

THE CHALLENGE FOR CANADIAN
COMPETITION LAW: OLIGOPOLY POWER AND
CONSCIOUS PARALLELISM

Masters thesis submitted in partial fulfillment of the
requirements for the degree of Masters of Business
Administration.



William Molloy

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THE CHALLENGE FOR CANADIAN COMPETITION LAW:
OLIGOPOLY POWER AND CONSCIOUS PARALLELISM

BY

WILLIAM MOLLOY

A thesis submitted to the Faculty of Graduate Studies of
the University of Manitoba in partial fulfillment of the requirements
of the degree of

MASTER OF BUSINESS ADMINISTRATION

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TABLE OF CONTENTS

	Page
I. Introduction	2
II. Review of the Canadian Cases	11
A. <u>The Queen v. J.W. Mills & Sons Ltd.</u>	11
B. <u>R. v. Canada Cement LaFarge</u>	16
C. <u>R. v. Armco Canada Ltd.</u>	20
D. <u>R. v. Canadian General Electric Company Ltd.</u>	31
E. <u>R. v. Aluminum Company of Canada Ltd.</u>	41
F. <u>The Queen v. Atlantic Sugar Refineries Co. Ltd.</u>	45
G. Summary	59
III. The Development of the Doctrine of Conscious Parallelism in the United States	62
A. <u>Inter-State Circuit Inc. v. United States</u>	62
B. <u>United States v. Masonite Corp.</u>	65
C. <u>American Tobacco Co. v. United States</u>	66
D. <u>Bigelow v. RKO Radio Pictures, Inc.</u>	67
E. <u>William Goldman Theatres, Inc. v. Loew's Inc.</u>	68
F. <u>Ball v. Paramount Pictures Inc.</u>	70
G. <u>United States v. Paramount Pictures Inc.</u>	70
H. <u>Milgram v. Loew's Inc.</u>	72
I. <u>Pevely Dairy Co. v. United States</u>	73
J. <u>Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.</u>	75
K. Summary	77
IV. Proposals for Reform	79
A. Professor Turner's Proposal	79
B. Professor Posner's Proposal	81
C. Professor Simonetti's Proposal	84
D. Professors Stanbury and Reschenthaler's Proposal	86
E. Assessment of the Proposals for Reform	88
V. Attempts to Reform Canadian Competition Policy	93
VI. Conclusion	99
Appendix A. Speech given by D.H.W. Henry, October 12, 1962	100
Footnotes	104
Bibliography	109

I. Introduction

Conspiracies, agreements or arrangements which have the effect of restricting competition are governed by s.32 of the Combines Investigation Act (R.S.C. 1970 c. C-23 as amended). Section 32(1) reads as follows:

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, sales, 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 effect only those conspiracies, agreements or arrangements that if carried out would lessen competition unduly are prohibited by the Act.

One of the most difficult problems facing Canadian competition policy is the application of section 32 to closely coordinated oligopolies. Firms in oligopoly markets may adopt identical pricing strategies and follow parallel policies without collusion or agreement. In fact the behaviour of firms in oligopoly markets can be almost indistinguishable from that of firms who have conspired, agreed or arranged to unduly lessen competition contrary to section 32 of the Combines Investigation Act. This is the phenomenon of conscious parallelism.

Conscious parallelism has wide implications for Canadian competition policy. A large part of the Canadian economy operates within oligopolistic industries. The small size of the domestic Canadian market dictates that many industries be highly concentrated. Competition policy must address the problems that these concentrated industries create.

An industry may be categorized as being either competitive, oligopolistic or monopolistic. A perfectly competitive market has many sellers and buyers and the market price is set by the sellers acting in competition with each other. Market price is a function of both market-wide supply and market-wide demand. Each individual seller knows that

any restriction in his output will have only a minimal effect on market supply. Each seller must take the market price as given and adjust his output in order to maximize his profits.

In a monopoly market output is less and the unit price higher than in perfectly competitive markets. Since a monopolist is the only source of supply the monopolist's decision on the level of production will have an impact on the market price. Accordingly if the monopolist desires to maximize profits he will do so by producing less and obtaining a higher price than that which would have resulted if the market were perfectly competitive.

Within the sphere of oligopolistic markets however a wide variety of policies toward price and product can occur. At one extreme, firms in an oligopolistic market may desire and be able to collude either explicitly or tacitly to set prices and reap monopoly profits. At the other extreme firms may engage in cut throat competition that in the short run drives prices and profits below even those that would prevail in a perfectly competitive market. The essential difference among firms in competitive, oligopolistic and monopolistic industries is the discretion they have to behave anti-competitively.

Underlying every oligopolistic industry is the recognition by the individual firms of the mutual interdependence of their activities. The end of the spectrum nearest which an oligopolistic industry operates depends on the structure of the industry in which the firms operate. This behaviour is strongly influenced by such structural factors as concentration, product differentiation, barriers to entry of new firms, growth rate of market demand, and price elasticity of demand.

A direct relationship exists between the degree of concentration in an oligopoly and the amount of collusion that can occur in coordinating firms' behaviour. The smaller the number of firms which account for a large proportion of an industries' output, the more likely it is for monopolistic practises to prevail. In highly concentrated industries individual firms have considerable discretionary power in making decisions regarding price, output and related matters. When concentration is low the existence of many rival firms forces each to behave independently and market forces rather than individual firms determine the levels of prices and outputs. Indeed industries with lower levels of concentration may even resort to more open forms of collusion than more coordinated oligopolies which can gain the same ends through less visible means.

The mutual interdependence among firms is a primary characteristic associated with oligopoly markets. In simple terms this means that any oligopolistic firm is influenced by the behaviour of its rivals, and that its own behaviour in turn influences those rivals. Each firm, then, must consider not only what its opponents happen to be doing at the moment but also the way in which rivals may respond to its own actions. The actions of a single firm cannot be viewed in isolation.

Any change in policy by one of the firms resulting in increased sales will of necessity cause a significant and offsetting decline in market share of its competitors. In such circumstances each firm must not only respond to the actions of its rivals but must also take into account their rivals' responses to its own actions. Therefore, a firm introducing a change in policy will do so in a manner compatible with the interests of its competitors to avoid any hostile reaction on their part. It follows that the market conduct of competitors will often be similar or parallel.

The pricing behaviour of oligopolists increases the outward appearance of parallel conduct. Pricing behaviour in oligopolistic industries starts with the fact that the pricing output and other strategic decisions of one firm are made

with a view to their impact on all of the firms in the market and that the firms involved quickly recognize their mutual interdependence. Managers of firms in both competitive and oligopolistic industries recognize that profits will be higher when cooperative pricing policies are pursued than when each firm aggressively seeks a larger market share through price competition. In the absence of an agreement, this is only possible in those oligopolistic industries that are able to coordinate their pricing. While firms in such oligopolistic industries may not compete on price they may aggressively pursue a larger market share through non-price competition.

The conduct of a firm in an oligopolistic market is strongly influenced by the many elements that make up the structure of its industry. As industries become more concentrated the behaviour of firms change as they become more aware of the competitive reaction of other firms in the industry to their price decisions. It becomes easier for firms to coordinate these decisions among themselves. Industry profits are more likely to be raised above the competitive level as the industry becomes more concentrated. As concentration within an industry increases, the firms within it become more aware of their competitive interdependence in setting price levels and in their other strategic decisions.

As already stated the degree of coordination in pricing strategy is greatly influenced by structural variables, within the oligopolistic industry. Thus parallel behaviour is more likely to occur when the products of competing firms are sufficiently similar both physically and subjectively that they are nearly perfect substitutes for each other. Steel, cement and sugar are examples of such products. With perfect homogeneity price becomes the most important and visible area in which rivalry can take place. Hence, oligopolists can coordinate their behaviour more easily and find it highly desirable to do so in avoiding price wars.

While the practise of conscious parallelism may lack all the customary elements of a formal agreement the economic effects may be similar. The difficulty for competition policy is to distinguish between the completely independent behaviour of competing firms and behaviour that is the result of explicit or tacit collusion to increase profits. While it would be irrational to prohibit oligopolists from matching the prices of rival firms, competition policy must address the question of how to determine when firms have gone beyond that point and have entered into collusion. Milton Moore defines the problem for competition policy as follows:

The key assumption in the analysis of their behaviour is that most oligopolies engage in conventional pricing practices that are indistinguishable from the tacit collusion that is almost universally disapproved.¹

The challenge for competition policy is to effectively sanction competitors from banding together to hamper competition while at the same time not forcing competitors to behave irrationally.

In almost all of the reported conspiracy cases dealing with parallel behaviour some further pattern of behaviour beyond a mere adoption of a parallel course of action was present. It appears to be relatively rare for members of an oligopoly, even one producing a completely homogeneous product, to be able to coordinate their behaviour without the use of one or more extra factors. These factors are additional techniques over and above simple parallel action which allows firms to follow closely coordinated policies. Some of these factors are the publication of price lists, policing of pricing policy, product standardization and industry associations. Competition policy must focus on these factors especially when they are evident in certain market structures of oligopolies.

This paper starts with a review of judicial decisions in Canada dealing with conscious parallelism under section 32 of the Combines Investigation Act, goes on to consider some of the American authorities under section 1 of the Sherman Act, and then concludes by reviewing and evaluating existing proposals for reform.

II. Review of the Canadian Cases

A. The Queen v. J.W. Mills & Sons Ltd.²

It was not until 1968 that the issue of conscious parallelism was raised in a Canadian combines case. In The Queen v. J.W. Mills & Sons Ltd., five freight forwarders raised conscious parallelism as a defence to a violation of section 32(1)(c) of the Combines Investigation Act. Gibson, J. rejected the defence and all five were convicted.

1. Summary of the Facts

The five accused all carried on a business known as the import pool car business. This business concerned imported goods shipped to Vancouver to be forwarded by rail to points in eastern Canada - mainly Toronto and Montreal. The accused would consolidate these imported goods into freight car lots and the goods would then be transported in a certain category of railway car referred to as pool cars.

The accused's activities became possible with the amendment of the railway tariffs in 1955. As a result of those amendments consolidation of different kinds of imported goods into carload lots to be shipped at the lower carload

rates became permissible. The rail carriers were precluded by the regulations from themselves effecting a consolidation of goods into a mixed pool car.

By consolidating two or more commodities for shipment in a single railway car the freight forwarding companies could obtain a cheaper rate than would be obtained by shipping the various commodities individually. The difference in rates would be as much as half the rate that would apply for shipping a commodity that constituted less than a full car load.

The accused operated by obtaining general authorizations from the importers in the east to secure the release of goods consigned to the importers at Vancouver. Between January, 1956 and August, 1966, the accused handled 80% of the import pool car traffic.

In 1958 two of the accused, J.W. Mills & Sons Limited and Leimar, entered into an agreement to end a price cutting war between themselves and to stabilize prices. This agreement established rates that the two companies would charge at various volumes of goods. Initially the agreement was to have a life expectancy of one year. Over the course of the year there were numerous changes in the rates that

were the result of discussions and consultations between the two accused.

In 1959 a new agreement was made that amended and expanded the 1958 agreement. Thereafter until August 1, 1966 Leimar continued to consult J.W. Mills on all questions regarding rates and they acted jointly in revision and issuance of rate schedules. As other companies entered the business Leimar and J.W. Mills convinced them to agree to quoting rates similar to and conforming with their rates.

The indictment against the five accused contained two offences contrary to s. 32(1)(a) and s.32(1)(c) of the Combines Investigation Act during the period between January 1, 1956 and August 1, 1966.

2. Decision of the Exchequer Court

The accused sought to prove by economic evidence that the competitive situation of the market in which they operated was an oligopoly. Based on this fact, the accused contended that according to the economic theory of oligopoly, even in the absence of an agreement, the long run pricing behaviour would not have been significantly different than resulted here and therefore no offence was committed.

In convicting the accused, Gibson, J. wasted little time in dismissing their argument. His Lordship seemed singularly unimpressed with the economic evidence saying:

The fact that under the theory of oligopoly prices would have been the same in the long run is irrelevant. No persons are entitled to engage in anti-competitive trade practices or policies because this result may obtain in any event if all things are equal.³

It is important to point out that this was not a case of consciously parallel pricing behaviour because Gibson, J. did find existence of an agreement. Gibson, J. makes that quite clear in his conclusion:

The crown has proven an agreement or conspiracy by the accused to fix prices; to divide the markets and customers between themselves; to control the channels of distribution; and to prevent people from entering this service industry.⁴

Even though J.W. Mills was in fact a conspiracy case the above comments by Gibson J. on oligopolistic behaviour are worth noting.

