

R. v. ABITIBI — A RECONSIDERATION OF THE “PER SE” DOCTRINE UNDER THE COMBINES INVESTIGATION ACT

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“Monopoly, besides is a great enemy to good management, which can never be universally established but in consequence of that free and universal competition which forces everybody to have recourse to it for the sake of self-defense”.¹

The interdependence of the several elements of an economy gives rise to a need to regulate the activities of each member unit so as to ensure production of goods and services in accordance with the desires of the consuming public, to provide efficient resource allocation, and to achieve a satisfactory distribution of the national product. The attainment of these goals within Canadian society is set in the framework of individual liberty. This leads us to the selection of the market system as the regulatory mechanism rather than to the centrally coordinated planned economy. This general approach is, however, modified in many sectors resulting in a mixed economy ranging from authority to competition as the regulatory mechanism.

The first legislative attempt to regulate the sector relying upon competition came in 1889.² To date, unanimity in its interpretation has not been achieved. This was made clear by a recent decision of Judge Batshaw in *R. v. Abitibi Power and Paper Co.*³

Seventeen firms were proceeded against for conspiring during a period of nearly eight years between April 3, 1947 and December 31, 1954 “to prevent or lessen, unduly, competition in the production, purchase, barter, sale, transportation or supply, in diverse places throughout the Provinces of Ontario, Quebec, and New Brunswick... of an article or commodity which may be a subject of trade or commerce, to wit... pulpwood...”⁴

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¹Adam Smith: *The Wealth of Nations*.

²1889 S.C. ch. 41, s. 1.

³(1962) 36 C.R. 96.

⁴The Combines Investigation Act (R.S.C., 1952, C. 314, as amended 1953-54, C. 51 and 1960, C. 45) does not include the restriction of competition in service industries, except insofar as the courts can find some effect upon an “article”. This limitation in the law made it necessary to expressly mention insurance in the Act — the legislature choosing to consider price only with regard to insurance [s. 32(1)(C)]. It is likely that the prominence of service industries was not foreseen by the framers of the original legislation. While *R. v. Abitibi* was heard under the Criminal Code s. 411(1)(d), this section was embodied in the

The crime has been found to lie in the conspiracy itself. As Batshaw, J. put it:

"The mere concurrence of intention is not enough. It requires the announcement and acceptance of the intentions. But as soon as the parties come to such an arrangement, the conspiracy is born, even if they never committed any overt act towards carrying it out. The offence is complete as soon as the parties have agreed to the common design."⁵

However, it is the conspiracy "to prevent or lessen *unduly*" which violates the legislation. Not all agreements which restrain competition are illegal. It is not the purpose of this comment to analyse the interpretation placed upon the evidence introduced. Suffice it to note the court found that:

"...the accused agreed mutually to prevent or lessen competition between them by fixing schedules of maximum prices which they undertook to observe in the purchase of pulpwood."⁶

The question which is to be discussed here is the degree and nature of the restraint upon competition which must be embodied in the agreement for it to constitute an "undue" lessening of competition, short of which no offence has been committed.

There are two different approaches to the assessment of 'un-*dueness*'. The first investigates competition regardless of the results found in the market. If the agreement achieves or aims at a restriction upon competition of a certain degree a violation is found even if profits, prices and other economic variables fail to reflect harmful effects upon the consumer. This is called the "structural test". The second approach seeks to measure the variables in the market with a view to assessing, in each particular case, whether the public has actually been harmed. These effects are deemed, in this approach, to be the genuine purpose of the legislation. This is called the "behaviourial test".

It will be suggested that the test selected ought to vary with the degree of restraint sought or achieved by the combine. It is further submitted that the "structural test" has both legal and economic roots which favour its application only in situations where

Combines Investigation Act as s. 32(1) (C) without change in 1960, which legislation is now the only regulatory enactment now covering conspiracy in restraint of trade.

⁵ *Op. cit.* at p. 103. *Weidman v. Shragge* (1912) 46 S.C.R. 1; see also: *Paradis v. The King* (1934) S.C.R. 165; *R. v. Eddy Match Company Limited et al.* (1951) 13 C.R. 117; *R. v. Crown Zellerbach Can. Ltd.* (1955) 5 D.L.R. 27; *R. v. Howard Smith Paper Mills Ltd.* (1954) 4 D.L.R. 161.

⁶ at p. 109. At p. 155 Judge Batshaw reveals that he considered export demand as a competitive factor — but that his evaluation found it meaningless in fact. "...the export demand did not constitute such an effective competition as to relieve the accused from the charge that their conspiracy was "undue".

the conspirators exercise or seek to exercise a "virtual monopoly" in the industry involved. At lesser degrees of control by the combine "behavioural" criteria become relevant to the assessment of "undue-ness". It is not that actual public harm is unimportant when a virtual monopoly exists, but that such is reasonably presumed to exist by virtue of control exercised by the combine. The notion of public harm underlies any violation, but under monopolistic conditions it is presumed to have been inflicted without any deeper analysis since the consumer can no longer directly influence the industry.

Judge Batshaw's review of the evidence with regard to structure alone fails to meet this principle in view of his willingness to use the "structural" approach even where the restraint falls short of a "virtual monopoly".⁷

The "Per Se" Doctrine

"32. (1) Everyone who conspires, combines, agrees or arranges with another person

(c) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, rental, transportation or supply of an article, or in the price of insurance upon persons or property . . ." ⁸

In assessing "undue-ness" of restraint to the forces of competition, the courts have long held that it is the competition itself which is to be considered rather than the results which are expected to flow from this market mechanism. In the earliest combines case of *R. v. Elliott*⁹ the court did not discuss effects beyond that of restricting

⁷ Note that the fact that the offence is in the agreement itself does not mean that in deciding which agreements "unduly" restrain competition one cannot employ "behavioural" criteria. The "structural test" is based upon the notion that the existence or non-existence of competitive forces is all that really matters — i.e. competition *per se* is merely a test for deciding which agreements are in themselves offensive. The notion of competition *per se* is readily distinguishable from cases where the offence is in the act itself independently of any other measure. Such, for example, is the case in the offence of resale price maintenance under the Act. We are concerned here with the measure of "undue-ness" and the tests used in its determination. In this context the term *per se* merely indicates that one looks at the forces of competition independently of any results therefrom.

