BETWEEN:

HER MAJESTY THE QUEEN,

AND

J. W. MILLS & SON LIMITED, KUEHNE & NAGEL (CANADA) LIMITED, OVERLAND IMPORT AGENCIES LIMITED, DENNING FREIGHT FORWARDERS LIMITED, JOHNSTON TERMINALS LIMITED.

Vancouver 1967
Nov. 6-10, 13, 15-17, 20-24
1968
April 1

Combines—Conspiracy in the import pool business to carry into effect an anticompetitive trade practice or policy in a relevant competitive market—Element of "undueness" relating to limiting "the facilities for transporting or dealing" in articles or commodities subject of trade or commerce—Combines Investigation Act, R.S.C. 1952, c. 314, ss. 32(1)(a) and 32(1)(c).

The indictment found against the accused contained two counts alleging offences contrary to ss. 32(1)(*a*) and 32(1)(*c*) respectively of the *Combines Investigation Act* during the period between January 1st 1956 and August 1st 1966.

The accused were in the import pool business which concerned "articles" or "commodities" that may be the subject of trade and commerce imported from certain designated areas in the Orient which were transported by ship from such areas in the Orient to Vancouver, B.C., and which were then transported by railway in a certain category of railway car sometimes called Pool cars to points in Canada, east of Manitoba, Ontario boundaries, such points being mainly Toronto and Montreal, in which cities the importers of such articles or commodities had their places of business.

The two broad issues for adjudication were whether the indictment and the particulars thereof alleged and the evidence adduced proved beyond a reasonable doubt, an agreement to carry into effect an anticompetitive trade practice or policy in (1) a relevant competitive market; and (2) having the element of "undueness" relating to (*a*) (under count 1) limiting "the facilities for transporting or dealing" in articles or commodities that may be subject of trade or commerce (s. 32(1)(*a*)) of the *Act* and (*b*) (under count 2) preventing or lessening "competition in the transportation" of articles or commodities that may be subject of trade or commerce (s. 32(1)(*c*)) of the Act.

Held: (1) that the indictment and particulars alleged the true relevant market; and that the evidence proved such was the true relevant market in which these accused carried on their respective business at the relevant times, beyond a reasonable doubt.

(2) that the evidence also proved beyond a reasonable doubt that the behaviour or conduct of the accused (other than Denning Forwarders Ltd. and Johnston Terminals Limited) in such relevant market, employing the devices they did, had the necessary criminal elements of "undueness" so as to constitute the offences charged under both s. 32(1)(*a*) and s. 32(1)(*c*) of the *Combines Investigation Act.*

1968

THE QUEEN
v.
J. W. MILLS & SON LTD.
et al

(3) that the verdict of the court was therefore that the accused Overland Import Agencies Ltd., J. W. Mills & Son Limited and Kuehne and Nagel (Canada) Limited were guilty on both count 1 and count 2 of the indictment.

PROSECUTION under *Combines Investigation Act.*

R. P. Anderson, I. M. Wolfe and *D.W. Patterson* for the Queen.

R. M. Hayman for J. W. Mills & Son, Limited and Kuehne & Nagel (Canada) Limited.

J. G. Alley and *W. Hohmann* for Overland Import Agencies Limited.

Brenton D. Kenny and *Martin Gross* for Denning Freight Forwarders Limited.

G. S. Cumming and *D. T. Hopkins* for Johnston Terminals Limited.

GIBSON J.:—The indictment found against the accused contains two counts alleging offences contrary to sections 32(1)(*a*)[1] and 32(1)(*c*)[2] respectively of the *Combines Investigation Act.*

These sections make it an offence, among others, for any person to conspire, combine, agree, or arrange with another person (1) "to limit unduly the facilities for transporting ... or dealing in any article" or (2) "to prevent or lessen unduly competition in the ... transportation ... of an article ...".

The period prescribed in each count is between January 1, 1956 and August 1, 1966, both inclusive.

Particulars of this Indictment were given.

This Indictment and the Particulars are set out in full in Schedule "A" to these reasons.

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[1] 32. (1) Every one who conspires, combines, agrees or arranges with another person

(*a*) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article,

...

[2] (*c*) to prevent, or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of an article, or in the price of insurance upon persons or property, or

...

All accused (who are sometimes called freight forwarders) at some or in some cases at all of the material times prescribed in the Indictment were in what is sometimes known as the import pool car business. Such business concerned articles or commodities that may be the subject of trade and commerce imported from certain designated areas in the Orient which were transported by ship from these areas in the Orient to Vancouver in the Province of British Columbia and which were then transported by railway in a certain category of railway car sometimes called pool cars to points in Canada east of the Manitoba-Ontario boundary, such points being mainly Toronto and Montreal in which cities the importers of such articles or commodities had their places of business.

The accused, Overland Import Agencies Ltd., at the time of the trial carried on business under the trade name of "Leimar Forwarding Co." (herein sometimes called "Leimar"). Originally when this business was established in July 1955, it was the pool car department of Leith & Dyke Limited, which latter company was a large customs brokerage firm in Vancouver. Subsequent to that, the business was carried on by Leithdyke Forwarders Limited; then under the name of Leimar Forwarding Co. which was a partnership of two entities namely, Leith Services Ltd. and Mardock Enterprises Ltd.; and then this partnership was dissolved and Mardock Enterprises Ltd. changed its name to Overland Import Agencies Ltd.; and then, as stated, this business was carried on under the trade name of Leimar Forwarding Co. and was solely owned by Overland Import Agencies Ltd.