3. The Decision of the Supreme Court of Canada

The accused appealed their convictions to the

Supreme Court of Canada. The appeal was dismissed in a short judgment and the convictions against each accused were affirmed.

J.W. Mills was the first Canadian case to raise the issues of oligopoly and conscious parallelism. Its significance goes beyond that fact because it raised issues fundamental to the whole debate surrounding competition policy in this area. These issues are still not satisfactorily resolved today. What is or what should be the prohibited act? Should it be the agreement that lessens competition "unduly" or the effect of a firm's behaviour on competition no matter how that behaviour came about.

In J.W. Mills such questions did not have to be answered because an agreement was found to exist. It seems ludicrous that the accused would have been acquitted if an agreement had not been proven by the Crown. Competition policy should be concerned with performance in the market place regardless of whether such performance is the result of market structure, market power or through an agreement. The fact that anti-competitive behaviour does not flow from an agreement should not make it exempt from the law.

J.W. Mills raised several factors relating to market structure and market conduct that reappear in the later cases. The market structure was oligopolistic and the accused provided a homogeneous product. Intense price competition within the industry led to the conspiracy. There was a sharp contrast in pricing practices before and after the agreement - prices were irregular before 1959 and thereafter became uniform. The agreement resulted in smooth price changes. There was also evidence of a considerable amount of communication among the conspirators.

B. Regina v. Canada Cement LaFarge Ltd.⁵

Canada Cement LaFarge Ltd., St. Marys Cement Ltd., Lake Ontario Cement Ltd. and St. Lawrence Cement Company were charged with unduly lessening competition in cement contrary to s.32(1)(c) of the Combines Investigation Act. The indictment specified that the offence occurred in Ontario between January 1, 1955 and August 15, 1972. In particular the accused were charged with selling and meeting tenders at identical prices by virtue of a base point freight equalization policy.

The four companies referred to in the indictment were in the business of manufacturing cement. Cement is the

classical homogeneous product - each company's product is identical to that of the others. Canada Cement was the industry leader supplying about forty per cent of the market. The other three firms supplied twenty-five, twenty and twelve per cent respectively.

From the period 1955 to 1959 industry market ing arrangements were in a chaotic condition, due, among other reasons, to the incongruous freight allowances. Commencing in 1959 an element of harmony could be detected in industry prices. The practice developed to the point that even with large contracts tenders for cement were identical. Prices for cement sold by or for the four accused companies in different areas were examined and found to be identical.

At the preliminary inquiry Chamblin J. held that the Crown had "established that the companies involved were using a base freight factor pricing system which did not come about by mere coincidence".⁶ The conclusion which logically follows is that the pricing system was the result of an agreement.

Chamblin J. went on to extensively quote from the text of a speech given by D.H.W. Henry, when he was the Director of Investigation and Research under the Combines

Investigation, to the Public Buyers Group of British Columbia on October 12, 1962.⁷ The excerpt quoted Chamblin J. takes up two pages of his four page judgment. His Honour commented that he found the speech to be of the greatest assistance.

A particularly relevant part of Mr. Henry's speech is the following:

Conscious parallelism, if conducted without collusion among the members of the industry, is not an offence. This is because if such collusion is not present, there is not the element of agreement or arrangement necessary to constitute the offence of conspiracy. I must emphasize, however, that this is so only in the absence of collusion.⁸

Chamblin J. made no attempt to analyze the speech by Mr. Henry or to relate it to the facts.

The four companies were discharged, Chamblin J. ruling that:

the resulting prices set by the companies are the result of conscious parallelism and the companies are therefore discharged.⁹

The result flew in the face of Chamblin J.'s earlier conclusion that the basing point pricing system came about as a

result of an agreement. If there was an agreement there cannot be conscious parallelism. This result also contradicts the above quoted excerpt from Mr. Henry's speech that emphasizes that conscious parallelism can only exist in the absence of collusion.

It is most unfortunate that Chamblin, J. did not give more elaborate reasons for his decision. His short judgment is contradictory and far from instructive. It is also unusual for a judge to give so much weight to such extrinsic evidence as a speech given by a civil servant eleven years before.

By including the speech in his reasons for judgment Chamblin J. gave it judicial approval. A status which Mr. Henry most certainly did not intend his speech to achieve. The Director of Investigation and Research does not have the authority to make pronouncements of law. Unfortunately that is the status that Mr. Henry's speech subsequently achieved in later cases dealing with conscious parallelism. It provided a strong basis on which accused were able to mount their defence to conspiracy charges.

C. Regina v. Armco Canada Ltd.¹⁰

1. Summary of the Facts

The ten accused in this case were all engaged in the production and sale of metal culverts in Ontario and Quebec. They were charged with violating section 32(1)(c) of the Combines Investigation Act in conspiring to lessen competition in the industry of metal pipe culverts throughout Ontario and Quebec during the period November, 1962 through August, 1967.

Corrugated metal pipe is a homogeneous product. All producers make the same product from the same materials with the same design. It is all alike and all equally acceptable to purchasers. Corrugated metal pipe is used principally for sewers and culverts, and in those uses it competes with clay and concrete pipe.

The major customers for metal culverts were the Department of Highways in Ontario, its counterpart in Quebec, the federal government municipalities and the railways. The market was created by the requirements of the purchasers who usually called for tenders or less frequently made direct

purchases. Geographically the market served by the accused companies was Ontario and Quebec.

To commence operations as a manufacturer of corrugated metal pipe required only a small amount of capital and limited manufacturing facilities. As a result, during 1962-1963 several small companies entered the industry. By way of comparison, in 1957 there had been fifteen metal pipe producers operating 37 plants but by 1962 the industry had expanded to 22 producers with 49 plants. Evidence was adduced at trial that in 1963, the industry was operating at only 30 percent of capacity. These factors were reflected in the performance in the market. From October, 1962 to December, 1963, there was active price competition and prices tendered were volatile.

On November 10, 1961, the corrugated metal pipe industry incorporated an association known as the Canadian Metal Pipe Institute. The purpose of the Institute was ostensibly to eliminate "cut-throat competition" without contravening the Combines Investigation Act. The original members were Armco, Pedlar People, Robertsteel, Rosco Metal and Westell Products. Robertsteel was the only original member of the Institute not named in the indictment. In subsequent years each of the accused eventually became members of the Institute.

In an endeavour to solve the problems of the industry, particularly the price war, the Institute investigated an open price policy. The concept of an open price policy was first introduced at the conclusion of an Institute board meeting in November, 1962. Background material was prepared and distributed to the Institute's directors, who were representatives of the firms in the industry.

The open price policy advocated that each firm openly set out its price in written or printed form, including discounts and terms of credit and make these available to all customers, competitors and the public. The objective of the open price policy was stated in a letter to Institute members:

prices will adjust themselves to the requirements of the individual producer and ultimately reflect the true state of the market through the natural forces of known competition.¹¹

Lerner, the trial judge, J. saw through this obscure language and found that the simple objective of the open price policy was to be "the means of preventing price-cutting competition by all manufacturers for customers".¹²

The advantages of the open price policy were advocated in various memoranda and reports circulated throughout the industry and in various speeches given to members of the Institute. It was emphasized in all written material that the policy was one to be assumed voluntarily by each member on its own. The Institute went to great pains to ensure that the members were not in violation of any of the provisions of the Combines Investigation Act. It was stressed that it would be in the best interests of each member to follow the leadership of other firms and publish its price list.

Concern over the legality of the Institute's actions prompted Mr. Pepper, legal counsel for the Institute, to write D.H.W. Henry, Director of Investigation and Research in March of 1963. In his letter Mr. Pepper expressed his own concerns as to how far the Institute could go in exhorting its members to adopt the open price policy. He accurately foresaw the legal problem that would arise if the policy was successfully adopted by all of the members of the Institute:

If all the members of the metal culvert industry publish identical prices and subsequently make identical tenders, how does one persuade the objective outsider that is to say a Supreme Court judge, that those prices have been arrived at independently and not by collusion. I am

obliged to ask you to appreciate that this is a very real problem.¹³

In June, 1963, Robertsteel Ltd. published its price list. This initiative was not followed by any of the other firms in the industry. In fact, Armco Ltd., one of the accused, because of its competitive advantage due to size and manufacturing techniques, continued to offer discounts on large orders and lower prices for culverts manufactured through a cheaper process.

In December, 1963, Robertsteel published a new price list and within two weeks this price list was adopted by all the firms in the industry. Armco Ltd. in particular discontinued discounts on large orders and lower prices on cheaper products as it had before December. Furthermore, bid prices were no longer quoted delivery at the factory but rather were quoted on delivery to the area in which the culverts were to be delivered. Lerner J. stated:

... producers divided Ontario into three zones and all prices quoted were a 'delivered' price in each zone rather than FOB plant. All prices were uniform in any zone regardless of the distance of the plant of the particular manufacturer from the geographical point of delivery.¹⁴

Thus all manufacturers had an equal opportunity to compete no matter where in the province their plant was located.

For the next four years uniform prices prevailed in the market for corrugated metal pipe. During that time period several industry-wide changes and increases in price were accomplished smoothly.

In his judgment, Lerner J. thoroughly dealt with the considerable amount of documentary and circumstantial evidence. In the final analysis there was probably not one overwhelming factor that compelled his lordship to conclude beyond a reasonable doubt that an agreement existed. This is in accordance with the view expressed by Mr. Henry in a letter to the Canadian Steel Warehousing Association:

... collusive arrangements to restrict competition are likely to be found to exist by a court on the basis of inference from surrounding circumstances rather than from an examination of direct evidence of agreement or understanding. In such circumstances, successive steps, each of which looked at independently and in isolation might be regarded as lawful, can bring the participants closer to the brink of illegality.¹⁵

One significant factor was the sudden achievement of the open price policy in December, 1963. The court was

fully aware that this result could never have been attained without some agreement to fix prices:

The effort that the documentary evidence revealed to have been expended in attempting to effect stability of prices as against 'price war' competition, and the time that it took before stability was achieved, could never have been brought about in this industry without arrangement or agreement between the member manufacturers ...¹⁶

To find otherwise Lerner J. said would offend one's common sense.

Notwithstanding that he found more than enough evidence to infer an agreement Lerner J. went on deal with the defence of conscious parallelism. His Lordship summarized the evidence provided for the defence by economist, J.A. Cherbaniak, as suggesting that conscious parallelism in an oligopoly is the logical phenomenon to be found without arrangement, agreement or a conspiracy to bring stability and uniformity of prices into being.

Lerner J. refused to accept this theory, noting that:

If price stability would come (if not naturally), then by the economic forces as expressed by Mr. Cherbaniak in this

ideal oligopoly situation, it suggests the query (which I find was never answered by the defendants) - why was it necessary for the Institute, Campbell, Turney, et al., to spend the several months in 1962, and 1963, which I have, I hope, exhaustively outlined, supra, to bring the results that form the basis of this prosecution?¹⁷

Lerner J. rejected the accused's argument and denied that this interruption had any application to this case.

Lerner J. went further and questioned the application of conscious parallelism to any combines case:

... by way of obliter, economists to the contrary, I fail to see on a common-sense basis how conscious parallelism could be achieved without a conspiracy on the part of the accused to come to an agreement or arrange beforehand. That occurred in this case notwithstanding that the ideal characteristics of an oligopoly were present.¹⁸

This view does not answer the question. It is clear that an agreement that has the effect of unduly limit competition is illegal. The question still to be answered is whether conscious parallelism absent an agreement is legal.

Mr. Justice Lerner attempted to develop Canadian law by giving meaning to the hitherto unused word "arrangement" in s.32(1)(c). He borrowed the broad meaning of "ar-

rangement" found in an English combines case, British Basic Slag Ltd. v. Registrar of Restrictive Agreements [1963] 1 W.L.R. 727. Lerner J. quoted from the judgment of Willmer L.J. in that case:

For 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'.¹⁹

From the same case Lerner, J. also quoted Lord Diplock's definition of an "arrangement":

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.²⁰

The adoption of this definition has to be considered strictly obiter. Lerner J. had already concluded that there was an agreement and therefore it was unnecessary for him to go on and define an arrangement.