⁸ There is no reported decision of a conviction under any other clause of s. 32 without there also being a conviction under clause (c). Since the case of *R. v. Canadian Import Co.* (1953) 3 D.L.R. 330, all convictions have been under clause (c) alone. All charges since that in *Container Materials v. R.* (1942) S.C.R. 147, have been laid under clause (c) solely, unlike the earlier practice of charges under several clauses.

⁹ (1905) 9 O.L.R. 648, judgment on appeal reported at 656. Numerous cases have followed this precedent and considered competition as an end in itself, con-

competition, excluding details of supply, prices and profits. The famous dictum stated:

"The right of competition is the right of everyone, and Parliament has shown that its intention is to prevent oppressive and unreasonable restrictions upon the exercise of this right."^{9a}

The Supreme Court of Canada had its first opportunity to state its view of the combines legislation in 1912 in *Weidman v. Shrage*.¹⁰ The discussion of the effects of competition were limited to a justification for enshrining competition as an end which is itself to be upheld, rather than as a means of achieving the objective of sound economic performance. That is, it is *not* the performance which is legally required, but the machinery which it is conclusively presumed will lead to the end desired by economic rationale. However, the law requires competition because competition ensures the protection of the public interest thereby avoiding the burden on the courts of protecting the public interest itself via an assessment of each case to decide what will best satisfy this objective.¹¹ The underlying economic rationale to this philosophy is that competition can be reliably assumed to achieve a result which no modification of this machinery can ensure (unless, of course, the legislature has replaced the free market mechanism with some form of public control ranging anywhere from simple surveillance to absolute authoritarian control or even ownership).

In fairness to this leading judicial precedent, one must observe that this simple presumption was held to be valid by most economists

victing or acquitting upon structural findings which affect competition as a regulatory mechanism rather than upon its behavioural implications. *Gibbins v. Melcalfe* (1905) 15 M.R. 584; *Hatley v. Elliott* (1905) 9 O.L.R. 185; *R. v. Master Plumbers* (1905) 19 O.L.R. 307; *R. v. Alexander* (1932) 2 D.L.R. 109; *R. v. McGavin Bakeries* (1952) 1 D.L.R. 201; *R. v. Crown Zellerbach* (1955) 5 D.L.R. 27; *R. v. Northern Electric* (1955) 3 D.L.R. 449; *R. v. Lyons Fuel* (1961) 36 C.R. 157.

The following found agreements to fix price offensive regardless of the price actually fixed. *R. v. Clarke* (1907) 14 C.C.C. 57; *Stinson-Reeb v. R.* (1929) S.C.R. 276; *R. v. Singer* (1931) 3 D.L.R. 715; *Container Materials v. R.* (1942) S.C.R. 147; *Howard Smith v. R.* (1957) S.C.R. 403; *Peloquin v. Latraverse* (1920) 54 D.L.R. 181.

^{9a} *Ibid.*, at p. 661.

¹⁰ (1912) 46 S.C.R. 1. This case entailed a contract between two junk dealers in Western Canada which contract fixed the prices for the purchase and sale of junk. Included, as well, was a profit-sharing agreement out of which this action arose.

¹¹ Presumably the legislature is to have done this when deciding which sectors of the economy must be regulated by competitive forces, and which sectors are to be regulated in a different manner, e.g. labour unions, public utilities, banks and cooperatives.

of that period.¹² Most subsequent cases merely accepted this judgment without further analysis of what has become known as the *per se* doctrine. This test renders public benefits which result from the combination irrelevant once the forces of competition have been thwarted to what will be noted to be an "undue" degree. In *Container Materials v. R.*¹³ although it was argued that beneficial effects resulted from the agreement in question, the court held that the term "unduly" could not import a consideration of economic theories of what enures to the public good. Public interest was felt to be in having the market under the control of competitive forces.¹⁴ This is most readily expressed in lay language as a fear of power, whether abused or not. The most authoritative statement on this point is found in the case *Howard Smith Paper Mills Ltd. v. R.*¹⁵

"The public is entitled to the benefit of free competition and the prohibitions of the Act cannot be evaded by good motives."

The statement¹⁶ went further to note that actual injury to the public need not be demonstrated — it is the influence of competition, rather than its results, which is protected.

"The statute proceeds upon the footing that the preventing or lessening of competition is in itself an injury to the public. It is not concerned with public injury or public benefit from any other standpoint.

"That it is the arrogation to the members of the combination of the power to carry on their activities without competition which is rendered unlawful; that the question whether the power so obtained is in fact misused is treated as irrelevant; and that the Court, except I suppose on the question of sentence, is neither required nor permitted to inquire whether in the particular case the intended and actual results of the agreement have in fact benefitted or harmed the public."¹⁷

¹² Competition, as a regulatory force, was felt to ensure:

(i) Innovation and growth of the efficient firms, often necessarily leaving the inefficient by the wayside. This was observed in answer to those who complained of the wastage created by competition. In fact, competition allows only the fit to survive — and fitness is a composite of techniques of production, methods of finance, calibre of staff and effectiveness of distribution.

(ii) Compulsory conveyance of economic benefits to the market. Thus, while collusive agreements need not prove inconsistent with high levels of efficiency in production and distribution (although often, in fact, such agreements do shelter the inefficient) only competition imposes the transmission of these benefits to the public where altruism might fail. Benevolent monopolists, like benevolent dictators, may not continue to be enlightened.

¹³ [1942] S.C.R. 147.

¹⁴ *R. v. Northern Electric (op. cit.)* recalled that the restraint upon those competitive forces need not actually be achieved — proof of a conspiracy to do so is sufficient.

¹⁵ (1957) 8 D.L.R. (2nd) 449 at 452.

¹⁶ *Ibid.* at 457.

¹⁷ Note that the possession of the power is the best proof of a conspiracy which seeks to do so, or at least has the effect of so doing.