The accused J. W. Mills & Son Limited (herein sometimes called "Mills") entered this business after the accused Leimar; and originally it obtained customers by cutting rates which Leimar countered with a rate war which lasted between the two companies for about six months. This was in 1958. This rate war then ceased, brought about by an agreement between Mills and Leimar dated October 3, 1958, which agreement was subsequently modified by a subsidiary agreement executed on October 7, 1958.

Mills is and was at all material times, a Canadian owned company of Kuehne & Nagel of Hamburg, which latter

1968

THE QUEEN v. J. W. MILLS & SON LTD. et al

Gibson J.

company also incorporated and owned another Canadian company namely, the accused Kuehne & Nagel (Canada) Limited. The latter and Mills were inter-related companies and acted in concert during the material period.

The accused, Denning Freight Forwarders Ltd. (herein sometimes called "Denning") became established in this business early in 1960. It was established by a Victor Denning who was then employed as Traffic Manager in Montreal by J. W. Mills & Son Limited. Denning very quickly cut into the business of Leimar and Mills and to such an extent that the latter two companies by agreement instituted a rate war in April 1960 against Denning which lasted until October 1960, by which time Denning, because of the damages done to it by this rate war, was advised to, and had instituted a civil action in the Supreme Court of Ontario for such damages for conspiracy against Mills and Leimar. In October 1960, this rate war came to an end when Mills and Leimar settled this civil conspiracy action with Denning and entered into an agreement by which among other things, they agreed to pay Denning a certain commission for five years, and to give Denning a certain right of renewal of this agreement, which will be discussed more fully in these reasons.

The accused, Johnston Terminals Limited (herein sometimes called "Johnston"), (which is and was at all material times, a very substantial Vancouver transport company) entered into the Oriental import pool car business in September 1960 and has continued in it up to the time of this trial.

In addition, there was one other company that entered into this business which is not an accused person. This company is known as Freight Consolidators of Canada Limited, a company owned by certain customs brokers in Toronto. It got into this business about 1963, but by August 1, 1966, which is the terminal period of the time prescribed in the Indictment, it had been most unsuccessful in obtaining any significant part of the business in this industry and market and was supported by only three or four importers of any size.

All accused pleaded not guilty.

Two collateral matters arose during the course of this trial.

Firstly, after plea, counsel for the accused moved to quash the Indictment on the grounds that it disclosed no offence.

Secondly, after all the evidence was adduced at the trial, Crown counsel applied for an amendment to the Indictment, namely, for the addition to each count of the words "which could be" after the words "Province of British Columbia and" and before the words "transported by railway in railway cars".

As to the first motion, the submission of counsel for the accused was that: the activities of the accused were not within the purview of section 32(1)(*a*) of the *Combines Investigation Act* as alleged in Count 1 in that the accused provided "services" only and not "facilities"; and that what the accused did was also not within the purview of section 32(1)(*c*) of the Act as alleged in Count 2 because the accused were not in the business of "transportation". In support of this, it was argued that the accused did not own the means or facilities of transportation, did not themselves provide transportation, that they did not have physical possession of the goods, that they did not have the responsibility for the safety of the goods, but instead that was the responsibility of the carrier, and that the service fee charged for what they did was for pure services.

The decision on these motions was adjourned until now.

As to this first motion, I am of opinion, firstly that the accused at all material times were in a business which is in a service industry which touched and concerned tangible things that is "articles" "that may be the subject of trade or commerce" and were not in a business in a service industry which related solely to the provision of services; and that there are no words in this subsection or in the Act generally and nothing in the jurisprudence in respect thereto which make the ownership of "facilities for transporting" articles or commodities that may be the subject of trade or commerce a necessary element to constitute an offence contrary to section 32(1)(*a*) of the *Combines Investigation Act*; and secondly, in respect to Count 2 alleging an offence contrary to section 32(1)(*c*) of the Act, for similar reasons as set out above, it is not necessary that the accused own the physical means of

1968

THE QUEEN v. J. W. MILLS & SON LTD. et al

Gibson J.

transportation to be in the transportation business so as to be capable of committing an offence contrary to that subsection.

Accordingly, this motion is dismissed.

As to the second motion to amend the Indictment, I am of opinion that as there is no prejudice to the accused, the application for the amendment to each of the counts should be and accordingly is granted. (These amendments are included and underlined in the copy of the Indictment set out in Schedule "A" hereto).

Aside from the general defence of the plea of not guilty, the defence of these accused (aside from the certain additional specific defences of the accused Denning and Johnston) was that the Crown has not alleged in the Indictment and Particulars, nor proved in evidence, beyond a reasonable doubt, a relevant market in which the conduct or behaviour of the accused had the necessary element of "undueness" contrary to these said subsections of the *Combines Investigation Act*.