Lerner J. found the ten accused guilty as charged. The ten companies appealed.

3. Decision of the Ontario Court of Appeal

The Ontario Court of Appeal allowed the appeal of three of the companies but upheld the conviction of the other seven. The Court of Appeal did, however, disagree with Lerner J.'s definition of arrangement:

Irrespective of the difference in meaning that may or may not exist between 'conspire, combine, agree or arrange' as they are used in the Act, all four words contemplate a mutual arriving at an understanding or agreement between the accused and some other person to do the acts forbidden.²¹

In Houlden J.A.'s view, who delivered the judgment of the Court, any application of the British Basic Slag definition was precluded under the Combines Investigation Act:

If, however, the parties have acted in the manner described by the English Court of Appeal in British Basic Slag, there is not necessarily an 'arrangement' within the meaning of s.32(1)(c). As has been pointed out, 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.²²

It is most unfortunate, although not unexpected,

that the Ontario Court of Appeal refused to take this opportunity to expand the application of s.32. The judiciary has consistently interpreted the wording of the Combines Investigation Act to narrow the Acts scope and effect.

The economic evidence in R. v. Armco revealed a familiar pattern. The market structure of the metal culvert industry was highly concentrated. The market shares of the leading companies were as follows: Armco 42.3 per cent, Rosco 14.2 per cent, Westeel 12.5 per cent, Robertsteel 7.5 per cent, Pedlar 7.1 per cent, Ontario Culvert 3.5 per cent and six others whose shares ranged from 0.8 per cent to 1.5 per cent.²³ The five largest firms controlled nearly 85 per cent of the relevant market. The small number of major firms facilitated reaching an agreement and co-ordinating activities.

The importance of the industry organization to this conspiracy should also be noted. The formation of the Canadian Metal Pipe Institute was a necessary preliminary step to the making of an agreement between the firms in the industry. The Institute stamped its members' activities with an aura of legality. From the beginning the Institute was nothing more than a cover under which its members operated.

A second precondition to the establishment of an agreement was the adoption of the delivered price scheme which enabled all companies to have uniform prices. All prices were uniform within a delivery zone regardless of the distance of the manufacturer's plant from the point of delivery. By this means transportation cost was effectively eliminated as an element of competition.

D. R. v. Canadian General Electric Company Ltd.²⁴

Canadian General Electric Company Limited (C.G.E.), Westinghouse Canada Ltd., and GTE Sylvania Canada Limited were charged with two counts of monopoly and one of conspiracy under s.32(1)(c) of the Combines Investigation Act. The indictment covered the period January 1, 1959 to August 25, 1967 and related to the business of manufacturing, supplying and selling electric lamps commonly known as electric large lamps.

The defendants were the only manufacturers of large lamps in Canada throughout the relevant period. During the indictment period, the three accused controlled 95% of the Canadian market. All three companies operated on a national basis.

Large lamps were categorized as homogeneous products. There was little or no product differentiation among the large lamps of the three accused. Each defendant had a similar product line. Each accused's product was designed for the same use and had the same physical characteristics.

This industry fits the classic definition of an oligopoly - a highly concentrated industry where a few manufacturers make up the majority of sales in a homogeneous, undifferentiated product.

In the years prior to 1959 the large lamps industry had gone through a period of intense price cutting. In that year CGE, the market leader, attempted to stabilize the industry. It published a large lamp sales plan and price list based on a consignment distribution system with varying discounts in price from list for specific segments of the market.²⁵

The sales plan was circulated well in advance of its April 1, 1959 implementation date. The Crown alleged that the plan was distributed so far in advance of the effective date to signal the two co-accused of a change in market strategy.

CGE readily admitted that this was one of the purposes of the early circulation. To them common sense dictated advance publication so that CGE could ascertain whether or not their competitors would follow. CGE denied that this implied overtones of a conspiracy. Their decision to publish the plan when they did was a deliberate and independent exercise of choice.

Whatever the underlying assumptions of CGE the results were clear. Both Westinghouse and Sylvania published substantially similar sales plans and price lists. Westinghouse had recently completed its own sales plan, which had taken two years to develop, yet discarded it in favour of adopting the CGE plan, even though certain aspects of its plan were superior to those in the CGE plan.

After the CGE sales plan was introduced prices became relatively stable in the industry. The evidence indicated many instances where price changes by one accused were quickly met with a similar reaction by the other two accused. In some situations there was even simultaneous adoption of price changes by the three accused.

Pennell J. refused to draw any conclusions from the simultaneous adoption of the sales plan saying only that

a definitive statement could not be made. He did make note however of the contrast between the stability and co-ordination in prices over the alleged conspiratorial period and the chaotic conditions of the market prior to 1959.²⁶

A new sales plan was announced by CGE at a Canadian Electrical Distributors Association ("CEDA") meeting in April, 1961. This new plan was based on a schedule of net prices, designed to make pricing clearer and simpler for agents to calculate and thus eliminate errors. The new plan attempted to stabilize further the market and to remove the emphasis from prices to sales and services.

By August, 1961 Sylvania and Westinghouse had made the decision to follow the CGE plan. The plan came into effect simultaneously by all accused on September 1, 1961. Although Westinghouse dragged its feet, perhaps to show its independence, by not distributing its plan until November 1, 1961. This could only have been for purposes of show because it followed the CGE plan right from September 1.

Pennell J. placed considerable importance on the enforcement of the plan. He stressed, however, that the existence of an agreement or contract did not depend on whether or not it was enforced. Although in his opinion the

presence of enforcement activities would be relevant to a consideration of a charge of conspiracy.

After the introduction of the 1961 plan, the three defendants insisted on rigid adherence to the sales plan. Price cutting or deviation from the plan was not tolerated. A one cent difference in a price quoted on a contract for 300 lamps prompted a letter from a Westinghouse agent to an executive (at CGE) in which he says: "I would appreciate hearing from you regarding this, as it is a serious breach of the Lamp Sales programme."²⁷

There was also a letter from a sales manager of CGE to the district manager of Westinghouse. The purpose of the letter was to explain a mistake by one of CGE's agents in making a bid. The agent had quoted a cash discount of 5 per cent instead of the normal 2 per cent. To resolve the problem CGE advised Westinghouse that the agent would donate the profit from the sale to charity.

Pennell J. took a predictable reaction to the letter:

It contradicts experience that a man occupying the position of a sales manager of CGE should inform his competitor of a breach of CGE's sales plan by a CGE agent

unless there was an arrangement between the competitors To me this is a document which speaks volumes ... It is no answer to say that the letter was returned. To my mind it would violate reality to treat the incident as a bona fide mistake. Genuine competitors do not make reports of their business transactions, as Mr. Cox did. This was not the conduct of a competitor but of a sales manager who believed that the accused were united in an agreement, express or implied, to act together and pursue a common purpose.²⁸

There were many other documents which indicated adherence with the sales programme. The quality and quantity of the communications between the accused were such that Pennell J. was driven to the conclusion that an agreement existed.

2. Decision of the Ontario High Court of Justice

Against the overwhelming mass of condemning documentary evidence the accused raised in their defence the theory of conscious parallelism. Pennell J. summarized their submission as follows:

... the behaviour under attack represents no more than rational individual decisions in the light of relevant economic facts; that this industry is an oligopoly with a homogeneous product; that natural oligopolistic pricing does not violate the Act; that the structure of the market demanded the published price list of the

competition and thus prices could not be different for a substantial period of time; and that the actions of the accused were based on pure, non-collusive, oligopolistic parallelism of action, a practice described by the term 'conscious parallelism'.²⁹

In Pennell J.'s view the theory of conscious parallelism even if applicable was not determinative of the issue. He was of the opinion

that the theory of oligopoly pricing is irrelevant to the determination of whether or not the accused have offended the prescription on them under the conspiracy section of the Act.³⁰

That section would be offended in Pennell J.'s view if an agreement was found to exist.

As quoted above, His Lordship had little trouble in finding the existence of an agreement. In response to a Sylvania inter-office memorandum concerning an error made in a bid price by an agent Pennell J. expresses his thoughts:

On the other hand, the document is very intelligent if there was an agreement among the accused to abide by their sales plan.³¹

In response to another letter between Sylvania executives Pennell J. commented:

This letter would suggest an obligation accepted by one competitor to correct a situation within its own organization to placate another competitor.³²

Having found that an agreement existed, Mr. Justice Pennell had to determine whether it lessened competition unduly. Pennell J. did indeed find that the competition was lessened unduly and found the three accused guilty of the conspiracy charge.

Pennell J. also had to rule on the Crown's argument that s.33 of the Combines Investigation Act could be the basis of an attack on the marketing practices of an oligopoly. Section 33 of the Combines Investigation Act provides as follows:

33. Every person who is a party or privy to or knowingly assists in, or in the formation of, a merger or monopoly is guilty of an indictable offence and is liable to imprisonment for two years.

Section 33 must be read in conjunction with the definition of s.2 wherein "monopoly" is defined as follows:

"monopoly" means a situation where one or more persons either substantially or completely control throughout Canada or any area thereof the class or species of business in which they are engaged and have operated such business or are likely to operate it to the detriment or against

the interest of the public, whether consumers, producers or others, but a situation shall not be deemed a monopoly within the meaning of this definition by reason only of the exercise of any right or enjoyment of any interest derived under the Patent Act, or any other Act of the Parliament of Canada;

To prove the offence of monopolization it was necessary for the Crown to prove: (1) control on the part of one or more persons and (2) detriment or the likelihood of it.

On the issue of control the Crown submitted that it was not necessary to prove an agreement between the parties but only to prove that a number of persons controlled a large part of the market for a particular commodity. Pennell J. did state that "the accused worked together as a unit through the device of the sales plans, identical price lists and consignment system, the end result being an effective power to control the market."³³ Indicating that an agreement to lessen competition unduly under a conspiracy charge would also establish the control required for a monopoly.

The court made several rulings on the question of public detriment. It rejected the defendants' argument that the detriment must be undue. To find if there was detriment the court ruled it was obliged to weigh the proven benefits against the proven evils to determine if the net result was

detrimental to the public. Most importantly the court ruled that evidence of lessening of competition is not evidence of detriment under a charge of shared monopoly.

Pennell J. reasoned that the requirement of control had been met by Crown tendering evidence showing identical price lists, the consignment system, and identical prices. This same evidence could not then be used as proof of the second requirement of public detriment. The Crown had failed to prove that the anti-competitive practices of the accused had resulted in any public detriment. Pennell J. concluded that the Act should be read so "as to exclude such evidence ... tending to prove formation of a monopoly as irrelevant to prove that the monopoly has operated to the detriment of the public".³⁴

Constrained to hold that the Crown had not proved beyond a reasonable doubt that detriment actually flowed from the operation of the alleged monopoly. Pennell J. acquitted the accused on the monopoly charge. Although it did not obtain a conviction, the Crown showed that s.33 may play a crucial role in curbing the market power of oligopolists.

Many of the factors that were significant to the court in R. v. Armco were present in R. v. Canadian General Electric Ltd. The adoption of an industry plan came about after a detrimental period of intense price-cutting. The court was again impressed with the dramatic change in pricing patterns before and after the adoption of the industry change. The ubiquitous trade association was also present although its role was not as prevalent as in R. v. Armco.

As in R. v. Armco the accused relied on the price dissemination technique. Both in 1959 and 1961 sales plans were published well in advance of the implementation date. The legal analysis of this technique, known as signalling, is deficient. It appears to have contributed to Pennell J.'s conclusion that there was an agreement. It is apparent, however, that the evidence of direct communication among the accused was more important.

E. R. v. Aluminum Company of Canada Ltd.³⁵

1. Summary of Facts

Aluminum Company of Canada Limited ("Alcan"), Reynolds Extrusion Company Limited, Indalex Limited, Keizer Aluminum & Chemicals Canada Limited and Daymond Company

Limited were charged with conspiracy to prevent or lessen unduly competition in the manufacture and sale of extruded aluminum from the period of June 1, 1968 to June 30, 1968. The five accused were the principle suppliers of extruded aluminum in Canada accounting for 86% of the market.

Alcan was the largest producer and was the price leader in the industry. Alcan published a price list for extruded aluminum products which was sent to all of its customers. This list was also used by each of the accused as a guide in their pricing.

