Case Comments and Notes

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Chronique de Jurisprudence et Notes

Monopoly, Detriment to the Public, and the K. C. Irving Case

INTRODUCTION

The K. C. Irving case, reaching, as it did, the Supreme Court of Canada, is of substantial importance with respect to the effectiveness of the monopoly and merger provisions of the *Combines Investigation Act.* In a recent Annual Report, the Director of Investigation and Research stated:

> On November 16, 1976, the Supreme Court of Canada handed down its unanimous decision dismissing the Crown's appeal against the acquittal in the *K. C. Irving* case. That decision disposed of whatever hopes may have remained that the present criminal prohibition of mergers could be an effective instrument.[1]

The need for a Supreme Court judgment, particularly in a merger case, had been prominent in the thinking of the administrators of the *Combines Investigation Act* ever since the trial court decisions acquitting the defendants in 1960 in the Beer[2] and Sugar[3] cases. A common theme in the opinions expressed by Combines officials was that these decisions, by requiring a virtual elimination of competition to be illegal, seriously weakened the merger provision of the Act. The 1960 amendment specified that a lessening or likely lessening of competition to the detriment of the public in a merger case was proof of illegality. The Beer and Sugar decisions were arrived at under legislation in which operation, or likely operation to the detriment of the public, was required for illegality. In view of the different provisions, it is somewhat surprising that these decisions were as influential in official thinking as they evidently were. In any event, the Supreme Court ruling in the

[1] *Canada Bureau of Competition Policy, Combines Investigation Act,* for the year ended March 31, 1978, at 14.

[2] *Regina* v. *Canadian Breweries Ltd.*, [1960] O.R. 601 (Ont. H.C.).

[3] *Regina* v. *British Columbia Sugar Refining Company Limited et al.* (1961), 129 C.C.C. 7 (Man. Q.B.).

Irving case, which involved both a monopoly and a merger charge based on the 1960 Act, has provided what can probably be considered an authoritative ruling on the existing legislation.[4]

It is not the intent of this article to assess the importance of the Irving decision for merger and monopoly policy in Canada. Neither is it the purpose of this article to examine the judgments of the three courts involved in the case.[5] Instead, an attempt will be made to demonstrate that an issue of substantial significance to the public interest was dealt with in what can only be termed an essentially sterile manner. The result was that the underlying public interest issues were never effectively tackled. The failure of the case to come to grips with the issues of deepest concern stems from the fact that, given the criminal nature of Canadian monopoly and merger legislation, the task of the Crown was to satisfy the court, beyond a reasonable doubt, that the crime of assisting in the formation or operation of a monopoly and merger had been committed. The interpretations assigned to the key phrases in the legislation in previous judgments were all important. As a result, essential public interest, or public policy questions, though raised by the Crown in the Trial Court as well as in its submission to the Supreme Court, were never central to any decision. Thus an issue with a substantial public interest content was transformed into a narrowly legal question through the very process whereby a decision was reached.

Involving, as it did, the newspaper industry, the *Irving case* raised matters of particular public concern, extending beyond those typically present in a *Combines Investigation Act* case. The public interest aspects of the matter were sharpened by the extensive holdings of K. C. Irving Ltd. in other sectors of the New Brunswick economy. The outcome of the case, in revealing the inadequacy of the present Combines Act, demonstrates the need for new legislation, involving a new approach, to cope with the problem of mergers in Canada; this demonstration of the weakness of the existing law may be the most important contribution of the case to merger policy in Canada. As well, questions are suggested relating to the particular public interest matters present in a newspaper merger case, and the possible need for specific treatment of such mergers.

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[4]It should, however, be noted that the post-1960 merger charge foundered with the Court of Appeal's finding that there had been no lessening or likely lessening of competition, a finding of fact accepted by the Supreme Court, so that an essential component of illegality was absent. That being the case, the question arises as to how authoritative will be the Supreme Court's decision with respect to merger charges in which a lessening, or likely lessening, of competition is established. The meaning to be attached to the key phrase "lessen competition to the detriment of the public" did not, as such, require an interpretation for a decision to be arrived at in the Irving case.

[5]The case is discussed by Reschenthaler, G. B., and W. T. Stanbury in "Benign Monopoly: Canadian Merger Policy and the K. C. Irving Case"; *Can. Bus. L.J.* Vol. i, No. 2, Aug. 1977. See also Jones, David Phillip, "Trade Regulation", 1978 *Ottawa Law Rev.* Vol. 10, no. 1, 195-197, and Roberts, R. J., "The Death of Competition Policy, Monopoly, Merger and *Regina* v. *K. C. Irving Ltd.*" *U.W.O. Law Rev.* 1976-77. Vol. 15-16.

The events of the case may be briefly summarized. In the Trial Court — the New Brunswick Supreme Court, Queen's Bench Division, Robichaud J. brought in verdicts of guilty against K. C. Irving Limited on all four counts, two of which related to the pre-1960 amendment period, and two to the post-1960 amendment period.[6] In addition to the imposition of fines, Robichaud J. ordered the disposal of the *Moncton Times* and *Moncton Transcript,* the newspapers acquired by the Irving interests in 1948. The Trial Court's judgment was appealed to the Appeal Division of the New Brunswick Supreme Court and the appeal was upheld by a unanimous court; Limerick J. delivered the judgment. The Court of Appeal rejected the Trial Court's understanding of the meaning of public detriment. The Crown then appealed to the Supreme Court of Canada. Laskin C.J. delivered the unanimous opinion of the Supreme Court in November, 1976. He declared, in effect, that K. C. Irving, Limited and the others charged, were not guilty of the combination, monopoly and merger charges laid by the Crown.[7]

THE CROWN'S CASE

The public interest thrust of the Crown's case was made clear in Counsel's opening remarks to the Trial Court.[8] After arguing that a daily newspaper had "sufficient peculiar characteristics and uses which make it distinguishable from all other products"[9] and that the Province of New Brunswick constituted an appropriate geographical market in