The two broad issues for adjudication, therefore, are whether the Indictment and the Particulars thereof alleges, and the evidence adduced has proved beyond a reasonable doubt, an agreement to carry into effect an anti-competitive trade practice or policy in (1) a relevant competitive market; and (2) having the element of "undueness" relating to (*a*) (under Count 1) limiting "the facilities for transporting or dealing" in articles or commodities that may be the subject of trade or commerce (section 32 (1)(*a*) of the Act), and (*b*) (under Count 2) preventing or lessening "competition in the transportation" of articles or commodities that may be the subject of trade or commerce (section 32(1)(*c*) of the Act).

In general outline, the factual situation during the material time namely between January 1, 1956 and August 1, 1966 was as follows:

Firstly, the subject articles or commodities which were the subject of trade and commerce are those set out in Canadian Freight Association East Bound Import Freight Tariffs and in the supplements and amendments thereto being:

(a) Canadian Freight Association Tariff 70A; effective July 11, 1951;

(b) Canadian Freight Association Tariff 70B; effective June 23, 1961; and

(c) Canadian Freight Association Tariff 70C; effective May 29, 1963.

Tariff 70B replaced Tariff 70A and Tariff 70C replaced Tariff 70B.

The said articles and commodities prescribed in these Tariffs by the terms of it were articles and commodities imported from certain designated areas in the Orient—in the main from Japan, Taiwan and Hong Kong.

These Tariffs stipulated, among other things, the unit price for minimum mixed carload weights of these specified articles or commodities, at which designated carriers, including the Canadian Pacific Railways and the Canadian National Railways, might carry them.

In the importation process, these said articles or commodities were transported firstly by vessel to the Port of Vancouver in the Province of British Columbia, and then, at the rates prescribed in these Tariffs, were transported by rail carriers from Vancouver to destination points in Canada in the Provinces of Ontario and Quebec, such points being east of the Saskatchewan-Manitoba boundary and which points were mainly Toronto and Montreal.

These said Tariffs were approved by the Board of Transport Commissioners of Canada and had the force of law.

The Canadian Freight Association was and is an association consisting, among others, of all railways with termini in Canada.

Secondly, the volume of articles and commodities imported from the Orient and transported by rail, pursuant to the said Canadian Freight Association Tariffs 70A and 70C, as admitted by the Crown, "constitute only a small portion of the imports to Canada as a whole of the nature described therein from the area designated (in the Orient) in Tariffs 70A, 70B and 70C".

Thirdly, the critical feature of these Tariffs which gave rise to the accused being in the business they were, and conducting it in the way they did, out of which these charges arose, was the privilege of mixing a railway car—called the mixing privilege.

A few words of explanation of this will suffice.

1968

THE QUEEN v. J. W. MILLS & SON LTD. et al

Gibson J.

Generally speaking, a railway car consists of 30,000 pounds of freight.

In the trade the rates for all individual shipments are known as "L.C.L." or "less than carload lots" while carload shipments are known simply as carload lots "C.L.".

When two or more commodities are consolidated for shipment in a single railway pool car, the pool car is known as a "mixed car". The consolidation of shipments of approximately 30,000 pounds per railway car is made of individual shipments of importers who, as stated, were located mainly in Toronto and Montreal, and such shipments consist of articles or commodities of merchandise which they have imported from the said designated area in the Orient.

The mixed carload rates under these tariffs was much less than the "L.C.L." or "C.L." rates. For example, the mixed car rate at one juncture for a certain type of shipment was just a little more than one half of the "L.C.L." rate.

This "mixing" privilege was first granted by the publication by the Canadian Freight Association of an amendment in 1955 to their Tariff 70A. Until that time, no mixing privileges were permitted.

The purpose of this mixed carload rate of this Tariff was to provide competitive freight rates to consignees in eastern Canada so that these commodities or articles imported from the Orient would move by rail from Vancouver to eastern Canada, instead of by other transportation facilities, and at a total transportation cost competitive with the ocean rates by ship when such articles or commodities were imported and shipped from the Orient directly to New York and then trucked to eastern Canada or transported by ship to New Orleans and trucked to eastern Canada or transported by ship to Halifax or Montreal, and (since the opening of the Seaway) to Toronto.

The Railways were willing in 1955 to establish this mixed carload rate because they were losing this business to the ships. The purported reason they established this rate and made it especially applicable to eastern Canada mainly from Vancouver to Toronto and Montreal was so that they would not have to reduce their rates for all other traffic

between intermediate points and thereby they could and were able to leave undisturbed their other "L.C.L." and "C.L." rates.

In addition, by their Rule 43[3], the Railways denied to themselves the privilege of consolidating into a mixed pool car the merchandise or commodities imported by more than one consignee; so that in the result all this business was available only to parties other than the Railways.

This business is that in which the accused became involved and engaged in at all material times.

Fourthly, these accused freight forwarders, in the carrying on of this business, obtained what was the equivalent of a power of attorney from individual importers in Toronto and Montreal and so became the one consignee of the merchandise and commodities of a number of importers; and thereby were able to obtain the benefit of these mixed carload rates pursuant to Tariffs 70A, 70B and 70C by consolidating into shipments of 30,000 pounds per railway car such individual shipments of such importers.