Prior to the month of June, 1968 competition in the aluminum extrusion industry was very intense. Each of the accused had excess production capacity and all were trying to attract to themselves the customers of the others. To obtain and retain business there was intensive price cutting and many services were offered at below cost.

On June 3, 1968 the price of aluminum ingot in the United States was increased by 1% per pound. On June 4, 1968 an executive committee meeting was held at Alcan to decide what action should be taken by Alcan in Canada. The Crown contended that on June 5, 1968 as a result of numerous telephone conversations between employees of Alcan with

various employees of the other aluminum extruding companies an agreement was made to increase the price of extrusion products.

The cornerstone of the Crown's case was a type written memorandum sent by Mr. Clement, Manager of the Extrusion Division of Alcan, to Mr. Williamson, an Alcan Vice-President, reading as follows:

I have talked to everybody on basis of 1.2 cents/pound extrusion ingot price increase across the board and carried over into extrusion prices. All have agreed to implement accordingly. Bob Weber in favour of any increase; J. Erickson agrees that there is little point in trying for additional extrusion price increase; W. Stracey feels we are brave to try to increase at this time. John Parsons of Daymond is happy and will go along. Tony Kingsmill will follow same.³⁶

Within a period of two weeks from the initial Alcan price increase the other accused increased their list prices accordingly.

2. The Preliminary Hearing

The purpose of a preliminary hearing is to ascertain whether or not there is sufficient evidence to warrant

the accused being placed on trial. In determining this, a judge who conducts a preliminary hearing is not concerned with whether or not the accused is guilty or not guilty. His function is to ascertain whether or not there is sufficient evidence to induce the belief in the mind of a reasonable person that the accused is probably guilty. Therefore, the criminal standard of proof - beyond a reasonable doubt - has no application at this stage of the proceedings.

In discharging the accused Joncas, J. relied on the decision in The Queen v. Canada Cement LaFarge Ltd., (1973), 12 CPR (2d) 12. From Chamblin, J.'s judgment he zeroed in on the speech by Mr. Henry quoting from it as follows:

Here is an example of a situation that may, with collusion, bring about the same result as if there were collusion. It may be that in such an industry characterized by the oligopoly of which I am speaking, one of the firms will act as a price leader and his pricing policies will tend to be adopted by the others. Conscious parallelism, if conducted without collusion among the members of the industry, is not an offence. This is because if such collusion is not present, there is not the element of agreement for arrangement necessary to constitute the offensive conspiracy. I must emphasize, however, that this is so only in the absence of collusion.³⁷

His Lordship asked whether it was 'possible to conclude from the evidence that there was collusion to the detriment of

the public?' He answered his own question by saying 'that competition between the accused was very strong before, during and after the increases'.

3. Decision of the Quebec Superior Court

Even though the accused were discharged at the preliminary hearing the Attorney General proceeded by way of preferred indictment and a trial on the merits was held in the fall of 1976. Mr. Justice Rothman acquitted all five accused on the single count of conspiracy. The Crown was not successful in proving beyond a reasonable doubt that there was a conspiracy. Despite the fact that conscious parallelism had been the basis of discharge at the preliminary hearing Rothman J. made no mention of it in his reasons for judgment.

F. The Queen v. Atlantic Sugar Refineries Co. Ltd.³⁸

In October, 1974 three sugar refineries companies, Atlantic Sugar Refineries Co. Ltd., Redpath Industries Ltd., and St. Lawrence Sugar Ltd., were indicted on one count of conspiring to enhance unreasonably the price of raw and refined sugar contrary to Section 32(1)(b) of the Combines Investigation Act and one count of conspiring to prevent or

lessen competition unduly in the production, manufacture and sale of raw or refined sugar. The indictment covered the period between January 1, 1960 and May 31, 1973. The charge under Section 32(1)(c) is not relevant to this discussion and attention will be focused on the second count that of agreeing to lessen competition unduly.

In December, 1975, the accused were acquitted on both counts by Mr. Justice MacKay of the Quebec Superior Court. In March, 1978, the Quebec Court of Appeal convicted the accused on the conspiracy charge but upheld the acquittal under Section 32(1)(d). On appeal by the accused to the Supreme Court of Canada the judgment of the trial judge was restored.

1. Summary of the Facts

Sugar is a homogeneous product. There is neither an observable or real difference between the quality of the product of any two refineries. In the words of the eminent cordon bleu Madame Jehanne Benoit who testified at trial, "du sucre c'est du sucre".³⁹

Production of refined sugar in Canada is a very highly concentrated industry. During the Second World War

the accused were the only sugar refineries in Eastern Canada. By virtue of war-time controls, quotas for the production of refined sugar in Eastern Canada had been allotted to the accused in the following proportions:

Atlantic	35.5%
Redpath	43%
St. Lawrence	21.5% ⁴⁰

After the controls were lifted the accused were able to maintain their market shares. Even though other companies entered the market the three accused maintained their relative market shares and in 1973 still controlled 74% of the market.

To prove the guilt of the accused on the charge of conspiracy to lessen competition unduly the Crown advanced four propositions:

1. That the accused entered into a conspiracy to keep raw sugar from reaching Canadian wineries and candy manufacturers by limiting the amount of sugar which India would export to Canada. The Crown alleged that the accused threatened to stop buying Indian sugar if Indian producers sold direct to Canadian users of sugar.
2. That in 1964, when a new sugar refinery known as Cartier Refined Sugars Ltd. was being organized in Eastern Canada, South African sugar producers were advised through brokers that if raw sugar was sup-

plied to Cartier the accused refineries would make no further purchases from any of them who sold to Cartier. The Crown contended that this was done to put Cartier out of business.

3. That in 1960, Redpath adopted the base stock system for the pricing of refined sugar. This was derived from matching the refined sold with replacement cost of a similar quantity of raw sugar on the day of sale, plus freight, duty, the preferential premium of 75 per hundred weight and a refiner's margin. Freight charges from the refinery nearest the customer to the latter's plant or warehouse was then added. The price list based on this formula was invariably simultaneously and exactly followed item by item by the other two accused although actual freight cost differed for each refiner.
4. That the accused maintain a traditional market share and refused to compete for a larger share although conditions in the industry existed which ought to have encouraged such an effort.⁴¹

To support its allegation of price fixing the Crown relied most strongly on the adoption by the accused of a unique system of pricing the refined sugar - the base stock system - which was based on raw sugar prices and the adoption of identical price lists based on this pricing system.

Redpath, the acknowledged price leader in the industry, developed the base stock pricing system. After adopting the system, Redpath prepared and published price lists of refined sugar which followed the up and down movements of the London daily price. Each of Redpath's competitors followed the Redpath price lists which were posted each day in the lobby of Redpath's offices and communicated to its

competitors by sugar brokers, customers or telegraph company employees. Whenever they learn of changes in Redpath's prices competitors immediately issued new price lists of their own.

In time, Redpath's competitors were able to discover Redpath's pricing formula from available data but instead of making their own calculations they simply followed Redpath's published price list. There was evidence that notwithstanding the identity of the price lists, actual prices charged by the various competitors differed appreciably. There was also a notable absence of any evidence of significant communication among the accused.

The defence rebutted the Crown's argument by arguing that identical price lists are not necessarily evidence of collusion to fix prices. The accused said they may be, in this instance, merely an example of price leadership without prior arrangement.

The fourth proposition of the Crown was that the accused had a market sharing arrangement. After a disastrous price war which was initiated by Redpath in 1958 the accused settled down to a policy of maintaining their traditional market shares. The Crown alleged that the accused

could have readily obtained a greater share of the market by giving greater discounts to customers, more vigorous advertising, better packaging, and using maximum plant capacity.⁴²

2. Decision of the Quebec Superior Court

The sales managers for Atlantic and St. Lawrence testified that instead of making their own price calculations they simply followed Redpath's price lists which were posted each day in the lobby of Redpath's offices. MacKay J. stated the issue that confronted him as follows:

The question then is whether what these sales managers said was true or whether the uniform price lists resulted from an agreement between the accused.⁴³

This highlights the problem with Section 32(1)(c) of the Combines Investigation Act. This section has been drafted in terms of means - the means by which markets become non-competitive. It is not concerned with the ends that competition law is supposed to obtain. Therefore to see if there is an offence it is necessary for the Court to find an agreement. No matter how non-competitive the industry if there is no agreement there can be no conviction.

Mackay J. recognized that price conformity and identical price lists were characteristic of an oligopoly industry and could be obtained either by members of the industry conspiring to fix prices or by the members of the industry making a conscious effort to parallel the prices of the leader. If the prices were achieved by agreement this would be illegal. On the other hand:

If conformity was the result of price leadership by the industry leader in a conscious effort by other members of the industry to follow the leader, to parallel its prices, then, although the result might be an undue prevention of competition it would not offend the [Combines Investigation] Act because there would be no agreement or arrangement direct or tacit.⁴⁴

Mackay J. readily accepted the evidence provided by Dr. Donald E. Armstrong as to the economics that apply in an oligopoly market situation:

In an oligopolistic situation where the product is homogeneous - as is sugar - the price of the product must inevitably be the same, for if one member priced his product higher than the others he would have no sales. If he posted a lower price he would soon be inundated with buyers, would realize his price was too low, perhaps unprofitable, and raise it. Thus by natural osmosis the price of a homogeneous product tends to reach the same level.⁴⁵

Mackay J. was of the opinion "that while identical price lists might give rise to an inference of an arrangement to fix prices such inference is unwarranted where it is shown that conformity of prices was not arrived at as a result of collusion."⁴⁶ Therefore, Mackay J. rejected the Crown's argument that an agreement existed between the accused.

The Crown's proposition in relation to market shares was also rejected by Mackay J. Although in this case his lordship did find an agreement to exist. After describing the disastrous results of the price war Mackay J. commented:

Thereafter, each of the accused settled down to a policy of maintaining their traditional market shares. Although each stressed that this was the result of an independent decision, one would be ingenuous not to be aware that there was and continues to be a tacit agreement to this effect.⁴⁷

Even though he found that an agreement to maintain market shares existed Mackay J. still acquitted the accused because in his opinion "it had not been shown that this agreement was arrived at with the intention of unduly preventing or lessening competition".⁴⁸ Considering that the three accused controlled 75% of the market it is difficult to accept Mackay

J.'s conclusion that the agreement did not unduly lessen competition.

What was not discussed in the judgment was the relationship between the Crown's proposition of price fixing and the proposition relating to market share. In an oligopoly market dealing with a homogeneous product the only effective means of competition is price. If the firms in the industry, independently or in connection with an agreement, decide not to compete on price there is no competition at all. If the firms are not competing there is no reason why one would gain or lose market share to the other. The result that would be expected was as happened here that there would be no change in market share. The traditional market shares of each firm would remain the same.

The argument also works in reverse. If the firms have come to an agreement to maintain market shares, as MacKay J. found then to comply with the terms of that agreement the firms cannot compete. If they did not compete such as on price it would cause market share to be taken away from one of its competitors. Clearly one follows the other and they cannot be separated from an analysis of the situation.

3. Decision of the Quebec Court of Appeal

On appeal the accused were found guilty of conspiring to lessen competition unduly by the unanimous decision of the Quebec Court of Appeal. Mayrand J.A. writing on behalf of the court did not deal with the issue of conscious parallelism at all. Rather he focused on the tacit agreement that was found to exist with respect to the maintenance of market shares.

The Court of Appeal ruled that the trial judge had mis-directed himself on the law. It went on to review the facts found by the trial judge to determine whether the accused ought to have been convicted if the correct law had been applied. With respect to the existence of an agreement Mayrand J.A. accepted the trial judge finding that a tacit agreement was an agreement for the purposes of the Act. Mayrand J.A. found sufficient findings of fact in MacKay J.'s judgment to support a finding that such an agreement in the circumstances of this case would be to lessen competition unduly. Mayrand J.A. expressly focused on the trial judge's conclusion that:

Where the accused at the beginning of the period controlled 99.8% of the Eastern Canadian market, an agreement to lessen

competition would be tantamount to extinction and so would be undue.⁴⁹

It was the opinion of the Court of Appeal was that the elements of the offence under Section 32(1)(c) were present and the accused were therefore convicted.