[6]To be more precise. In count one, of the first case, K. C. Irving Limited, New Brunswick Publishing Company Limited, Moncton Publishing Company Limited, and University Press of New Brunswick Limited, were found guilty of a monopoly charge under the Act as amended in 1960. In counts two and three, also of the first case, K. C. Irving Limited and New Brunswick Publishing Company Limited were found guilty of a combines charge under the Act as it was prior to the 1960 amendment, and University Press of New Brunswick was found not guilty. And in the sole count in the second case, a merger charge under the Act as amended in 1960, K. C. Irving Limited was found guilty. 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 Evening Times-Globe. Moncton Publishing published the two Moncton daily newspapers, the Times and Transcript, and the University Press of New Brunswick published the Fredericton Daily Gleaner. It should be pointed out that the offence in the post-1960 monopoly charge, and in the pre-1960 charges, involved an operation, or likely operation, to the detriment of the public; the offence in the post-1960 merger charge involved a lessening, or likely lessening, of competition to the detriment of the public. Despite this presumably important difference in the nature of the offences alleged, the evidence was, with agreement of counsel, declared applicable to all four charges. As a result, the Trial Court judgment does not make the differentiation in the meaning to be attributed to public detriment that the different wordings of the relevant provisions suggest is warranted.

[7]The judgment of the Trial Court is given in (1974), 45 D.L.R. (3d) 45. The judgment of the Court of Appeal is given in (1976), 62 D.L.R. (3d) 157. The judgment of the Supreme Court of Canada is given in (1977), 32 C.C.C. (2d) 1.

[8]There was also what might be called the legal thrust: when competition had been lessened unduly, there had been, necessarily, public detriment with no need, consequently, to prove specific instances of detriment.

[9]In the Supreme Court of Canada. On appeal from the Court of Appeal for the Province of New Brunswick. Case on Appeal, Vol. 1, at 67. The transcript of the trial is contained in Volumes 1 to 6.

that the newspapers in question "provide a service to the New Brunswick readers in that only they, from both a news reporting . . . and . . . an advertising standpoint, can cover in depth the events which are of interest — in detail — only to the people of New Brunswick"[10], Crown Counsel went on to say:

> My lord, the detriment . . . which will be proven in this case, I suggest takes its genesis in that there must be freedom of the press — a freedom — should I say for an opportunity of diversity of ideas.[11]

And quoting from a Report by the Restrictive Trade Practices Commission:

> The conduct of our affairs in a democratic manner . . . is dependent upon the formation of public opinion. If the public . . . is not enlightened by discussion that points out the possible consequences of the alternative courses of action before the community, too many opinions will be ill-informed and muddled . . . If well-informed public opinion is an essential of sound public policy then the channels through which information flows to the members of the public have an importance which cannot be over-emphasized.[12]

Crown Counsel stated: "My lord, I suggest that is really the nub of this case".[13]

And continuing,

> For better or for worse, my lord, this country and our way of life has chosen a democratic form of government, and that whole form of government depends on informed public opinion, and public opinion can only be informed, I suggest, when there is a diversity of news available to it and presented to it so that it can make up its mind. Then, my lord, we see that in this particular case — in this particular monopoly — the economic interests of one of the accused, and the ramifications of its other economic holdings . . . it makes the detriment ever more apparent and more serious.[14]

A substantial part of the case presented by the Crown consisted of expert evidence to the effect that in a situation such as existed in New Brunswick, where all the English-language daily newspapers were under the same ownership, whatever the declared policy of the owner with respect to editorial and publishing freedom might be, there would, in fact, be a resultant constraint that would inhibit the exercise of editorial autonomy. A major objective of the defence was to establish that the publishers and editors of the Irving-owned newspapers had been free to

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[10] *Ibid.*, at 68.

[11] *Ibid.*, at 68.

[12] *Ibid.*, at 69. The quotation is from the Restrictive Trade Practices Commission Report *Concerning the Production and Supply of Newspapers in the City of Vancouver and Elsewhere in the Province of British Columbia*, Department of Justice, Ottawa, RTPC No. 9, 1960.

[13] *Ibid.*, at 69.

[14] *Ibid.*, at 69.

exercise their own judgment as to editorial policy and news stories to be included in their newspapers.[15]

The expert opinion evidence related to several matters: the role of the press in society, the relationship between newspapers, radio and television, the economics of the newspaper industry, and the difference between daily and weekly newspapers. The Crown relied heavily on expert evidence concerning the relationships between owner, publisher, editor and reporter as they affected the selection of news and the content of the paper. The goal was to establish a case as to the likely consequence of common ownership. As the case proceeded, it turned out that this expert evidence was of minimal importance. Although Robichaud J. was favourably impressed by some of this evidence, quoting portions of it in his judgment, it played no part in the reasoning that led to his decision. Limerick J., in the Court of Appeal, said the following; "All three [experts] admitted that they had made no study of the New Brunswick situation and were unable to say that the facts as they existed in New Brunswick followed along the line of their *obviously biased opinions*".[16] The Supreme Court judgment dismissed the evidence of these experts with the remark, "They spoke theoretically".[17]

Crown Counsel concluded his opening submission to the Trial Court thus:

> In this particular case we say that the issue here is so fundamental — the necessity for a well-informed public opinion — that this is the type of detriment which results when a monopoly owns all the daily newspapers in a province, such as happens in New Brunswick.[18]

In his oral argument, at the conclusion of the trial, Crown Counsel dealt with the meaning to be attached to the phrase "to the detriment of the public" and submitted that the two concepts which appear in the combines legislation — "unduly" and "to the public detriment" — are "synonymous and have exactly the same meaning".[19] Since the judicial

[15]The Trial Court Judge was satisfied that this was, in fact, the case. In his judgment he wrote "In other words, I find, as a fact, that these newspapers have complete editorial autonomy and the owners have never cast over their columns any editorial shadow whatsoever". (1974), 45 D.L.R. (3d) 45, at 88 (N.B.S.C.).

[16](1976), 62 D.L.R. (3d) 157, at 175. (N.B.S.C., A.D.) (Italics supplied) The three experts were Claude Ryan, Douglas Fisher, and Eric Wells.

[17](1977), 32 C.C.C. (2d) 1, at 13. (S.C.C.).