Fifthly, these said railway Tariffs when combined with a certain category of shipping rates known as "O.C.P. ocean rates" (Overland Common Point) (more fully described later), permitted Canadian railway carriers in Vancouver to offer such consignees in eastern Canada lower freight rates for articles and commodities imported to Canada from the said designated areas in the Orient and destined for these consignees in eastern Canada.

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[3] Rule 43

Section 1. Carriers' Agents must not act as Agents of shippers or consignees for the assembling or distribution of CL or LCL freight.

Section 2. Carriers' Agents at points of shipment must not accept freight to be carried at CL ratings or rates for distribution to two or more parties by Carriers' Agents at points of destination.

Section 3. (a) Carriers' Agents at points of destination must deliver freight carried at CL ratings to one consignee only, and must not accept orders from shippers or consignees calling for split deliveries according to brands, marks, sizes or other identification of packages.

(b) If at the request of the owner of the property or his authorized agent, a CL shipment is delivered to more than one consignee, LCL ratings or rates will be applied on the entire shipment, except that the portion delivered to any one consignee will be subject to Rule 15, Section 1.

1968

THE QUEEN v. J. W. MILLS & SON LTD. et al

Gibson J.

Speaking generally, the ocean freight rates for most ships arriving in Vancouver from the Orient are governed by a particular conference[4] known as the Trans-Pacific Freight Conference of Japan.

This Conference established basically two rates, namely, one rate for shipments to eastern Canada and the other rate for other shipments. The eastern Canada rates (technically known as "Overland Common Point (O.C.P.) rates") were lower than the other rates, and applied to imported articles or commodities destined for inland points in Canada east of the Saskatchewan-Manitoba boundary where carriage was made by rail. This eastern Canada rate was about 10 per cent less than the other rates which applied to articles or commodities destined for Vancouver only, or, for transportation by non-rail facilities destined for Vancouver or for points west of the Saskatchewan-Manitoba border, or for transportation by non-rail facilities to inland points in Canada.

The combination of the two rates therefore, that is, the O.C.P. rates and the rates under Tariffs 70A, 70B and 70C, the ocean and the rail rates, during the material times and at the present time were and are significant to any importer in eastern Canada, because they did and still do provide him with a dollar and cents basis for electing to choose one mode of transportation over another in respect to articles or commodities imported by him from the said designated areas in the Orient to his place of business in Canada. In the cases where a dollar and cents basis outweighed all other basis for decision, an election in favour of the mode of transportation permitting such an importer to take advantage of the combination of these two rates followed.

Such an importer had at all material times (and still has) a meaningful choice therefore of taking advantage of these two rates and causing his importation of articles or commodities from the said designated areas in the Orient to be shipped to Vancouver and then to him in Toronto or Montreal by rail in mixed pool cars, or of causing his importation to be delivered to him by ship to New York

[4] "Shipping conferences" are groups of formally linked steamship lines. See for a reference. Restrictive Trade Practices Commission 1965 on *"Shipping Conference Arrangements and Practices"*.

and by truck to Toronto or Montreal, or delivered to him by ship to Halifax and by truck to Montreal or Toronto, or delivered by ship to him directly to Montreal (and since the opening of the St. Lawrence Seaway) to Toronto.

Such a consignee also had the option of using air transport either directly from the Orient or from Vancouver.

In addition, there is and was also one further inducement for such an importer to elect or take advantage of the combination of the ocean and rail preferential rates established (the O.C.P. rates and the rates of Tariffs 70A, 70B and 70C), in preference to the rates by other transportations above noted, because the ocean and rail carriers as a further inducement to cause such eastern Canadian importers to elect so as to benefit them, also absorbed all the shipping and loading charges, all of the wharfage charges, and all of the rail carloading charges that would normally be assessed by steamship companies, the docks, and the railways respectively. The division of absorption of these charges is and was as follows:

> vessel unloading—payment 100% by vessel wharfage —payment 50% by vessel and 50% by railways; rail carloading—payment 100% by rail.

Sixthly, a freight forwarder, such as the accused, did the following jobs for any importer who requested services of it, that is to say:

(a) it assembled and consolidated or provided for the assembly and consolidating of shipments of articles or commodities imported from the said designated areas in the Orient and for the distribution of such consolidated shipments;

(b) it assumed the responsibility for the transportation of such articles and commodities from the point of receipt to the point of destination; and

(c) it utilized for the whole or part of the transportation of such shipments the services of a common carrier.

(It is of significance that a most important feature of this service was and is the provision of assembling and consolidating imported articles and commodities into railway carloads or truckload lots of numerous small shipments of imported articles and commodities of individual impor-

1968

THE QUEEN v. J. W. MILLS & SON LTD. et al

Gibson J.

ters, most of whom would not be importing sufficient articles or merchandise to make up a carload or truckload lot.

Another essential feature of a freight forwarder's business is also of significance and that is that, although he is not the beneficial owner of the goods, nevertheless, as the "named consignee" he assumes the responsibility for such goods from the time such goods are received from the consignor until they are delivered to the beneficial owner.)