4. Decision of the Supreme Court of Canada

The Supreme Court of Canada, Estey J. dissenting allowed the appeal and restored the trial court's acquittal of the accused. Pigeon J. wrote the reasons for judgment on behalf of the majority. Unfortunately his reasons for judgment are unclear and had been subjected to much comment.⁵⁰ After reviewing the facts Pigeon J. stated that "A conspiracy requires agreement" and asked if "a finding of 'tacit agreement' [was] sufficient?"⁵¹ He continued:

It must be accepted that a conspiracy may be effected in any way and may be established by inference. In dealing with a 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 Redpath's list price the moment a new price was posted in its lobby, they also in time were able to discover Redpath'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 Redpath's formula but merely 'conscious parallelism'. Could this not be just as accurately called 'parallelism by tacit agreement'?⁵²

Pigeon J. appears to be saying nothing more than conspiracy cannot exist without an agreement. For some unarticulated reason he wants to equate conscious parallelism with tacit agreement. Indicating that a tacit agreement is something less than a full fledged agreement which would be included under Section 32(1)(c).

Pigeon J., like the trial judge, could not see the relationship between price fixing and market shares. He said:

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 ...

The situation was different in respect of the adoption by Redpath 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.⁵³

By definition in an oligopoly market dealing with a homogeneous product any member firm that significantly reduces prices will increase its market share and thus makes its actions known to the other members.

The passage quoted is troubling for another reason. Pigeon J. seems to equate the finding of a conspiracy under Section 32(1)(c) with that of making a contract. He says that the publication of the price list could be considered the making of an offer. This was an element lacking in his opinion with regards to the argument in respect of the market shares policy.

Pigeon J. reiterates this notion of an offer in the next paragraph of his reasons for judgment.

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 ...⁵⁴

This approach by the Supreme Court wipes out any possibility of controlling conscious parallelism under Section 32(1)(c). In none of the other preceding conspiracy cases did the

Courts place the burden on the Crown of proving an offer and an acceptance of an agreement. In a situation of conscious parallelism this would be impossible.

Pigeon J. then returns to the maintenance of market share charge:

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 the author of Redpath's marketing policy was conscious that its 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.⁵⁵

Pigeon J. seems to be re-interpreting the finding of an agreement between the accused with respect to the market share arrangement and is concluding that if the prices could be equal as a result of conscious parallelism so could their market shares. This view is strengthened by Pigeon J.'s comments in the next paragraph that "the trial judge's right in coming to the conclusion that what he called the tacit agreement to market shares"⁵⁶ Pigeon J. is indicating that he would call the behavior of the accused something different from that what the learned trial judge called it. His com-

plete reasons for judgment indicate that he thinks the trial judge mistakenly called a tacit agreement what in reality was conscious parallelism.

Pigeon J. also adopted the view that the purpose of competition policy was not to force firms to compete. He says:

None of the refiners was obliged to compete more strongly than it felt desirable in its own interest. Each refiner was entitled to decide not to seek to increase its market share as long as this was not done by collusion.⁵⁷

Again the point is made that there can be no violation of Section 32(1)(c) without proof of collusion.

G. Summary

The few Canadian cases on conscious parallelism have revealed that the doctrine has been applied to two very different problems. The first has been with the evidential problem of proving a conspiracy or agreement where only circumstantial evidence and not direct evidence can be offered. The second is the behavioral problem of oligopolists acting independently but non-competitively.

The first problem has no real connection with conscious parallelism. It was adopted by the defendants in the cases like R. v. Canadian General Electric and R. v. Armco to confuse the issue and to legitimize their behaviour. In both of those cases the Crown introduced more than sufficient evidence to establish beyond a reasonable doubt that an agreement existed. On that basis the trial judge had no choice but to convict the accused.

The second problem is the true application of the doctrine of conscious parallelism. In complete absence of any evidence of an agreement firms in an oligopoly may still be acting non-competitively. Similar behaviour by firms in such an industry raises the inference of collusion but in the absence of evidence of an agreement that inference may be rebutted by applying conscious parallelism.

This was the situation in Atlantic Sugar. There was no evidence of communication between the accused and the subject of price or for that matter on the subject of market shares. The case was deficient on analyzing the signalling aspect of Redpath's posting its prices in its lobby. Nevertheless the conclusion that can be drawn from that case is that a true conscious parallelism situation is not covered by Canada's current competition law. If the problem of oligopo-

ly power and conscious parallelism is to be resolved it will have to be resolved with new legislation.

Although the Combines Investigation Act has prevented the emergence of classic monopolies, it has proven ineffective against oligopolies adept at keeping their parallel business behaviour from becoming a traditional conspiracy in the eyes of the courts. As a result it has become increasingly untenable that such an antiquated law should be allowed to regulate parallel business activity that has such a direct and harmful effect upon the national economy.

III. The Development of the Doctrine of Conscious Parallelism in the United States

In the United States the doctrine of conscious parallelism has developed under Section I of the Sherman Act which reads as follows:

Section I: Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade ... is hereby declared to be illegal.⁵⁸

Section I of the Sherman Act and Section 32 of the Combines Investigation Act are similar in that they both prohibit contracts, combinations, or conspiracies in restraint of trade. Under both statutes the prohibited act is the conspiracy or the agreement.

The American courts have had the opportunity to deal with a considerably greater number of conspiracy cases than their Canadian counterparts. As a result they have faced a far wider range of the facets of the conscious parallelism problem.

A. Inter-State Circuit Inc. v. United States⁵⁹

This case, decided by the U.S. Supreme Court in

1939, is one of the earliest cases to use the conspiracy provisions of the Sherman Act to attack a case of conscious parallelism. The Defendant Inter-State was the owner of virtually all the first run motion picture theatres in six Texas cities. It instigated an agreement by a form letter sent to each of the eight major motion picture distributors. The letter proposed a plan to market films which if implemented, would result in a series of contracts between Inter-State and each distributor. Each contract would provide that in licencing Class A pictures to second run theatres, the distributor would require those theatres to charge a minimum admission of 25 cents and not to show such pictures as part of a double-feature program. This proposal was accompanied by a threat from Inter-State that it would refuse to place the distributors' films in its first run theatres if an agreement could not be reached. Following conferences between representatives of Inter-State and the distributors, Inter-State's demands were met and each distributor entered into a contract with Inter-State.

Not surprisingly, the trial court found that the distributors had conspired with Inter-State, however the trial court went further and held that the distributors had also conspired among themselves in making these contracts. The principal question on appeal to the Supreme Court was the

correctness of the finding of a conspiracy existing among the distributor defendants. The Supreme Court affirmed the trial court decision on this point saying:

Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which if carried out, is restraint of inter-state commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act.⁶⁰

The Supreme Court seized upon the letter, the uniformity of behaviour, and the failure of the defendants to produce witnesses to explain their behaviour as evidence of an agreement and hence conspiracy. The Supreme Court was clearly of the opinion that an agreement need not be shown to support a conviction for conspiracy:

While the district court's finding of an agreement of the distributors among themselves is supported by the evidence, we think that in the circumstances of this case such agreement for the imposition of restrictions upon subsequent run exhibitors was not a prerequisite to an unlawful conspiracy. It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it. Each distributor was advised that the others were asked to participate; each knew that co-operation was essential to successful operation of the plan. They knew that the plan, if carried out, would result in a restraint of commerce, which, we will presently point out, was unreasonable within the

meaning of the Sherman Act, and knowing it, all participated in the plan. The evidence is persuasive that each distributor early became aware that the others had joined.⁶¹

B. United States v. Masonite Corp.⁶²

This case was decided by the Supreme Court in 1942 and re-affirmed the decision in Inter-State Circuit Inc. Under substantially similar circumstances, parallel business behaviour in the hardboard industry was held to constitute circumstantial evidence from which an inference of collaboration could be drawn.

Masonite Corporation had invited each of its competitors to become del credere agents for its products. Each competitor entered into a separate agreement with Masonite. Each firm knew that the others had signed an identical agreement. The Supreme Court held that each of the agents had conspired among themselves and individually with Masonite to maintain a monopolized trade within the meaning of the Sherman Act.

In his review of the Inter-State and Masonite cases, J.P. Dunn suggests that both cases involved in their facts a "link", meaning that "the parties to the parallel

behaviour were related through their common ties."⁶³ Dunn argues that the link in these cases was "an established conspiracy and the court held that by joining in the scheme and adhering to its principles by parallel behaviour the joiners became conspirators."⁶⁴ For his part Michael Conant says that these two cases represented a fundamental shift in the thinking of the Supreme Court and "initiated the trend away from stress upon the agreement aspect of Section 1 of the Sherman Act ... to the illegal objective of Section 1."⁶⁵

C. American Tobacco Co. v. United States⁶⁶

The three largest tobacco processors in the United States, producers of from 68 - 73% of all cigarettes sold in the United States, were charged with conspiracy to monopolize and monopolization. Evidence was presented to the jury that the defendants refused to bid in established or in new tobacco markets unless the other defendants were also present. Buying agents for each defendant were instructed as to top prices to pay and percentages of total offerings to bid for. Distinctive grades of tobacco were established for which only one company would bid. Thus by a program of entire market control, consciously followed by each major firm, with awareness as to the similar policies of the other major firms, competition was eliminated. There was no evidence of an

express agreement and it was thus from the market performance and resulting market conditions that the conspiracy and monopolization were inferred.

In affirming the conviction of the accused the Supreme Court abandoned the traditional requirement of an agreement, actual or tacit, in which the sellers joined and adopted a broader concertive action doctrine. The Court said:

It is not the form of the combination or the particular means used but the result to be achieved that the statute condemns ... no formal agreement is necessary to constitute an unlawful conspiracy. Often crimes are a matter of inference deduced from the acts of the person accused and done in pursuance of a criminal purpose.⁶⁷

D. Bigelow v. RKO Radio Pictures, Inc.⁶⁸

The suit alleged conspiracy among the major motion picture distributors to maintain the "Chicago system of release". Under this distribution system, each theatre was classified as to how many weeks on first runs it would be allowed to licence and screen films. The contracts between the distributors and the Chicago exhibitors uniformly contained schedules of minimum admission prices on the basis of

playing position assigned. The facts disclosed a rigid system of market regimentation.

Relying upon the Inter-State and Masonite cases, the Court of Appeals found that the verdict of the jury for the Plaintiff at trial was supported by the evidence. The Court said:

True no specific agreement to enter into such conspiracy on the part of the Defendants was proven, but that was not necessary. Knowing participation by competitors without previous agreement in a plan, the necessary consequence of which, if carried out, is unreasonable restraint of inter-state commerce, is sufficient to establish an unlawful conspiracy.⁶⁹

However the Court of Appeals reversed the trial court's judgment on the basis that the plaintiff had not proved any damage resulting from the unlawful conspiracy. On appeal the Supreme Court held the proof of damages sufficient, reversed the Court of Appeals' judgment and affirmed the judgment of the District Court.

E. William Goldman Theatres, Inc. v. Loew's, Inc.⁷⁰

The plaintiff had acquired a movie theatre in

Pennsylvania and had requested a licence from the major distributors who had licenced films to the theatre before the purchase. In spite of an offer to pay higher licence fees than rival theatre operators were paying, the distributors refused first run films to the plaintiff.

At trial the court was of the view that refusals by the distributors to distribute first run films to the plaintiff did not violate the anti-monopoly provisions of the Sherman Act. Accordingly, the trial court held that the behaviour did not unreasonably restrain trade and that a conspiracy had not been established.

The Court of Appeals relying on the rule in the Inter-State Circuit case, reversed the lower court and held that the evidence established a monopolization resulting from the defendants' uniform denial of first run films to the plaintiff. Noting the Defendants' failure to present testimony that no agreement existed among them for concerted action, the Court also held that a conspiracy could be inferred from the evidence. The Court of Appeals said:

Plaintiff's evidence shows that there was concertive action in what has been done and that this concert could not possibly be sheer coincidence. We think that there must have been some form of informal understanding.⁷¹

The Court continued:

Uniform participation by competitors in a particular system of doing business where each is aware of the other's activities, the affect of which is the restraint of inter-state commerce, is sufficient to establish an unlawful conspiracy under the statutes before us.⁷²

F. Ball v. Paramount Pictures, Inc.⁷³

This case was similar in its facts to Goldman v. Loew's. The Plaintiff had purchased a theatre in Amridge, Pennsylvania, and requested the former distributors to licence him. The distributors refused. After mentioning the defendant's past "proclivity to unlawful conduct" the Appeals Court held that there did exist an inference of conspiracy among the distributors in their uniform denial of first run films to the plaintiff. The Court of Appeals came to this finding by saying that "conspiracy may be inferred when concerted action cannot possibly be sheer coincidence."⁷⁴ It is clear that the Court was of the opinion that concerted action was sufficient to uphold a finding of a conspiracy.

