MERGER POLICY IN CANADA AND THE SUPREME COURT DECISION IN *K.C. IRVING, LTD.**

JAMES P. CAIRNS**

In his Annual Report for the year ended March 31, 1978, the Director of Investigation and Research, Combines Investigation Act, refers to the unanimous decision of the Supreme Court of Canada "dismissing the Crown's appeal against the acquittal in the *K.C. Irving* case". The Director goes on to say:[1]

> That decision disposed of whatever hopes may have remained that the present criminal prohibition of mergers could be an effective instrument.

Two academic commentators have arrived at the same position. In a recent paper, G.B. Reschenthaler and W.T. Stanbury wrote as follows:[2]

> This was the first ruling by the Supreme Court in a merger or monopoly case in Canada, and it substantiated some of the worst fears of enforcement officials and others interested in an effective competition policy in this country .... With this decision the anti-merger provisions virtually cease to be of any effect ... The K.C. Irving decision makes it clear that under the present legislation ... embedded in a criminal statute there is no longer an operative merger policy.

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* *R.* v. *K.C. Irving Ltd. et al* [1978] 1 S.C.R. 408, (1977) 72 D.L.R. (3d) 82, 32 C.C.C. (2d) 3, *affg.* (1976) 62 D.L.R. (3d) 157, 23 C.C.C. (2d) 479 (N.B.C.A.), *revg.* (1974) 45 D.L.R. (3d) 45, 16 C.C.C. (2d) 49 (N.B. S.C.).

** Professor of Economics, Royal Military College of Canada, Kingston. The author is grateful to the officers of the Bureau of Competition Policy, Dept. of Consumer and Corporate Affairs, with whom he discussed many of these matters during his sabbatical year, 1978-79. He is also appreciative of the office space and other assistance provided by the Bureau. He alone, of course, is responsible for the views expressed in the article.

1. Director of Investigation and Research, Combines Investigation Act, Annual Report for the year ended March 31, 1978, Consumer and Corporate Affairs, 14.

2. G.B. Reschenthaler and W.T. Stanbury, "Benign Monopoly: Canadian Merger Policy and the K.C. Irving Case" (1977) 2 *Bus. L.J.*, at 135, 136. The reasons for their conclusion may be gleaned from the following quotations [emphasis added in each case]. "For a merger to be illegal under the Act, *monopoly power* in the terms of effective control over the market must have been *created* and *exercised* in a way seen to be *clearly detrimental* to the public interest in *rather narrow* terms" (p. 165). (It is doubtful that all this can be said on the strength of the Supreme Court judgment. The judgment did not confirm that a merger, to be illegal, must result in a monopoly position. It is not clear where, in the judgment, there is a basis for the statement that the monopoly power, allegedly necessary, must have been *created* in a clearly detrimental way, as a clearly detrimental *exercise* would be sufficient for illegality. Nor did the judgment limit the concept of detriment to *rather narrow* terms in a manner that could be considered binding. Instead, the judgment avoided taking a stand on the broad notion of detriment argued by the Crown; the important point was "left open".) The article goes on to say that the courts have in effect ignored the Parliamentary directive to "take a *prospective* as well as retrospective review of questionable mergers" (p. 166). [Italics in original]. "Even the mildest version of a *structural approach* to mergers or monopoly" has been rejected (p. 135). "It seems unlikely that an effective anti-merger policy is possible if there is not acceptance of a *theory of industrial organization which links conduct and performance ... to industry structure*" (p. 168). The Supreme Court "has adopted a *conduct approach* in which *specific detriment* must be shown beyond a reasonable doubt" (p. 135). "In effect, the Supreme Court has ruled that the creation of a monopoly by merger, even if the elimination of all competitors is involved, is legal, provided the Crown cannot show *specific detriment* to the public interest flowing from the merger or the resulting monopoly." (p. 135). "The separation of the merger and monopoly offences in the 1960 revisions apparently did not impress the court; for, by this ruling, they have simply been read as one offence." (p. 165).

These assessments of the significance of the Supreme Court's decision lead, if correct, to one clear conclusion about government policy with respect to mergers: the government, if it is truly concerned about the alleged lack of an effective instrument to control mergers, will move quickly on the revision to the Combines Investigation Act[3] which has been under discussion for so many years and which would increase the ability of enforcement officials to deal with the merger problem. By the same token, a failure to move will suggest an absence of concern and a willingness to live without an effective merger policy. It should be recognized, however, to be quite fair, that changes having to do with merger policy are only part of the proposed revisions to the Act. It may be that problems associated with other parts of the Act are the explanation for the observed lack of progress. It should not, however, be impossible to introduce legislation limited to mergers if such is deemed necessary.

This paper will examine the *Irving* decision and will attempt to determine whether or not the opinions quoted above as to the damaging effect of the decision on merger policy are justified. Even if they are not justified, a strong argument can be made that the approach to merger policy contained in Bill C-13[4] is to be preferred to that which exists in the present Combines Investigation Act. The case for a new procedure for coping with mergers is grounded on considerations more compelling than those which specifically arise from a particular Supreme Court judgment. The judgment serves primarily to draw attention to the desirability of change. If the judgment in the *Irving* case is given the significance assigned to it by the comments already noted, the desirability becomes a necessity.

Before the issue with which this paper is primarily concerned is addressed, important questions concerning the meaning of "competition" in the interpretation of the Act will be considered. It will be suggested that the Supreme Court ruling failed to come to grips with the issues raised by the Crown.

I.

The facts in the case may be briefly summarized. K.C. Irving Limited acquired control of New Brunswick Publishing Company Limited in 1944; New Brunswick Publishing acquired control of Moncton Publishing Company Limited in 1948; K.C. Irving Limited acquired control of University Press of New Brunswick Limited in 1968 (80%) and 1971 (100%). New Brunswick Publishing published the two Saint John daily newspapers, *The Telegraph Journal* and *The Evening Times Globe*. Moncton Publishing published the two Moncton daily newspapers, *The Times* and *The Transcript*, and the University Press of New Brunswick published *The Fredericton Daily Gleaner*.

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3. R.S.C. 1970, c. C-23, as am.
4. Bill C-13, Third Session, Thirtieth Parliament, 26 Elizabeth II, 1977. An Act to amend the Combines Investigation Act and to amend the Bank Act and other Acts in relation thereto or in consequence thereof. First reading, November 18, 1977. The merger provisions are contained in s. 31.71. The Bill died on the Order Paper when the session ended. Suggestions that an effort be made to amend the present legislation continue to be heard.

It is with the acquisition of *The Fredericton Daily Gleaner* that this paper is primarily concerned. With that acquisition, K.C. Irving Ltd. obtained control of all five English language daily newspapers published in New Brunswick. The monopoly charge covering the period 1960 - 1971 and the combine charges covering the period 1948 - 1960 will not be considered, except to note that these charges required an operation, or likely operation, to the detriment or against the interest of the public. The merger charge covered the 1960 - 1971 period, with the acquisition of University Press of New Brunswick, publisher of *The Fredericton Daily Gleaner*, "whereby competition in a trade or industry, to wit: the producing, selling or dealing in English language daily newspapers, articles that may be the subject of trade or commerce, was or is likely to be lessened to the detriment or against the interest of the public, whether consumers, producers or others". The only competitive situation that might be lessened by this particular acquisition was between *The Daily Gleaner* and *The Telegraph Journal*, a Saint John newspaper with province-wide distribution, including Fredericton. The merger charge, it may be noted, contains no reference to detrimental operation, and so differs from the pre-1960 charges, and the post-1960 monopoly charge.