[18]Case on Appeal, Vol. 1, at 70.

[19]In the Supreme Court of New Brunswick, Queen's Bench Division, Moncton, New Brunswick, December 15, 1972. Oral Argument, at 1621. "Unduly" is the key word in the provisions of the Act dealing with conspiracies, combination, agreements and arrangements to "prevent, or lessen, unduly, competition"; in the monopoly provision the key concept is "operation or likely operation to the detriment or against the interest of the public"; in the merger provision the reference is to the "lessening, or likely lessening of competition to the detriment or against the interest of the public". The jurisprudence on "unduly", which also appeared in the relevant section of the Criminal Code, is much more extensive than the jurisprudence on public detriment, as a result of the greater number of conspiracy cases in the history of the enforcement of the legislation.

interpretation of "unduly" was applicable, it followed that "detriments", whether actual or potential, ceased to be important, it being well established in the "unduly" cases that the public interest was in the preservation of competition, with "benefits" and "detriments" from any other point of view irrelevant.

Given his emphasis on the "unduly" precedents, Crown Counsel argued that it was not necessary "to get into specific illustrations of detriment — that the mere concentration of ownership is sufficient — is all that you need in order to find a person guilty of this charge".[20] Hence, specific detriments become merely examples of the exercise of that monopoly power and are essentially irrelevant to the question of guilt. Similarly, the stress on the peculiar importance of newspapers to the functioning of a democratic political system ceases to be central. The detriment that stemmed from the very nature of the commodity, so much referred to in opening remarks, and so much discussed in the actual trial, is of significance only if a specific detriment has to be proved. In other words, given the way in which the concluding argument by the Crown was made, much of the prior material, focussing upon the part played by the press in society — a discussion which had lent to the case much of its general interest, and a discussion which most outside observers would probably agree came to grips with the key public interest aspect of the case — lost its importance. The purely legal question arises: has the line between due and undue, between legal and illegal, been crossed? The nature of the commodity allegedly monopolized matters not.[21]

THE TRIAL COURT'S DECISION

How did each court deal with the "freedom of the press" issue?[22]

[20] *Ibid.*, at 1657. On the basis of the decision eventually reached in the Irving Case, it appears that for the Crown to establish guilt in a merger case, not only must a lessening of competition be established, but, as well, specific detriments must be demonstrated.

[21] This is not to suggest that the Crown abandoned its emphasis on the importance of competition in the newspaper industry for the proper functioning of a democratic political system. Its argument, however, that "detriment to the public" was established by proof of an undue lessening of competition, an argument accepted by the Trial Court, in effect deprives the Crown's submission on the particular role of newspapers of the significance it would otherwise have.

[22] Counsel for both defence and Crown stressed "freedom of the press" throughout the trial, but they saw it rather differently. The defence argued that "freedom of the press" implied — or included — the right to publish and sell newspapers free of governmental interference, and the case was seen as an attempt by the government to deny to K. C. Irving this particular freedom and therefore a (politically motivated) restriction on press freedom. The philosophy of Brigadier Wardell, former publisher of the Fredericton Daily Gleaner, was cited: "The freedom of the press is the freedom to own, edit, print, publish and sell a newspaper, without interference or coercion from any Governments at any level". Case on Appeal, Vol. IV, at 728. The Crown saw the issue as the availability to the public of a variety of independent newspapers. Freedom of the press did not include the right of a newspaper owner, who already had an interest in the publishing of four newspapers, to purchase yet another one, if that newspaper was the sole remaining competition for the newspapers already owned. Freedom of the press also required, in the view of the Crown, that there be independent ownership. In the view of the defence it was sufficient that there be independent editorial and publishing operation which, it was argued, was quite consistent with common ownership.

In the Trial Court, Robichaud J. observed that "The uniqueness of the instant cases places me on the very threshold of a previously unopened door in our Canadian jurisprudence".[23] Turning to American cases, he quoted from Black J.:

> . . . the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society.[24]

and from Frankfurter J.:

> . . . the incidence of restraints upon the promotion of truth through denial of access to the basis for understanding calls into play considerations very different from comparable restraints in a cooperative enterprise having merely a commercial aspect.[25]

In his conclusion that the *Combines Investigation Act* did apply to the daily newspaper business, Robichaud J. found helpful the remarks of Ferguson J.:

> The daily newspaper business . . . has sufficient peculiar characteristics and uses which make it distinguishable from all other products . . . Daily newspapers have a unique market for which there is no real substitute . . . The daily newspaper provides a cluster of services in one unique package. . . They provide more, wider and deeper coverage of all news — international, national and local — than any other medium of daily news dissemination.[26]

That the once dominant position of the newspaper as a source of information had been weakened by the development of radio and television was recognized. Expert evidence to this effect was accepted by the court, being referred to as a "recital of what everyone knows: That the advent of radio and television has provided keen competition with the newspapers, in dissemination of news and in advertising, all over the world".[27] The formerly "exclusive territory" of the press had been invaded by radio and television.

> Nevertheless, journalism or the press still remains, in my view, a most important cog in the machinery of properly informing the public, the citizens of our Province and of our country as a whole, and so contributing a basis for the formation of their opinions. The "Press" still mans the front line in the bastion of our liberties and civil rights.[28]

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[23](1974), 45 D.L.R. (3d) 45, at 62 (N.B.S.C.).

[24]*Ibid.*, at 63; the quotation is from the judgment of the Supreme Court of the United States in the Associated Press case, 1945.

[25]*Ibid.*, at 63; the quotation is also from the Associated Press case, from a concurring opinion.

[26]*Ibid*, at 63, 64; the quotation is from the judgment of the U.S. District Court for the Central District of California in the *Times Mirror* case (1967).

[27]*Ibid.*, at 68.

[28]*Ibid.*, at 68.