Seventhly, when the accused entered this business in this service industry, and how in certain respects they carried on their respective businesses, was as follows:

As stated, until early in 1958, Leimar Forwarding Co. (and predecessor entities) were the sole mixed pool car freight forwarders in the business. At that time J. W. Mills & Son Limited and Kuehne & Nagel (Canada) Limited got into the business.

J. W. Mills & Son Limited entered this business obtaining customers by cutting rates and Leimar countered and got into a rate war with it, which rate war between these two companies lasted for about six months.

At that time, these two companies entered into an agreement to cease the rate war and to stabilize rates. This Agreement was dated October 3, 1958; and this Agreement was subsequently modified by a subsidiary Agreement executed on October 7, 1958.

The October 3, 1958 Agreement, among other things, specified that for a period of four months a differential was to be maintained between the rates of these two companies, that the rates of Mills were to be lower than those of Leimar by 3¢ per one hundred weight for quantities of 10,000 pounds or less; and the Agreement also provided that this differential progressively was to be reduced for higher volume shipments until the rates of both companies became identical on shipments of 20,000 pounds or more. This Agreement further provided that the rates were to remain in effect until February 14, 1959, at which time they were to be reviewed and revised. Also, a group of selected customers of each company were granted an exception from the rates and the terms agreed upon, and those selected customers were to continue receiving special rates.

In addition to this formal agreement on rates, these two companies also agreed that for a period of one month from the date of their Agreement they would neither solicit nor accept business from each other's customers.

The provisions of these 1958 Agreements were carried into effect by Mills and Leimar and rate schedules conforming to the provisions of such Agreements were issued by both companies.

Thereafter there were various changes in some of the rates, sometimes arising in part from changes in railway tariffs on which they were based, which changes were also agreed to after discussion and consultation between Mills and Leimar.

These October 1958 Agreements provided for their renewal in February 1959; and in implementation of such provision on February 27, 1959, a new Agreement was entered into by these companies amending and expanding the October 1958 Agreements and removing the rate differential by reducing the Leimar rates to the same level as those of Mills. Subsequently, namely, from the day of these Agreements until August 1, 1966, Leimar continued to consult Mills on all questions regarding rates and they acted jointly in the revision and issuing of rate schedules.

Going back, the situation was that until May 1959 Mills and Leimar had this oriental import pool car business all to themselves.

At that time, as stated, a Victor Denning who was Traffic Manager for Mills in Montreal, left Mills and formed a new company called Denning Freight Forwarders Ltd., which entered into this west coast pool car business. This new company was financed by Milgram and Company which was a substantial Montreal broker, and the latter immediately caused certain importers in Montreal to employ the services of Denning, switching them from either Mills or Leimar.

As a result, Denning was successful in getting established in the business, and by early 1960, it had cut into the business of Leimar and Mills to such an extent that the latter two companies by agreement instituted a rate war in April 1960 which lasted until October of that year for the purpose of forcing Denning out of business. This rate

1968

THE QUEEN v. J. W. MILLS & SON LTD. et al

Gibson J.

war was referred to by Leimar and Mills in correspondence between them as "operation clobber".

This action of Leimar and Mills caused Denning in its 1960-61 operation in Vancouver in the short space of about six or seven months to lose about $32,000; and the evidence and allegation of Denning is that it was on the verge of bankruptcy at that time.

Denning, however, as a result, in June 1960 consulted a Toronto lawyer (see Exhibit 343). This lawyer advised three things, namely:

1. to approach the Board of Transport Commissioners of Canada to see if it could obtain some relief from that Board;
2. to approach the Restrictive Trade Practices Commission established under the *Combines Investigation Act* to see if some relief might be obtained; and
3. to institute a civil action for damages for conspiracy against Mills and Leimar.

All three things were done.

The Board of Transport Commissioners of Canada informed they did not have authority in this matter; the Restrictive Trade Practices Commission under the *Combines Investigation Act* advised they would look into the matter (and, as it transpired, did); and a civil action for damages for conspiracy was instituted against Mills and Leimar.

In October 1960, Mills and Leimar settled this civil action for conspiracy with Denning; and pursuant thereto entered into an agreement to pay Denning a commission for five years. (See Exhibit 284).

In this Agreement there was a release for damages for civil conspiracy.

At this time also, namely on October 27, 1960, Leimar wrote Mills and Kuehne & Nagel (Canada) Limited as follows:

> Whereas agreements were entered into between our companies under dates October 3, 1958 and October 7, 1958 and February 27, 1959 and
>
> Whereas neither you nor we have since the beginning of this year, or earlier, adhered to all the provisions of said agreements; and

Whereas it has been suggested to us by counsel that such agreements during the period of their effectiveness may have been contrary to certain laws of Canada;

We therefore now give notice that this company is not, and will not, be bound by the provisions of such agreements, which are hereby cancelled.

Attached to this letter is a hand-written note reading as follows:

for the record only.

Mr. H. C. Boysen, Vice-President of Mills and Kuehne & Nagel (Canada) Limited replied to this letter of November 3, 1960, as follows:

We hereby acknowledge receipt of your letter dated October 27 addressed to J. W. Mills & Son Limited and Kuehne and Nagel (Canada) Limited.

We accept your notice to terminate the agreements between our companies, dated October 3, 1958, October 7, 1958 and February 27, 1959.