"... once it is established that there is an agreement to carry the prevention or lessening of competition to the point mentioned, injury to the public interest is conclusively presumed. The relevant question thus becomes the extent to which the prevention and limitation of competition are agreed to be carried and not the economic effect of the carrying out of the agreement."¹⁸

While Cartwright, J. expresses some dissatisfaction with a law which would have to convict upon an agreement that had done no more than permit the industry to develop and survive in Canada, and had kept profits and prices at a reasonable level, he feels bound by the precedents of our courts. While all subsequent decisions have accepted this structural criterion the statement by Cartwright, J. does link the *per se* test to the degree of restraint achieved or contained in the agreement.

"... once it is established that there is an agreement to carry the prevention or lessening of competition to the point mentioned, injury to the public is conclusively presumed."^{18a}

Thus the degree of restraint becomes a very significant factor for not only must it reach the point of undueness to be in violation of the Act but also this point is the premise upon which the conclusive presumption of the *per se* doctrine is predicated.

The Degree of Restraint which Constitutes "Undueness"

Judge Batshaw does, in fact, accept the *per se* doctrine insofar as he restricts his consideration to structural factors without regard to the effects upon the behavioural elements of the industry. He notes, however, that the same approach may be used for degrees of restraint which fall short of that sought by Cartwright, J.

The jurisprudence has long held that the degree of "undueness" which constitutes an offence is that of the virtual elimination of competition. Thus, to date, the *per se* rule which has developed has always been associated with this extreme degree of restraint.¹⁰ This

¹⁸ *Op. cit.* at 473. The italics are those of this writer unless otherwise specified.

^{18a} *Ibid.*

¹⁰ It is interesting to note that the interpretation of "unduly" has passed through two schools of thought.

(a) Qualitative — the use of the word "prevent" in s. 32(1)c is itself absolute and does not admit of quantitative variations. Consequently, to prevent or lessen *unduly* must refer to the manner in which the competition is lessened or prevented to this absolute degree. That is, the device must be of an undue nature as contrasted, presumably, with ordinary or acceptable business behaviour. This view was expressed as recently as the decision of the trial court in the case of *R. v.*

quantitative assessment of "undueness" appears to have a qualitative factor which, until the statement of Judge Batshaw, had automatically been held to be inherently part of the "undueness" — that is, the total elimination of competitive forces by virtue of a horizontal collusive agreement is conclusively presumed to cause injury to the public, and "undueness" was held to be at this point of "virtual monopoly" as well. If the restraint is not complete, the jurisprudence does not impose the structural test as the sole determinant of "undueness". The approach to "undueness" becomes exclusively quantitative only because of the qualitative result which accompanies the total restraint of competitive forces. Once the restraint is less extreme, the qualitative result ceases to have automatic validity. It demands further assessment of qualitative or behavioural elements to establish the existence of public harm upon which the short-hand statements of the *per se* doctrine were predicated. This presumption is apparently regarded as being irrebuttable and has led to a mechanical application of the *per se* test, losing sight of this underlying premise which was clearly enunciated in the case of *Weidman v. Shragge*, and most recently in the *Howard Smith case* — namely that the total elimination of competition justifies a presumption of public injury without further analysis of the market effects.

In *R. v. Elliott*²⁰ the Association embraced a sufficiently extensive section of the coal trade such that persons in bad standing could only acquire coal at retail prices. Meredith, J. expresses the degree of control required where he says:

"... a dangerous power, unfair, unreasonable and unjust toward those who might desire to trade in the commodity without joining the association and becoming party to the wrong, and towards those who are *obliged* to buy..."²¹

Howard Smith in 1954, *op. cit.* although it was subsequently overruled. Here, of course, there would be no dispute as to the degree of restraint required, but merely a discussion of the manner in which such a degree had been achieved.

(b) Quantitative — the phrase "prevent or lessen" is interpreted as meaning something short of absoluteness — i.e. to hinder or impede. Accordingly, "undueness" relates to the degree of hindrance placed upon the competitive forces. The devices used merely provide evidence of the primary object or effect of the agreement — namely, to restrain competition.

The courts have conclusively ruled in favour of this latter, but have always made a finding of an absolute degree of control of the industry in question thus resulting ultimately in the same degree as noted in the Qualitative School — the difference being that the devices have little relevance in themselves, but only as evidence of the restraint upon competition, the intention, or likely result thereof. As well, the question arises as to whether to "lessen" competition to a point short of virtual monopoly might constitute a violation of the Act.

²⁰ *Op. cit.*

²¹ *Ibid.* at p. 652.

Surely, the curtailment of entry and the fact that consumers could not buy elsewhere than from a member of the combination indicates a "domineering and absolute control over the commodity which the association designed and endeavoured to get."²² It is at this point that the restraint is in itself "oppressive".²³ That is, public harm comes via the denial of consumer choice whereby he makes his desires felt by the producers in an industry. Regardless of "behavioural" harms in terms of profits, prices or output, the public is denied an effect of competition — namely, the choice between alternatives whereby the economy is regulated by the will of the consumers.

The judgment in *Weidman v. Shragge* reveals that the conclusive presumption has the underlying logic of its resulting harm to the public only when competition is actually destroyed. The short-hand method thus introduced was *not* intended to create a divorce between the simplicity of a presumption in locating an offense and the substance of the offense — the law protects competition because competition protects the public interest.

"Destroy competition and you remove the force by which humanity has reached so far. The altruism some people would substitute for it may, when it has arrived, bring with it a higher sense of justice, but it has not arrived."²⁴

Idington, J. appears concerned for the harm resulting from combinations which achieve or seek to achieve sufficient control to shelter "the stupid, the slothful, the ignorant, the overcapitalized man working with antiquated machinery, and a mill or warehouse overmanned".²⁵ Such control would have to be fairly complete to rival "the standard that may be fairly reached by the men of brains, of energy, of sleepless vigilance, with only adequate capital to earn dividends for, and all the advantages that the latest improvements, invention or discovery can furnish."^{25a} The fate of the former class must be left to the market, the failings of such economic units being a necessary part of growth.

²² at p. 654.