Robichaud J. at a later point in his judgment quoted from the Crown submission, with evident approval:

> . . . the effect of restraints on competition in the daily newspaper field are so important from the point of view of freedom of the press that they are one of the main heads of detriment that must be considered by the Court.[29]

In so concluding, the judge necessarily rejected the defence position, stating that he could not subscribe to the submission "that in charges under the Combines Act the Courts are concerned with *Economics*, that is, pricing, and not with such matters as dissemination of ideas, news and comments".[30]

The argument of the Crown was that, given the complete control of the English-language daily newspaper business in New Brunswick enjoyed by K. C. Irving Ltd. "actual detriment does exist in that the very foundation of our democratic system is imperilled". "It is the intellectual competition among independent newspapers which must be regarded as detrimental in its absence".[31] Mr. Justice Robichaud indicated his acceptance of the Crown's approach to detriment as exemplified by the above-quoted statement.

However, despite the existence of "actual detriment", as alleged by the Crown, and accepted by the Court, the finding was that

> the owners of the acquiring company . . . have never exercised any control or direction in the gathering and publication of news and have always left total editorial independence to the publishers and editors of the five English-language daily newspapers in New Brunswick.[32]

There appears to be no necessary contradiction between this finding of fact — complete editorial autonomy — and the finding of actual detriment — "the very foundation of our democratic system is imperilled". The foundation can be "imperilled", and this can be considered an actual — rather than a potential detriment — even though, as in this case, no evidence of any detrimental restraint upon editorial autonomy was available.

In his verdict, Robichaud J., in effect, ignored the very question to which his judgment devoted a great deal of discussion. By the application of the jurisprudence developed in cases involving allegations of an undue limitation of competition, the question can be answered quite apart from any particular public interest in competition in the newspaper field. The question is: has the line that separates a "due"

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[29]*Ibid.*, at 100.

[30]*Ibid.*, at 99.

[31]Case on Appeal, Vol. XVI, at 2902.

[32](1974), 45 D.L.R. (3d) 45, at 88 (N.B.S.C.).

from an "undue" limitation of competition been crossed? If the answer is "yes", as Robichaud J. determined, then the monopoly or merger has been a source of public detriment.

> In my view, once a *complete monopoly* has been established, such as the evidence clearly discloses, inasmuch as the post-1960 charges are concerned, detriment, in law, resulted.
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> As for the pre-1960 charges . . . did this not constitute a *"virtual monopoly"* of the English-language newspapers of New Brunswick? I think so.[33]

Guilt was, accordingly, established and Robichaud J. so concluded. And, as the case proceeded through the Court of Appeal and the Supreme Court of Canada the key question became: Had the trial judge been correct in relying on the jurisprudence relating to "unduly", in the conspiracy cases, to arrive at the meaning to be assigned to the phrase "to the detriment of the public" in a monopoly/merger case?

Hence, although Mr. Justice Robichaud's judgment confirms the importance of a free press in a democratic society, and therefore confirms the particular importance of competition in the newspaper industry, and although he accepted the Crown's submission that actual detriment was produced by the monopoly control of daily newspapers in New Brunswick, Justice Robichaud's judgment is not dependent upon any such importance.

The nature of the commodity in question — so much discussed in the judgment, and so much considered in the evidence presented — faded from view; the public interest aspect of the case (*i.e.* is it in the public interest that all five English-language daily newspapers in the Province of New Brunswick be under single ownership?) was replaced by the purely legal aspect (*i.e.* has the acquisition of these newspapers produced a crossing of the line that separates the "due" from the "undue", thereby being illegal and is this the correct approach to illegality in a monopoly/merger charge?). This is not surprising. Although the legislation makes use of the concept of "the interest of the public" the court is not a tribunal to determine what is in the public interest. It is the task of the court to determine, as a matter of law, whether or not a specified offence has been committed.

THE COURT OF APPEAL'S DECISION

Given the basis of the Trial Court's decision, the question of the peculiar public interest attaching to competition in the newspaper industry did not loom large in the reasoning of either the Appeal Division of the New Brunswick Supreme Court or the Supreme Court of Canada. Nevertheless, both judgments included observations relevant to

[33] *Ibid.*, at 101.

the concern of this article, so that a brief consideration of these judgments seems worthwhile.

At an early point in the judgment of the Appeal Division, Limerick J., writing on behalf of a unanimous court, had this to say:

> ". . . it is not contended, *if* the question of editorial comment, editing of news and suppression of news are matters to be considered in determining whether it be deemed to be 'to the detriment or against the interest of the public. . .' that there has been a detriment to the public or against the interest of the public in that respect".[34]

It was, of course, so contended by the Crown. The Crown had argued that "actual detriment does exist in that the very foundation of our democratic system is imperilled" and the Trial Court had accepted the Crown's approach. The issue is, in part, semantic. The Trial Court had concluded that there had not been the centralized control, and restriction on editorial independence, seen by the Crown as the danger to the public interest inherent in the situation. It is undoubtedly this aspect of the Trial Court's judgment that Limerick J. is referring to. In that sense, it could be said that there had been no actual detriment, *i.e.*, no specific instances of detrimental behaviour involving editorial or news policy. The position of the Crown could thus be described either as a concern with potential detriment resulting from the power to control or as an actual detriment produced by the creation of the (as yet unexercised) power to control.

The judgment of the Court of Appeal goes on to differentiate between the newspaper as a physical object and the contents thereof.

> A distinction . . . must be made between the physical object, the newspaper consisting of a number of pages of newsprint, and the contents thereof such as the editorials, news items and other subject-matters and viewpoints expressed in the newspaper . . . The *Combines Investigation Act,* however, when read as a whole applies to commercial transactions, trade and commerce, the buying and selling of such articles as newspapers, paper plates, or any other commodity.[35]

The judgment continues:

> It [*the Combines Investigation Act*] does not and was not intended to control or restrict the expression of ideas, editorial comment, or editing of news.[36]

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[34](1976), 62 D.L.R. (3d) 157, at 164 (N.B.S.C., A.D.). (Italics supplied).

[35]*Ibid.*, at 167. On this point, the Crown's factum to the Supreme Court had this to say: "A newspaper is a newspaper not because it consists of a number of sheets of newsprint, but because it does contain editorials, news items and other subject matters and view points. These are the attributes likely to be affected most by competition or the lack of it. Conversely the effects of competition cannot be appraised properly if the effects in these areas are not considered". In the Supreme Court of Canada. On Appeal From the Court of Appeal In the Province of New Brunswick. Appellant's Factum. (para. 25), at 20.

