way and may be established by inference. In dealing with the Refiners Uniform Prices, the trial judge felt that they raised an inference of collusion. However, he accepted . . . that this was a result of independent decisions called "conscious parallelism" which is not illegal. The evidence was clear, however, that not only were its competitors immediately aware of Red Path's list price the moment a new price was posted in its lobby, they also in time were able to discover Red

49. *R. v. Atlantic Sugar* (1975), 26 C.P.R. (2d) 14, at 103 (Que. S.C.).

50. *R. v. Atlantic Sugar* (1978), 41 C.C.C. (2d) 209, 91 D.L.R. (3d) 618 (Que. C.A.).

51. See Reschenthaler and Stanbury, "Recent Conspiracy Decisions in Canada: New Legislation Needed" (1981), 26 *Anti-trust Bulletin* 839; Cairns, "Actna Insurance, Eastern Sugar and Unduly in the Combines Investigation Act: Still More Confusion" (1980-81), 5 *Can. B.L.J.* 231; and Engelhart, "Agreements to Lessen Competition After Atlantic Sugar: A Comment" (1981-82) 6 *Can. B.L.J.* 104.

52. McFetridge & Wong, "Agreements to Lessen Competition After Atlantic Sugar" (1980-81), 5 *Can B.L.J.* 329.

53. Engelhart, *supra*, n. 51.

Path's pricing formula by a process of deduction from available data. Yet the trial judge held, correctly I think, that this did not constitute a conspiracy to maintain uniform prices according to Red Path's formula but merely "conscious parallelism". *Could this not be just as accurately called "parallelism by tacit agreement"?*

The basis for an inference of "tacit agreement" was in a way stronger for the uniform list price than for the maintenance of market shares. There was a feature which could be considered as the making of an offer, that is the publication of a list price which meant that it was immediately made known to the competitors by the brokers. Hence, I find that the trial judge quite properly on that point put the burden on the defence to disprove the evidence of collusion.

The situation was different in respect of the adoption by Red Path of a maintenance of traditional market share sales policy. *There is no evidence that this policy was in any way made known to its competitors . . .*

When as expected, the competitors did adopt a similar policy did this mean that an agreement had been reached? In order to make an agreement by tacit acceptance of an offer there must not only be a course of conduct from which acceptance may be inferred, *there must also be communication of this offer.* In the case of the list price, this was apparent and did cast a burden on the defence. But there was no such communication of the marketing policy. *In those circumstances, did the "tacit agreement" resulting from the expected adoption of a similar policy by the competitors amount to a conspiracy? I have great difficulty in agreeing that it did* because of the author of Red Path's marketing policy was conscious that his competitors would inevitably after some time become aware of it in a general way and also expect them to adopt a similar policy which would also become apparent.⁵⁴ (Emphasis added.)

It is the above passage which has led some observers to conclude that the Supreme Court in *Atlantic Sugar* has ruled, among other things, that tacit agreements do not fall within the ambit of s. 32.⁵⁵ While I cannot agree that tacit agreements have been judicially read out of the *Combines Investigation Act* by the judgment in *Atlantic Sugar*, Pigeon J. did seem to emphasize two things:

(1) The tacit market sharing agreement found by the trial judge, Mackay J., is no different in substance from the consensus on prices which Mackay J. found to be merely a result of conscious parallelism.

(2) For tacit agreements to fall within s. 32, there must be some communication of an offer which can then be tacitly accepted.

In stating that the tacit market-sharing agreement found by Mackay J. was in fact really conscious parallelism, and hence outside the ambit of s. 32, Pigeon J. may have only been expressing a dissatisfaction with the trial judge's finding of fact on this matter. It is, of course, unusual for any appellate court to reverse a finding of fact made at trial and would be particularly so in this case where Mackay J. quite clearly knew, and in fact stressed, that there was a difference between conscious parallelism and tacit agreements; this would account for his finding of a tacit market-sharing agreement at the same time as he found no agreement at all in regard to prices. Nevertheless, Pigeon J.'s dissatisfaction with these findings was clear

54. *Atlantic Sugar Refineries v. Attorney General of Canada* (1980), 115 D.L.R. (3d) 21 at 29, 30 (S.C.C.).

55. See in particular Englehart, *supra* n. 53 who finds the above passage to be the *ratio decidendi* of the case. See also Bureau of Competition Policy Working Paper, Proposals for Amending the Combines Investigation Act, A Framework for Discussion, 1981 at 16.

when he stated that “. . . the basis for an inference of “tacit agreement” was in a way stronger for the uniform list price than for the maintenance of market shares”.⁵⁶ In addition, Pigeon J. emphasized the absence of communication of any market-sharing policy.

If all that Pigeon J. was doing was disagreeing with Mackay J.’s inference of a tacit agreement, then it would be incorrect to conclude that *Atlantic Sugar* holds that “tacit agreements” fall outside the scope of s. 32. The better interpretation would be that tacit agreements *of the type found by Mackay J.*, are not illegal. This means that future cases based on allegations of tacit agreements could still result in convictions if the evidence of communication among the accused was stronger than in *Atlantic Sugar*.

The question that arises then, is what sort of communication might be sufficient? The case itself gives an example of conduct which might meet the requirement of some evidence of communication. Pigeon J. noted that publication of a price list is sufficient evidence of communication, so that the “burden is on the defence to disprove the evidence of collusion”.⁵⁷ In most cases, because evidence of the above sort is usually available, the requirement of some conduct which amounts to communication could probably be met. In fact the example given is also consistent with pure conscious parallelism (as was ultimately found to be the explanation for the identical pricing formula in the case at hand).

Atlantic Sugar probably does *not* change the law concerning the legal definition of agreements to lessen competition and their proof. What can be deduced from the decision are the following points:

(1) While tacit agreements fall within s. 32, there must be some evidence of communication among the conspirators of the subject matter of the agreement. Seemingly, this amounts to a reminder to trial judges that there is a difference between conspiracy and conscious parallelism as well as an admonition that conscious parallelism cannot simply be turned into an agreement by labelling it a tacit agreement.

(2) While some evidence of communication is required to establish agreement, it will not necessarily be sufficient; for instance, the finding of conscious parallelism as the explanation for the identical pricing behaviour in *Atlantic Sugar*.

To summarize, Canadian courts prior to *Atlantic Sugar* postulated a distinction between conscious parallelism and tacit agreements; unfortunately other than just asserting it, the distinction has never been adequately, if at all, described. *Atlantic Sugar* does not really clarify matters. The case does emphasize the necessity of finding some sort of communication among the accused; but since such communication also occurs in most cases of conscious parallelism over prices (to be contrasted with the unusual market sharing policy alleged in *Atlantic Sugar*), and since clearly proof of communication is not in itself sufficient to establish an agreement, it is likely

56. *Supra* n. 54, at 30.

57. *Ibid.*

that confusion will continue to reign in future cases. One can surmise that some accused who indeed enter into price-fixing agreements will be acquitted on the grounds that their defence of conscious parallelism at least raises a reasonable doubt. Likewise, it might be that some accused who have "only" engaged in conscious parallelism will be convicted by courts who find that on the totality of the evidence the conduct goes beyond conscious parallelism, without at all stating how.

F. Assessment of the Law and Proposals for Reform

In considering the "problem" of conscious parallelism, it becomes readily apparent that there are two basic policy approaches which can be taken. The first assumes that *pure* conscious parallelism cannot logically or fairly be the subject-matter of the law. Adherence to this approach represents the position of the majority of academic writers on this subject. Because *pure* conscious parallelism cannot itself be legally proscribed, the proponents of this approach typically endorse strong anti-merger proposals as a means of inhibiting market structures conducive to conscious parallelism.⁵⁸

As well as seeking to prevent conscious parallelism from arising in the first place, it is recognized that certain practices do facilitate conscious parallelism and these facilitative practices, unlike conscious parallelism itself, can and ought to be regulated in some form. Proposals along these lines have ranged from Hay's theory that "specifically avoidable" acts ought to be culpable under American antitrust law⁵⁹ to notions of making "conscious parallelism plus" a reviewable trade practice.⁶⁰ This is reflected in past Canadian attempts at legislative reform.⁶¹ In the United States, through judicial decisions, some price exchange agreements are now recognized as illegal because of their facilitating tendencies.⁶²

The second approach is predicated on the assumption that there is no true distinction to be made between *pure* conscious parallelism and tacit agreements. The chief proponent of this approach is Posner who would examine a wide range of economic criteria in examining whether a tacit agreement exists:

If the economic evidence introduced in a case warrants an inference of collusive pricing, there is neither legal nor practical justification for requiring evidence that will support the further inference that the collusion was explicit rather than tacit. Certainly from an economic standpoint it is a detail whether the collusive pricing scheme was organized and implemented in such a way as to generate evidence of actual communications.⁶³

Posner's economic approach to the problem would result in a concentration of enforcement resources on those markets where collusion is likely to occur. He also describes economic criteria which are actual evidence of collusion.