²³ Similar degrees of restraint were found in: *Hatley v. Elliott* (1905) 9 O.L.R. 185; *Wampole v. Karn* (1906) 11 O.L.R. 619; *R. v. McMichael* (1907) 18 C.C.C. 185; *R. v. Central Supply Association*, 12 C.C.C. 371; *R. v. Clarke* (1907) 44 C.C. 57.

²⁴ (1912) 46 S.C.R. 1 at p. 28. Idington, J. Law exists to avoid the actions which some would take in its absence. If full agreement existed, it would be unnecessary.

²⁵ *Ibid.* at p. 28-29.

^{25a} *Ibid.*

It is when these men do not ultimately "go to the wall before their onward march" (that is the march of the more efficient group) that concern is expressed.

Idington, J. seeks "to find the vicious purpose aimed at" and he finds that vicious purpose to be the destruction of all competition:

"His (one of the contracting parties) one thought was, if possible, to destroy all competition and, if need be, those who ventured to come in competition with him. His language and conduct portray exactly what this statute strikes at. Its aim was to put out of business use the methods of men banding themselves together to render it difficult if not impossible for others to become rivals and *stop competition* in the same field of business."²⁶

The Chief Justice, Sir Charles Fitzpatrick also recognizes that the ultimate objective is to avoid harm to the public.

"The mischief aimed at is the undue and abusive lessening of competition which operates to the oppression of individuals or is injurious to the public generally."²⁷

It has been noted above that the conclusive presumption of such harm is only intended to apply at absolute²⁸ degrees of control.²⁹ In fact, the agreement being studied in this case virtually eliminated competition in the Western Canadian junk market. Public interest could never lie in such an agreement. To avoid assessing the public interest in each situation, the court conclusively presumes the effects of competition to be missing under similar situations.³⁰ This alone is the *ratio decidendi* of the judgment. To read this into situations with lesser control is not justified by the language of this and other judgments.³¹ This was the finding of the Chief Justice:

²⁶ *Ibid.* at p. 31-32.

²⁷ *Ibid.* at p. 4.

²⁸ The term "absolute" is used to indicate a degree of restraint which eliminates or "virtually eliminates" all competition in the industry concerned.

²⁹ It should be made clear to the reader that the writer does not feel that any combination short of the absolute degree of control is automatically to be held permissible. It is, however, contended, that in law the *per se* doctrine is only intended to apply at such an extreme point. The legislation might well permit of convictions short of absolute control, but the developers of the doctrine did *not* intend it to be with the help of the conclusive presumption. It will also be suggested later that the underlying logic supports such a conclusion.

³⁰ Those effects were noted in footnote 12.

³¹ It will be seen that Judge Batshaw acknowledges that all prior decisions had found an absolute degree of control. He suggests, however, that such a degree is unnecessary. This writer contends that while it may not be necessary to a conviction under the legislation involved it is indeed a necessary element in the application of the presumption which accompanies the *per se* doctrine. Batshaw J., does apply the *per se* doctrine, and attempts to suggest its application at lesser degrees of concentration.

To find a violation at lesser degrees he must assess the evidence in a different light. Namely, in that of the public interest.

"...the main object and purpose of the agreement was to eliminate competition..."³²

Idington, J. felt that the parties sought control of the entire market and had, in fact, achieved their aim. Anglin, J. also found an intention to "destroy" competition. Duff, J. stated:

"I have no hesitation in holding that as a rule an agreement having for one of its direct and governing objects the establishment of a virtual monopoly in the trade of an important article of commerce... comes under the ban."³³

While the court did not say that something less than a virtual monopoly is not offensive, it did apply the *per se* doctrine within the confines of this degree of concentration.

As Chief Justice Duff put it in *Container Materials Ltd. v. R.*:

"...the aim of the parties to this agreement was to secure effective control of the market in Canada; it may be added that in this they were very largely successful. *But the fact that such was the agreement affords in point of law a sufficient basis for a finding that the agreement was one which, if carried into effect, would gravely prejudice the public interest in free competition, and... (result in)... a conviction.*"^{33a}

The conclusive presumption of law is sufficiently justified only because the degree of restraint of competition was such as to give the members of the combine effective control of the market.³⁴

The latest Supreme Court judgment on this point is that of *Howard Smith v. R.* Cartwright, J. summarizes the law as follows:

"In essence the decisions... appear to me to hold that an agreement to prevent or lessen competition in commercial activities of the sort described in the section becomes criminal when the prevention or lessening agreed upon reaches the point at which the participants in the agreement become free to carry on those activities virtually unaffected by the influence of competition, which influence Parliament is taken to regard as an indispensable protection of the public interest."

"...that it is the arrogation to the members of the combination of the power to carry on their activities *without competition* which is rendered unlawful;"³⁵

Batshaw, J. suggests that Cartwright, J. has here gone further than previous decisions. There is agreement that the earlier cases

³² *Op. cit.* at p. 5.

³³ *Ibid.* at p. 37.

^{33a} *Op. cit.* at p. 153.

³⁴ Similar degrees of restraint were found in *Stearns v. Avery* (1915) 33 O.L.R. 251; *Peloquin v. Latraverse* (1920) 54 D.L.R. 181; *Wampole v. Karn* (1906) O.L.R. 619; *Stinson Reeb v. R.* (1929) S.C.R. 276; *R. v. Alexander* (1932) 2 D.L.R. 109; *Container Materials Ltd. v. R.* (1942) S.C.R. 147; *R. v. Belyea* (1932) 2 D.L.R. 88; *R. v. Master Plumbers* (1905) 14 O.L.R. 307; *R. v. Clarke* (1907) 14 C.C.C. 57. In *R. v. McGavin Bakeries* (1952) 1 D.L.R. 201 and *R. v. Canadian Imports* (1935) 3 D.L.R. 330, absolute control was found to be the "intention" of the parties.

³⁵ (1957) 8 D.L.R. (2nd) 449 at 473.

had found situations of "virtual monopoly"³⁶ to be offensive. Clearly, the law permits some restraint but prohibits greater degrees thereof. The question is what degree of restraint constitutes an offense; is it necessary to find a virtual monopoly? Is this what Cartwright, J. is suggesting?