[36](1976), 62 D.L.R. (3d) 157 at 167.

It is difficult to attach meaning to this statement as there was no suggestion that the Act was "intended to control or restrict the expression of ideas". It was the argument of the Crown that the benefits of competition, to which the public was entitled, included in this case the free flow of ideas, editorial comment and news, so that a possible restriction on such a free flow was a legitimate concern as an ingredient of the public interest.

One can, however, speculate on the intended meaning of the quoted statement. It may mean that any restriction on the expression of ideas, editorial comment, or editing of news resulting from the common ownership of the five English-language newspapers would not have been considered by the Court of Appeal as a source of detriment. Had the Crown, for example, established that a common editorial policy had been imposed — as, of course, it did not — or that specific news stories had been suppressed — as, again, it did not — then that would not have been evidence of detriment for purposes of the *Combines Investigation Act.* If that is what is meant, as appears reasonable, the further references in the judgment to the non-interventionist position taken by K. C. Irving, Ltd., with respect to editorial policy must be seen by the court as evidence relating to the question not of detriment, but of continuing competition in the industry.

In the light of the statement that the Act was not intended to control or restrict the expression of ideas, editorial comment, or editing of news, if it has the meaning assigned to it in the above paragraph, it is particularly difficult to see the basis for the Court of Appeal's assertion that "if New Brunswick Publishing had discontinued distribution of the *Moncton Times* in the North Shore area or had agreed with the other companies charged to increase the price of all newspapers unreasonably. I would have no hesitation in finding those publishing companies involved guilty of assisting in a monopoly which had operated to the detriment of the public".[37] The attachment of critical importance to the continued distribution of the *Moncton Times* in one area of the province seems hard to justify if the newspaper is, as suggested, no more than "a number of pages of newsprint" no different from "paper plates or any other commodity". It is, surely, the fact that a newspaper is more than simply a number of pages of newsprint, the fact that it contains "editorials, news items and other subject-matters and viewpoints" that would make its discontinuation detrimental to the public in a way in which the discontinuation of the distribution of paper plates, other paper plates remaining available, would not.

The *Combines Investigation Act* establishes no specific limitations applicable to the undefined concepts of public interest and detriment in the monopoly and merger section. It seems not unreasonable to suggest that the phrase "detriment to the public" is, or should be, elastic enough

[37] *Ibid.*, at 167.

to permit, in the case of an alleged merger or monopoly offence involving newspapers, a consideration of those aspects of the public interest to which a newspaper makes a particular contribution, a contribution recognized in the Trial Court. That being the case, matters relating to the expression of ideas, editorial comment and editing of news become relevant; the exclusion of such matters seems an unwarranted confining of the concept of the public interest within narrow bounds.

The judgment of the Court of Appeal returns to this point again:

> The evidence disclosed no detriment to the public relating to the newspapers . . . even as to editorial policy if such can be considered as being included in the contemplation of what is detrimental to the public interest.[38]

As a result, given the facts of the case, the interpretation of detriment adopted by the Court of Appeal is not critical. Had its concept of detriment been broad enough to include those matters, such as editorial policy, excluded by the judgment, the decision would have been the same, there being no evidence of any detriment of this sort.

In its Factum to the Supreme Court, the Crown placed considerable stress on the point with which this article is concerned, as is evident from the following quotations:

> The Court of Appeal did not give effect to this evidence [of expert witnesses, concerning the danger of monopoly control of all English language daily newspapers in the Province of New Brunswick] because of its view that any detriment to the public arising out of interference with freedom of the press was outside the scope of the *Combines Investigation Act.* The Appellant submits that the Court of Appeal erred in law.
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> The complete elimination of competition, in the circumstances of these cases, deprived the public of access to a free and independent press. *This deprivation, in and of itself, was detrimental to the public in a particular way over and above any*

[38] *Ibid.*, at 169. Limerick J. proceeds to discuss the "evidence [which] discloses no detriment to the public . . . even as to editorial policy". He notes that "editorials . . . in direct conflict with each other" have been carried, (at 169). News items "unfavourable to K. C. Irving enterpries and editorials criticizing various Irving enterprises" have been carried, (at 169). This suggests the sort of public detriment Limerick J. would consider relevant *if* editorial policy were "included in the contemplation of what is detrimental to the public interest" a possibility he had earlier in the decision rejected. He had also commented on the slanting of "editorials and news selection to coincide with what he [a publisher] thought the owner would want and particularly to avoid unfavourable reference to any other business enterprise operated by the newspaper owner"; he found no evidence of any such slanting, (at 168). He was impressed by the fact that publishers and editors "were to have absolute control over editorial policy without interference from the owner or the holding company", (at 168). In this connection, it is interesting to note that in the Proceedings of the Special Senate Committee on Mass Media, No. 5, December 16th, 1969, Mr. K. C. Irving is reported to have been asked by Senator Prowse: "If you thought that any action he [the publisher] was taking would be inimicable to the interests of New Brunswick, you would step in?" Mr. Irving answered "Yes". The publishers' "absolute control over editorial policy", as seen by Mr. Irving, apparently had limits; Mr. Irving was to be the arbiter of what was in the interest of New Brunswick.

> *consequence [sic] which follow or are deemed in law to follow prevention or lessening of competition generally.*[39]

This passage indicates the way in which the Crown attempted to relate its emphasis on the legal detriment of the reduction in competition with its concern for the particular importance to the public interest of the reduction in competition in this case. And further from the Crown's *Factum:*

> . . . the monopoly control over all English language daily newspapers published in the Province of New Brunswick which resulted from the elimination of competition, constituted such an interference with the freedom of the press that it necessarily operated and was likely to operate to the detriment of the public.
>
> No two daily newspapers are the same. Each will reflect the views and policies of its owners as to what news is more important, what matters of public interest require comment, and the like. . . The submission made here is that the reflection of independent points of view in news coverage and editorial comment is the most important manifestation of competition between or among newspapers.[40]

The defence might agree with the above statement, provided the word "owners" was replaced by the words "editors and publishers" whose actual independence was a large part of the defence case.