58. *Supra* n. 21 and accompanying text.

59. *Supra* n. 28 and accompanying text.

60. *Supra* n. 31 and accompanying text.

61. For example, "Competition Act", Bill C-256, 28th Parliament, 3rd session, First Reading, June 29, 1971, would have regulated delivered pricing, as would successor bills.

62. See Prance, "Price Data Dissemination as a Per Se Violation of the Sherman Act" (1983), 45 *U. Pitt. L.Rev.* 55 for a recent review of the American literature and jurisprudence in this area.

63. Richard A. Posner, *Antitrust Law, An Economic Perspective* (1976) 17.

This approach is preferable, according to Posner, to that of emphasizing a vigorous anti-merger policy. Advertently or inadvertently, Posner's approach was recommended in a Bureau of Competition Policy working paper, which proposed a definition of tacit agreement which would have embraced pure conscious parallelism:

While encompassing a conspiracy, combination or agreement, the definition of arrangement would be expanded to include a tacit arrangement or agreement where it can be shown that each of the parties adopts a course of conduct which would significantly lessen competition and intentionally arouses in each of the other parties an expectation that he will continue in that course of conduct if each of them adopts a similar course of conduct.⁶⁴

This proposal, transgressing orthodoxy, received substantial criticism and is not found in Bill C-29, the most recent attempt at legislative reform.

As between the two approaches which is the preferable, at least in the Canadian context? The first approach would require a strong anti-merger policy, something not likely to be accepted in the Canadian political environment. The best that could be hoped for along these lines is some mechanism which allows the blatantly anti-competitive, unredeemable merger to be reviewed and enjoined. One would expect the Canadian market, if only because of its smaller relative size, to continue to be highly concentrated and susceptible to collusion, much more so than that of the United States. As to attacking facilitating practices, such as basing point pricing and price-exchange schemes, I cannot see how this can be effectively achieved through legislation. Making these facilitating practices reviewable would not be effective for several reasons. The process of review and adjudication is a long one during which the practice continues to be legitimate. When and if the practice is prohibited, it is so prohibited only after harm to competition has occurred. Not only that, but firms not subject to the order are free to engage in the practice. In short, the deterrent effect of any reviewable trade practice is almost nil. Reviewable trade practices look nice on the statute books and they do give commentators something to write about, but they are largely window dressing. As far as I can determine, their most practical effect is to give the Director of Investigation and Research some leverage when negotiating with firms against whom complaints have been made. However, if the practice is harmful in a wide number of instances, making it reviewable under Part IV.1 of the *Combines Investigation Act* will not achieve the goals of antitrust policy.

Of course, it is possible to absolutely prohibit these practices either with criminal sanctions or perhaps only civilly, as under the *Clayton Act* in the United States. To the extent that a practice is unambiguously harmful, this will work. Past proposals on delivered pricing were, I think, a step in the right direction. However, many facilitating practices vary significantly in their effects on competition, such that it is practically impossible to define in advance those permutations of the practice which are legal and those which are not. With these more illusive practices, the ideal approach is to leave it to the judiciary to work out the nuances of legality. This has been

64. Framework for Discussion, *supra* n. 55 at 17.

done with some, though by no means total, success in the United States. Past judicial decisions on key points of Canadian antitrust law cannot leave one with a feeling of optimism that such judicial developments will occur in Canada. In sum, an attack on facilitating practices, the so-called "plus" factors, will probably not be effective in Canada. Nor is it likely that any changes in anti-merger law will have a significant impact on conscious parallelism.

Consider Posner's approach from the viewpoint of public policy, which approach was actually proposed in "A Framework for Discussion".⁶⁵ The objections to the approach are theoretical and deep rooted — primarily, that to prohibit mutual interdependence is to expect a firm to act irrationally.⁶⁶ Posner's response is as follows:

I assume that Professor Turner does not believe that economic evidence is so uncertain that it should be deemed inadmissible in a price-fixing case. The issue between us is the narrow one whether some evidence of actual communication among the alleged colluders should be required, as corroboration for the economic evidence. I believe that in some cases the economic evidence of collusion may be sufficiently convincing to enable dispensing with evidence of actual communication. Probably in most such cases there will have been some actual communication among the colluding firms, though it cannot be proved. The absence of such proof is a detail if the economic evidence is sufficiently convincing to stand alone.⁶⁷

I would suggest that there is much merit to Posner's approach to conscious parallelism and tacit agreements, particularly in the Canadian economic and legal environment. There are several reasons for this. First, it might very well be that, contrary to orthodoxy, firms engaging in classical instances of consciously parallel pricing behaviour such that supra-normal profits can be attained, have indeed agreed in much the same way as conspirators meeting face to face in the proverbial back room agree. A corollary is that such behaviour is not just rational economic behaviour thrust upon participants by market conditions. Rather it is behaviour which is specifically intended to accomplish certain results and can be deterred by appropriate prohibitory legislation. No doubt scholars in the fields of antitrust law and industrial organization will continue to disagree over this matter.

But even if there is a substantive difference between conscious parallelism and tacit agreements, a good case can still be made out in favour of an expanded definition of conspiracy to include pure conscious parallelism. Almost all commentators recognize that instances of pure conscious parallelism, unaccompanied by any communication or other overtly facilitating acts, must be quite rare. Thus, even if this behaviour is to be regarded as morally innocent, expanding the definition of conspiracy as suggested would have an unfair impact in only a very few cases. Balanced against this is the fact that because of the criminal standard of proof, the use of conscious parallelism as a defence must result in many cases of acquittals where there has been actual agreement, even by orthodox definitions. An expanded definition would thus result in more convictions of the "truly" culpable at

65. *Ibid.*

66. *Supra* n. 17 and accompanying text.

67. *Supra* n. 63 at 76.

the expense of the occasional conviction of the non-culpable. This is, however, a trade-off inherent in our criminal law in general. In addition, there would be social savings achieved through an increased certainty in the law and more efficient legal proceedings. (One could expect more guilty pleas if the defence of conscious parallelism was not available.)

In any event, a review of Canadian cases suggests that the distinction between conscious parallelism and tacit agreements is not a workable one in our present legal system, and is a source of continuing confusion to all concerned parties. There is not much to be gained from maintaining the distinction and much to be gained from abolishing it. The proposed reform in "A Framework for Discussion" was therefore well founded.

Bill C-29, Clause 23, would amend s. 32 by adding ss. (1.2) which reads:

In a prosecution under subsection (1), the court may infer the existence of a conspiracy, combination, agreement or arrangement from all the surrounding circumstances, with or without evidence of communication between or among the alleged parties thereto, but, for greater certainty, the conspiracy, combination, agreement or arrangement must be proved beyond a reasonable doubt.

This is clearly an attempt to reverse part of the impact of *Atlantic Sugar*. According to the Background Paper and Explanatory Notes accompanying the Bill, the intent is to restore the law as it stood before *Atlantic Sugar*, where direct evidence of communication was not required.⁶⁸

The amendment is useful in clarifying the probative value of circumstantial evidence. However, it is not likely to be of much assistance to the courts, or the business community, in clarifying just where conscious parallelism ends and tacit agreements begin.

III. The Requirement of Undueness

Section 32(1) only prohibits those agreements which restrain competition "unduly". Historically, "undueness" has been held to be a quantitative and not a qualitative criterion, i.e., predicated on the amount or quantum of competition affected by the agreement, if it were to be carried out.⁶⁹ The prevailing view has been that in order for a conspiracy to be undue it must be shown that the agreement, if carried out, would virtually (though not totally) eliminate competition. This is known as the "virtual monopoly" test and the *Howard Smith Mills*⁷⁰ case is thought to be authority for it. There is also a second line of authorities to the effect that something less than a virtual monopoly would suffice.⁷¹ Because this strain of jurisprudence consists largely of lower court decisions it was never clear whether it was going to be adopted in any particular case. The "virtual monopoly" test for undueness resulted in some acquittals in clearly anti-competitive conspiracies on

68. Combines Investigation Act Amendments 1984, Background Information and Explanatory Notes, at 10.

69. See generally R. Roberts, *Anticombiners and Antitrust* (1980) at 135, 136; C. Flavell, *Canadian Competition Law, A Business Law Guide* (1979), at 165-167.

70. *Howard Smith Paper Mills v. The Queen*, [1957] S.C.R. 403, 26 C.R. 1, 118 C.C.C. 321, 8 D.L.R. (2d) 449.