Batshaw, J. objects:

"... it cannot be accepted as our law that only those conspiracies are illegal that completely eliminate or virtually eliminate *all* competition. To say that the prevention or lessening of competition must be carried to the point where there remains no competition, or virtually none, is tantamount to considering the words "prevent" or "lessen" as synonymous with extinguish. Giving to words their ordinary meaning, it would seem that what the legislator intended by "prevent" or "lessen" is something less than extinguish."³⁷

While Batshaw, J. is definite about his interpretation of the law on this point he seems to render the statement less meaningful only a few paragraphs later where he makes the interpretation unnecessary to a conviction. He finds an absolute degree of control:

"... the evidence discloses that for a time at least and in particular areas, the accused were able to achieve even the virtual elimination of competition."³⁸

"... the intention of the conspirators to control the purchased pulpwood market is rather evident."

"... What these companies set out to achieve by their agreement was nothing more or less than the control of the pulpwood market by agreeing mutually as to the maximum prices which they would pay, and if necessary, distributing available pulpwood amongst members of the group who could not get sufficient wood by observing the ceiling prices."³⁹

However, although the statement is obiter, it merits further consideration. It is submitted that while Judge Batshaw is interpreting the law correctly in that restraint short of virtual monopoly can still be undue, there is no justification for the application of the *per se* doctrine with its conclusive presumption at points short of the virtual elimination of competition. The *per se* doctrine is a product of judicial interpretation. It enables a court to declare that the public has been harmed after examining the structure of the industry for competitive forces and finding *none* to exist. Thus the agreement has "unduly" restricted competition. This does not mean that this absolute degree of control is necessary for a conviction under the Act. It does, however, mean that such a degree of restraint *must* be

³⁶ They found such situations even where they stated an absolute degree to be unnecessary.

³⁷ at p. 148.

³⁸ at p. 150.

³⁹ at p. 151.

involved in the agreement to justify the use of the *per se* doctrine and avoid further scrutiny in search of actual harm to the public. This is what Cartwright, J. is saying:

"... once it is established that there is an agreement to carry the prevention or lessening of competition to the point mentioned, injury to the public interest is conclusively presumed."⁴⁰

The *agreement* to prevent or lessen competition becomes undue by virtue of a structural test alone when "the participants in the agreement become free to carry on those activities virtually unaffected by the influence of competition". The statute is acknowledged as resting "upon the footing that the preventing or lessening of competition is in itself an injury to the public." In view of this underlying policy, the *per se* doctrine *must* also be viewed in similar terms — i.e. one must view competition *per se* as being a conclusive presumption of harm to the public interest resulting from the destruction of competition. This presumption is only felt to be beyond reproach "... once it is established that there is" a degree of restraint which leaves the "activities virtually unaffected by the influence of competition". Cartwright, J. is clearly linking the requirement of virtual monopoly to the validity of the conclusive presumption.

In referring to evidence of the absence of public detriment Cartwright, J. again relates the finding of an offense without assessment of any effects to the absolute degree of control.

"The conclusion of the learned trial judge in the case at bar, affirmed by the Court of Appeal appears to me to be that because the purpose and effect of the agreement of the appellants was the virtual elimination or prevention of *all* competition... the object of the agreement is *neccessarily* "undue" and the making of it is criminal..."⁴¹

Thus, it is because of the virtual elimination of competition that the criminal conviction is justified without looking further. While at lesser degrees of restraint the activity is not "necessarily undue", it may be so if the "footing... (of) ...injury to the public" is violated. This, however, demands a different assessment of the evidence. In all cases one *must* by presumption or by direct evidence find harm to the public. Members of a combine cannot, thus, monopolize a *substantial part* of the market and then seek a defense in the absence of actual public harm.

Batshaw, J. suggests that Cartwright, J. is making an absolute degree of restraint a precondition to a conviction. To explain this

⁴⁰ at p. 473.

⁴¹ at p. 472. Taschereau, J. states at p. 452-53 that "... no defense will condone the undue restraint, which is the *elimination* of the free domestic markets". It is interesting to note that Taschereau restricts his view to the domestic market. Also, it is possible that defenses might be entertained in other cases.

away, Judge Batshaw notes that Cartwright, J. acknowledges that he is summarizing the jurisprudence. The jurisprudence cited is exclusively that subscribing to the *per se* doctrine. Thus, what Cartwright, J. is saying is that restraint which leaves the members of the combine "virtually unaffected by the influence of competition" is, indeed, a condition precedent to the *per se* jurisprudence. It is not necessary that Cartwright, J. had intended a distinction between the application of the *per se* doctrine where "virtual monopoly" is achieved and those lesser degrees of restraint where offence must be found without the aid of the conclusive presumption of public harm. What is significant, however, is that in summarizing *his* view of the jurisprudence, having cited cases which had accepted the *per se* doctrine, he finds that absolute control is a *necessary* factor in such cases. One can sympathize with Judge Batshaw's attempt to find an offence at lesser degrees of restraint, but one must avoid the facility of the *per se* doctrine's conclusive presumption in assessing the evidence.

While the *per se* jurisprudence does not say that a conviction cannot be had for an "undue" *lessening* of competition, it does explicitly restrict the use of the structural test to the exclusion of behavioural factors to cases where competition is eliminated.

It is where the virtual elimination of competition is felt to be lacking in evidence that the courts have considered some of the effects (or "behaviourial" data) of the agreement in question. One cannot, however, be sure that the courts were not considering behavioural data as proof that the restraint was not absolute. If the intent was genuinely to ascertain whether or not harm had actually been effected, the fact that non-members were able to buy at the same prices as those offered to members of the combine indicates that the combine lacked absolute control.⁴² Consequently, it is possible that the court anticipated the possibility of finding a violation by virtue of actual public harm constituting "undueness".

Subsequent cases have applied the structural test exclusively for the assessment of "undueness" but have found in each case that

⁴² *R. v. Beckett* (1910) 20 O.L.R. 401. *R. v. Gage* (1907) 13 C.C.C. 428. *Attorney-General for Ontario v. Wholesale Grocers' Association* (1923) 53 O.L.R. 627. Hodgins, J. A. declares that an absolute degree of restraint would satisfy him in this latest case: "...the result is, to my mind, that a combination does injure or restrict trade if it coerces a manufacturer by requiring him to refrain from trading with one class of dealers if he would preserve his trade with those who can qualify in another and self-constituted class, and if it prevents a jobber from trading in a commodity the sale of which to him is refused".