The trial court, Robichaud J. presiding, found K.C. Irving guilty of the merger charge (and other charges as well).[5] The judgment was appealed to the Court of Appeal of New Brunswick, where, with Limerick J.A. delivering the opinion, the appeal was upheld and the judgment of the trial court upset.[6] The Crown then appealed to the Supreme Court of Canada. In a judgment delivered in November 1976,[7] Laskin C.J.C., speaking for a unanimous court, rejected the Crown's appeal, thereby declaring K.C. Irving Ltd. and others charged not guilty on any of the counts.

II.

The Crown appealed to the Supreme Court on three grounds. It is to the third ground, involving the meaning of competition, that the following comments are directed. With respect, the Supreme Court's judgment fails to grapple with the essential points made by the Crown on this matter. In consequence, it leaves behind, if only by implication, an interpretation of the meaning of competition that could render even more difficult the already burdensome task facing the administrators of the Act in monopoly and merger cases.

5. (1974) 45 D.L.R. (3d) 45, 16 C.C.C. (2d) 49 (N.B. S.C.).
6. (1976) 62 D.L.R. (3d) 157, 23 C.C.C. (2d) 479 (N.B. C.A.).
7. [1978] 1 S.C.R. 408, (1977) 72 D.L.R. (3d) 82, 32 C.C.C. (2d) 3. This is the judgment of the Supreme Court of Canada in *R.* v. *K.C. Irving Ltd.* and three other corporations. In addition to the ground of appeal considered here, there were two others: (1) Did the Court of Appeal of New Brunswick err in holding that (a) no presumption arose of detriment or likely detriment to the public when competition has been prevented or lessened unduly, and (b) even if there was such a presumption there was evidence to rebut it; and (2) Did the Court of Appeal of New Brunswick err in its interpretation of the words "to the detriment or against the interest of the public, whether consumers, producers or others" as those words are used in the definition of "merger" and "monopoly" in the Combines Investigation Act and in the definition of "combine" in predecessor Acts?

The third ground of appeal reads as follows: "Did the Court of Appeal of New Brunswick err in its appreciation of the meaning of 'competition' as it related to the facts of the present case?"[8]

The Crown's factum presents two arguments on this point. One of them need only be noted: the alleged failure of the Court of Appeal to take into account the importance of "editorials, news items and other subject matters and viewpoints" in its assessment of competition in the newspaper industry. The Crown's factum submits that "the reflection of independent points of view in news coverage and editorial comment is the most important manifestation of competiton between or among newspapers".[9]

The other argument is of more general significance for the application of the Combines Investigation Act. It had been the conclusion of the Court of Appeal that competition, far from having been lessened by the acquisitions, had, in fact, been enhanced. This conclusion required the acceptance of the view that competition, as the term is employed in the Combines Investigation Act, could exist between subsidiaries of a common parent under certain conditions; for example, as in this case, an absence of direction from the parent as to the policies to be followed by the subsidiaries.[10] More fundamentally, this conclusion required the judgment that, given the purpose of the Act, this was an appropriate concept of competition.

The Crown's factum to the Supreme Court referred to this issue as follows:[11]

> The very nature of competition requires that there be independent competitors. To speak of a firm competing with itself through its own wholly-owned subsidiaries is either simply a figure of speech or it is a contradiction in terms. Economic self-interest, which is the motivating force of any meaningful competition, is absent.

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8. [1978] 1 S.C.R. 408, (1977) 72 D.L.R. (3d) 82, 32 C.C.C. (2d) 3.
9. Appellant's Factum, para. 27, p. 21. This particular question is discussed by the author in a forthcoming issue of the *U.N.B. Law Journal*.
10. The judgment of the Court of Appeal included the following: " . . . as each business was acquired, the publisher and editor was retained in office and the only instructions given were they were to run a good newspaper and were to have absolute control over editorial policy without interference from the owner or the holding company". " . . . actual control is vested in the publishers and editors of the individual publishing companies, which are, in fact, as independent in regard to selling price of newspapers, advertising rates, editorial policy, news editing and management as they were prior to their legal takeover by N.B. Publishing and K.C. Irving, Limited". 62 D.L.R. (3d) 168, 172.
11. Appellant's Factum, para. 26, p. 21. It is interesting to note that Professor Jesse Markham of Harvard University, the expert economist witness for the defence, defined monopoly as follows: "In the case of most products or services, monopoly is judged to be present or absent according to whether there are few or many *independent* suppliers of a nearly homogeneous product or service in the relevant market. That is, the greater the number of suppliers of a reasonably homogeneous [product], and the smaller the market share of any one supplier, the higher the degree of competition in the market in which the product is sold." [Emphasis added] He suggests that "in the information-disseminating market the conventional criteria by which monopoly is judged must be materially modified". This modification is called for by the necessity for the *"diversity* of the suppliers' "products" rather than their *homogeneity"*. For our purposes it is sufficient to note the emphasis on "independent" suppliers, an emphasis untouched by the suggested modification. J.W. Markham, "Economic Analysis Pertaining to the Case of Her Majesty the Queen against K.C. Irving et al." The quotation is from Exhibit D-50, Vol. 15, Transcript of Evidence, s. 2, at 2721-2736.

Earlier the factum had quoted the Court of Appeal:[12]

> When the N.B. Publishing bought out the Moncton Publishing, instead of thereby lessening competition, Moncton Publishing became more competitive and increased its sales in the competitive North Shore market many fold.

The factum goes on to say:[13]

> It is submitted that the Court of Appeal confused so-called "competition" among newspapers owned by a single owner with *genuine competition* among *independently owned* newspapers. [emphasis added]

And:[14]

> With respect, the error in law of the Court of Appeal is obvious and there are few authorities dealing with such a basic concept. Normally the meaning of competition is taken for granted.

In accepting this ground of appeal, the Supreme Court undertook to rule on a matter of substantial significance for competition policy, in addition to its significance for the case under appeal. Unfortunately, the Court's judgment is not as helpful as the importance of the matter warrants and it may, in fact, have awkward implications for future cases.

The Supreme Court judgment summarized the Crown's submission on this point as follows:[15]

> Crown counsel submitted . . . that the Court of Appeal erred in holding that subsidiaries of a parent corporation may be in competition with each other and, consequently, erred in holding that pre-existing competition had not been lessened by the acquisition of previously competing and *independently-owned* newspapers. [emphasis added]
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> The Crown contends that there can be no competiton among subsidiaries of a parent company, all engaged in the same business over which control has been acquired, or that it is likely, as a matter

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12. Appellant's Factum, para. 23, p. 19. The quotation appears in the judgment of the Court of Appeal, 62 D.L.R. (3d) at 169. "Many fold" is written as "manifold". This statement indicates a confusion between competitive behaviour and competition, a confusion stemming from the several meanings that may be attached to the words "competition" and "competitive". The Court of Appeal may be correct in stating that the Moncton paper became more competitive, in the sense that it was better able to operate successfully in the North Shore market; this is not an unreasonable meaning of "became more competitive". This is, however, not relevant to the question, was there a lessening of competition in the North Shore market? There clearly was, in that newspaper purchasers in that market no longer had available a non-Irving owned newspaper, and this diminution of competition is inherent in the fact of common ownership and is quite independent of the policy adopted by the owner or his publishers. The same confusion appears in the following: "The control acquired did not in fact deprive the public of the *benefits of free competition* as the individual companies became *more competitive* . . . . The public was not in fact deprived of a 'competitive market'." *Id.* at 182. [Emphasis added] Evidence had, as a matter of fact, been presented to the trial court to show that price increases of the newspapers serving the North Shore market, the *Moncton Times* and *Saint John Telegraph Journal*, had been coordinated. Mr. Ralph Costello, in answer to the question: "Who made the decision to increase the prices?", replied "This was something we discussed between Moncton and Saint John to determine when the morning newspapers would increase in price." A letter indicating such a discussion was also placed in evidence. "As previously discussed your change [of price] can take place a week in advance or a week later. I don't think it matters too much who goes first. However, I will discuss this with you next week and we can settle on details at tha time." (Transcript, Vol. 2 at 351). This would suggest, at the very least, some constraint on the pricing freedom of the individual newspapers and some shared concern with considerations that extended beyond those of each separate publisher. Surprisingly, the trial court judgment contained no reference to this illustration of co-ordinated pricing behaviour.