G. United States v. Paramount Pictures, Inc.⁷⁵

In this case eight motion picture producers and

distributors were charged with monopolization and with conspiracy to monopolize trade in the distribution and exhibition of motion pictures. The defendants had engaged in a number of parallel business practices but the conspiracy centred on their price-fixing behaviour and on their imposition of unreasonable clearances between first and subsequent runs in their licencing contracts.

Runs are successive exhibitions of a feature in a given area, first run being the first exhibition in that area, second run being the next subsequent and so on. A clearance is the period of time usually stipulated in the licence contract which must elapse between runs of the same feature within a particular area or specified theatres.

The trial court inferred a conspiracy from the pattern of price-fixing disclosed in the evidence which finding was subsequently upheld on appeal, by the Supreme Court. The Supreme Court said:

It is not necessary to find an express agreement in order to find a conspiracy. It is enough that a concertive action is contemplated and that the defendants conformed to the arrangement.⁷⁶

H. Milgram v. Loew's, Inc.⁷⁷

In 1949, the plaintiff built a drive-in theatre on the outskirts of Allentown, Pennsylvania. Even though first run pictures up to that time had only been exhibited in downtown conventional-type theatres, the plaintiff requested the eight major distributors to licence first run films to him. Upon their uniform refusal, he filed a suit under the Sherman Act. The plaintiff alleged that the defendants acted in concert to unreasonably restrain commerce by refusing to licence any feature pictures to him on first runs as part of a plan to relegate drive-ins to a second run status. The evidence consisted entirely of consciously parallel action.

In the face of the evidence of parallel behaviour, the defendants contended that each had acted in ignorance of the other. After reviewing the earlier cases the trial court concluded:

In practical effect, consciously parallel business practices have taken the place of the concept of meeting of the minds which some of the earlier cases emphasized. Present concertive action, further proof of actual agreement among the Defendants is unnecessary, and it then becomes the duty of the Court to evaluate all the evidence in a setting of the case at hand and to determine whether a finding of conspiracy to violate the act is warranted.⁷⁸

The trial judge seems to have adopted in effect, a per se rule that conscious parallelism in and of itself is sufficient to support a conviction. On appeal the third circuit affirmed the judgment of the trial judge. The Court of Appeal did however retreat somewhat from the trial judge's statement of the law. The Appeals Court said that there was sufficient evidence to sustain a conclusion of joint action on the part of the distributors. Then the Court added this significant sentence:

This does not mean, however, that in every case mere consciously parallel business practices are sufficient evidence, in themselves from which a court may infer concerted action.⁷⁹

The Court of Appeals appears to be holding only that conscious parallelism may serve as the basis for inference of agreement.

I. Pevely Dairy Co. v. United States⁸⁰

The defendants in this action were the two largest distributors of milk in the St. Louis area, controlling 63% of the market. The suit alleged that the two companies had conspired to fix wholesale and retail prices on Grade A regular milk.

The Court of Appeals held that though the indictments officially charged an offence under the Sherman Act the trial court erred in its evaluation of the evidence of agreement and concerted action. No evidence had been offered at trial to show any agreement, tacit or express. In fact, the Defendant introduced evidence to show that the reason for the consciously parallel behaviour was based purely on economic factors. The standard product, the evidence as to independent analysis of cost, testimony by expert economists that the market behaviour can be explained in terms of normal competitive practices and the lack of direct evidence of an agreement were all factors that compelled the Appeals Court to conclude that no agreement could be inferred.

It is conceded that there was no direct proof of any agreement between the appellants for the fixing of prices. In fact, the evidence is undisputed that every price change was made, not as the result of any understanding or agreement, but because of economic factors, and the same economic factors prompting a change by one of the appellants were equally applicable to the others.⁸¹

The Appeals Court was clearly of the opinion that conscious parallelism alone was not equivalent to an agreement and was not sufficient for conviction under Section 1 of the Sherman Act.

J. Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.⁸²

In 1949 the plaintiff built the Crest Theatre, a movie theatre, in a shopping centre six miles from downtown Baltimore. Although the only theatres showing first run films in the competitive area were in downtown Baltimore, the plaintiff demanded first run films from the eight major distributors: Loew's Inc., RKO Radio Pictures, Inc., Paramount Film Distributing Corp., Warner Bros. Pictures Distributing Corp., Universal Film Exchange, Inc., 20th Century-Fox Film Corp., United Artists Corp. and Columbia Pictures Corp. Upon their uniform refusal to licence it first run films the plaintiff filed a suit for an injunction and damages alleging conspiracy and violation of the Sherman Act.

At trial the plaintiff presented evidence of offers to licence first run films at higher rentals than bid by the downtown theatres, but the defendants attacked these as not being made in good faith. The trial court found for the distributors. The Court of Appeals affirmed the judgment for the defendants stating that the evidence could support the inference of both of the opposing parties. The plaintiff appealed contending that the evidence as to conscious paral-

lelism required the trial judge to direct the verdict for him.

In affirming the lower court decisions, the Supreme Court delimited what inferences could be made from consciously parallel action as follows:

The crucial question is whether Respondent's conduct toward Petitioner stemmed from independent decision or from agreement, tacit or express. To be sure, business behaviour is admissible circumstantial evidence from which the fact finder may infer agreement ... but this Court has never held that proof of parallel business behaviour conclusively establishes agreement or, phrased differently, that such behaviour itself constitutes a Sherman Act offence. Circumstantial evidence of consciously parallel behaviour may have made heavy in-roads into the traditional judicial attitude toward conspiracy; but conscious parallelism has not yet read conspiracy out of the Sherman Act entirely.⁸³

The Supreme Court went on to say that the two lower courts had been right in holding that the evidence of conscious parallelism was not sufficient to entitle the Plaintiff to a directed verdict. It said that conscious parallelism was not in itself enough to establish the existence of an agreement.

The significance of the Supreme Courts' decision has been described as follows:

It is clear that the attempt to extend the meaning of conspiracy to cover parallel courses of action - an attempt intended to enable anti-trust to be brought to bear more easily in oligopoly situations - has failed.⁸⁴

K. Summary

In Theatre Enterprises, Inc. the Supreme Court laid down a uniform rule that has been followed consistently thereafter in regard to conscious parallelism considered in relation to Section 1 of the Sherman Act. Since that decision the Supreme Court has not been prepared to reconsider its position.

The American law therefore appears to be well established that it is still necessary in order to establish a violation of Section 1 to show an agreement of some nature, either tacit or express. Consciously parallel action when proved is only one factor to be considered with all other evidence in arriving at a conclusion as to whether or not there has been a conclusive agreement by particular defendants. Conscious parallelism does not of itself amount to or dispense with the finding of an agreement. The United States

Supreme Court has never held proof of parallel business behaviour alone to be sufficient evidence to establish the finding of an agreement.

IV. Proposals for Reform

Although there are many differing views on the issue of conscious parallelism, there is a consensus that the effects of conscious parallelism in an oligopolistic industry are sufficiently anti-competitive to warrant some type of remedial action. The need to prohibit oligopolists from achieving anti-competitive results through the use of parallel business practices and policies is generally accepted. What is not accepted is the method by which this problem should be remedied.

A. Professor Turner's Proposal⁸⁵

Professor Turner argues that if monopoly status and monopoly pricing are not unlawful per se, then neither should oligopoly pricing be unlawful per se absent a finding of an agreement.⁸⁶ He admits that there have been instances in which behaviour, lawfully engaged in by competitive firms, has been forbidden to monopolists or the leading firms in a highly concentrated industry and he concedes "that consciously parallel decisions can reflect non-competitive behaviour without actual agreement having taken place".⁸⁷

Turner, nevertheless, maintains that to prohibit oligopolists from taking into account probable reactions and decisions of competitors is to require them to act in an economically irrational manner. Examining the behaviour exhibited in a competitive industry, Turner concludes that it seems questionable to characterize the behaviour of oligopolists in setting their prices as unlawful when the behaviour in essence is identical to that of sellers in a competitive market. He further claims that the only effective remedy available under Section 1 of the Sherman Act would be a "public utility type regulation" which in his opinion the courts would be ill-equipped to administer.⁸⁸

Turner, however, does recognize that the problem of conscious parallelism must be dealt with in some manner. He suggests that the best method of eliminating the effects of uniform activity among oligopolists is to charge those involved with an unlawful attempt to monopolize. Thus he argues that if it is appropriate to make conduct, having relatively minor anti-competitive effects, the basis for illegality in a single firm monopoly case, it is no large step to extend that principle to a shared monopoly. Turner maintains that an attack on shared monopoly power is an important aspect of every effective competitive policy.

As a remedy, Turner favors divestiture. He starts from the fundamental premise that competitive markets will perform better than their monopolistic counterparts. He favours divestiture because it is a structural remedy and is thus better suited to the elimination of concentration, a structural condition that he believes is an approximate cause of conscious parallelism. To this end he has proposed a new statute, which would limit unreasonable market power by reforming market structure by reducing concentration through dissolution and divestiture, especially when it appears that injunctive relief would not adequately dissipate the market power within a reasonable time.⁸⁹

In opposing the application of Section 1 to conscious parallelism on the basis that the participants are merely acting in an economically rational manner, Turner is overlooking the harmful economic consequences of such activity. Strict observance of economic rationality by those who collectively wield monopoly market power is certain to lead to anti-competitive results.

B. Professor Posner's Proposal⁹⁰

Professor Posner is of the opposite view, believing that conscious parallelism can be controlled under the exist-

ing provisions of Section 1 of the Sherman Act. He does not feel that a violation of Section 1 of the Sherman Act requires a traditional conspiracy to restrain trade. Rather, he argues that if a particular industry demonstrates characteristics that encourage conscious parallelism, and if certain economic tests indicate that the market is indeed anti-competitive because price levels are substantially above a competitive level, then the uniform activity of the participants should constitute a violation of Section 1. Posner claims that "businessmen should have no difficulty ... in determining when they are behaving non-competitively because tacit collusion is not an unconscious state."⁹¹

Posner suggests twelve market conditions conducive to tacit collusion (which include fixed market shares, exchanges of price information, price discrimination, resale price maintenance, demand elasticity, high level of profits and a system of basing point pricing) and twelve economic indicators which he believes constitute evidence of actual collusive behaviour (which include level of concentration, inelastic demand, entry barriers, product standardization, importance of price competition and numerous customers).

According to his approach a violation of Section 1 would result upon a sufficient showing of the existence of

such conditions and indicators. Posner says that the "major implication of viewing non-competitive pricing by oligopolists as a form of collusion is that Section 1 of the Sherman Act emerges as prima facie the appropriate remedy".⁹²

Posner takes exception with Turner's assertion that conscious parallelism is economically rational among oligopolists. Posner claims that it is in fact quite rational for an oligopolist to refuse to collude and to expand output until the return to investors is roughly equal to what they could otherwise earn. He further maintains that it is not irrational for such a firm to set a price at approximate marginal cost rather than one that is artificially high. He does concur with Turner that "public utility type" regulation is the only effective means of remedying the problem. Unlike Turner, however, he feels that the elimination of concerted restraints of trade justifies the administrative difficulties involved.

Posner acknowledges that his proposal contains one major shortcoming that is the inherent difficulty of proving collusive behaviour by the complex, technical, and often inconclusive character of economic evidence. Adoption of his proposal would require a thorough examination of each of the market conditions and economic indicators that he suggests.

Considerable litigation could be expected to develop over each of his suggested criteria.

C. Professor Simonetti's Proposal⁹³

Professor Simonetti bases his proposal on the premise that oligopolists whose conduct produces the same or similar anti-competitive effects on the market as the activities of a monopolist should be treated as an actual monopolist.⁹⁴ He is of the view that parallel behaviour of several competing firms often has the same harmful effects on the market as the exercise of monopoly power by a single enterprise. Furthermore, Simonetti claims, just as no monopolist unconsciously monopolizes, no oligopolist inadvertently engages in conscious parallelism. Thus he says business practices that are forbidden to a monopolist because of their size can and should be forbidden to oligopolists whose collective market power wielded through conscious parallelism, approaches that of a single firm monopolist.