71. See for example, *R. v. Canadian Coat and Apron*, [1967] 2 Ex. C.R. 53 at 63.

the ground that there was still some competition remaining from those firms in the relevant market not party to the conspiracy, or that there was still competition of a certain sort remaining from those firms who were part of the conspiracy. Section 32(1.1) was enacted as of January 1, 1976, with the obvious intent of negating the virtual monopoly test. The enactment of s. 31(1.1) was explained by the government as follows:

In some cases in recent years the expression "unduly" has been interpreted to mean the complete or virtual elimination of competition in the relevant market. In other cases the courts have disagreed with such a demanding interpretation. Cases arise in which competition is lessened to an extent that is obviously detrimental to the public but which might not meet the severity of the test of complete or virtual elimination of competition if it were definitely decided that such is the meaning of the expression "unduly". The purpose of the new subsection 32(1.1) is to ensure that it will not be so decided.⁷²

The section 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 arrangement, if carried into effect would or would be likely to eliminate, completely or virtually, competition in the market to which it relates or that it was the object of any or all of the parties thereto to eliminate, completely or virtually, competition in that market.

As a thorny reminder of the ineffectiveness of the pre-1976 conspiracy provision, two celebrated Supreme Court of Canada s. 32 conspiracy cases resulted in acquittals. Both cases, while decided after 1976, did apply the pre-1976 Act since the conduct of the accused was prior to the enactment of the amendment. In *Aetna Insurance Company v. The Queen*⁷³ an overt price-fixing agreement among some 73 insurance companies in Nova Scotia did not result in a conviction, in large part because there was still found to be sufficient competition from companies not party to this formal agreement. Likewise, in *Atlantic Sugar*,⁷⁴ one, though not necessarily the only, ground of acquittal, was that even though the accused had agreed to maintain historical market shares, there was still some apparent competition in terms of large volume sales. In both *Aetna* and *Atlantic Sugar* the requisite amount of undue influence had not been proved. These two cases so discouraged combines authorities that in "A Framework for Discussion", a *per se* rule for price-fixing agreements similar to the present *per se* ban on bid-rigging was suggested. It was noted that the two cases:

... seriously reduced the effectiveness of section 32. In both cases the decisions appear to require the Crown to establish the virtual elimination of all competition, in other words, a virtual monopoly.⁷⁵

It must be emphasized, however, that these two cases were decided under the pre-1976 Act and, hence, in and of themselves cannot be viewed as casting doubt upon the effectiveness of s. 32(1.1).

Because of the time lag between investigation, prosecution and reporting of a judgment, a time differential which tends to be accentuated in

72. *Proposals for a New Competition Policy for Canada, First Stage* (1973) at 71.

73. [1978] 1 S.C.R. 731, (1977), 75 D.L.R. (3d) 332.

74. *Supra* n. 48 and accompanying text.

75. *Supra* n. 55 at 16.

combines cases, there have been only three cases which have considered s. 32(1) as amended by s. 32(1.1) (There have been numerous s. 32 cases decided since the 1976 Amendments but most of these, like *Aetna* and *Atlantic Sugar* were decided under the old Act).

The three cases throw considerable doubt on the prospective effectiveness of s. 32(1.1). The first is *R. v. La Federation des Courtiers D'Assurance du Quebec*.⁷⁶ Two trade associations were charged under s. 32(1)(c). The substance of the complaint was an allegation of a conspiracy among insurance brokers in the County of Charlevoix, implemented through a local trade association, to impose a service charge of a certain amount. This would provide compensation over and above commissions payable by the insurance companies. It was found that there was an agreement, the object of which was a lessening of competition. The main issue was whether the agreement, if carried out, would result in an "undue" lessening of competition. After noting the enactment of s. 32(1.1), the court considered at some length the market share controlled by those brokers who were members of the Association in question. The relevant market was found to be the County of Charlevoix. Statistical data was admitted as evidence and the market share of Association members was either 49%, 47% or 44.65% depending on just how potential statistical error and reliability factors were taken into account. The agreement was not found to be undue, even under the Act as amended. The court stated:

In order to reach the conclusion that the result of the agreement or conspiracy could not have been to lessen unduly competition in the supply of a professional service, I have taken into consideration the fact that the market share controlled by the members of the Agreement was less than 50%, as disclosed by the survey, and that that figure does not take into account the fact that two brokers who were members of the Agreement at the outset had withdrawn from it, one completely and the other partially, which would have reduced correspondingly the market share controlled by members of the agreement.⁷⁷

The court distinguished *R. v. B.C. Professional Pharmacists Society*⁷⁸ in which there was an agreement to charge one dollar for each prescription filled for those on social assistance. This latter case was found to be distinguishable in that the market share of the Association was 75% and the intent was to get the agreement of all non-members as well.

Perhaps an even more troublesome case for the Crown is *Mediacom Industries v. The Queen*.⁷⁹ One count in an information alleged a conspiracy from 1973 to mid-1976. An application was made to have the information quashed, in part on the ground that the enactment of s. 32(1.1), effective as of January 1, 1976, had substantially changed the law. Labrosse J. held that s. 32(1.1) "... did not bring an alteration, but rather a clarification of the existing law".⁸⁰ The existing law which was held to be clarified was that set forth by Ritchie J. in *Aetna*:

76. Unreported [1979] Bureau of Competition Policy Mimeo 229-1 unofficial translation (Que. S.C.).

77. *Ibid.*, at 31.

78. [1971] 3 C.C.C. (2d) 29.

79. (1982), 63 C.P.R. (2d) 75; affirmed (1983), 68 C.P.R. (2d) 285 (Ont. C.A.).

80. *Ibid.*, at 82.

An agreement to prevent or lessen competition alone is not an offence. 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. There is no requirement for the Crown to prove the existence of a monopoly and it is a question of fact as to whether the agreement reaches the point of intending to lessen competition unduly and therefore becomes a criminal conspiracy.⁸¹

According to Labrosse J. the above passage refers to two tests for undueness in the alternative; one is that of Kellock J. in *Howard Smith Mills*, and the other is that of Cartwright J. in the same case. Section 32(1.1), according to this interpretation, merely clarifies that there are these two alternative tests either of which when met by the Crown will result in conviction. Unfortunately, this two-pronged criterion of undueness is not very rigorous, as is evidenced by the ultimate result in *Aetna* itself. The third post-1976 case is *R. v. B.C. Television Broadcasting System Ltd.*,⁸² in which a non-price fixing agreement was considered under the post-1976 Act. Ten radio and television broadcasters openly agreed that a 15% discount was to be granted only to those advertising agencies accredited by the Canadian Association of Broadcasters. Such accreditation could be accomplished by showing a minimum "net working capital" position or by filing a letter of credit with the Association for a certain amount. The intent was to ensure a certain creditworthiness among the advertising agencies. The effect was to increase the costs of those less financially stable agencies either in acquiring letters of credit or in non-accredited agencies using accredited agents to contract with the broadcasters, the discount being apportioned. It is noteworthy that it was necessary to have an agreement for this quasi-boycott. As the court noted:

The scheme could only work if the Corporate accused acted in concert — with each refusing to grant the discount to agencies not accredited. Only if there was concerted action could a station safely refuse to grant a discount without fear that the agency would take the business to a competing station.⁸³

The court found an agreement to lessen competition and that the accused exerted a strong element of control over the product; ten out of twelve stations in the lower B.C. mainland area were party to the agreement. However, the question of undueness still remained to be decided. Unfortunately, the court did not at all refer to s. 32(1.1), even though the accused were clearly charged under the amended Act; rather the test for undueness set forth in *Aetna* by Ritchie J. was adopted. Ultimately it was found that the agreement would not affect competition "unduly", largely, as I see it, on the ground that only a few agencies were affected and some for only part of the time. While the decision is puzzling in the latter respect, of more significance is the apparent decision to apply the pre-1976 test for undueness without any advertance to the changes made in the law. To this extent the case is consistent with *Mediacom Industries*.

These three cases seem to confirm the fears of combines authorities that s. 32 as amended has lost much of its effectiveness. Certainly in the

81. [1978] 1 S.C.R. 731 at 748.

82. (1981), 52 C.P.R. (2d) 47 (B.C. S.C.).