13. *Id.* at para. 23, p. 20.

14. *Id.* at para. 24, p. 20. As well, "[b]ecause of this error it [the Court of Appeal] held incorrectly that previously existing competition among independent competitors had not been lessened as a result of the acquisitions of all such competitors by one corporation". (*Id.* at para. 2, p. 10.)

15. 32 C.C.C. (2d) 3 at 7, 9.

> of necessary inference, that competition will be lessened as a result of the acquisition of such control.

And continuing,[16]

> I have already noted that there was no proof of detriment in fact. *The other points* taken by the Crown are based on what, in my view, is a mistaken application to the present case of the law governing unlawful conspiracies or agreements unduly to prevent or lessen competition. [emphasis added]

The other points mentioned evidently include the ground of appeal concerning the meaning of "competition". It seems, however, that the alleged "mistaken application . . . of the law governing unlawful conspiracies" has to do with the relationship between the "unduly" concept in conspiracy cases and the "detriment to the public" concept in merger and monopoly cases. It has nothing to do with the question raised by the Crown: can subsidiaries of a parent company be said to "compete"?

Again:[17]

> In contending that subsidiaries which are in the same business do not or cannot be said to compete, *the Crown appears to be putting them in the position of parties to an agreement or arrangement to lessen competition*, which agreement or arrangement is proved by reason of the interwoven corporate structure of which they are part, the parent company being the ultimate beneficiary of the profits flowing from the business. [emphasis added]

Although the Crown may, as the Supreme Court contends, appear to be putting subsidiaries "in the position of parties to an agreement or arrangement to lessen competition",[18] it is doubtful that this was the intention of the Crown. Certainly there is nothing in the Crown's factum to suggest that this was the case. By so interpreting the Crown's argument, the Supreme Court judgment unfortunately evades the issue raised by the Crown; an issue the Crown presumably thought had been made clear by the comparison made in its factum between "so-called 'competition' among newspapers owned by a single owner with *genuine competition* among independently owned newspapers"[19] [emphasis added].

The opinion of the Supreme Court that the Crown appeared to be putting subsidiaries in the "position of parties to an agreement or arrangement" seems to stem from the fact that the Crown relied on conspiracy cases, seeking "to draw from the decisions therein on undue lessening of competition support for its contention that undueness, if shown in respect of a merger, carries with it detriment, at least by way of a rebuttable presumption".[20] It is on this basis, the Supreme Court said, that the Crown relied on conspiracy cases ("this basis" referring to the Crown's apparently putting subsidiaries in the same position as parties to an agreement or arrangement). An alternative explanation of the reliance of the Crown on conspiracy cases is a much simpler one: that the jurisprudence developed in the interpretation of "unduly" would be transferable to the phrase "to the detriment of the public". Such an explanation seems completely in accord with the case developed by the Crown. For example, in the Crown's factum we read the following: "The point . . . is that the prevention or lessening of competition to an undue

16. *Id.* at 9.
17. *Id.*
18. *Id.*
19. Appellant's Factum, para. 23, p. 20.
20. *Supra* n. 15 at 9, 10.

degree by the elimination of previously active and viable competition constitutes, in itself, proof of detriment or the likelihood of detriment under the Combines Investigation Act."[21] And again, "It seems clear that Parliament has, since 1910, considered 'undue' restraints of competition . . . to be detrimental to the public interest."[22] And, finally, "The first aspect [of the Crown's submissions on detriment] . . . was that the jurisprudence establishes that the undue prevention or lessening of competition is deemed in law to operate or be likely to operate to the detriment of the public".[23]

In short, the Supreme Court judgment, by accepting the Court of Appeal's finding that the "pre-existing competition . . . was to some degree intensified" — which was a finding of fact — simply ignored the Crown's appeal on this issue. There is no explicit discussion in the judgment of the key question asked by the Crown and implicit in the ground of appeal on the meaning of competition: Can subsidiaries of a common parent be said to compete, not in some colloquial sense of competition — so-called competition — but in a meaningful sense for purposes of the Combines Investigation Act? Is competition between subsidiaries the free competition with which the Act is concerned and preservation of which has been long recognized as the purpose of the Act? Does not such competition have an ephemeral quality, in that it can, at any time, be eliminated by directive from the parent corporation, rendering it suspect as a reliable protector of the public interest?

An important consequence of the Supreme Court judgment in the *K.C. Irving* case is, accordingly, the acceptance of the proposition that subsidiaries of a common parent can be in a competitive relationship with one another such that the standards of the Combines Investigation Act are met. Independent ownership ceases to be a requirement for competition. Thus, provided the subsidiaries retain their separate identities, and provided they are told by the owning corporation to go out and get as much business as they can, they will be considered by the courts to be competitive. A merger that brought together under common ownership the only two firms in some industry could be said not to lessen competition provided that the operating independence of the two subsidiaries is maintained. It will be difficult, in the face of the *Irving* decision, to argue that a merger will lessen competition, let alone to the detriment of the public, if the acquiring firm imposes (or purports to impose) no central direction on the policies of the acquired firms. Moreover, the conclusion that such an acquisition would not produce a likely lessening of competition (and the Supreme Court judgment refers to the Crown's contention that a likely lessening of competition was a necessary inference in such a situation) requires a further prediction. Either the consequences of the competition are not likely, at some future time, to be so harmful to the interests of the parent company that the directive to compete will be withdrawn; or if this competition between subsidiaries turns out to be harmful to the interests

21. Appellant's Factum, para. 47, at p. 28.

22. *Id.* at para. 54. p. 30.

23. *Id.* at para. 93, p. 44. Para. 5. p. 11 of the Crown's Factum is also relevant. "The crux of this issue is whether the broad principles about the intention of Parliament enunciated by this Court in the so-called "unduly" decisions are applicable in determining whether detriment or the likelihood of detriment to the public has been shown."

of the parent company, it is likely nevertheless to continue to be permitted. Whatever the intended policy of the acquiring firm may be, it is difficult to argue that when previously competing firms are brought under common ownership, a likelihood of some lessening of competition is not produced, or that the competitive behaviour likely to be allowed the acquired firms will not be limited. Yet the finding in the *Irving* case, that the acquisitions challenged did not bring about a likelihood that competition would be lessened, requires just such an extreme argument. In essence, the prediction — which is what is called for if the phrase "is likely to" is to be given any significance, as was presumably intended when it was included in the legislation — that competition is not likely to be lessened, despite the common ownership of the "competitors", requires the supporting prediction that those factors which caused the owner to maintain the competitive relationship are likely to persist. In other words, no matter how much it may be asserted that only the facts of the case are considered, it is impossible to avoid recourse to *some* theory, some basis for the called-for look into the future, when the question of "what is likely" is addressed.