It is agreed and understood that neither party shall be bound by the agreements after date of expiration.

On November 5, 1960, Mr. Boysen wrote to the President of Kuehne & Nagel Company in Germany in part as follows:

In order to avoid an unnecessary sharp competition war Leith & Dyke and ourselves for the old Denning business, we have concluded a gentleman's agreement with Leith & Dyke. According to this agreement, we will for the time being only try to acquire the part of the old Denning business which we used to handle before, while Leith & Dyke will do the same thing with our old firms. This only applies for the transition period, after which Leith & Dyke and ourselves will try to handle as much business as possible in free competition. In this connection, we have agreed on (the) rates orally but not in writing, and our tariffs will be identical.

On the advice of our lawyers, we have given notice to terminate our original agreement with Leith & Dyke of October 1958, because of the danger that, in the event of a investigation by Canadian authorities, this agreement would be termed illegal and we could perhaps be fined. We and Leith & Dyke agreed, however that even after the termination of the agreement we shall continue to adhere to its essential points.

Then in September 1960, as stated, Johnston Terminals Limited entered the Oriental import pool car business.

The first thing that Johnston did was to draw up a schedule of rates for imported freight by pool car to Montreal and Toronto, which rates were higher than the then current rates being charged by Leimar and Mills pursuant to their rate war with Denning, but lower than the rates which were in effect prior to the initiation of the rate war.

1968

THE QUEEN v. J. W. MILLS & SON LTD. et al

Gibson J.

Then in October 1960, Leimar and Mills got in touch with Johnston in an effort to get the latter to agree to quoting rates similar to and conforming with their rates. There is great equivocation in the evidence as to what precisely was the result of these meetings.

But in the result, I am of opinion that although Johnston distrusted Leimar and Mills and was loathe to make an agreement with them, it did in fact agree at that meeting to publish a tariff and live by it in the future. In support of this for example, is the fact that Mr. Leith was able to foretell what was going to happen on November 7, 1960, namely, the publication of this tariff by Johnston (see Exhibit 119); also the General Manager of Johnston, Mr. Methven, after this meeting wrote the letter (Exhibit 123) in which he said he had agreed to the proposition above mentioned and the new rates of Johnston which it issued on November 7, 1960, were substantially the same as Leimar and Mills. (In this respect, the evidence of the defence witness Mr. Guest was based on railway cartage rates and did not touch the issue herein).

But other than that, Johnston did not cooperate or make any other agreements with Leimar and Mills and thereafter had nothing to do with them and competed in the normal way without any collusive arrangements with Leimar and Mills.

(In this latter connection, it is not without significance that Johnston did not succeed thereafter, at any relevant time, in obtaining more than 5 per cent of the market.)

One other company (not an accused), as also stated, attempted to enter this business, namely Freight Consolidators of Canada Limited, a company owned by certain customs brokers in Toronto. This company after three years of operation, was most unsuccessful in obtaining any significant part of the business in this market, and was supported by only three or four importers of any size. This company transported a very small amount of freight weekly during the three year period ending August 1, 1966, and most of it was by truck and in each case the trucker absorbed the O.C.P. differential, because the truckers did not enjoy the benefit of O.C.P. ocean rates.

Eighthly, there was another facet of this business during the material times, in which the accused Leimar and Mills were involved. The Canadian truckers attempted during

the material times to obtain O.C.P. privileges, and made application to the Trans-Pacific Freight Conference of Japan for this purpose.

(The Railways through this Conference had obtained this O.C.P. rate many years ago.)

The Canadian truckers sought to secure from this Conference an identical arrangement of that enjoyed by the Railways.

Apparently in the United States the truckers have the same O.C.P. privileges.

But this Conference denied them this privilege and Leimar and Mills in connection with this truckers' application, (1) actively engaged in opposing the granting of such privilege to the Canadian truckers; and (2) as an alternative action in case their said opposition failed, Leimar and Mills made an attempt to control the business that would go by truck if such O.C.P. privilege was granted to any Canadian truckers' association.

But the Canadian truckers failed to obtain this O.C.P. rate privilege.

The purported reason why the Conference refused to grant O.C.P. privileges to the Canadian truckers was that there was no federal jurisdiction over truckers as there was over railways.[5]

Nevertheless, the truckers attempted to compete in this business.

Prior to 1962, trucker competition was not a substantial factor, but from 1962 on, the trucking companies endeavoured to increase their share of this market and by 1966 serviced approximately 20 per cent of this market. Apparently, to get such business, in each case, the truckers absorbed the differential of the O.C.P. rates.

What happened in the result was that, during the material times, 80 per cent of the articles or commodities listed in Tariffs 70A, 70B and 70C imported from the said designated areas in the Orient to the Port of Vancouver

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[5] Following the decision of the Privy Council in *Attorney-General for Ontario v. Israel Winner et al* [1954] A.C. 541, holding inter-provincial transportation a matter of federal legislative jurisdiction under section 92(10)(*a*) of the *British North America Act, The Motor Vehicle Transport Act* 1953-54 (Can.) c. 59 was passed, which, *inter alia,* delegated to the provincial motor vehicle licensing bodies, authority to license trucks engaged in inter-provincial business.