"...Not only was competition lessened, it was obliterated..."⁴³ Ferguson, J. continues to say that *because* of this virtual elimination the object of the agreement is *necessarily* "undue".

"It is, of course, plain... that every agreement to prevent or lessen competition is not an offence... That general statement is recognized as valid, but with the limitation... that if such an agreement eliminates or prevents *all* competition, it is *necessarily* undue."⁴³

If this is intended to mean that *only* those agreements which completely eliminate competition are "undue", he appears to be carried away with the thrust of the jurisprudence which originates a *per se* doctrine for situations of "virtual monopoly".⁴⁴ It commits the error of summarizing the jurisprudence under the guise of reciting the capacity of the legislation to convict. It seems, rather, to say that, only if all competition has been eliminated or would be eliminated by the combination is the agreement "*necessarily undue*". However, an agreement may well prove "undue" at lesser degrees of restraint, but not without careful consideration of the public interest, as not "every agreement to prevent or lessen competition is an offense". This interpretation is supported by a statement which follows closely the above:

"It is idle to argue that the public is receiving the benefit of free competition when prices were fixed and unalterable."⁴⁵

A lesser degree of restraint might render the claim that the public is receiving the benefits of competition possible. Having such extreme control renders it safe to conclude without further scrutiny that at least some of the "benefits of competition" are being denied.

The confusion seems to be in the viewing of the jurisprudence as revealing all the potential of the Combines Investigation Act for the finding of offenses. By objecting to this interpretation of the cases and holding that the Act has scope for convictions in areas as yet untried by the jurisprudence (namely, a simple lessening of

⁴³ *R. v. Lyons Fuel* (1962) 36 C.R. 157 at 166. Note the distinction between lessening and preventing (obliterating) competition.

⁴⁴ The cases cited all support the *per se* doctrine, and enunciate a test of "undueness" within that context. e.g. *Weidman v. Shraggc* (1912) 46 S.C.R. 1; *Howard Smith v. R.* (1957) 8 D.L.R. (2nd) 449; *R. v. Ash-Temple* (1949) 93 C.C.C. 267.

⁴⁵ p. 169. While all the effects of measurable values may be achieved — i.e. prices, profits, growth, etc. — the element of consumer control and consequent market enforcement of the transmission of gains to the consumer is lacking. The simple fixing of price is a sufficient index of the elimination of competition here because the item involved (coal) is a standardized product sold by weight. Consequently, the court felt that price competition was the "only real competition".

competition which does not actually destroy it) the statement of Judge Batshaw has great merit. To "prevent, or lessen, unduly..." includes two different degrees of restraint — "to lessen, unduly" appears intended to imply less restraint than "to prevent, unduly". Certainly, "to lessen" permits of convictions even where competition has not been destroyed, regardless of its meaning relative to prevention of competition.

The judgment in *R. v. Abitibi* may well open the way to this second line of offense — "to lessen, unduly". In this area, however, the defences commonly rejected by the jurisprudence in the *per se* line of the prevention or destruction of competition must be heard and evaluated.⁴⁶ While Judge Batshaw points out that the jurisprudence deals only with the absolute degree of restraint (and consequently limits it in view of the broader wording of the Act) he fails to limit the judicial interpretation developed within that realm to the same boundaries. At least a re-examination of the tools used under those different circumstances is called for. If it is felt that the *per se* doctrine has legal and economic justification for its application to areas where the initial expression does not anticipate its use, some *a priori* rationale is required in this *new* application.⁴⁷

To apply the *per se* doctrine to this *new* area, that is to judge every "lessening" of competition to be "undue" (for without behavioural criteria one could not differentiate between one degree of lessening and another, except by a subjective and arbitrary decision) is, it is submitted, to misinterpret the spirit, if not the actual language, of the jurisprudence. The Supreme Court left it open to find a violation short of complete destruction of competition.⁴⁸ The decision in *Howard Smith v. R.*, however, clarified the view of this court — that in applying the *per se* doctrine the restraint must be absolute.⁴⁹ To interpret this judgment in any other way is to confuse Cartwright,

⁴⁶ That is, the defence that no harm has actually been brought upon the public. It will be noted later that the defence which claims advantages in terms of the broader economic policy objectives is beyond the purview of legislation geared to deal with the control of the market. Certainly, advantages in keeping with the area involved — namely, consumer control and welfare must be considered.

⁴⁷ Judge Batshaw is not alone in his mechanical application of the *per se* doctrine to this "new" area. The same thing is done in *R. v. Electrical Contractors Association* (1963) 36 C.R. 1.

⁴⁸ *Weidman v. Shragge; Stinson-Reeb Builders Supply Co. v. R.; Container Materials Ltd. v. R. Supra.*

⁴⁹ Locke, J., concurs with Cartwright, J., Taschereau, J. also appears to accept this attitude.

J's summary of the jurisprudence with the legislation itself.⁵⁰ Only the former has required absolute restraint and has in that context elucidated a *per se* doctrine. To convict for conspiracies which fail to control the market, the court must look further and implement the purpose of the statute which the *per se* doctrine has done in cases of "virtual monopoly" — that is, preserve the public interest in competition. That interest was enunciated as early as *Weidman v. Shragge* to be innovation and growth via efficiency rather than by less economical procedures, and the compulsory conveyance of such benefits to the consumers. It is this evidence which must be sought.

The "Public Interest"

The social policy underlying the Combines Investigation Act is the preservation of the public interest in that area of the economy in which competition is relied upon as a regulatory mechanism. The public interest in competition lies in the supremacy of the consumer in the market — the market must serve the consumer.⁵¹ Accordingly, the objective economic concepts of growth, innovation and efficiency do not alone suffice. The gains thus achieved must be conveyed to the consumer under the compulsion of the market forces. Just as politically we place a great deal of emphasis upon the means by which we achieve the "effects" of a well ordered society which best serves the populace, so we apply the same notion to the market place. This basic philosophy does not require specific structures in the market; it merely demands that the forces which ensure its fulfillment be preserved. Competition has no value for its own sake, but merely for the results it brings. This is where judicial opinion began:

"... its intention is to prevent *oppressive* and unreasonable restrictions..."⁵²

In the "competitive" areas of our economy, the presumption is that only the individual himself can decide what satisfies him best.