III.

Before proceeding with our analysis of the more general implications for the effectiveness of merger policy of the *K. C. Irving* judgment by the Supreme Court, it might be helpful, and interesting, to record some of the opinions expressed with respect to the implications of the 1960 amendments as they affected the merger provision, and as they relate particularly to the question about to be considered.[24] It is fair to say that the interpretation of the merger section of the legislation expected by most commentators on the 1960 amendment appears not to have been applied by the Supreme Court in the *Irving* case. Commentators on the amendments, of course, recognized the necessity of a Supreme Court case to produce an authoritative ruling on the matter.

Writing in 1963, D.H.W. Henry, at that time Director of Investigation and Research, Combines Investigation Act, had the following to say:[25]

> . . . in determining whether, in a merger, competition has been lessened to the detriment or against the interest of the public . . . one could expect the courts to apply the same tests as for determining whether a restriction of competition through a conspiracy is undue under Section 32 of the Act or Section 411 of the Criminal Code. This test relates . . . *only to the effect upon competition without regard to any additional benefit or detriment that may result.* [emphasis added]

In a footnote to the above, Mr. Henry notes that the point had not yet been determined by the Supreme Court of Canada.

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24. Prior to the 1960 amendment, a merger was illegal (as was a monopoly, trust or combination) if it "has operated or is likely to operate to the detriment or against the interest of the public". After the amendment, a merger was illegal if "competition . . . is or is likely to be lessened to the detriment or against the interest of the public". In both cases, the public is stated to be "whether consumers, producers or others".

25. D.H.W. Henry, "Unfair Distribution and Pricing Practices" (1963) *Special Lectures of the Law Society of Upper Canada*, at 37.

In a paper published in 1969, Mr. Henry made much the same point:[26]

> Legal proceedings will be undertaken when there is a reasonable likelihood that a court, particularly an appellate court, might reasonably be persuaded that the merger limits competition substantially, and *therefore* to the detriment of the public. [emphasis added]

That the 1960 amendment was intended to focus upon the competition-reducing effect of mergers as the test of illegality was stressed by another official in the Combines Branch. Mr. J.J. Quinlan, then Deputy Director of Investigation and Research, in a note originally prepared for the staff of the Branch wrote as follows:[27]

> Parliament [in the 1960 amendment] has made it *clear* that in prohibiting certain mergers it is concerned with the public interest in free competition and it is the extent to which competition is or is likely to be interfered with that is the test. [emphasis added]

Turning to academic commentators, reference may be made to J.A. Sherbaniuk's 1964 University of Washington doctoral dissertation: "... the wording of the criterion for judging mergers was modified ... the government made it clear [with its 1960 amendment] that the 'operation' they were concerned with was the 'lessening of competition'."[28] But Sherbaniuk was not convinced that the change in wording was of substantial importance: "Whether these changes will be of any consequence is a moot point." It is true that the Minister of Justice had stated in the House of Commons that: "We have made the point apparent that what we are concerned with is the lessening of competition." But he also said that: "I do not really think there is much change ... I do not think that there is really any change in substance."[29]

In a recent paper much the same point is made:[30]

> The statute was amended in 1960 to separate mergers from other combines ... The definition of 'merger' was changed to include the element of public detriment within the definition itself ... these changes were mainly changes in statutory drafting technique, rather than changes of a substantive nature.

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26. D.H.W. Henry, "Mergers in Canada Under the Combines Investigation Act" (1969) 5 *Texas International Law Forum*, (No. 1) at 28. This introduces the thought that the limitation on competition must be substantial; there is, however, no suggestion that the concept of detriment extends beyond the effect on competition. This paper also contains the following: "For purposes of administration and enforcement, a decision is made on the basis of whether competition has been impaired by the merger (or concentration has increased) to the extent that it may fairly and responsibly be argued before a court that the *line has been crossed with resulting public detriment*" (p. 27). [Emphasis added] In his program of compliance, however, Mr. Henry did not confine himself to considerations of competition. In his Annual Report for 1966, he states that "the range of factors considered in the Combines Branch in assessing a particular merger from the standpoint of the statutory test" includes "evidence of a real possibility of increased efficiency" and "direct evidence of detriment such as excessive profits or price enhancement". (Report of the Director of Investigation and Research, Combines Investigation Act, For the Year Ended March 31, 1966. p. 19.) Mr. Henry also expressed his view that "it would not appear to be inconsistent with this test [the fundamental statutory test of the effect on competition] to take account of other possibly offsetting factors, such as the possibility of increased efficiency" (*Texas International Law Forum*, at 6). On the face of it, it does seem inconsistent, though perhaps administratively sensible.
27. J.J. Quinlan, "Canadian Anti-Combines Legislation: 'Unduly' and 'Public Detriment' " Reprinted in *Restrictive Trade Practices in Canada* (L.A. Skeoch ed. 1966) at 76.
28. J.A. Sherbaniuk, *"Regina* v. *Canadian Breweries Limited:* An Analysis of a Merger Case" (1965, University Microfilms International) at 35.
29. *Id.*
30. A.J. MacIntosh and Warren Grover, "Bill C-13: Mergers, Regulated Industries and the Competition Board" in *Competition Policy in Canada* (J.W. Rowley and W.T. Stanbury eds., Institute for Research on Public Policy, 1978) at 186.

On the face of it, a change which converted the merger offence from an "operation or likely operation to the detriment of the public" to a "lessening or likely lessening of competition to the detriment of the public" would appear to be "substantive". It may be true, as the former Director of Investigation and Research pointed out in his 1969 paper, already referred to, that the "amendment merely entrenches the test that was in fact applied by the courts under the pre-1960 provision".[31] But it is surely not unimportant that the reference to operation to the detriment of the public was removed from the merger provision, with the presumably clear message from Parliament to the courts that the operation of the merger was not the issue with which the law was concerned, unlike the case of monopoly where detrimental operation remained a critical concept.

One further reference may be made. In a paper published in 1962, the following statement was made:[32]

> The words 'to the detriment or against the interest of the public' [as they appear in the merger provision] will in all probability be taken [by the courts] as referring to a situation where a merger has lessened competition to such an extent or degree as to cause detriment or the likelihood thereof to the public'. 'The sole test now . . . is whether competition is or is likely to be lessened to the detriment of the public as a result of the merger.'

The upshot of this discussion may be summarized as follows: The 1960 amendment as it applied to the merger provision was seen as a helpful clarification of the intent of the legislation, with its emphasis on competition as the criterion against which mergers were to be judged. The amendment, by directing the attention of the courts to the effect of the merger on competition, and by separating, and describing differently, the offences of merger and monopoly, seems to have been saying that detriments other than the effect on competition were not to be considered in a merger case. That is a thrust that is, of course, in tune with the overriding philosophy of the Act. The amendment is surely saying that the courts need not — in fact, should not — go beyond the competitive effect in their search for detriment in a merger case.

IV.

The competitive question relevant for the post-1960 merger charge was the effect of the acquisition in 1968 by K.C. Irving Limited of University Press of New Brunswick, publisher of *The Fredericton Daily Gleaner*. It was to this acquisition, and only to this acquisition, that the allegation of a lessening or likely lessening of competition to the detriment of the public applied. The competition in question had to do with the circulation overlap in Fredericton and certain adjoining areas between *The Fredericton Daily Gleaner*, an evening newspaper, and the Saint John *Telegraph Journal*, a morning newspaper with province-wide circulation.