83. *Ibid.*, at 50.

future it will be difficult, if the *Courtier D'Assurance* case is followed, to get convictions where the market share of the parties to the agreement is in the neighbourhood of 50%. One of the problems with s. 32(1.1) is that it is worded in a peculiarly negative manner: it purports to negate the virtual monopoly test for undueness thought to be set forth in *Howard Smith Mills* without defining or even giving any indication just where the threshold of undueness does lie. One can surmise that a price-fixing agreement among parties comprising 90% of the market would indeed be caught by the amended s. 32; likewise, 50% now seems to be insufficient. The threshold of undueness appears to be somewhere in between. Wherever lies the threshold, market shares as a criterion for adjudicating the illegality of price-fixing conspiracies would seem to be a most unsatisfactory criterion and justifies a proposed *per se* ban on price-fixing.⁸⁴

Yet another problem with the market share test for undueness is that there have been cases where the courts have not determined "undueness" by measuring market shares of the participants, but have looked at the type of competition sought to be eliminated. For example, in *Atlantic Sugar* the share of the market held by parties to the agreement was close to 100%. What rendered the agreement not undue was not potential or actual competition from non-conspirators but rather the fact that the parties to the market sharing agreement itself were sometimes giving volume discounts to large buyers with the intent of maintaining historical market shares. The Supreme Court of Canada commented that while the agreement did lessen competition it did not suppress it. Clearly what rendered the agreement not undue was not the low market percentage of the parties but the type of agreement in issue. As noted above *Atlantic Sugar* was decided under the pre-1976 Act. It is uncertain how, if at all, the enactment of s. 32(1.1) will change the judicial approach to such agreements. Other non-price fixing agreements (in the purest technical sense) which have come before Canadian courts under the pre-1976 Act include agreements to pass on cost increases⁸⁵ and agreements to disseminate pricing data.⁸⁶ It is equally unclear with respect to these latter types of agreements in what manner, if at all, s. 32(1.1) will change the application of the general conspiracy section.

As already noted, in "Framework for Discussion" it was proposed that there be a *per se* ban on price-fixing agreements, market sharing agreements or agreements to restrict a firm from entering or expanding a business. Other types of agreements basically would have fallen under section 32 as it presently stands. Bill C-29 does not carry forward these proposals into

84. There are two problems with the quantitative test in regard to price fixing agreements. First, it is difficult to see why an agreement that "only" encompasses, say, 50% of the relevant market should be permitted. The parties must have thought that the agreement was going to have an impact on price or else they would not have entered into the conspiracy. To the extent the agreement is effective in this goal it should be deterred in the same way that an agreement covering 90% of the market is sought to be proscribed. If the agreement is not effective in raising prices, it only means the parties were not successful in effectuating their intent, but the conduct should still be regarded as offensive.

A second problem with the quantitative or market share test is the social cost involved in applying it. Litigation inevitably occurs on what constitutes the relevant market and legal advice and economic analysis becomes necessary, at least in theory, to determine whether a proposed price fixing agreement is legitimate.

85. See *R. v. Charwin Motors Ltd.*, [1980] 2 S.C.R. 64, 52 C.C.C. (2d) 148, 49 C.P.R. (2d) 7, 31 N.R. 345, 110 D.L.R. (3d) 281, 23 B.C.L.R. 130; and *R. v. Aluminum Co. of Canada Ltd.* (1977), 29 C.P.R. (2d) 183 (Que. S.C.).

86. *R. v. Anthes Business Forms Ltd.* (1976), 26 C.C.C. (2d) 349, 10 O.R. (2d) 153, 20 C.P.R. (2d) 1 (C.A.); affirmed (1977), 32 C.C.C. (2d) 207, 28 C.P.R. (2d) 33, 22 N.R. 541 (S.C.C.).

actual amendments. According to the explanatory notes accompanying the Bill it is hoped that s. 32(1.1) would mitigate the “virtual monopoly” test applied in *Aetna Insurance* and *Atlantic Sugar*:

However, subsection 1.1 of section 32 did not apply to the *Aetna* and *Sugar* cases because the period of the indictment in those cases preceded the coming into force of the subsection. Indeed, subsection 1.1 has yet to be tested in a court case. Moreover, over the course of the past two years, there have been four major convictions that demonstrate the section does indeed work. Therefore, the basic test in subsection 32(1) is, for the time being, to remain unchanged — namely that the agreement, if put into effect, must lessen competition unduly.⁸⁷

However, as noted in this paper, there are in fact judgments which suggest that s. 32(1.1) will not be given the interpretation for which the government optimistically hopes. The ban on price-fixing agreements proposed in “Framework for Discussion” was therefore warranted. The failure to include such a ban in Bill C-29 is, in my opinion, a step backwards.

Quite apart from s. 32 there are other recent developments which may make the job of deterring price-fixing arrangements somewhat easier. In 1976, along with the other changes to the *Combines Investigation Act*, the prohibition of resale price maintenance was stiffened. The basic prohibition found in s. 38(1) reads:

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

- (a) by agreement, threat, promise or any like means, attempt to influence upward, or to discourage reduction of, the price of which any other person engaged in business in Canada supplies or offers to supply or advertises a product within Canada; or
- (b) refuse to supply a product to or otherwise discriminate against any other person engaged in business in Canada because of the low pricing policy of that other person.

Roberts has speculated that horizontal price-fixing agreements might be illegal *per se* under s. 38.⁸⁸ Certainly, on a fair reading of the section, competitors entering into an agreement to sell or offer for sale at the same price or not below a minimum price, are attempting “. . . to discourage the reduction of, the price at which any other person engaged in business in Canada supplies or offers to supply or advertises a product . . .”

An attempt to influence upward or discourage the reduction of prices of other businesses is not sufficient to meet the requirements of the section. Such attempt must be by “. . . agreement, threat, promise or any like means . . .” But surely the price-fixing agreement itself would be an agreement in the same manner that a resale price agreement is an agreement which satisfies the vertical price-fixing prohibition. There is some authority to support the application of s. 38 in a horizontal manner. In *R. v. Peter Campbell*⁸⁹ an individual who through the use of threats attempted to induce his *competitors* to raise their prices was convicted under s. 38. It should be

87. *Supra* n. 68 at 10.

88. *Supra* n. 69, chapter 10.

89. (1981), 51 C.P.R. (2d) 284.

noted that while there were threats there was no actual price-fixing agreement.

Some doubt has been cast on the application of s. 38 to horizontal agreements by *R. v. Schelew*.⁹⁰ An official of a landlords' association attempted to induce members of the association to increase their rents. Letters were sent out encouraging members to raise their rents and at one meeting it was alleged that a decision was taken through a vote to increase rents. Two of the three judges in the Court of Appeal found that there was, on the evidence available, no agreement whatsoever. However, Angers J.A. went further and cast considerable doubt on the application of s. 38 to horizontal agreements. Interpreting s. 38 his Lordship states:

Finally it is not every attempt to manipulate (upward or downward) or maintain prices that is prohibited but only those attempts made by "agreement, threat, promise or any like means". Such an attempt achieved by threat or promise directed at persons may be, at least in some instances, a tangible concept, but where there is no vertical distribution link, it is difficult to conceive an agreement between horizontal entities which could constitute the attempt prohibited by the section. Indeed, it seems to me that an agreement between horizontal entities must, if it is to constitute an attempt to alter the prices at which other persons supply their product, have some constraining effect on those other persons. It must be of such magnitude as to be capable of affecting prices in such a way as to restrict the freedom of trade of suppliers who are not part of the agreement.⁹¹

If this interpretation is followed by other courts, s. 38 will have very little application to horizontal agreements since what his Lordship is apparently stating is that the price maintenance effect of the agreement must be shown on non-conspirators.

However, this aspect of the judgement is inconsistent with the manner in which the section is normally applied. There is no reason why s. 38 should be interpreted in this manner in regard to horizontal agreements any more than s. 38 should be interpreted as requiring proof of the effect of a *vertical* resale price maintenance agreement on persons not party to the resale price maintenance agreement. Yet, it is clear that the section does catch agreements between a supplier and a retailer under which the retailer is not to resell below a certain price. In any event, on this point, the above passage is *obiter dictum*.

On the assumption that s. 38 does have a horizontal application, it is not at all clear how it would apply to non-price-fixing horizontal agreements. For example, would the alleged market-sharing arrangement in *Atlantic Sugar* constitute an attempt by agreement to discourage the price reductions of competitors? This might be the natural effect of the agreement, but since the agreement did not *directly* relate to prices, it can be argued that the intent of the parties to affect price is not necessarily there. Roberts has postulated that, in such circumstances, the Crown must prove a specific intent to fix prices.⁹²

90. (1984), 52 N.B.R. (2d) 142 (C.A.).

91. *Ibid.*, at 156.

92. *Supra* n. 88.