> The Crown argued that in this case detriment to the public results because the public is deprived of having news selected and presented by independent publishers representing different points of view.[41]

At issue is the meaning of "independent". It was the position of the defence that, despite the fact of common ownership, the publishers were independent in that there was no imposition of centralized direction as to editorial policy or news content.

THE SUPREME COURT'S DECISION

Laskin C.J., in delivering the unanimous opinion of the Supreme Court, wrote as follows:

> Limerick, J. A. held . . . the legislation would not cover the contents [of a newspaper] as such. This is not a question that I need decide here and I leave it open, especially in view of the fact, established by the evidence, that

[39]In the Supreme Court of Canada. On Appeal From the Court of Appeal for the Province of New Brunswick. Appellant's Factum. Para. 109, at 51, and Para. 105 at 49. (Italics supplied). It deserves to be noted that the Crown had requested leave to appeal on the ground: Whether the Court of Appeal for New Brunswick erred in law in refusing to consider the importance of a free and independent press in determining whether monopoly control of newspapers operates or is likely to operate to the detriment of the public. This ground was not, however, one of those accepted by the Supreme Court.

[40]*Ibid.*, Para. 94, at 44, and Para. 27, at 21.

[41]*Ibid.*, Para. 16, at 18.

> editorial control of the five newspapers was left in the hands of their respective publishers and editors without any attempt at central or other combined direction. At first blush, it seems incongruous that a prohibited merger or monopoly should not include newspapers in respect of their editorial direction, but, as I have said, I leave the point open.[42]

He then summarizes, but does not comment upon, the Crown's submission.

> I do not overlook the Crown's submission... that because newspapers are important channels of communication in support of an informed public opinion and are important disseminators of ideas, and hence significant for a working democracy, they are so different from other commercial ventures as to require the Courts to view any alleged merger or monopoly in the newspaper field with greater concern for maintenance of freedom in the communication or dissemination of news and ideas.[43]

He then states that "it will be more convenient to deal with it [this view in the Crown's submission] when I come to consider that submission.[44]

Regrettably, when in his concluding paragraph, Laskin C.J. returns, as promised, to the question, he does so only briefly. Referring to the need to establish operation or likely operation to the detriment of the public in a "merger, trust, or monopoly" charge under the previous (pre-1960) legislation or to a monopoly charge under the present Act, the Chief Justice states:

> True enough, there was testimony taken from witnesses, referred to as expert witnesses by the trial Judge, who spoke of the threat to newspaper independence (and likely resulting public detriment) where there was centralized ownership of a number of newspapers with a right to control their policies in both editorial views and news reporting. They spoke theoretically, without having made any study of the situation in New Brunswick, nor did they address themselves to the facts relating to the operation of the newspapers involved in the present case.[45]

These remarks, including, as they do, the phrase "they spoke theoretically" indicate the minimal weight to be attached to theoretical evidence, and hence the minimal weight also to be attached to any detriment, also necessarily theoretical, based on such evidence. The Chief Justice does not come to grips with the concept of detriment as urged by the Crown, over and above the detriment alleged to reside in the lessening of competition as such. As a result the fundamental public interest question raised by the case is not effectively answered by the Supreme Court.

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[42](1977), 32 C.C.C. (2d) 1, at 5. It is unfortunate that the Supreme Court's judgment chooses to leave this question open; an opinion on this would have been valuable, particularly if, in some future newspaper monopoly case, the question of an operation detrimental to the public is at issue.

[43]*Ibid.*, at 5-6.

[44]*Ibid.*, at 6.

[45]*Ibid.*, at 13.

EDITORIAL DIRECTION AND PUBLIC DETRIMENT

It is clear, then, that the issue of detriment in the case of a merger/monopoly charge involving newspapers has not been resolved. The Trial Judge, while indicating his agreement with the proposition that newspapers perform a function of particular importance in a democratic society, so that special interest attaches to competition in the industry, based his verdict on his finding of an undue lessening of competition unrelated to any particular properties a newspaper might have and therefore unrelated to any particular values that might be attached to competition in the newspaper industry. In the Court of Appeal the thrust of the decision was to stress that the *Combines Investigation Act* applied to newspapers because they were a commodity subject to trade and commerce. Their peculiar information-providing function was treated as irrelevant. In the Supreme Court, the matter was left open, though in such a way as to suggest that the Supreme Court found it difficult to see how the content of newspapers, and hence their function, could sensibly be ignored in a *Combines Investigation Act* case. What the Supreme Court had in mind by the phrase "in respect of their editorial direction" ("it seems incongruous that a prohibited merger or monopoly should not include newspapers in respect of their editorial direction") is not clear; the most reasonable interpretation is that "editorial direction" becomes relevant when the question of public detriment arises. One would also be inclined to assume that the Court is suggesting "editorial direction" would be a component of public detriment if that editorial direction were centralized under common ownership. This assumption seems justified in that the judgment states that the question of whether the legislation covered the contents of a newspaper as such need not be decided here, *"especially in view of the fact*. . . that editorial control of the five newspapers was left in the hands of their respective publishers and editors without any attempt at central or other combined direction".[46] The implication surely is that, had editorial control not been left in the hands of the publishers and editors, the question of the applicability of the Act to the contents of a newspaper could not have been shunted aside, and the issue of public detriment flowing from such centralized editorial control would have had to be faced.

What type or amount of editorial direction might constitute public detriment is not, understandably, made clear. And what sort of evidence would be required to demonstrate editorial direction is also not made clear; one suspects that editorial direction can be imposed in more than one way, some less obvious (or more subtle) than others, some less likely to produce evidence satisfactory to a court than others. The very notion of "editorial direction" lacks precision. Would a policy of continuing editorial direction be necessary? Would a policy of agreeing on the editorial line to be taken on certain major issues be sufficient? Would a

[46] *Ibid.*, at 5. (Italics supplied).

policy covering the treatment, whether in editorials or news, of particular matters such as other economic interests of the owner be enough? Would it be sufficient to demonstrate, as the Crown attempted to do, that, due to centralized direction, in a number of instances particular news items were not covered, or were covered in a misleading way, or deliberately misinterpreted? In sum, there is little in the Supreme Court judgment to afford guidance on the central public interest issue with which the case was concerned: 'under what conditions is the common ownership of all newspapers in a province detrimental to the public, given the judgment that such common ownership cannot, in and of itself, be said to involve that detriment which the Act is supposed to guard against?'. Expressed concisely, when would the operation of a newspaper, or newspapers, in a monopoly position be illegal, because of detrimental operation?