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31. *Supra* n. 1 at 26.
32. J. Edgar Sexton, "Mergers Under Canadian Combines Law" (1962) *U. West. Ont. L. Rev.*, 49. *See also* Terence G. Ison, "The Legal Misconception of Monopoly" 2 *U.B.C. Law Review*, at 94: "The public interest test [for monopoly] is not *limited* to the effect upon competition [as it is for mergers]." [emphasis added]

Jesse Markham, Professor of Economics, Harvard University, testifying as an expert witness for the defence, gave the following evidence:[33]

> Only the issue of whether the two papers were in competition as advertising media can be effectively resolved by economic analysis, and on this point the analysis would appear to be conclusive.

His conclusion with respect to advertising competition was emphatic:[34]

> It is therefore obvious that the two papers are not competitive [advertising] media in the Fredericton local market . . . the two papers are not competitive advertising media in either the Saint John local market or the Province of New Brunswick.

Professor Markham went on to state his views, with respect to the news disseminating market:[35]

> The *Telegraph Journal*, addressed to a Province wide audience, would not logically be considered an effective competitor with any 'local' evening newspaper in the province such as the *Fredericton Gleaner* . . . Rather it is supplemental to the evening 'local' newspapers, providing an additional service to those residents who wish to receive a morning newspaper.

And he concluded:[36]

> While the distinctions in market behaviour between complementary and competitive products are admittedly complex the fact that the circulation of *both* papers have continued along their previous growth paths strongly suggests that the citizens of Fredericton regard them as complementary rather than substitute newspapers.

In his oral examination, Professor Markham frankly admitted that he was "clearer in my own conclusions" with respect to the advertising media than to the news disseminating media competition.

In view of the importance of the competitive situation in the Fredericton and area market for the post-1960 merger charge, it is worthwhile to trace through the consideration given to this matter by the separate courts. In this connection, perhaps because in the trial court evidence in the first case, involving three charges, was held "applicable to the second case" involving the post-1960 merger charge, the judgments do not always sufficiently distinguish in their treatment the acquisition of *The Fredericton Daily Gleaner* in 1968, to which the allegation of a lessening of competition applied, from the earlier (1948) acquisition of the Moncton papers, and the operation over the period, to which the allegation of an operation detrimental to the public applied. Inasmuch as it was the acquisition of *The Daily Gleaner* that evidently prompted the Crown to lay the charges, it may be suggested, with the benefit of hindsight, that a single charge of merger might have been more appropriate. The entire case would then have hinged upon the "lessening or likely lessening of

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33. The quotations are from his brief, "Economic Analysis Pertaining to the Case of Her Majesty the Queen against K.C. Irving, Limited, et al" at 2735. By specifying "advertising media" Professor Markham is indicating his belief that economic analysis was unable to answer the question whether or not the two papers were in competition with each other as news disseminating media. Professor Markham was accepted by the Trial Judge as an expert in economics and market analysis and market research.

34. *Id.* It is really only the Fredericton area market served by the *Gleaner* that is at issue.

35. *Id.* at 2736. Dalton Camp, an expert witness for the defence, expressed a similar opinion. "I suppose they [*The Saint John Telegraph Journal* and *The Fredericton Daily Gleaner*] complement each other. They aren't competitive certainly." Transcript, Vol. 6, p. 1017. Mr. Camp appears to have both the advertising and news dissemination markets in mind.

36. *Id.* at 2736. Regrettably, Professor Markham did not elaborate on his reasoning in his written submission nor was it developed in his oral testimony. The theoretical link between the two newspapers continuing along their "previous growth paths" and their being "complementary rather than substitute newspapers" is obscure.

competition to the detriment of the public" flowing from the purchase of the *Gleaner* and the resulting monopoly position of K.C. Irving Limited in the New Brunswick daily newspaper industry.

Mr. Justice Robichaud, as the trial Judge, was emphatic:[37]

> I am in total disagreement [with Professor Markham's theory] . . . about the absence of competition between the Saint John 'Telegraph Journal' and the 'Fredericton Gleaner'.
>
> His conclusion . . . that the above two newspapers 'are complementary rather than competing newspapers' is wrong.
>
> It is against the evidence viewed as a whole.

The opinion of Mr. Ralph Costello was preferred to the analysis of Professor Markham. A letter from Mr. Costello to Brigadier Wardell of the Fredericton *Gleaner* was quoted: "The fact is, in Saint John and Moncton we think of you (with your Gleaner and Advocate) as a pretty tough competitor."[38]

Robichaud J. went on to say: "These are strong . . . unequivocal words, which I certainly must take under consideration as coming from an expert journalist, right on the spot."[39]

Later in the judgment the following statement appeared, which was quoted by the Court of Appeal:[40]

> . . . with the acquisition of the 'Daily Gleaner' the *door became completely closed* to any competition in the field of English-language daily newspapers in New Brunswick. Free competition therein was absolutely stifled. The new English-language daily newspaper structure, in other words, became absolutely monolithic. [emphasis added]

This statement seems definitive enough. Unfortunately, the phrase "door became completely closed" lent itself to an interpretation, adopted by the Court of Appeal, which, given the context in which the statement was made, was almost certainly different from the meaning intended by the trial judge.

The above quotations demonstrate that Robichaud J. formed two opinions with respect to competition in the Fredericton area:

(a) There had been competition in the market prior to the acquisition of the Daily Gleaner, and

(b) that acquisition stifled competition.

It therefore seems fair to claim that in the trial court there was found to be a lessening of competition flowing from the merger.

This conclusion must, however, be set against the finding of the trial judge that there had, as a matter of fact, been no evidence that K.C. Irving Limited had exercised the control to which the ownership of the newspapers entitled it.[41]

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37. 45 D.L.R. (3d) 70, 71.
38. *Id.* at 71. Ralph Costello had been a leading figure in the New Brunswick newspaper industry for many years. The Advocate referred to is the *Atlantic Advocate*, a monthly publication of University Press.
39. *Id.* It may also be noted that, in testimony before the Senate Committee on Mass Media, Mr. Crowther, Vice-President and General Manager of the Saint John *Telegraph Journal*, had said: "There is a very strong competitive situation for circulation with Moncton on the North Shore and with Fredericton in the central section of the Province". *Proceedings of the Special Senate Committee on Mass Media*, No. 5 (Senate of Canada, December 16th, 1969) 5:57.
40. *Id.* at 91. The Appeal Court's quotation from the Trial Court judgement ended with "absolutely stifled".
41. *Id.* at 86, 87.

> The ... evidence is overwhelming that the owner does not now — nor ever did — influence or attempt to influence the publishers and editors of the five English-language daily newspapers of the Province.

And he found: " ... non-interference ... in the editorials, news gathering and dissemination policies, as well as in the advertising and other important segments of the publishing of the acquired newspapers".[42] And, further, " ... the three editing publishers ... are, in fact, the owner's completely independent editors of their respective dailies".[43]

Mr. Justice Robichaud's position may be summarized as a finding of a change in structure that "stifled competition" but a continuation of independent behaviour on the part of the acquired papers.