1968

THE QUEEN v. J. W. MILLS & SON LTD. et al

Gibson J.

were transported to Toronto and Montreal by railway car; and of that 85 per cent of this business was serviced by the freight forwarders, the balance of 15 per cent being done by individual consignees on their own; and of this 85 per cent Johnston did 5 per cent of this business, Freight Consolidators of Canada Limited did a negligible percentage, and the balance was handled by Leimar and Mills.

Both the accused and the Crown made certain admissions. They were as follows:

(a) by the accused:

(i) Admissions (Exhibit 1)

ADMISSIONS

(Exhibit 1)

Pursuant to Section 562 of the Criminal Code, Statutes of Canada, 1953-54, Chapter 51, the accused admit the following facts:

1. That each Company or Corporation mentioned in the Indictment as an accused or as a co-conspirator is a legal entity with corporate existence and, accordingly, is a person as defined in the Criminal Code and more particularly that:

(a) *J. W. MILLS & SON, LIMITED*—incorporated under the provisions of the "Companies Act", R.S.C. 1906 by Letters Patent dated March 21, 1922 with its head office situate in Montreal, in the Province of Quebec.

(b) *KUEHNE & NAGEL (CANADA) LIMITED*—originally incorporated under the name K & N TRANSPORT LIMITED under the provisions of the "Companies Act", R.S.C. 1934, by Letters Patent dated April 21, 1953 with supplementary Letters Patent dated June 30, 1954 changing the name to Kuehne & Nagel (Canada) Limited with its head office situate in Montreal in the Province of Quebec.

(c) *OVERLAND IMPORT AGENCIES LTD.*—operating under the name LEIMAR FORWARDING CO. from June 12, 1964 and originally incorporated under the name MARDOCK ENTERPRISES LTD. under the provisions of the "Companies Act", R.S.B.C. 1960 by Certificate of Incorporation dated August 1, 1962 with a Certificate of Change of Name changing the name to Overland Import Agencies Ltd. dated August 7, 1964 and with its registered office situate in Vancouver, in the Province of British Columbia.

(d) *DENNING FREIGHT FORWARDERS LTD.*—incorporated under the provisions of the "Companies Act", R.S.C. 1952 by Letters Patent dated May 1, 1959 with its head office situate in Montreal, in the Province of Quebec.

(e) *JOHNSTON TERMINALS LIMITED*—incorporated under the provisions of the "Companies Act", R.S.B.C. 1936 by Certificate of Incorporation dated December 28, 1945 with its registered office situate in Vancouver in the Province of British Columbia.

(f) *LEITHDYKE FORWARDERS LIMITED*—incorporated under the provisions of the "Companies Act", R.S.B.C. 1948 by Certificate of Incorporation dated July 20, 1956 with its registered office situate at Vancouver, in the Province of British Columbia.

(g) *THOMAS MEADOWS & COMPANY CANADA, LIMITED*—incorporated under the provisions of the "Companies Act", R.S.C. 1906 by Letters Patent dated July 29, 1920 with its head office situate in Toronto, in the Province of Ontario.

(h) *LEITH SERVICES LTD.*—(presently in Voluntary Liquidation) incorporated under the provisions of the "Companies Act", R.S.B.C. 1948 by Certificate of Incorporation dated July 24, 1959 with its registered office situate in Vancouver, in the Province of British Columbia and MARDOCK ENTERPRISES LTD. carrying on business under the firm name and style of LEIMAR FORWARDING CO. which said partnership was registered under the "Partnership Act", R.S.B.C. 1960 by Declaration of Partnership registered September 1, 1962 in the County Court of Vancouver and which said partnership was dissolved by a Declaration of Dissolution of Partnership dated June 12, 1964 and which Declaration of Dissolution was registered in the County Court of Vancouver on June 12, 1964.

(i) *MUIRHEAD FORWARDING LIMITED*—incorporated under the provisions of the "Companies Act", R.S.C. 1934 by Letters Patent dated May 23, 1947 with its head office situate in Toronto, in the Province of Ontario.

2. That each of the persons listed below was an officer or agent or servant or employee or representative of the Company or Corporation under which his name is listed, during the period covered by the Indictment or during a portion of the said period:

(a) *J. W. MILLS & SON, LIMITED* and *KUEHNE & NAGEL (CANADA) LIMITED*

Name	*Capacity*
Germany—	
Alfred Kuehne	President
K. M. Kuehne	
L. Roessinger	
L. Lueck	
Montreal—	
Horst G. Schellak	Vice President
Peter Ptacek	Sales Representative
Janus	
Toronto—	
Hans Christian Boysen	Vice President
	Manager
	Managing Director
Gurd H. Stoppenbrink	Secretary-Treasurer
H. A. Gutke	Manager

1968

THE QUEEN
v.
J. W. MILLS & SON LTD.
et al

Gibson J.