Of at least one thing we can be certain. The issues involved in the Irving case were unsuitable for determination under the *Combines Investigation Act,* in a criminal court, with the necessity to prove guilt beyond a reasonable doubt. The concept of guilt in this case seems somehow inappropriate. The issue in the case was implicit in Crown Counsel's opening statement to the court. Was it in the public interest that all five English-language daily newspapers in the Province of New Brunswick be under common ownership? This fundamental question was made more acute by — though it was not really dependent upon — the position which that owner occupied in the New Brunswick economy. Yet this issue was, in effect, pushed aside. The Crown itself relied primarily on the legal proposition that, when competition had been lessened unduly, there was detriment to the public. The Crown did not, however, lose sight of the nature of the detriment the public suffered when competition was unduly lessened in the newspaper industry. The trial Judge, as already noted, though impressed by the Crown's argument concerning the role of the press in a democratic society, did not rely on it in arriving at his decision, which would have been the same whatever the product involved. The Court of Appeal rejected the thrust of the Crown's case, finding that the *Combines Investigation Act* did not cover those matters which were seen by the Crown as critical to the nature of the detriment that would flow from the absence of competition in the newspaper industry of the province. The Supreme Court judgment found it unnecessary to tackle the issue. As a result the case was determined on a narrowly legal basis so that the real public interest issue was ignored. The system answered "no" to the following question; 'Was there a violation of the merger or monopoly provisions of the *Combines Investigation Act*?' The system did not provide an answer to the underlying public policy question: 'Was it in the public interest that all five English language daily newspapers in the province of New Brunswick be under common ownership?'. To an essentially irrelevant question: 'Has the crime of assisting in the formation of a merger or monopoly been committed?' an answer was given. To the important

question: 'What should public policy be in this situation?' no answer was provided, because the question was never asked.[47]

It does not appear that the merger provisions of Bill C-13, the latest attempt by the government to complete the reform of competition policy initiated in the late 1960's, represent an improvement with respect to the treatment of newspaper acquisitions. It is true that the proposal to have an expert Board, rather than a criminal court, deal with mergers would eliminate many of the procedural difficulties revealed in the Irving case.[48] The merger section of Bill C-13, however, contains no reference to the public interest or public detriment, so that arguments relating to the importance of the free flow of information from the point of view of the public interest, would evidently not be appropriate when the proposed Board applies the criteria established by C-13. The requirement that a merger "lessens, or is likely to lessen, substantially, actual or potential competition" if it is to be brought before the Board would remove from the possibility of examination some newspaper mergers to which a public interest was attached. It is, in fact, probable that the Board, had it been faced by the Irving acquisitions, would not have found that any lessening of competition resulting from the acquisitions, given the limited circulation overlap, could be considered "substantial". In addition, the several criteria to be taken into account by Bill C-13's proposed Board in reaching its judgment do not include those matters likely to be important in a newspaper case.

THE UNITED KINGDOM'S POLICY

Brief mention may be made of the approach of the United Kingdom to newspaper mergers. A recognition of the particular importance of competition in the newspaper industry has resulted in a policy to deal with newspaper mergers separate from that dealing with mergers generally. Stated simply, a newspaper is not to be transferred to the owner of another newspaper without the consent of the Minister, and this consent will be given, except in certain specified cases, only after the proposed merger has been referred to a specially constituted group of the Monopolies and Mergers Commission, for a public interest assessment. The Commission is directed to determine whether:

> the transfer may be expected to operate against the public interest, taking into account all matters which appear in the circumstances to be relevant and,

[47]It is regrettable — though there may well have been some very good reason — that the Irving case was not referred to the Restrictive Trade Practices Commission for a public interest assessment. It was a situation in which the public interest issues were sufficiently important that an assessment by the Commission would seem to have been of value.

[48]Bill C-13. An Act to amend the *Combines Investigation Act* and to amend the *Bank Act* and other Acts in relation thereto or in consequence theeof. First reading, November 18, 1977. Third Session, Thirtieth Parliament, 26 Elizabeth II, 1977. The merger provisions are contained in Sec. 31.71 It is probably safe to assume that, if the present Act does get revised and passed, which is far from certain, the merger provisions will not differ fundamentally from those proposed in C-13. C-13, in fact, died on the order paper. Suggestions that it will again be introduced, suitably revised, continue to be heard.

> in particular, the need for accurate presentation of news and free expression of opinion.[49]

A leading commentator on competition law in the United Kingdom has discussed the policy with respect to newspaper mergers as follows:

> Newspapers — sufficient newspapers to represent most of the widely held political approaches — are so important in a democracy that it has been made illegal to transfer a paper to the owner of others without the prior consent of the Minister . . . Where a newspaper cannot survive, a merger with another paper may be the kindest way of ending its life. . . But where a paper might have continued, the concentration by merger of the organs for influencing public opinion is damaging. Consequently, the requirements for a press merger are more stringent than for others.[50]

It is to be particularly noted that, unlike the *Irving case* which concerned completed mergers, one in 1948, one in 1968, in the United Kingdom it is the merger proposal that is referred to the Monopolies and Mergers Commission, so that a merger that does not satisfy the Commission's concept of what the public interest requires will be prevented from taking place. This procedure also permits mergers to go ahead on the strength of conditions agreed to by the acquiring newspaper owner, conditions which bring the proposed merger within the confines of the public interest.