IV. The Mens Rea or Intention Requirement

The requirement under s. 32(1) that the Crown prove a conspiracy to *unduly* limit competition, together with the normal *mens rea* requirement in criminal cases has raised much uncertainty concerning precisely what the Crown must prove to establish its case. It is proposed, first, to outline the theoretical possibilities, then to state the orthodox position on this matter, and finally to consider whether there has been any change in the traditional position as a result of *Aeta Insurance* and *Atlantic Sugar*. Without having regard to judicial precedents at all it can be seen that there are three theoretical possibilities:

(1) The criterion of “undueness” goes only to the *actus reus*, and the *mens rea* requirement is satisfied once an intention to enter into an agreement is established. By this interpretation once an agreement has been entered into which was in fact undue or would have been undue if carried out, then if the Crown can prove an intention to enter the agreement the *mens rea* requirement will have been met. Accordingly, if undueness in fact is established it is no defence to assert that undueness was not intended.

(2) Undueness goes to the *mens rea*. Under this interpretation the Crown must establish not only an agreement which would be undue if carried out, but that this requisite amount of undueness was intended by the accused. This interpretation is the most favourable to the accused and leaves open such interesting possibilities as some conspirators being convicted while co-conspirators are acquitted on the grounds that they individually did not have the necessary guilty intent.

(3) Yet a third possibility is that undueness goes *either* to the *actus reus* or *mens rea* at the option of the Crown. This would mean that a conviction could be attained if the Crown proved that an agreement had been entered into which would be undue if carried out, regardless of the accused’s intent in regard to undueness, or if the accused intended the necessary amount of undueness regardless of the inability of the Crown to establish undueness in fact.

The traditional position in Canada certainly includes proposition (1) above and maybe proposition (3) as well. In *Container Materials Ltd. v. The King*,⁹³ it was argued by the accused that the Crown had a burden to show that the conspirators intended an undue effect. The judgement of Kerwin J., concurred in by three of the other four judges sitting on the case, unambiguously rejected this assertion:

This is not the meaning of the enactment upon which the count was based. *Mens rea* is undoubtedly necessary but that requirement was met in these prosecutions when it was shown that the appellants intended to enter, and did enter, into the very arrangement found to exist.⁹⁴

This constitutes a clear affirmation of proposition (1) above and the rejection of proposition (2). Since the third possibility was not argued the case

93. [1942] S.C.R. 147, 1 D.L.R. 529.

94. *Ibid.*, at 538.

does not decide that point. While there is no case which supports the view that the Crown need only prove undue intent, some support for it can be found in the legal literature. Gosse argues:

To sum up: if the courts are able to find that the object of the parties is to eliminate competition that is sufficient. This the courts have, in the past, been able to do from the evidence. If, in the future, a case comes before them in which such an object is lacking but the effect of the agreement is to lessen competition unduly, then this, too, will be an offence. In short, either intention or effect is enough.⁹⁵

More recently, Roberts has argued that "... a direct corollary..." of the *Container Materials* judgment "... appears to be that in cases where it cannot be shown that the actual effect of an agreement was or would have been to create an undue restraint, the Crown must show that the accused specifically intended unduly to limit competition".⁹⁶ Nevertheless, this matter must be considered to be an open question. There are no doubt observers who find it offensive to permit the Crown to characterize the element of undue intent as either part of the *actus reus* or the *mens rea* depending upon its own convenience.

What is certain is that from the date that judgment was given by the Supreme Court of Canada in *Container Materials* it was not open to the accused to argue that the absence of an intention to restrain competition unduly is a defence. This was, after all, the defence unambiguously rejected in *Container Materials*. Therefore, unless *Container Materials* has been overruled by a subsequent Supreme Court decision this defence is not available. However, some commentators have indeed argued that the Supreme Court of Canada decision in *Aetna Insurance* and *Atlantic Sugar* have overruled *Container Materials* on this issue.⁹⁷ By way of illustration, in "Framework for Discussion", the effect of the two cases was described:

The cases also weaken the jurisprudence in other respects. In the *Sugar* case, the court stated that the question was whether competition was *intended* to be lessened unduly and referred to the majority judgement in the *Insurance* case. Furthermore, in the past the courts have clearly held that the offence lay in the agreement itself and its natural consequences if carried into effect. The Supreme Court departed from this approach in the *Insurance* case.⁹⁸

However, in a document put forth by the government as a hopeful precursor to legislative reform, it would not be unusual for the weaknesses in present legislation to be overstated for the purposes of justifying proposed legislative changes. Whether the *Insurance* and *Sugar* cases have indeed overruled *Container Materials* on the question of undue intent will now be examined. The cases will be looked at individually.

Aetna Insurance⁹⁹

As noted, several commentators have stressed that the majority judgment in *Aetna Insurance* held that an innocent intent was a defence to a conspiracy charge under s. 32 even if undue intent was proved. Because this would effectively amount to the Supreme Court overruling its own

95. Gosse, *The Law on Competition in Canada* (1962) 104.

96. *Supra* n. 69 at 127.

97. *Supra* n. 51.

98. *Supra* n. 55 at 16.

99. (1977), 34 C.C.C. (2d) 157 (S.C.C.).

previous decision in *Container Materials*, the *Aetna Insurance* case ought to be closely examined. In *Aetna* some 73 insurance companies were charged with fixing the price of fire insurance in Nova Scotia through the mechanism of the Nova Scotia Board of Insurance Underwriters. There was no question but that they had agreed. The issue was whether this particular agreement was illegal. At trial, evidence in the form of testimony of a Board official was admitted, which showed, among other things, public benefits which tended to flow from fixing the price of fire insurance through the Board. At trial the accused were acquitted. The Nova Scotia Court of Appeal reversed the acquittal and convictions were entered, the Court of Appeal holding that the trial judge had erred as to the legal meaning of the word "unduly". In the Supreme Court of Canada the acquittal was restored. In a vigorous dissent Laskin C.J.C. found that the trial judge had erred in admitting the evidence of the Board official in that such testimony went to prove public benefit which is not relevant in a s. 32 case and did not go to prove undueness as the trial judge had stated. Laskin C.J.C. also found that the trial judge had erred in requiring proof of intent to affect competition unduly.

Ritchie J., delivering the majority judgment held that the evidence was properly admitted by the trial judge for the purpose of establishing whether the agreement unduly limited competition:

... the illegal character of the agreement lies in the fact that the prevention or lessening is *undue* and it appears to me that the best if not the only way in which to determine this is by considering whether competition would be unduly prevented or lessened *if* the design evidenced by the agreement were carried into effect. In my view, it is only by assessing what the result would be if the agreement were implemented that the elusive quality of undueness can be measured, and it was for this reason that the learned trial judge in the present case heard evidence as to the effect of the plan on free competition in the insurance business.¹⁰⁰

Ritchie J. then stated the following about the requisite intent:

The burden lying upon the Crown in this case is to establish beyond a reasonable doubt first, that the respondents intended to enter into a conspiracy, combination, agreement or arrangement and, secondly, that the conspiracy, combination, agreement or arrangement *if* it were carried into effect would prevent or lessen competition unduly. These are questions of fact and the only question of law to which this appeal can be said to give rise is the meaning of unduly in the context of s. 32(1)(c).¹⁰¹

Ritchie J. went on to emphasize that the evidence of the Board official was properly introduced for the purpose of proving the existence of non-Board competition.

Far from overruling *Container Materials* on the question of intention, the majority judgment is in fact applying it. It would seem then, that the difference between the majority and dissenting judgments in *Aetna Insurance* lies not in the law to be applied, but in an assessment of the probative value of certain evidence introduced at trial. Laskin C.J.C. found that the testimony of the Board official was introduced to prove innocent intention and/or public benefit, which are irrelevant under s. 32. Ritchie J., on the

100. *Ibid.*, at 169.

101. *Ibid.*

other hand, found that the evidence was admitted for the purpose of establishing non-Board competition and hence was relevant on the material question of undueness.

While there was much room for disagreement with the assessment of Ritchie J., of the motivation of the trial judge in allowing in such evidence, as well as in assessing its probative value, I think it is clear from a reading of the judgment that there was no intent to change the basic law on *mens rea* set forth in *Container Materials*.

Atlantic Sugar¹⁰²

This case, too, it has been argued, imposes a requirement on the Crown to prove an intention to limit competition unduly. Engelhart,¹⁰³ seized on the following statement adopted by Pigeon J., as support for the proposition that the *Atlantic Sugar* judgment imposes a requirement to prove intent to limit competition unduly:

This review of the various statements on the meaning of "unduly" as it relates to the offence of lessening competition brings me to these conclusions. An agreement to prevent or lessen competition alone is not an offence. 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. There was no requirement for the Crown to prove the existence of a monopoly and it is a question of fact as to whether the agreement reaches the point of intending to lessen competition unduly and therefore becomes a criminal conspiracy.¹⁰⁴

The above statement was from the trial decision in *Aetna*, adopted by Ritchie J. in the Supreme Court judgment.