⁵⁰ Some cases have interpreted this precedent to mean that *only* the "virtual elimination" of competition constitutes a violation under the Act, thus obviously failing to recognize a distinction between the criteria to be used in assessing evidence. It has been suggested that the test may vary with the degree of restraint.

The assumption that Cartwright, J. was summarizing the law is at the root of the requirement of conditions of absolute control by McRuer, C.J., H.C., in *R. v. Canadian Breweries Ltd.* (1960) O.R. 601 and by Williams, C.J., Q.B., in *R. v. B. C. Sugar* (1962) 36 C.R. 32. These were both merger cases. While the law differs slightly from that of loose combinations, in that it includes the term "public detriment", suffice it to note that the courts have equated this with the term "unduly" in section 32 of the Act.

⁵¹ The end object of all production is, clearly, consumption.

⁵² *R. v. Elliott* (1905) 9 O.L.R. 656.

Consequently, he must be confronted with a choice between at least two alternative ways of satisfying a particular need.⁵³ The selection of one in preference to another causes it to survive. This might be called a "retrospective principle of consumer satisfaction" only after he has chosen, and only if he remains free to change his selection, is he to be deemed satisfied. Such a choice might be rendered impossible or seriously uneconomical (perhaps due to the smallness of the domestic market). If domestic competition is not adequate to regulate the industry, external forces such as importation might effectively secure consumer sovereignty. Failing all such forces some other means of regulating the economy must be found to reconcile the unwillingness to permit the power enabling dictation to the market to reside in private hands with the need for economic efficiency which also forms part of the public interest.⁵⁴

Public policy dwells upon the result. But since one of the results desired is consumer sovereignty the mechanism acquires significance as it is there that this objective lies. It is legal interpretation, however, which has translated this into a presumption that where competition has been destroyed, in those areas of the economy where it has been relied upon by the legislature, the public ceases to derive the benefits to which it is entitled. This legal tool ought not to cause us to lose sight of its purpose — which is to ensure the benefits of consumer sovereignty and satisfaction. To apply a *per se* rule at degrees short of the elimination of competition — that is, to presume that the public interest is no longer being served once competition has merely been partially impeded (without considering the values of consumer sovereignty and satisfaction which may not have been 'unduly' affected) is to overlook this purpose. Structural appraisal is inconclusive if the structure permits of some competitive influence for it might be sufficient to secure the objectives. Only by considering those objectives themselves can one be sure. The degree of competition which suffices is that which produces both consumer welfare and consumer control in the market.⁵⁵ One can confidently state that at least control by the

⁵³ The alternative must be with regard to satisfying a "need" rather than in term of the same product. It is possible that aluminum, for example, can be an alternative to a copper product — or that widely divergent items satisfy a "need" at the level of the spending of the discretionary consumer dollar.

⁵⁴ As noted earlier, such regulation can vary in form from surveillance to government ownership.

⁵⁵ In fact, it often takes very slight structural indications of competition to effectively regulate the market. For example, note how the fringe of the retailing market influenced all outlets by introducing the "discount house". Some economists appear to be disillusioned with structural tests and claim them inconclusive even at degrees of absolute control. With this the writer does not agree — for

consumer is lacking should the combine possess absolute control of the industry. This is so even if the monopolists (either a group of conspiring firms or an individual firm which controls the industry)⁵⁶ act benevolently or for other motives so as to provide satisfactory consumer welfare. Once, however, the combine has a lesser grip (or the agreement envisages or would result in some lesser degree of restraint) one cannot glibly conclude that it violates the concepts of welfare and/or consumer control to an "undue" degree.

Furthermore, the very vital question of how much restraint is tolerable cannot be answered in structural terms. Since some restrictive agreements are permissible (that is, if they are not "undue") how can the line be drawn? The total elimination of competition is an offense. If there are to be convictions for restraint which merely *lessens* competition, against what measure can we assess those which are "undue"? At the extreme point of complete destruction of competition no other yardstick is required. At intermediary points, however, competition can no longer be measured against itself but must be assessed for "undueness" of restraint against the effects desired from it.⁵⁷ Bitshaw, J. appears to sense this difficulty. While he fails to provide any alternative criteria, he does suggest that the criteria for "undueness" is more than "the manner, extent and degree to which competition has been lessened", although these are definitely factors

if nothing else can be found which harms the public by virtue of absolute restraint of competition, certainly the market enforcement of the transmission of consumer gains is missing. While the difference might be semantical, it is suggested that the place to consider the non-structural factors as mitigating the effects of a "virtual monopoly" is in the assessment of whether that "virtual monopoly" does, in fact, exist. In other words, if these elements are genuinely competitive, then absolute control is lacking. Once, however, absolute control is found (in what is to be noted as the broadest economic framework) no such mitigating factors exist to alter the conclusion.

⁵⁶ The logic would apply to any industrial concentration which removes the power of regulation from the market — be it the result of merger, honest growth, or combination. The path of development may, however, indicate the best corrective measure. This applies, also, to concentration of power of either sellers or buyers — that is, if the buyers do not represent the ultimate consuming public to whose service the market is dedicated. The 'middlemen buyers' may be effective not only in securing benefits for themselves but also in avoiding their conveyance to the ultimate consumer. J. K. Galbraith's concept of "Countervailing Powers" merely explains a redistribution of the surplus created by the productive process — if such redistribution does not favour the consumer, it does not satisfactorily replace the competitive environment.

⁵⁷ It is possible that this fact has compelled those who think exclusively in terms of structural tests to contend that only the destruction of competition is a violation of the existing legislation. It is against this view that Judge Batshaw reacts on the basis of the legislation itself.

to be considered. Where the presumption of harm cannot be used, each of the values aimed at must be assessed on its own to decide if it has been denied to an extent which constitutes an infliction of harm.