As far as the question of treating newspapers differently from the products of other industries is concerned, the United Kingdom's Royal Commission on the Press had the following to say (after recommending a Press Amalgamation Court):

> Then it may be said — and said truly — that the proposal involves treating the newspaper industry differently from industry in general. The answer is that the public interest in relation to the newspaper industry is different. The discrimination is based on the proposition that freedom and variety in the expression of opinion and presentation of news is an element which does not enter into the conduct of other competitive industries and that it is a paramount public interest.[51]

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[49]This is a direct quotation from *The Fair Trading Act*, 1973. See Korah, Valentine, *Competition Law of Britain and the Common Market*, Paul Elek, London, 1975, at 76.

[50]*Ibid.*, at 72-73.

[51]Royal Commission on The Press 1961-62 Report, September 1962, London, HMSO, Cmnd. 1811, at 106. The recommended Court was not, in fact, established. When legislation to deal with mergers was enacted in 1965, however, newspaper mergers were given special treatment and specific criteria. And it may be noted that, in Canada the Special Senate Committee on Mass Media recommended a Press Ownership Review Board. "We urge the government to establish a Press Ownership Review Board with powers to approve or disapprove mergers between, or acquisitions of, newspapers and periodicals". Note also the burden of proof suggested by the Senate Committee ("all transactions that increase concentration of ownership in the mass media are undesirable and contrary to the public interest — unless shown to be otherwise"), and consider the burden of proof placed on the Crown in a *Combines Investigation Act* case: to prove guilt beyond a reasonable doubt. The Senate Committee went on to ask the question: "Suppose K. C. Irving wished to buy the last remaining independent newspaper in New Brunswick. . . It seems almost unarguable that the state should be empowered to watch over the public interest if any such transactions were proposed". "The Uncertain Mirror" Report of the Special Senate Committee on Mass Media Volume 1, Queen's Printer for Canada, Ottawa, 1970, at 73. As the Report had already noted, at 26, that K. C. Irving owned all five of the province's English language dailies, the "last remaining independent newspaper" must be *l'Evangeline*, a French-language paper.

SUMMARY

A number of points summarizing key aspects of the Irving case may now be made.

1. The Supreme Court decision, as stated in the Director's Annual Report, appears[52] to demonstrate the inability to deal with the merger problem under the present legislation. If the government feels that there should be a policy to deal effectively with mergers — a doubtful assumption perhaps — an early passage of revised legislation capable of coping with the merger problem may be confidently predicted.

2. The *Irving case* reveals the problems inherent in an Act which — at least in the merger section — must translate a public interest problem into a "competition" problem. In view of the finding by the Court of Appeal that the acquisition of the Fredericton *Daily Gleaner* in 1968 had not resulted in a lessening of competition, the alleged illegality attaching to that acquisition was necesssarily denied, given the wording of the Act. This does not, however, eliminate the public interest in the acquisition nor does it, in this case, remove all concern that there might be public detriment. The public interest in changes in press ownership is not confined to changes that reduce competition, *i.e.,* to acquisition of newspapers competitive with papers already owned by the acquirer.[53] Hence, even if it were agreed that the Fredericton *Daily Gleaner* had not been competitive despite an overlapping circulation with the Saint John *Telegraph Journal,* there would seem to be a public interest in the preservation of an entirely independent newspaper in the province. The finding by the Court of Appeal that there had been no lessening of competition

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[52]"Appears" is used for the following reason, already alluded to in footnote 4. The merger charge based on the present Act necessarily failed given the finding by the Court of Appeal that there had been no lessening of competition as a result of the acquisitions, including the acquisition of the Fredericton *Daily Gleaner* in 1968. As a merger, to be illegal, must lessen competition, or be likely to lessen competition, the acquisition of the *Daily Gleaner* did not even meet this requirement for illegality, so that the question of whether or not the lessening was to the detriment of the public did not arise. That being so, it may be suggested that the reasoning behind the decision is applicable only to future cases in which there is no lessening of competition — it is hard to think that there would be any such cases — so that the interpretation of the phrase "to the detriment of the public" in a case involving an actual lessening of competition has not yet been determined.

[53]A report by the United Kingdom's Monopolies Commission on a proposed newspaper merger makes this point effectively: "The special risk arising from concentration lies rather in the fact that, if the owner of a wide-ranging group were to use whatever power in this respect his ownership gave him so as to prevent accurate presentation of news or free expression of opinion, or were he, indeed, to abuse this power in any other way, the damage would be much greater because of the area over which the harmful effects would be sustained. There is a further risk in that, while there may be little in the way of direct competition in the production of local newspapers, *the absence of independent papers within a region* makes it difficult for comparisons to be made and easier for standards of efficiency to deteriorate through complacency". (Italics supplied). *The Monopolies Commission, George Outram & Company Ltd. and Hamilton Advertiser Ltd. and Baird & Hamilton Ltd.* A report on the proposed transfer of six weekly newspapers, 20th January, 1970. London, HMSO, at 21-22.

flowing from the Irving acquisitions may or may not have been correct. The Crown's appeal to the Supreme Court included the ground that the Court of Appeal had erred in "holding that subsidiaries of a parent corporation may be in competition with each other"[54]. This important point was not dealt with directly in the Supreme Court's decision. In accepting the Court of Appeal's finding the "pre-existing competition. . . remained and was to some degree intensified"[55] the Supreme Court implicitly denied the Crown's argument and accepted the possibility that subsidiaries of a common owner could in fact compete one with the other. Given the Act, specifically the post-1960 merger provision, the finding was crucial as far as the legality of the merger was concerned but not, it is suggested, of overriding significance as far as the public interest aspect was concerned.

3. Given that the legislation is criminal law, the public interest issues were shunted aside in favour of a sterile argument — sterile from the public policy point of view — of the interpretation which, on the basis of past decisions, was to be given to the phrase "to the detriment of the public". It seems fair to conclude that a study of the Irving case supports the criticism made by many commentators on the *Combines Investigation Act:* the procedures of a criminal court, the adversary system, and the constraint imposed by the obligation to apply the reasoning of past decisions in comparable cases, makes criminal law a totally inappropriate method for reaching a balanced judgment as to where the public interest lies. It is, however, such a balanced judgment that a sensible merger policy requires.

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[54](1977), 32 C.C.C. (2d) 1, at 7.

[55]*Ibid.*, at 13.

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