In the judgment of the Court of Appeal, Limerick J.A. dealt with the competitive significance of the acquisition of *The Fredericton Daily Gleaner.*

The Daily Gleaner, Mr. Justice Limerick wrote, " ... is not competitive with any other English newspaper printed in the Province with the *possible exception* of the 'Telegraph Journal'."[44] [emphasis added]

He accepted Professor Markham's findings concerning competition in the advertising market:[45]

> The only competition of any substance *for the advertising dollar* is between the Telegraph Journal and Moncton Times and this competition is restricted to what is known as the North Shore. [emphasis added]

Limerick J.A. continued:[46]

> In the other areas of the Province [i.e., apart from the North Shore area where the two morning papers compete] each paper has its own captive market, as it did prior to the common ownership ... The competitive position of the Telegraph Journal with the Daily Gleaner ... remains unaltered with many people in Fredericton buying both the Gleaner and the Telegraph; the Gleaner for local news, the Telegraph Journal for national news, stock market reports and other services not furnished by the Gleaner.

And later:[47]

> The statement of the Crown that there is a lessening of competition is not supported by the evidence ... The 'Telegraph Journal' serviced and supplied a diferent market than the 'Daily Gleaner' ... No lessening of competition has been established nor any evidence pointed out to this Court or the trial Judge to indicate any such lessening of competition.

The reference in the Court of Appeal judgment to servicing a "different market" indicates a rejection of the trial court's finding that the two papers were competing — a finding that the trial Judge had stated to be

42. *Id.* at 89.

43. *Id.* at 88. Robichaud J. stressed, however, that the "potential [to control] was always there to be exercised at any time, and the likelihood that such control could be exercised was always present": 45 D.L.R. (3d) at 90. Moreover, he also found that control "in the operations of the acquired Moncton Publishing Co. Ltd" and "the acquired University Press of New Brunswick" was, in fact, "exercised by Mr. Ralph Costello, who definitely was Mr. Irving's right-hand man": *id.* It is not easy to square this finding by the Trial Judge with his description of the three editing publishers as completely independent editors.

44. 62 D.L.R. (3d) at 163.

45. *Id.*

46. *Id.* at 164.

47. *Id.* at 169.

supported by the "evidence viewed as a whole". Limerick J.A. turned to this matter again:[48]

> In the Fredericton area where both the 'Daily Gleaner' and 'Telegraph Journal' were distributed and sold, each served a different market and *the opinion evidence of a majority of experts* was that they were not competitive. A letter written by Mr. Costello was placed in evidence by the Crown, however, in which he described the Gleaner as a tough competitor. [emphasis added]

But, whereas Robichaud J. had found the Costello letter persuasive, Limerick J.A. and the Court of Appeal, for reasons that are not stated, evidently preferred the evidence of the "majority of experts" to that provided by the Costello letter.

The Court of Appeal considered the sentence in the trial court's judgment, already referred to, in which the phrase "the door became completely closed to any competition" appears. This sentence expressed, in what was doubtless intended to be forceful language, Mr. Justice Robichaud's conclusion concerning the impact of the acquisition of *The Daily Gleaner* on competition in the Province. It seems clear from a reading of the judgment that what the trial court judge had in mind in his use of the (unfortunate) phrase "The door became completely closed" was that it was now virtually impossible for a new publisher to enter the New Brunswick market by purchasing one of the *existing newspapers*, all of which were now owned by K.C. Irving Limited. There was nothing in the evidence — nor is there anything in the judgment — to suggest that he intended to convey the thought that the acquisition of *The Daily Gleaner* erected a new barrier to the entry of a new, sixth, English-language daily newspaper. Immediately before he made the quoted statement, he refers to the evidence of four witnesses that "it would be a very precarious undertaking to start another English-language daily newspaper in this Province".[49] That being the case, the acquisition of the *Gleaner* (for which there had been other interested purchasers) by K.C. Irving Limited made it most unlikely — in fact, closed the door to the possibility — that an "outsider" would enter the industry by acquisition of an existing paper.

Limerick J.A. in the Court of Appeal interpreted this sentence in the trial court's judgment in a way, which, it is respectfully submitted, was almost certainly not the intent of the trial court Judge.[50]

> With respect to the opinion expressed by the trial judge, the situation after the acquisition of the Daily gleaner was no different than it was prior to that acquisition . . . The evidence of all expert witnesses called by the Crown was to the effect that it would be difficult, if not impossible, for a new newspaper to commence a successful operation in the Province with five papers already established, whether owned by one owner or several owners. The situation was not changed by the purchase of University Press [which published the Daily Gleaner] by K.C. Irving Limited. The only change was that there was no longer a completely independent paper existing in the Province. The

48. *Id.* at 177. It is interesting to contrast Mr. Justice Limerick's acceptance of the evidence of expert witnesses on this point in preference to that contained in the Costello letter, with his reference elsewhere, on a separate issue, to the "obviously biased opinions" of three experts called by the Crown. *Id.* at 174, 175. The expert witnesses whose evidence was given no weight had, however, made no study of the situation in New Brunswick, whereas the expert witnesses for the defence, including Professor Markham, had either made a special study of, or were familiar with, the newspaper industry in New Brunswick.

49. 45 D.L.R. (3d) at 91.

50. 62 D.L.R. (3d) at 174. As far as the merger charge is concerned, the relevant question was whether or not the purchase of the *Gleaner* lessened competiton to the detriment of the public, and not, as Limerick J.A. stated, whether or not it "resulted in an operation detrimental to or against the interest of the public".

> question which concerns this Court and should have concerned the trial Court is not whether the purchase of the Daily Gleaner prevented another paper from starting publication but whether the purchase of the 'Gleaner' resulted in an operation detrimental to or against the interest of the public.

Though it is impossible to know just what Robichaud J. had in mind, it is submitted that he did not have in mind the concern attributed to him by the Court of Appeal; that is, whether or not the "purchase of the 'Daily Gleaner' prevented another paper from starting publication".

Considering its importance, there is rather little discussion in the Supreme Court judgment of the question of competition between the Saint John *Telegraph Journal* and *The Fredericton Daily Gleaner.* This issue is, in fact, critically important to the determination of the post-1960 merger charge. After stating that "this Court . . . must accept the findings of fact in the Court of Appeal where they differ from those of the trial Judge", the Chief Justice goes on to say in the next paragraph: "To a lesser degree [than in the North Shore area] there is circulation competition in Fredericton and surrounding areas between the Daily Gleaner and the Telegraph Journal".[51]

When the Supreme Court judgment turns to consideration of "the charges alleging an unlawful merger under the present Act" (in which it is the acquisition of *The Fredericton Daily Gleaner* that alone is relevant) the following appears:[52]

> Even if the acquisition of entire control would be enough to support an inference of lessening or likely lessening of competition, that inference cannot be drawn here in the face of the evidence and the findings thereon by the trial Judge and by the Court of Appeal that the pre-existing competition where it existed, remained and was to some degree intensified by the takeover of the newspapers.

It seems difficult to speak of the findings of the trial Judge and the Court of Appeal in this way. The trial Judge had found the evidence as a whole disputed the argument that *The Fredericton Daily Gleaner* and the Saint John *Telegraph Journal* were complementary rather than competitive. The Court of Appeal, however, had found the two papers to service different markets, so that there was, in effect, no pre-existing competition in the Fredericton market to lessen. Moreover, the trial court had found that the acquisition of the *Daily Gleaner* had resulted in an absolute stifling of free competition. It may also be pointed out that the intensification of pre-existing competition referred to in the Supreme Court decision seems to have in mind the 1948 acquisition of Moncton Publishing, prior to the period to which the post-1960 merger charge applies. The reference is apparently to a statement in the Court of Appeal's judgment that the acquisition of Moncton Publishing, "instead of thereby lessening competition" resulted in Moncton Publishing becoming "more competitive" and increasing "its sales in the competitive North Shore market, many fold".[53] And there is a further reference in the Court of Appeal's decision to the acquired paper, the *Moncton Times,* which "greatly increased its circulation [in the competitive North Shore area] due partly to the infusion of new capital".[54]

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51. 32 C.C.C. (2d) at 6.
52. *Id.* at 12.
53. 62 D.L.R. (3d) at 169.
54. *Id.* at 177.