Simonetti argues that monopoly law should be extended to apply to any group of firms that through the use of any form of concerted action, including conscious parallelism, has monopolistic effects on the market.⁹⁵ He even goes so far as to suggest that the existence of conscious paral-

parallelism among the largest firms in a highly concentrated industry should constitute prime facie evidence of a conspiracy to monopolize, which would bring it in violation of the Sherman Act. Section 2 is concerned primarily with offences based upon the size and status of a defendant with little or no regard as to its behaviour. A charge under Section 1 must of course be supported by evidence of a conspiracy to commit the act because it is the conspiracy which is in fact the offence. A charge of conspiracy to monopolize under section 2, however, does not depend quite so heavily upon proof of an actual conspiracy because of the section's primary emphasis on size and status.

Simonetti suggests that the following factors be considered in establishing evidence of conscious parallelism which if engaged in by oligopolists, would form prima facie evidence of the conspiracy to monopolize:

- (1) The absence of economic pressures compelling the firms to behave uniformly;
- (2) A history of price leadership by the largest firm;
- (3) The frequent exchange of price information;
- (4) The simultaneous or near simultaneous announcement of pricing increases;
- (5) The improbability of several firms all reaching one of many possible decisions in response to the same economic stimulus;
- (6) Major changes in business methods being undertaken simultaneously;

- (7) Uniform action inconsistent with individual self-interest; and
- (8) The application of the concept of res ipsa loquitur in cases where the activities of the defendant parallel each other for an extended period of time for no apparent reason.⁹⁶

Simonetti suggests that the most appropriate remedy for a conspiracy to monopolize case is a properly focused and administered injunction. He feels that through their use the practices that are found to constitute conscious parallelism can be eliminated. He suggests that trade associations can be disbanded or severely limited in their function, advanced price announcements prohibited, the exchange of price information prohibited and inter-corporate meetings made public.

Simonetti himself recognizes the weakness of this remedy leaving the market structure unchanged, encouraging a reoccurrence of the problem. He still maintains however that injunctive relief aimed at the wrongful conduct is more effective than divestiture aimed at market structure.

D. Professors Stanbury and Reschenthaler's Proposal⁹⁷

In the Canadian context Professors Stanbury and Reschenthaler have proposed that Canada adopt legislation which would make reviewable those cases of persistent con-

scious parallelism which are accompanied by one or more specified "plus factors". They adopt the position that while not much can be done about conscious parallelism, something can be done to eliminate the factors which promote it.

The factors they propose would include various kinds of economic conduct which have the effect of facilitating close co-ordination of behaviour in an oligopoly market. The two authors compiled the following list of "plus" factors from a review of the relevant Canadian and American cases:

Conduct Factors:

- contrived or exaggerated product standardization
- exchange of detailed price in transaction data either ex-ante or ex-post
- use of uniform basing points and delivered pricing schemes
- uniform refusal to deal
- uniform exclusive territorial agreements
- uniform licencing arrangements
- parallel buying activity to collectively support the price of a substitute or an input used by competitors
- price leadership
- any conduct individually irrational but collectively profit-maximizing
- exhortation to maintain or increase prices
- advance notification of price changes without legitimate business justification

Performance Factors:

- persistent excess profits by the group
- persistent excess capacity
- submission of identical tender on non-standard items or on large orders of standard items
- systematic price discrimination
- long-term fixed market shares
- perverse price movements⁹⁸

Stanbury and Reschenthaler argue that the adoption of these "plus factors" would result in greater variability in prices and, on average, lower prices than what would occur if the oligopolists were allowed to continue using these co-ordinating devices.

The two authors suggest that their "plus" factors become reviewable trade practices. A reviewable trade practice is legal until it is enjoined by the Restrictive Trade Practices Commission. They reject injunctive orders on the basis that businessmen would find other means of co-ordinating their behaviour. They also rule out structural remedies on the basis of the small size of the domestic Canadian market together with economies of scale.

E. Assessment of the Proposals for Reform

In reviewing the proposals put forth to deal with the problem of conscious parallelism it is apparent that there are two basic approaches. The first advocated by Professor Turner, is based on the assumption that pure conscious parallelism cannot logically or fairly be sanctioned by law. The proponents of this approach endorse strong divestiture proposals as a means of inhibiting those market structures that encourage conscious parallelism.

The second approach is based on the assumption that no logical distinction can and should be made between conscious parallelism and agreements. The main proponent of this approach is Posner who would examine a wide range of economic criteria in examining whether a tacit agreement existed. Posner recommends concentrating on those markets where collusion is likely to occur.

The review of the Canadian cases shows that the distinction between conscious parallelism and tacit agreements is not a workable one. It is a source of continuing confusion. The objective of any law should be clarity and certainty, so that those affected by it can arrange their affairs accordingly. To date, one of the most disconcerting circumstances surrounding the Combines Investigation Act is the lack of definitiveness of the criteria on which the court is compelled to proceed.

Under Posner's approach conscious parallelism alone would be sufficient for a conviction. The absence of proof of communication among parallel acting firms Posner describes as a detail. He would urge the court to convict on the basis of the economic evidence alone. This approach is not compatible with the Canadian economic and legal environment. Past judicial decisions show that the courts would be very

reticent about convicting a firm of an offence that required no proof of a wrongful act.

Most commentators recognize that instances of pure conscious parallelism unaccompanied by any communication or facilitating acts would be quite rare. Thus, there is really no need to expand the definition of agreement as Posner suggests to include conscious parallelism.

The question is, which of the approaches is preferable in the Canadian context. The Canadian market because of its small size will continue to be highly concentrated and susceptible to collusion. At the same time the Canadian political environment is not likely to accept strong structural remedies.

On the other hand, attacking facilitating practices, as Stanbury and Reschenthaler have suggested, can be effectively achieved through legislation. It is possible to absolutely prohibit those practices either with criminal sanctions or preferably with civil prohibitions. Many facilitating practices vary significantly in their effects on competition and it could then be left up to the courts to work out the nuances of legality in particular fact situations.

To make any changes in the law with respect to conscious parallelism effective new civil legislation will have to be adopted. Exclusive reliance on the criminal law to date has been increasingly and widely recognized as a serious obstacle to effective implementation of competition policy.

A central difficulty with the use of criminal law to control economic behaviour is that the function of criminal law and the purpose and capacity of the criminal sanction depend upon a substantive prohibition that is defined sufficiently precisely in advance that a person has fair notice, before engaged in the conduct, that it is against the law and public interest for him to do so. Ideally, a widely accepted moral disapproval of the conduct exists in addition to the specific prohibition.

Competition law cannot realistically define many undesirable events except in terms of their economic effect or likely economic effect. The growing complexity of the economy and of economic analysis has significantly contributed to the difficulty in framing effective laws in this field. It has also contributed to the disappearance of much of the moral force underlying the original enactment of combines law.

There are other negative aspects associated with the use of the criminal law to control economic behaviour. The primary shortcoming is the economic ineffectiveness of the judgment and remedy. The judgment and remedy are usually backward looking and behaviourly oriented and pay little concern to fostering desirable market conditions. The procedures themselves are slow, costly and cumbersome.

V. Attempts to Reform Canadian Competition Policy

In July, 1966, the government of Lester B. Pearson requested the Economic Council of Canada to prepare a report on combines, mergers, monopolies and restraint of trade. Three years later the Council published its Interim Report on Competition Policy⁹⁹ in which it proposed major changes to the Combines Investigation Act.

In June, 1971, the Minister of Consumer and Corporate Affairs, Mr. Ron Basford, introduced Bill C-256, the proposed Competition Act, which was to replace the Combines Investigation Act. Business reaction to Bill C-256 was both extensive and almost entirely hostile to the objectives and the procedures embodied in the draft legislation. Some 200 briefs were submitted to the Minister. Mr. Basford was shifted to Urban Affairs in January, 1972, and in July, 1973, the federal government announced that it was splitting the reform of competition policy into two stages in the form of amendments to the existing legislation.

Stage I, taking the form of a series of amendments to the Combines Investigation Act, was given first reading in November, 1973, as Bill C-227. In October, 1975, the Stage I

amendments received third reading in the House of Commons. They became effective on January 1st, 1976.

The trade practices dealt with in the Stage I amendments involved the less controversial issues that had been raised in Bill C-256 in 1971. The technically more difficult and political sensitive questions including conspiracies and joint monopolizations and conscious parallelism were to be left for Stage II.

On March 16, 1977, Anthony C. Abbott, the seventh Minister of Consumer and Corporate Affairs since 1967, introduced Bill C-42 in the House of Commons. It incorporated significant changes in the legislation dealing with mergers, monopoly, monopolization and price discrimination. A number of entirely new elements were added: class and substitute actions, joint monopolization, specialization agreements, price differentiation and systematic delivered pricing.

The Stage II proposals were revised and introduced as Bill C-13 on November 18th, 1977, by Warren Allmand, the ninth Minister of Consumer and Corporate Affairs in eleven years. Bill C-13, like C-42, represented a major step back from the proposals found in C-256. Bill C-13 died on the

Order Paper on October 10th, 1978, at the end of the third session of the thirtieth parliament.

In April 1981, Andre Ouellet, the Minister of Consumer and Corporate Affairs, distributed copies of a paper entitled "Proposals for Amending the Combines Investigation Act: A Framework for Discussion".¹⁰⁰

The Minister's Proposals regarding the conspiracy provision contained the following relevant elements:

- (1) The provision is to continue to fall under the criminal law as 'the evil of conspiracy is self-evident, and there is general agreement that what is needed is a strong criminal provision that will inhibit competitors from getting together to fix prices, allocate markets, regard technological advances, or otherwise harm competition'.
- (2) The definition of an illegal agreement or arrangement is to include specifically a tacit agreement 'where it can be shown that each of the parties adopts a course of conduct which would significantly lessen competition and intentionally arousing 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'.
- (3) It is proposed to remove the present exemption under Section 32(2) for agreements relating to the exchange of statistics, definition of product standards, packaging and the adoption of the metric system. It is argued that 'such agreements do not ordinarily lessen competition, in which case they need no protec-

tion. Where they do, they deserve no protection'.¹⁰¹

The Minister also proposed a new civil monopolization section covering both the single firm and joint monopolization cases involving specific anti-competitive practices. The proposals indicated that a four-firm concentration ratio was to be used. In the case of joint monopolizations the proposals spoke of firms in "tight oligopolies ... following similar lines of conduct ... or engaging in the same sort of monopolizing practices as a single firm monopoly".¹⁰² It is presumed that the Crown would not have to prove an agreement under this Section to obtain a conviction. A court would be able to make a remedial order under this Section if three conditions were met:

- (1) The firms' joint market share exceeds the threshold;
- (2) The firms have engaged in one or more types of alleged anti-competitive conduct; and
- (3) The conduct has had or is having or is designed to have the effect of elimination or restriction of the growth of a competitor or prevention of entry; the prevention of the erosion of price levels; or foreclosure of sources of supply or of sales outlets.¹⁰²

It was not until April of 1984 that the proposals contained in the Framework for Discussion were presented as a draft bill to the House of Commons. On April 2nd, 1984, the

Minister of Consumer and Corporate Affairs, the Honourable Judy Erola, tabled Bill C-29.¹⁰³ The Bill died on the Order Paper when the general election of September 4, 1984, was called.

For present purposes the highlight of Bill C-29 was the proposal to repeal the criminal offence of monopoly and replace it with a civil provision concerning "abusive dominant position", to be adjudicated by the courts. Before the courts could make a prohibition order under this Section the Director of Investigation and Research would have to establish on the balance of probabilities, that:

- (i) the firm or firms involved substantially or completely controlled the relevant market;
- (ii) the firm or firms had engaged in or were engaging in a practice of anti-competitive acts such as those listed in the section; and
- (iii) the practice has had, is having, or is likely to have the effect of preventing or lessening competition substantially in the market.¹⁰³

The anti-competitive acts listed in the section included freight equalization on the plant of a competitor, the temporary and selective use of fighting brands, buying out products to prevent the erosion of price levels and the pre-emption of scarce facilities or resources required by a competitor. The section provided that no order would be made where competition had been lessened substantially as a result

of the superior economic efficiency of the person or persons against whom the order is sought.