However, as has been pointed out by McFetridge and Wong,¹⁰⁵ in spite of the use of the words "intending" and "intended" it is quite doubtful that this passage from the trial judgment in *Aetna* (as adopted by Ritchie J. in the Supreme Court and cited by Pigeon J. in *Atlantic Sugar*) is sufficient to constitute an overruling of the law on intention as set forth in *Container Materials*. First, as has been pointed out, Ritchie J. in *Aetna* expressly followed *Container Materials* on this point. Secondly, Pigeon J. when citing the above passage did so only in the context of discussing the meaning of "unduly" and not at all in the context of a discussion of the law relating to *mens rea*. Thirdly, at the conclusion of his judgment Pigeon J. stated the following about the *mens rea* requirement:

I must also point out that while, as was stressed in *Aetna*, the offence lies in the agreement made with the intention to lessen competition unduly, not in the actual result of the agreement, no such distinction has to be made when, as here, the only evidence of the agreement is found in the course of conduct from which it is inferred. In the present case, the "tacit agreement" which the trial judge found was obviously to lessen competition as it was in fact lessened in the manner above described. Whether this was a criminal offence depends exclusively on whether competition was thus lessened "unduly". While the offence charged is truly criminal in nature and, therefore, requires *mens rea*, this does not mean that, assuming the "tacit agreement" was illegal, the accused, or rather their officials who are their direct-

102. *Atlantic Sugar Refineries Co. Ltd. et al. v. A.G. of Can.* (1980), 115 D.L.R. (3d) 21 (S.C.C.).

103. *Supra* n. 51.

104. *Supra* n. 102 at 32.

105. McFetridge and Wong. "More on Atlantic Sugar: A Reply" (1981-82), 6 Can. B.L.J. 373.

ing minds, had to be conscious of its illegality. *If it had been intended to lessen competition "unduly" it would have been no defence that the accused mistakenly thought that the intended lessening of competition would not be "undue"*. It is always for the court to decide on the facts whether an agreement to lessen competition means that the competition is to be lessened "unduly" and the views of the accused on that are irrelevant.¹⁰⁶ (Emphasis added).

While the wording is awkward, when one focuses on the substance of the comments it is clear that Pigeon J. did not propose any change in the law relating to *mens rea*.¹⁰⁷

Finally, if there is any doubt on the matter, one need only reflect that the Supreme Court of Canada rarely overrules its own previous decisions. When it does overrule a previously existing and well established legal rule or principle it normally is quite explicit about what it is doing.¹⁰⁸

In summary, the orthodox position on the intention requirement, set forth in *Container Materials*, clearly establishes that the Crown need only prove that the conspiracy, if carried out, would result in an undue lessening of competition. Far from encroaching upon this principle, *Aetna Insurance* in fact explicitly reaffirms it. In *Atlantic Sugar* there are passages which support both the orthodox position as well as the proposition that an intention to unduly limit competition is required. The statement supporting the orthodox position is less ambiguous and not susceptible of any other interpretation. In addition, if the Supreme Court of Canada in *Atlantic Sugar* had intended to change the law on such a firmly entrenched principle, one would have expected them to do so in a clear and unambiguous manner.

This would seem then to be an area of jurisprudence surrounding s. 32 which is fairly clear. The uncertainty about the *mens rea* requirement lies more in the opinions of commentators than it does in the actual decisions of the Supreme Court of Canada.

To this writer, the judgments in *Container Materials*, *Aetna Insurance* and *Atlantic Sugar* all state that once undueness in fact is established the Crown need not prove an intent to limit competition unduly. The only point of uncertainty is whether a conviction can *also* result where undueness in fact cannot be established but where an intent to unduly limit competition is shown.

Bill C-29, if enacted, would remove much of the doubt on the whole question of *mens rea*. Clause 23 would amend s. 32 by enacting s. 32(1.3) which reads:

For greater certainty in establishing that a conspiracy, combination, agreement or arrangement is in contravention of subsection (1), it is necessary to prove that the parties thereto intended to and did enter into the conspiracy, combination, agreement or arrangement, but it is not necessary to prove that the parties intended that the conspiracy, combination, agreement or arrangement have an effect listed in subsection (1).

The proposed sub-section would codify the *Container Materials mens rea* test.

106. *Supra* n. 102 at 33.

107. Wong and McFetridge, *supra* n. 105, make the same point.

108. See for example, *Marvco Colour Research Ltd. v. Harris* (1982), 141 D.L.R. (3d) 577 for an illustration of the Supreme Court overruling its own previous judgment. In *Marvco* the prior judgment was acknowledged, considered and held to be erroneous in light of modern conditions.

V. The Regulatory Exemption

The extent to which businesses, professions and other persons subject to provincial regulation are exempted from the Combines Investigation Act, was considered at length by the Supreme Court of Canada in *A.G. of Canada v. Law Society of British Columbia; Jabour v. Law Society of British Columbia*.¹⁰⁹

It is intended first to examine the actual holding in the case and then to consider its implications for competition policy.

A. The Law on Regulated Conduct as Held in *Jabour*

Jabour had advertised his services in newspapers and had installed an illuminated sign. The Discipline Committee of the Law Society of British Columbia took steps to discipline him for "conduct unbecoming a member". Under the *Legal Profession Act*,¹¹⁰ the Benchers are directed to establish a discipline committee for investigating and determining *inter alia*, "conduct unbecoming . . ." "Conduct unbecoming" is defined in that Act as including:

... any matter, conduct, or thing that is deemed in the judgment of the Benchers to be contrary to the best interest of the public or of the legal profession, or that tends to harm the standing of the legal profession . . .¹¹¹

While no specific statutorily authorized regulation had been promulgated which prohibited advertising, an informal handbook had been prepared by the Benchers setting forth some rulings on professional conduct. Part C of the Handbook related to advertising and listed in detail various rulings concerning what a lawyer could do. For example, Ruling 1 reads:

It is improper for a member to advertise, except as permitted in this Part, in any publication or on radio or television or in any other media of communication, provided however, that a lawyer may place a card in a directory, law report, legal magazine or review or text intended primarily for circulation amongst lawyers.

Jabour brought an action seeking a declaration that the rulings and orders of the Law Society were null and void due to the *Combines Investigation Act* as well as being in violation of his right to freedom of speech. Upon being notified by the Director of Investigation and Research of an inquiry by the R.T.P.C. into "the Production, Purchase, Sale and Supply of Legal Services and Related Products in the Province of British Columbia", the Law Society commenced its own action for a declaration either that the Act did not apply to it or if it did the Act was to that extent *ultra vires* the Parliament of Canada. The two actions were heard consecutively in the Supreme Court of British Columbia.

Mr. Justice Mackoff held that under the *Legal Profession Act* the Benchers had the power to regulate, but not to prohibit, advertising. This was decided simply as a matter of legislative interpretation. He further held

109. [1982] 2 S.C.R. 307, 137 D.L.R. (3d) 1, [1982] 5 W.W.R. 289, 37 B.C.L.R. 145, 66 C.P.R. (2d) 1.

110. R.S.B.C. 1960, c. 214, now *Barristers and Solicitors Act* R.S.B.C. 1979, c. 26.

111. Section 1, formerly s. 111.

that the *Combines Investigation Act* applied to the Law Society to the extent that the Provincial Legislature did not specifically authorize the activity in question.¹¹² The British Columbia Court of Appeal reversed this judgment finding that the conduct of the Benchers was authorized by the *Legal Professions Act* and that the *Combines Investigation Act* did not apply to regulatory schemes established under provincial legislation.

Seaton J.A., delivering the judgment of the Court of Appeal, emphasized the basis of the regulatory exemption:

A number of attempts have been made to distinguish the cases that hold that the *Combines Investigation Act* does not apply to regulatory schemes validly established by provincial legislation.

One attempt was based on a study that revealed that most or all of the cases the power was found to have been specifically granted. It is then said that the power to prohibit advertising is not specifically granted to the Benchers and therefore the cases do not apply. Whether the powers have been granted to the regulatory body in specific language as opposed to broad general language, does not offer a valid distinction. The essential thing is that the power be granted. There is nothing in the Act to show an intention to override provincially authorized regulatory bodies, whether they are directed in specific terms or in general terms.¹¹³

The Court of Appeal judgments were appealed to the Supreme Court of Canada where the substantive issues were characterized as whether the *Combines Investigation Act* applied to the Law Society, and if so, whether it was constitutional.

The Supreme Court of Canada held that the Act, as a matter of legislative interpretation, did not apply to the Law Society. Accordingly, the constitutional issue which would have arisen had the court found the Act applicable, did not have to be and in fact was not decided.