In view of the fact that a merger charge includes a "likely" lessening of competition, there is surprisingly little discussion of this matter. In the judgment of the Court of Appeal it is stated that: "There is no evidence of lessening of competition or of the likelihood thereof",[55] on the facts of the case. Depending on how the word "likelihood" is interpreted, one could argue, as already suggested, that the simple fact of the previously competing newspapers now having the same owner would create the likelihood — whether a probability or a possibility — of a lessening of competition. The Appeal Court's decision deals with this general matter in the following terms: "We can *only* judge the likelihood of future conduct on the basis of past performance", in the absence, that is, of "evidence of a change in policy or specific evidence of combined action to the detriment of the public in recent time".[56]

V.

The significance of the Supreme Court's *Irving* decision with respect to the possibility of an effective merger policy based on the present Act, depends essentially on the interpretation (and weight) to be given to the statement from the judgment that follows:[57]

> In the light of the definition of 'merger' in the present Combines Investigation Act it is impossible to say that acquisition of entire control over a business in a market area (as contrasted with acquisition of some control) must mean *without more* not only that competition therein was or was likely to be lessened but that by reason of such control the lessening or likely lessening is to the detriment or against the interest of the public. Even if the acquisition of entire control would be enough to support an inference of lessening or likely lessening of competition, that inference *cannot* be drawn here, in the face of the evidence and the findings thereon by the trial Judge and by the Court of Appeal that the pre-existing competition where it existed, remained and was to some degree intensified by the take-over of the newspapers.
>
> This is sufficient to dispose of the charges alleging an unlawful merger under the present Act. [emphasis added]

And there then follows:[58]

> The charges involving "merger, trust or monopoly" under the previous legislation and involving "monopoly" under the present Act bring up the question of operation or likely operation of a completely controlled class of business in a market area to the detriment or against the interest of the public. In my opinion, *the same conclusion* must follow, namely, *that proof must be adduced of this element* and it cannot be presumed, as the Crown would have it, merely by showing complete control of a business let alone substantial control only. The evidence must go beyond that and it was not adduced in the present case. [emphasis added]

In the definition of merger in the Act the word "control" appears as "control over or interest in the whole or part of the business of a competitor, supplier, customer or any other person" by "purchase or lease of

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55. *Id.* at 186.

56. *Id.* at 172.

57. 32 C.C.C. (2d) at 12, 13. It may be suggested that the statement that an "inference of... likely lessening of competition *cannot* be drawn here, in the face of the evidence... that the pre-existing competition . . . remained and was to some degree intensified by the take-over of the newspapers" [emphasis added] is extreme. There seems nothing inconsistent in drawing an inference that the effect of the acquisitions on competition is likely to be different from what it was in the past. In fact, it would seem to many that the lessening of competiton remains a strong likelihood, with that likelihood perhaps diminished, but certainly not destroyed by the observed maintenance, or intensification, of the pre-existing competition, which, while perhaps relevant to the question of likelihood, is hardly as decisive as "cannot" implies.

58. *Id.* at 13.

shares or assets or otherwise" and it is to the "acquisition by one or more persons" of this control that the provision refers.

In Chief Justice Laskin's statement, the reference is to "acquisition of entire control over a business in a market area". This appears to be using the word "control" as it is employed in the monopoly section of the Act: "substantially or completely control throughout Canada or any area thereof the class or species of business in which they are engaged".

Hence, the Chief Justice is referring to a situation in which the act of merger ("acquisition ... of ... control over ... the business of a competitor etc.") results in a monopoly situation ("entire control [which can be equated to complete control] over a business in a market area"). And he states that: " ... it is impossible to say that acquisition of entire control over a business in a market area must mean *without more* not only that competition therein was or was likely to be lessened but that ... "[59] [emphasis added].

"Without more" becomes the key phrase for which an interpretation is necessary; the following interpretation is suggested: "Without more" means without specific evidence of an actual (or likely) lessening of competition. That is to say, there must be evidence that there has been an actual (or likely) lessening of competition in the process whereby a merger (acquisition of control of a business) resulted in a monopoly (entire control over a business in a market area). If there is no evidence of a lessening (actual or likely) of competition the mere fact that a merger resulted in the monopoly of some market area obviously cannot make the merger illegal, as there has been no proof of the necessary component of an illegal merger: a lessening — or likely lessening — of competition.

However, "without more" seems to carry a second and more important meaning. Even if it is proven that the merger which resulted in a monopoly position has lessened competition, or is likely to, it must still be demonstrated that this (proven) lessening of competition is to the detriment or against the interest of the public. Merely because a monopoly position has been reached ("by reason of such control over a business in a market area") the lessening of competition — which brought about the monopoly position — is not sufficient to permit a finding of detriment. Hence, "without more" seems to have a double meaning in this sense:

(a) that competition has in fact been lessened, or is likely to be lessened, must be demonstrated; and

(b) detriment to the public must also be shown. One would think that this detriment must, however, in some sense flow from the lessening of competition; to require proof of detrimental "operation" seems to transform the merger into a monopoly case.

The Chief Justice goes on to say: "Even if the acquisition of entire control would be enough to support an inference of lessening or likely lessening of competition, that inference cannot be drawn here ...."[60] This wording suggests a reversal of the burden of proof. Expressed differently, it seems to be saying that despite the inference to be drawn from the fact of a merger followed by a monopoly position, the accused can

59. *Id.* at 12. The complete quotation is that to which note 57 applies.

60. *Id.*

prove that this did not result in a lessening of competition. This is logically possible only if:

(a) the acquired business of a competitor, supplier, customer or any other person, was not in competition with the acquirer prior to the acquisition. This raises the question as to the legitimacy of the market area employed. The market area, as defined for the monopoly argument, would include a business (the acquired business) not in competition with — i.e., not in the same market as — the acquiring firm; or

(b) the pre-existing competition remained, i.e., no change occurred in the competitive situation despite the change in ownership. This requires the assumption that an acquired business can compete with the other businesses owned by the acquiring firm.

It may be noted that the *Irving* case contained elements of both of these aspects. "Without more" may accordingly, be taken to impose a double requirement on the Crown.

(a) An actual — or likely — lessening of competition must be shown. But, if this can be inferred, as the Supreme Court suggests may be possible in the case of a merger that produces a monopoly situation, the defence may upset the inference.

(b) An actual detriment to the public must also be shown to result from the lessening or likely lessening of competition. It is difficult to think of such a detriment, other than a detrimental operation.