Section 32 would be retained as part of the criminal provisions of the new Act. The key charging subsection 32(1)(c) would not be changed. A new subsection however would be added providing that the court can infer the existence of a conspiracy "from all the surrounding circumstances with or without evidence of communication between or among the alleged parties".

Bill C-29 does not deal with the problem of conscious parallelism which was addressed, in part in the joint monopolization section of Bill C-42 in 1977 and in the conspiracy section in the Minister's Proposals of April 1981. Given the oligopolistic character of most industries in Canada, this omission is highly significant. The greatest shortcoming of Bill C-29 is its failure to address the problem of oligopoly behaviour.

VI. Conclusion

Section 32(1)(c) of the Combines Investigation Act applies only to those firms that conspire, combine, agree or arrange to lessen competition. Consciously parallel behaviour does not fall within the prohibited forms of behaviour prescribed in s.32(1)(c) and subsequently goes unpunished. There is a need for a prohibition within the competition law that prevents oligopolists from achieving anti-competitive results through the use of parallel business practices and policies. Revisions must be made to the anti-combines legislation that forbid practices which facilitate parallel action. Amendments would be most effective if enacted as new civil legislation.

Appendix A

Speech given by D.H.W. Henry, Director of Investigation and Research to the Public Buyers Group of British Columbia. (Vancouver: October 12, 1962).

... we find an industry having a small number of competitors who by reason of their small number know a good deal about each others businesses and particularly about the way each is likely to react to given market changes. This gives rise to peculiar problems which are likely to manifest themselves more and more if, as some people predict, our economy moves in the direction of larger units and greater concentration in particular industries. Here we find the phenomenon which has been called in some anti-trust circles 'conscious parallelism' or the tendency on the part of a small group of firms constituting an industry to act more or less in a uniform manner.

Here is an example of a situation that may, without collusion, bring about the same result as if there were collusion. It may be that in such an industry characterized by the oligopoly of which I am speaking, one of the firms will act as a price leader and his pricing policies will tend to be adopted by the others. Conscious parallelism, if conducted without collusion among the members of the industry, is not an offence. This is because if such collusion is not present, there is not the element of agreement or arrangement necessary to constitute the offence of conspiracy. I must emphasize, however, that it is so only in the absence of collusion.

One manifestation of this present day characteristic of our economy is the submission of identical tenders to large buyers such as municipal corporations, public utilities, provincial and federal governments and the like. There is a tendency on the part of officials and elected representatives who receive a group of identical tenders to jump to the conclusion that this situation reveals a price fixing agreement which ought to be susceptible to inquiry under the Act.

This is not necessarily so. In some circumstances the fact that a number of sellers have quoted identical prices raises a strong presumption of arrangements among them, while in other circumstances all suppliers are likely to quote identical prices whether the quotations are the subject of agreement or not. In appraising situations where identical prices occur the Director is assisted by the experience of the branch in inquiries previously undertaken and by studies which have been carried out by economists specializing in the field of price behaviour.

It is generally recognized by economists and businessmen that in a market where there are only a few firms supplying a homogeneous product, any difference in the prices at which the firms regularly sell the product can be only temporary unless some unusual factor is present. Any such seller, for example, will find it difficult to market goods at a higher price than that at which his competitor is offering the product so long as the latter is able to supply the market. Unless a decision to reduce a price is considered unsound by those controlling the larger part of the production for the market, each price reduction by one of few sellers is likely to be followed by competitors and the firm initiating the price reduction may simply retain its original share of the market at the lower margin of profit. If the market shares held by the several sellers are altered

in the process, a seller whose share has decreased may attempt to regain his original position by a further price cut, and additional grounds of price cutting may follow.

Sellers in a market where there are few competitors are generally aware that attempts to enlarge their shares of the market by price cutting may result in rapid deterioration of price stability and substantial reduction of profits. They therefore tend to avoid any action which might put a chain of price cuts in motion. As long as the price structure is not disturbed by others, they are reluctant to make any price concession that might be detected by a competitor; this is particularly true if there is nothing in the business subject to quotation which sets it apart from the type of business ordinarily done by the firm, and in contemplation of which list prices were established.

The results of tenders made to public bodies are frequently made public or released by purchasing departments to those submitting quotations so that any departure from ordinary price levels in this process is likely to be known to all firms in the industry concerned.

Where the supply of materials to public bodies constitutes the day-to-day business of the seller or, if this is not the case, where quantities required by such users are not significantly different from those required by regular customers, a supplier tends to assume that his competitors will not depart from their usual behaviour; that is, if they ordinarily adhere to list prices he will expect them to do so in submitting quotations to public bodies notwithstanding the fact that the latter may purchase by tender. He may then expect, if factors other than price create no preference, that his chance of receiving business or a share of it at list price will be equal to those of his competitors.

In submitting a tender, a seller may be expected to weigh projected advantages of receiving the total order at a price below list against the risk of provoking retaliatory price cuts. He would also be expected to consider the possibility that regular customers who purchased at list might demand similar concessions, particularly if their purchases attained or surpassed the quantity on which the tenders were invited. Where conditions are such that each seller is likely to conclude that a quotation below list involves a threat to future profits which outweighs the immediate advantage of gaining the particular order identical tenders may be received from all suppliers without collusion among them.

FOOTNOTES

1. Milton Moore, How Much Price Competition? (Montreal and London: McGill-Queen's University Press, 1970) p. 3.
2. [1968] 2 Ex. C.R. 275; affd [1971] S.C.R. 63 sub nom. J.W. Mills & Sons Limited v. The Queen.
3. Ibid., p. 317.
4. Ibid., p. 317.
5. (1973), 12 C.P.R. (2d) 12 (Ont.Prov.Ct.).
6. Ibid., p. 14.
7. The relevant portions of Mr. Henry's speech can be found in Appendix A.
8. Ibid., p. 15.
9. Ibid., p. 17.
10. (1974), 6 O.R. (2d) 521, 17 C.P.R. (2d) 211, 21 C.C.C. (2d) 129, (H.C.J.); affd (1976), 13 O.R. (2d) 32, 24 C.P.R. (2d) 145 sub nom. Re The Queen and Armco Ltd. (C.A.).
11. 6 O.R. (2d) 521 at 530.
12. Ibid.
13. Ibid., p. 538.
14. Ibid., p. 565.
15. Ibid., p. 539.
16. Ibid., p. 569.
17. Ibid., p. 580.
18. Ibid., p. 583.
19. Ibid.
20. Ibid., p. 580.
21. 13 O.R. (2d) 32 at p. 41.
22. Ibid., p. 42.

23. The Metal Culvert Industry: Ontario and Quebec (Ottawa: Restrictive Trade Practices Commission, 1970).
24. (1976), 15 O.R. (2d) 360, 29 C.P.R. (2d) 1, 34 C.C.C. (2d) 489 (H.C.J.).
25. 15 O.R. (2d) 360 at p. 374.
26. Ibid., p. 380.
27. Ibid., p. 385.
28. Ibid., p. 389-390.
29. Ibid., p. 370.
30. Ibid., p. 388.
31. Ibid., p. 390.
32. Ibid., p. 391.
33. Ibid., p. 408.
34. Ibid., p. 412.
35. (1975), 22 C.P.R. (2d) 216 (Preliminary Hearing); (1976), 29 C.P.R. (2d) 183 (Que.S.C.).
36. 29 C.P.R. (2d) 183 at p. 197.
37. 22 C.P.R. (2d) 216 at p. 221.
38. [1976] Que.S.C. 42, 26 C.P.R. (2d) 14; rev'd (1978) 91 D.L.R. (3d) 618, 41 C.C.C. (2d) 209, 41 C.P.R. (2d) 5 (Que.C.A.); trial judgment restored [1980] 2 S.C.R. 644, 32 N.R. 562, 53 C.P.R. (2d) 1, 16 C.R. (3d) 128, 54 C.C.C. (2d) 373, 115 D.L.R. (2d) 22.
39. 26 C.P.R. (2d) 14 at p. 49.
40. Ibid., p. 101.
41. Ibid., p. 61-62.
42. Ibid., p. 101.
43. Ibid., p. 96.
44. Ibid., p. 97.

45. Ibid., p. 97.
46. Ibid., p. 98.
47. Ibid., p. 102.
48. Ibid., p. 104.
49. Ibid., p. 20.
50. See for example: Donald G. McFetridge and Stanley Wong, "Agreements to Lessen Competition After Atlantic Sugar", (1980-81) 5 Canadian Business Law Journal 329; Kenneth G. Engelhart, "'Agreements to Lessen Competition After Atlantic Sugar': A comment", (1981-82) 6 Canadian Business Law Journal 104; Donald G. McFetridge and Stanley Wong, "More on Atlantic Sugar: A Reply", (1981-82) 6 Canadian Business Law Journal 373; and Chester Mitchell, "Natural Price Fixing and Anti-Combines Law: Atlantic Sugar Refineries Co. v. The Attorney General of Canada", (1981) 19 University of Western Ontario Law Journal 303.
51. 115 D.L.R. (3d) 21 at p. 29.
52. Ibid., p. 29-30.
53. Ibid., p. 30.
54. Ibid.
55. Ibid., p. 31.
56. Ibid.
57. From F.M. Scherer. Industrial Market Structure and Economic Performance, Chicago, Rand McNally Publishing Company, 1980, p. 514.
58. 26 Stat. 209 (1890) as amended 15 U.S.C. S.1 (1946).
59. (1939) 306 U.S. 208 (U.S.S.C.).
60. Ibid., p. 227.
61. Ibid., at p. 226-227.
62. (1942), 316 U.S. 265, (U.S.S.C.).
63. John Purinton Dunn, Conscious Parallelism Re-examined (1955), 35 Boston University Law Review 225 at p. 231.

64. Ibid., at p. 231.
65. Michael Conant, "Consciously Parallel Action in Restraint of Trade", (1954), 38 Minnesota Law Review 797 at 802.
66. (1946), 328 U.S. 781.
67. Ibid., at p. 809.
68. (1946), 327 U.S. 251.
69. Bigelow v. RKO Radio Pictures, Inc. (1946), 150 F. 2d 877 at 882 (7th Cir).
70. (1945) 150 F. 2d 738 (3rd Cir).
71. Ibid., at 743.
72. Ibid., at 745.
73. (1948), 169 F. 2d 317 (3d Cir).
74. Ibid., at p. 319.
75. (1948), 334 U.S. 131.
76. Ibid., at p. 142.
77. (1951), 192 F. 2d 579 (3d Cir).
78. Milgram v. Loew's, Inc. (950), 94 F. Supp. 416 at 418.
79. Supra, note 75 at p. 583.
80. (1949) 178 F. 2d 363 (8th Cir).
81. Ibid., at p. 369.
82. (1954), 346 U.S. 537.
83. Ibid., at p. 540-541.
84. A.D. Neale, The Antitrust Laws of the U.S.A. (2d ed. Cambridge: Cambridge University Press, 1970) at p. 87.
85. Turner, "The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal", (1962) 75 Harvard Law Review 655.

86. Ibid., at p. 668.
87. Ibid., at p. 662.
88. Ibid., at p. 670.
89. C. Kaysen & D. Turner, *Antitrust Policy* 113-115, 224.
90. Posner, "Oligopoly and the Antitrust Laws: A Suggested Approach", (1969) 21 Stanford Law Review 1562.
91. Ibid., at 1592.
92. Ibid., at p. 1575.
93. D.J. Simonetti, "Conscious Parallelism and the Sherman Act: An Analysis and a Proposal" (1977), Vol. 30 Vanderbilt Law Review 1227.
94. Ibid., p. 1239-1240.
95. Ibid., p. 1241.
96. Ibid., at p. 1243.
97. W.T. Stanbury and G.B. Reschenthaler. "Oligopoly and Conscious Parallelism: Theory, Policy and the Canadian Cases" (1977), Vol. 15 No. 3 Osgoode Hall Law Journal 617.
98. Ibid., at p. 694-695.
99. Economic Council of Canada, Interim Report on Competition Policy, (Ottawa, Queen's Printer, 1962).
100. Proposals for Amending the Combines Investigation Act: A Framework for Discussion (Ottawa, Department of Consumer and Corporate Affairs, April, 1981).
101. Ibid., p. 16-18.
102. Ibid., p. 10.
103. Bill C-29 "An Act to Amend the Combines Investigation Act and the Bank Act and other Acts, in consequence thereof" 2nd Session, 32nd Legislature, 32-33 Eliz. II 1983-1984.

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