It is not being suggested that a consideration of behaviour alone would suffice. The situation must first pass the structural test. Results achieved by means of dictatorial or monopolistic benevolence rather than genuine market control have already been noted as objectionable to public policy objectives. Nor is any new measure of economic performance being suggested here. In reality no adequate measure of these dynamics has yet been devised. However, while an assessment in this area remains an "imprecise science" it is submitted that structure alone is not the only relevant factor in assessing a "lessening of competition". Thus, the application of the *per se* doctrine to such cases of a mere "lessening" of competition is the source of much dissatisfaction with the doctrine.

There are however, those who criticize this doctrine even when used under conditions of so-called "virtual monopoly". The point urged is that structural tests fail to account for the dynamics of a market which often achieve the effects desired. Such a contention either overlooks the policy objective of consumer control, or is really a reaction to the judicial definition of "competition". That is, they point out factors in the industry which are manifestations of a competitive environment, but which the court refuses to consider as such. The Canadian Courts have been very narrow with regard to those facets of a market to which they are prepared to attribute competitive content. Many economists would cease to object to the judicial use of the *per se* doctrine in cases of "virtual monopoly" if they were to agree with the lawyers as to those situations which are "virtually unaffected" by competitive influences.

Most Canadian cases on combinations have involved price-fixing arrangements of one sort or another.⁵⁸ The defence has frequently claimed the existence of non-price competitive elements. While non-price competition has not been denied by the courts, they have felt that competition in price is one of the main elements in a truly competitive industry.⁵⁹ In all fairness, this is largely true in industries pro-

⁵⁸ Tendering schemes is one of these forms.

⁵⁹ Such claimants quickly cite the oligopolistic market (a market with a few producers) where price uniformity is a classic attribute. However, under collusive agreement, the price set is not determined by the market forces however rigid the result. Furthermore, the survivor is more likely picked for qualities other than efficiency under collusive agreements on price — perhaps for his "power of purse" which enables him to introduce frills or auxiliary benefits which outdo his "competitor" who may be equally or more efficient, but some-

ducing a relatively homogeneous product which is the sort of industry which lends itself best to, and most stimulates, horizontal collusive agreements on price.⁶⁰ Once price alternatives are eliminated in such markets, little competition can be said to exist.⁶¹

In assessing whether competitive forces do exist one is looking for market discipline of the producers and distributors in the industry. So long as there is rivalry between these producers or distributors to win the consumers' dollar in the market, these suppliers are compelled to extend advantages to the consumer.⁶² The source of this disciplinary force is irrelevant provided that it is automatic and impersonal. It may come from other producers in the same industry, from producers of substitute products, from foreign producers, government boards, or even in competition for the capital needed to produce the item. Even large scale industry may be self-regulating in the long run. However, the social cost of waiting for such internal adjustments to occur (e.g. a new entrant, or a new and better product for the satisfaction of the given need) may be too great — thus motivating a substitute form of regulation. Innovations or "poised competition" might also prove effective.⁶³ In other words there are sound reasons for assessing each situation on its own merits and locating the regulatory forces which

what poorer. As well, under the protection of a fixed price, producers are perhaps more likely to be satisfied with their lot and avoid technical innovation which might upset a comfortable position. Oligopoly, on the other hand, presupposes a temporary incentive of innovation profits which are ultimately reduced to the benefit of the consumer by the competitors.

⁶⁰ Most Canadian cases have involved such homogeneous products — to wit: coal, plumbing supplies, lumber, electrical contracting, gypsum products, paper products, bread, groceries, beer and sugar.

⁶¹ Many defense counsels have suggested that the combine in question might be justified in that it serves other objectives of Canadian economic policy. For example, the survival of the industry, reduction of unemployment, enhancement of stability in the industry, etc. The courts have always held these to be irrelevant. The Combines Investigation Act directs the courts to enforce competition of a sufficient degree to regulate the industry in question (or rather, perhaps due to the constitutional justification as criminal legislation — to penalize those who violate this standard). The only results the court is directed to contemplate are those resulting from or expected to result from competition. If competition appears inadequate for other motives, it is up to Parliament to replace it with a separate regulatory mechanism — rather than to permit private parties to administer national policy. Parliament may well choose other steps such as transfer payments, investment projects, etc.

⁶² Clearly these advantages are defined by the consumer as he selects the composite of goods and services which satisfy him best.

⁶³ However, such "poised competition" must be readily identifiable and not merely the abstract threat that someone, some where will build a better mouse-trap!

are at play in each case.⁶⁴ Is there genuinely a monopoly situation? This question must be answered in each case in view of the dynamics of the industry in question. Once this is done, the *per se* rule might safely be applied where the answer is in the affirmative. If there is not a "virtual monopoly", but the structural appraisal nevertheless reveals some lessening of competition, a further analysis of the behavioural characteristics is merited.

The regulation of business in the best interest of the Canadian public has been left in certain sectors to market control, which is itself the manifestation of the will of the public and in keeping with the preference of individual freedom, unless its consequences are too grave. The layman fears concentration because he cannot exact what he wishes, or at least has no guarantee that his desires will be answered. Clearly, if the consumer control mechanism is completely destroyed by a combination the public interest is unquestionably denied. The danger of this *per se* doctrine is that it becomes too mechanical and one tends to lose sight of the economic tenets from which it sprang. So mechanical has it become that even where it is unjustified in both law and economic policy it has occasionally been blindly applied or suggested.⁶⁵ It is hoped that the decision by Judge Batshaw will awaken a consideration of the reasons for competition. Such a re-evaluation will hopefully accept the *possibility* of harm from the lessening of competitive forces (looking for competitive forces wherever they may be found in a particular industry and seeking the results of consumer welfare and control) and reserve the conclusive presumption for situations where at least one objective of public policy, namely consumer control, can safely be considered to be absent by virtue of the market structure alone.

⁶⁴ To be sure this might require a revolutionized administrative structure. This comment makes no attempt to suggest such a structure, nor to discuss the constitutional difficulties which exist in this area.

⁶⁵ For example where the courts have said that a "virtual monopoly" is a precondition to any conviction under the Act, they are applying the *per se* doctrine rather than the legislation itself.