If, in fact, detrimental operation must be established, then the merger provision has been rewritten: an illegal merger is one that lessens, or is likely to lessen competition, and operates, or is likely to operate, to the detriment or against the interest of the public. Given the reluctance of courts, in a criminal case, to base a finding of guilt on likelihood, evidence of actual detrimental operation following the merger seems necessary. If so, the merger and monopoly offences differ only in that (i) the merger offence requires a lessening — or likely lessening — of competition, and (ii) the monopoly offence requires complete or substantial control of a class or species of business. If this interpretation of the judgment is correct, both offences require proof of operation detrimental to the public. It is difficult to believe that the 1960 amendment which clearly differentiated between the two offences was intended to have ths result.[61]

Some further points may be made. The question of the weight to be assigned to the passages from which the above interpretation derives must be considered. The Supreme Court was presented with a finding of fact by the Court of Appeal that competition (as understood by the Court of Appeal and challenged by the Crown) had not in fact been lessened, nor

61. It should also be pointed out that Chief Justice Laskin, in his dissenting opinion in *Aetna Insurance*, had the following to say: "The question of public detriment (as to which *evidence of public benefit would be admissible*) is a matter that arises in charges of *unlawful mergers or unlawful monopolies*, and it was a crucial question in the recent judgment of this Court in *The Queen* v. *K.C. Irving Limited et al*". 34 C.C.C. (2d) at 161 [emphasis added]. This suggests that detriment is a net concept, requiring some sort of balancing of benefits and detriments. It is difficult to see how such a balancing operation can be performed except by the exercise of a value judgment, a value judgment for which the Combines Investigation Act provides no guidance. The conspiracy provisions of the legislation, in which "unduly" has been interpreted so that benefits are irrelevant, has permitted these balancing problems to be avoided. The recent Supreme Court decision in *Aetna Insurance*, however, raises questions on this point.

was it likely to be lessened, by the acquisition of newspapers by K.C. Irving Limited. The only acquisition relevant for consideration of the post-1960 merger charge was that of *The Fredericton Daily Gleaner*, brought about by the purchase of the University Press. Given the finding by the Court of Appeal that this acquisition did not lessen competition, the post-1960 merger charge did not even reach the "detriment" question. The judgment in the *Irving* case, at least as far as the post-1960 merger charge was concerned, was accordingly based upon the lack of any evidence of a lessening — or likely lessening — of competition. It could therefore be argued that the reasoning in the case could be transferred only to similar merger cases, i.e., to those merger cases in which there was no effect upon competition, surely a possibility of minimal significance in merger policy. The Crown's appeal, as far as the merger charge under the present legislation was concerned, was based upon the argument that the Court of Appeal had misinterpreted the meaning of competition, an argument which, as we have already seen, the Supreme Court rejected, though not as explicitly as the importance of the question demanded. In view of this, it may be suggested that much of what the Supreme Court had to say (the evident need, for example, to demonstrate detriment over and above a lessening of competition) may be considered as *obiter dicta*.[62] If that is the case, then of course the much discussed importance of the *Irving* decision for future merger cases under the Combines Investigation Act declines and the case becomes, instead, an uninteresting ruling based upon the simple absence of the necessary component of an illegal merger: a lessening or likely lessening of competition.[63]

It may also be pointed out that there is nothing in the Supreme Court decision to indicate any requirement that a merger must result in a virtual monopoly — the virtual monopoly having been reached as a result of an acquisition that lessened competition — if it is to be illegal.[64] In other words, the aspect of the decisions in the *Beer*[65] and *B. C. Sugar*[66] cases that led to the conclusion that they emasculated the merger provision of the pre-1960 Act and, it was feared, the post-1960 Act, has not been confirmed. Whereas it is clear that it is not *sufficient* for a finding of illegality to demonstrate that a merger has produced a monopoly situation, neither does it appear to be *necessary*. Assuming that the significance of the *Irving* judgment is as discussed above, and further assuming that what has been suggested as possibly being *obiter dicta* is in fact not so regarded, then proof of an illegal merger requires evidence of *some* (there is no requirement that it be substantial) lessening of competition, provided that some specific detriment can be established.

62. All that was necessary for the judgment in the post 1960 merger charge was that there had been no lessening of competition, or the likelihood thereof. Hence, the suggestion (very tentative) in the paper that, as far as the post-1960 merger charge is concerned, much of the judgment is *obiter dicta*.

63. The Supreme Court's acceptance of the Court of Appeal's view that competiton between subsidiaries of a common corporation is possible remains important.

64. The Crown's Factum made this point: "By creating an indictable offence which can be committed by an acquisition which does not involve complete control or a class of species of business, Parliament has made it clear that such substantial or complete control is not a necessary element of the offence of merger." Para. 2, p. 12.

65. *R.* v. *Canadian Breweries Ltd.* (1960) O.R. 601.

66. *R.* v. *The B.C. Sugar Refining Company Limited et al* (1960) 32 W.W.R. (N.S.) 577, 129 C.C.C. 7.

If it is agreed that what has been suggested as *obiter dicta* is, on the contrary, part of the *ratio* and hence binding, the judgment produces a result that can only be described as peculiar. On the one hand, a conspiracy that results in an undue lessening of competition is illegal. This is true even though it may not bring about any specific detriment, and even if it produces what might be considered public benefits and with "undueness" not requiring that the conspirators have a virtual monopoly (and this even before the 1976 redefinition of "unduly").[67] On the other hand, a merger will not be illegal, even though it results in a complete monopoly, let alone a virtual monopoly, unless it can be shown to have produced some detriment to the public: a detriment, that is, other than the lessening of competition. The public is accordingly in a position of being denied the benefits of competition which the Act is supposed to provide, as entirely legal mergers whittle away and finally eliminate competition, but do not do so in an otherwise detrimental way.[68]

The most hopeful outcome of the discussion of this paper is as follows. The Supreme Court decision in the *Irving* case, as far as the post-1960 merger charge is concerned, dealt with a merger that was found not to lessen competition. It cannot be relied upon to determine how courts in future cases would consider a merger charge when there was found to be a lessening of competition, the facts in the two cases being so different that the reasoning in the one is not transferable to the other. This outcome is based upon the suggestion that much of the Supreme Court's decision, particularly where the need to show specific detriment appears, is *obiter dicta*. Another possible, not to say probable, outcome is that as a result of the *Irving* decision, in future merger charges the Crown will be required to demonstrate both a lessening of competition (or likelihood thereof), and actual (or perhaps likely) detriment to the public. Though the difficulty of so proving may be somewhat reduced by the absence in the Supreme Court judgment of any statement that the lessening of competition must be such as to result in a virtual monopoly, the double requirement imposes on the Crown a burden which will make a demonstration of guilt extremely difficult, with a consequent reduced willingness to prosecute merger cases. As well, it may be suggested, the intent of the 1960 merger amendment, aimed as it clearly was at mergers detrimental to the public *because* they lessened, or were likely to lessen, competition, has been thwarted by the courts.

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67. In which it is clearly stated that it shall not be necessary to prove in an "unduly" charge under s. 32 that the conspiracy, etc., "would or would be likely to eliminate, completely or virtually, competition in the market to which it relates". *See* S.C. 1974-75-76, c. 76.

68. Attention may be drawn to the statement of Mr. R.J. Bertrand, Q.C., Director of Investigation and Research, before the Royal Commission on Corporate Concentration, Nov. 3, 1975: "The merger provisions of the Combines Act were designed to be preventive in that mergers are prohibited when they are likely to be damaging to the competitive environment". And, "In the case of a . . . merger, it is possible to focus on the degree to which competition has been lessened by looking, among other things, at the proportion of the market brought under common control by the merger." (Mimeo. presentation, at pp. 12-14). This statement was presented to the Royal Commission, it need hardly be said, before the Supreme Court ruling in the *Irving* case.