In considering whether the Act applied to the Law Society's conduct the Supreme Court proceeded on the assumption that the Benchers were empowered under the *Legal Professions Act* to act as they had. From a finding that the Law Society was empowered under provincial legislation it does not necessarily follow that the *Combines Investigation Act* does not prohibit that very same conduct. That was a matter for the Court to assess in interpreting s. 32 of the *Combines Investigation Act*.

In assessing whether the Act applied to the conduct of the Benchers, the Court considered the "regulated industries cases"¹¹⁴ and held as follows:

(1) The "regulated industries" cases set forth a principle under which provincially regulated industries are exempted from the *Combines Investigation Act*. According to the Court, these cases hold that where the Act is sought to be applied to provincially regulated industries, then as a matter

112. (1979), 98 D.L.R. (3d) 442, [1979] 4 W.W.R. 385, 45 C.P.R. (2d) 163.

113. (1980), 115 D.L.R. (3d) 549 at 567 (B.C.C.A.).

114. *R. v. Chung Chuck*; *R. v. Wong Kit*; *R. v. Sales Service Ltd.*; *R. v. Associated Growers of B.C. Ltd.*, 40 B.C.R. 512, [1929] 1 D.L.R. 756, [1929] 1 W.W.R. 394, 51 C.C.C. 260 (C.A.); aff'd [1930] 2 D.L.R. 97, [1930] 1 W.W.R. 129, 53 C.C.C. 14, [1930] A.C. 244 (P.C.); *R. v. Simoneau*, [1936] 1 D.L.R. 143, 65 C.C.C. 19 (Que.); *Cherry v. The King ex rel. Wood*, [1938] 1 D.L.R. 156, [1938] 1 W.W.R. 12, 69 C.C.C. 219 (Sask. C.A.); *Tolton Mfg. Co. Ltd. v. Advisory Committee*, [1944] S.C.R. 349, [1944] 4 D.L.R. 273, 82 C.C.C. 129; *Reference Re Farm Products Marketing Act*, [1957] S.C.R. 198, 7 D.L.R. (2d) 257; *R. v. Canadian Breweries Ltd.*, [1960] O.R. 601, 33 C.R. 1, 34 C.P.R. 179, 126 C.C.C. 133 (S.C.).

of legislative intent the Act should be interpreted as not applying to such regulated industry. In short, the cases are based on the notion that Parliament could not possibly have intended the Act to apply to provincially empowered activity. Estey J., delivering the judgment of the Court, commented:

When a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes.¹¹⁵

(2) This regulated industry exemption applies notwithstanding that the provincial statute does not *directly* regulate the activity in question, and notwithstanding the absence of a validly promulgated regulation on the subject matter. All that is necessary is that the activity in question *be empowered* by the provincial legislation.

(3) The regulated industry exemption is not restricted to the marketing of natural products.

(4) An argument had been raised that s. 32(6) indicated that Parliament intended to take within the Act governing bodies of the professions. Section 32(6) reads:

In a prosecution under subsection (1) the court shall not convict the accused if it finds that the conspiracy, combination, agreement or arrangement relates only to a service and to standards of competence and integrity that are reasonably necessary for the protection of the public

- (a) in the practice of a trade or profession relating to such service; or
- (b) in the collection and dissemination of information relating to such service.

This defence was added to the Act in 1975 when the Act was amended to include services as well as articles. The essence of the argument was that this defence would lack subject matter unless there was a general intent in the Act to include statutory professional bodies within its ambit. The Court rejected this argument, finding that the defence could still have meaning if a non-statutory professional body such as the Canadian Bar Association were charged under the Act.

B. The Implications of *Jabour* for Competition Policy

The *Jabour* case establishes an exemption for provincially regulated industries and professions which is extremely broad. For one thing, the exemption extends not just to regulatory schemes spelled out in provincial legislation, but also to more general delegations of authority to self-governing professional bodies such as the Benchers. As *Jabour* itself illustrates, such regulatory activity need not even take the form of official rules or regulations but can be justified under the power to discipline for "conduct unbecoming". In *Jabour*, the legislative definition of "conduct unbecoming" included:

... any matter, conduct, or thing that is deemed in the judgment of the Benchers to be contrary to the best interests of the public or of the legal professions, or that tends to harm the standing of the legal profession.

This sweeping definition effectively means that since the Benchers are the judges of what is in the best interests of the public, the scope for judicial review of the exercise of such disciplinary powers is quite limited. As Dunlop has pointed out, "... no argument need be advanced, as indeed none was, as to why it might be in the best interests of the public to ban advertising."¹¹⁶ In fact, according to a literal interpretation of the enabling legislation before the Court in *Jabour*, it is possible for the Benchers to act in the interests of the profession alone, even where that conflicts with the public interest¹¹⁷ (In actual fact almost any disciplinary conduct can be respectfully clothed as being in the public interest, even if it is not).

If advertising can be said to be "conduct unbecoming" so can almost anything else, if only the Benchers deem it so. For example, *Jabour* could just as easily justify disciplinary action against members pricing below a prescribed fee schedule. There apparently need not be *any* justification for such conduct once it is found to be empowered, never mind a justification on the grounds of competition policy.

One limitation on such a restraint is the fact that it must somehow be found to be empowered within the enabling legislation itself. One would not think that this would be too difficult, given the way most such legislation has been drafted. For example, s. 21(2) of the *Pharmaceutical Association Act*,^{117a} provides:

The council may establish, by by-law or by means of a code of ethics or otherwise, rules governing the conduct of members and interns of the Association in the practice of their profession, including advertising practices.

The Association Council under s. 22 has the power to initiate disciplinary proceedings where it has "reasonable grounds to believe" a member has been guilty of "conduct detrimental to the public interest".

While not as broad as the powers delegated to the Benchers in *Jabour*, these powers are nevertheless quite significant. (Under the *Pharmaceutical Association Act*, the council must at least have "reasonable grounds" for acting and since the alleged misconduct must be detrimental to the public, there is no power to discipline for conduct "only" detrimental to the profession.) Even so the ability to establish by-laws and codes of ethics, along with the provision in s. 22(3), that "... [t]he contravention of or the non-observance of any of the requirements of any by-law or code of ethics made under section 21(2) is conduct detrimental to the public interest . . ." probably gives the Pharmacist's Council the same powers to engage in anti-competitive policies, if they so desire, as the Benchers enjoyed in *Jabour*.

Thus it would seem that given the wide powers typically delegated by provincial legislation to self-governing professional bodies, and given that *Jabour* holds that the *Combines Investigation Act* does not apply in such instances, the guardians of the public interest in ensuring that competition

116. Bruce Dunlop, "Is Competition Unbecoming" (1983), 8 Can. B.L.J. 235 at 238.

117. *Ibid.*, at 239, 240.

117a. R.S.A. 1980, c. P-7.

policy objectives are met, or at least taken into account, by the professions are the provincial governments and the professions themselves. Provincial governments can do much when enacting and reviewing the enabling legislation to ensure either that the power to restrict competition as an end in itself is either not delegated to professional bodies or else is delegated in such a way that the public interest in competition policy must be taken into account. Other steps can also be taken. As early as 1969, the Economic Council of Canada, recognized the monopoly power of the professions. It recommended:

... that lay members should be appointed to the governing of self-governing professions to represent consumer's interests and to check any tendency towards the exercise of power in the interests of the profession rather than that of the public. This device could be useful in respect not only of licensing but also of other economically significant activities of professional bodies, including that of fee setting. . .¹¹⁸

It is also incumbent upon the professions themselves to act in the public interest and not just in the parochial interest of the profession itself. In this respect it is noteworthy that most of the provincial Law Societies have abandoned mandatory minimum fee tariffs and some now permit price advertising with varying restrictions.¹¹⁹

Nevertheless, it must be stressed that since the public interest and the interest of the professions do not necessarily coincide, the self-governing professions are clearly in a conflict of interest when reviewing and establishing rules that have an impact on competition. If economic hard times persist, protectionist elements in the professions may win out in respect of such matters as advertising, minimum fee schedules, and restrictions upon entry. This is much more likely as a result of the *Jabour* judgment. For example, 3 months after the judgment in *Jabour*, *The Adviser*, a publication of the Law Society of Upper Canada, contained the following admonition to members:

Reduced Fees — Conveyancing Matters

Reports of Members regularly quoting and charging fees below amounts that would cover the value of a solicitor's time to give proper and adequate attention to a client's file are causing concern to Convocation.

Members are reminded of the provision of Professional Conduct Rule 10, Commentary 1, as follows:-

"The lawyer should not offer to provide legal services at reduced rates for the purpose of attracting clients."

Many of the County and District Law Associations publish guidelines briefly setting out the services that should be provided by a solicitor and the fees that appear to be appropriate for those services. These are usually basic guidelines and Members are reminded that other factors, such as are listed in Rule 10, Commentary 1, should be considered.

The regular practice of charging fees below the amounts recommended in the County and District guidelines may result in less than standard workmanship, to the detriment of the public.

118. Economic Council of Canada, *Interim Report on Competition Policy* (1969) at 152.

119. Various forms of price advertising are now permitted in British Columbia, Alberta and Manitoba. See *Lawyers and the Consumer Interest* (1982) (Evans and Trebilcock, eds.), Ch. 5 "Competitive Advertising".

The Law Society is co-operating with the Canadian Bar Association-Ontario in the preparation of comprehensive material that will outline the obligations of solicitors in Real Estate matters. It is expected that this material will recommend fee charges to insure that the public receives the quality of service which it is entitled to expect.

In the meantime, the Law Society regards the County and District service and fee guidelines as appropriate in most circumstances. Where, following an Errors and Omission claim, it is demonstrated that a Member has been deficient in giving adequate attention to the file, and has quoted and charged less than an appropriate fee of the services that should have been rendered, the Law Society intends to proceed with disciplinary action against the Member.¹²⁰

In the opinion of this writer, the above is an attempt to revert to minimum fee schedules. No one can quarrel with disciplining lawyers for providing substandard work, but why discipline only those who have quoted less than "appropriate" prices? Surely, the way to deter professional incompetence is to discipline all members who give inadequate or substandard performance, regardless of the prices charged.

One matter left unresolved by the *Jabour* judgment derives from the possibility that in the future the *Combines Investigation Act* might be amended to make it clear that provincially regulated industries and professions are intended to be caught by the Act. The essence of the *Jabour* case is that the Act should not be interpreted as applying to provincially empowered conduct. It would not be too difficult to draft appropriate amendments making the intent of Parliament clear.

By way of illustration Bill C-13,¹²¹ which never was enacted, contained an exemption for regulated conduct. The definition of regulated conduct was much narrower than that given by *Jabour*. Proposed s. 4.5 reads:

- (1) Part IV.1 and sections 32, 32.2, 32.3, 33, 34, 35, 38, and 38.1 do not apply in respect of regulated conduct.
- (2) For the purposes of this section, "regulated conduct" means conduct in respect of which the following conditions are met:
 - (a) the conduct has been expressly required or authorized by a regulating agency that
 - (i) is not appointed or elected by the persons or by classes or representatives of the persons, whose conduct is subject to be regulated by such agency, or
 - (ii) is subject to supervision, in the case of a regulating agency that is an agricultural products marketing board, by a supervising agency that is not appointed or elected by the persons, or by classes or representatives of the persons, whose conduct is subject to be regulated by such regulating agency, and
 - (b) the regulating agency is expressly empowered, by or pursuant to an act of parliament or of the legislature of a province, to regulate the conduct in the manner in which it is being regulated and has expressly directed its attention to the regulation of the conduct,

And includes the conduct of a regulating agency or supervising agency acting within a power referred to in the definition "a regulating agency" or "supervising agency", whichever is applicable.

120. The Advisor, No. 3, Oct. 1982.

121. Third Sess., Thirtieth Parliament, 1977.

As can be seen from the definition regulated conduct would have been exempt only to the extent that the regulators are not in the position of regulating themselves.

Had such a provision been in force at the time *Jabour* was disciplined there would have been a clear constitutional conflict. The Act would have made it clear that the conduct of the Benchers did not come within the exemption for regulated conduct as defined by the *Combines Investigation Act*. On the other hand the conduct would have been authorized by provincial legislation. The Supreme Court of Canada in *Jabour* deliberately left undecided whether provincial or federal legislation would prevail in such an instance. Therefore, even if the federal government passed legislation making clear the intent to take self-governing professional bodies within the ambit of the combines legislation there is only an even chance that the provision would be found constitutional.

Another possible check on the seemingly unbridled powers of the professions is the possible application of the *Charter of Rights* to certain types of anti-competitive restraints. One can only speculate whether a ban on advertising would violate s. 2(b) of the Charter. Section 2(b) provides for "freedom of thought, belief, opinion and expression including freedom of the press and other media of communication."¹²² The application of the *Charter* to other types of restraints is even more speculative.

VI. Summary and Conclusion

Of the four major problem areas discussed in this paper, those which will continue to provide the most difficulties for combines prosecutors are the regulatory exemption and the necessity of proving an agreement over and above "pure" conscious parallelism.

The regulatory exemption as set forth by the Supreme Court in *Jabour* is so broad that it invites strong protectionist measures to restrict supply and limit price competition in a major component of our service industry. Further, it is possible that any proposed measures to amend the *Combines Investigation Act* with the intent of reversing the effect of *Jabour* might be found to be unconstitutional. This means that other than relying on the self-regulating bodies themselves, the best means of asserting the public interest in free competition rests with the provincial governments. This presents the possibility of a non-uniform competition policy across Canada, at least with respect to the self-governing professions. The importance of dealing with this problem in an effective manner can not be over-emphasized. A competition policy which is largely inapplicable in major sectors of agriculture and professional services can be expected to be regarded not only as ineffective, but as unfair.

The problem of conscious parallelism will continue to vex our courts and policy-makers, notwithstanding the proposed amendments in Bill C-29. The more radical proposals in "Framework for Discussion" which, in

122. See Dunlop, *supra* n. 116 at 242.

effect, adopted Posner's thesis that so-called conscious parallelism is in fact an agreement, were not carried forward into Bill C-29. The proposed amendments only permit a court to convict in the absence of evidence of communication. However, needless to say, the proposal does not make conviction mandatory where there is evidence of communication. In fact, in most instances of conscious parallelism there is evidence of communication. What really troubles the courts is not the presence or absence of evidence of communication but whether such communication in fact amounts to an agreement. The Bill will do nothing to change this.

Insofar as the *mens rea* requirement is concerned, I have argued in this paper that such requirement under section 32 is very favourable to the Crown. Thus, the proposal in Bill C-29, probably only codifies present jurisprudence. It is nonetheless useful in clarifying matters once and for all.

In the Bill, the government also retreated from earlier proposals to make price fixing and market allocation agreements a *per se* offence. The justification for this retreat is that s. 32(1.1), enacted in the so-called "Stage I" amendments to the Act in 1976, has made the threshold of "undueness" easier to meet. However, as I have pointed out in this paper, there are cases under the post-1976 Act which bring this assumption into question. The original proposals in "Framework for Discussion" to ban price fixing agreements *per se* are therefore warranted. Indeed it is difficult to postulate any policy reasons against a *per se* ban of horizontal price fixing.

Nevertheless, in spite of the weaknesses in the law arising from judicial interpretations of the "undueness" criterion, the law in s. 32 is probably a much stronger deterrent than many of its critics are willing to admit. First, the two recent Supreme Court cases, *Aetna Insurance* and *Atlantic Sugar* which resulted in acquittals, at least in part based on the "undueness" criterion must be viewed in perspective. In each case there was an acquittal at trial and a reversal of this by the provincial Court of Appeal which imposed a conviction. Finally, the Supreme Court of Canada in both cases reinstated the decision of the trial judge. Looked at in this context the two cases may reflect nothing more than the general reluctance of the Supreme Court to have acquittals in criminal cases reversed by appellate courts, particularly where such acquittals were based in part on findings of fact. It must be emphasized that while the legal meaning of undueness is a question of law, the actual findings of undueness are questions of fact.

Secondly, any defects in s. 32 in this regard might be ameliorated by a more stringent interpretation of the price maintenance prohibition in s. 38. While it is still too early to be certain, it is likely that s. 38 imposes a *per se* ban on horizontal price fixing, much as it does on vertical price fixing.

Finally, it is doubtful that any conspirators would *openly* enter into a price fixing agreement based on a market percentage of say, 50% instead of 90%, and it is difficult to see lawyers so advising their clients. Past judicial precedents are just too contradictory, based as much on findings of fact as on legal rulings and the law in general is much too murky and uncertain. Has s. 32(1.1) changed the law? Have the holdings in *Atlantic Sugar* (whatever they might be) and *Aetna Insurance* survived the enactment of s. 32(1.1)? Does s. 38 impose a *per se* prohibition of horizontal price fixing?

Are we really dealing with only 50% of the market or will a court find a narrower market and thus a higher percentage?

Price fixing agreements will continue to be made, but usually covertly, on *the assumption* that being caught will entail nasty consequences, even if the market share of conspirators is only 50%. To this extent the law is still a strong deterrent.