	Name	*Capacity*
Vancouver—		
	Fred Schultze	Manager
	Peter Reschke	Manager
	Ray W. Bos	
	J. Pusch	
	Michael von der Nuell	
Winnipeg—		
	R. B. Locher	
Hamilton—		
	Wilkie	

(b) *OVERLAND IMPORT AGENCIES LTD. (LEIMAR FORWARDING CO.)*

	Name	*Capacity*
Vancouver—		
	R. Stanley Leith	President
	Ian Mardock	Vice-President
		Manager
		President
	William Doig	
	James Greenlees	

(c) *DENNING FREIGHT FORWARDERS LTD.*

	Name	*Capacity*
Montreal—		
	Victor J. Denning (Dening)	President
	Nathan Gross	Vice-President
	Harry Milgram	Shareholder
	Fred Zanders	
	Bernard Gross	
	Gerald Gross	
	Oscar Goldman	
Toronto—		
	Mrs. H. L. Weiss	
Vancouver—		
	Tom Dombay	Manager

(d) *JOHNSTON TERMINALS LIMITED*

	Name	*Capacity*
Vancouver—		
	James N Methven	Vice-President
		Assistant General Manager
		General Manager
	Douglas M. Brown	Vice-President & Managing Director
	R. Murray Brink	Director
	Bill E McKinney	Sales Manager
	Peter L Richardson	Foreign Freight Import Department
	Vic Shiedel	
	Ralph Mattson	
	I Froese	

(e) *LEITHDYKE FORWARDERS LIMITED (LEITH SERVICES LTD. & LEIMAR FORWARDING CO)*

	Name	*Capacity*
Vancouver—		
	R. Stanley Leith	President
	Ian F. Mardock (formerly Gee)	Manager
	William Doig	Assistant Manager
	F. G. Smith	Vice-President
	J. M. Brill	Canvasser
	David Leith Edwards	
	Percy H. Dyke	
	B. L. O'Malley	
	Roy Johnston	
	James Greenlees	
	Ronald Richards	

(f) *THOMAS MEADOWS & COMPANY CANADA, LIMITED*

	Name	*Capacity*
Montreal—		
	Frank O'Rourke	Managing Director
	J. V. Mitchell	Manager
	Ray Delaney	Canvasser
	Winger	Canvasser
	T. J. Dombay	Staff Member—Leimar
	Harry Wegner	
	Pat J. Parsons Foley	
Toronto—		
	Arthur R. Carey	President
	J. W. Sedge	Managing Director
	Peter Stonebanks	Joint Manager
	L. C. Nicholls	in charge of Leimar
Winnipeg—		
	Hans Haase	Manager—Leimar
	Morris Hoshowski	

(g) *MUIRHEAD FORWARDING LIMITED*

	Name	*Capacity*
Montreal—		
	Herb L. Duerr	Manager
	Charles Osborne	
	Joe Williams	
Toronto—		
	Robert E. Vince	Assistant General Manager
	Jack D. Fraser	
Hamilton—		
	E. M. Perkins	

1968

THE QUEEN
v.
J. W. MILLS
& SON LTD.
et al

Gibson J.

3. That the documents described herein, the originals of which are to be produced by Counsel for the Crown for admission as evidence under Section 41 of the Combines Investigation Act, R.S.C. 1952, Chapter 314, were obtained from (i) the possession of the accused Companies or Corporations or those named as co-conspirators, or (ii) on premises used or occupied by the said accused Companies or Corporations or co-conspirators, as cited below:

(a) *J. W. MILLS & SON, LIMITED and KUEHNE & NAGEL (CANADA) LIMITED*

Montreal	—serial nos. 439 to 1048 inclusive
	—serial nos. 6000 to 8163 inclusive
Toronto	—serial nos. 120 to 438 inclusive
	—serial nos. 9176 to 9963 inclusive
Vancouver	—serial nos. 3290 to 4073 inclusive
	—serial nos. 10661 to 11129 inclusive

(b) *OVERLAND IMPORT AGENCIES LTD, LEIMAR FORWARDING CO., LEITHDYKE FORWARDERS LIMITED, IAN F. MARDOCK (formerly known as Ian F. Gee), the late R. Stanley Leith and LEITH SERVICES LTD.*

Vancouver	—serial nos. 2082 to 3289 inclusive
	—serial nos. 4228 to 4545 inclusive
	—serial nos. 4840 to 5964 inclusive
	—serial nos 10015 to 10660 inclusive

(c) *DENNING FREIGHT FORWARDERS LTD.*

Montreal	—serial nos. 1555 to 2081 inclusive
	—serial nos. 4546 to 4579 inclusive
	—serial nos. 8164 to 8416 inclusive

(d) *JOHNSTON TERMINALS LIMITED*

Vancouver	—serial nos. 4074 to 4227 inclusive
	—serial nos. 11130 to 11328 inclusive

(e) *THOMAS MEADOWS & COMPANY CANADA, LIMITED*

Toronto	—serial nos. 1-119 inclusive
	—serial nos. 8671-9175 inclusive
Montreal	—serial nos. 1049-1554 inclusive
	—serial nos. 8417-8670 inclusive

(f) *MUIRHEAD FORWARDING LIMITED*

Toronto	—serial nos. 4580-4839 inclusive
	—serial nos. 9964-10014 inclusive
Montreal	—serial nos. 11329-11368 inclusive

(ii) Admissions (Exhibit 14)

ADMISSIONS
(Exhibit 14)

Pursuant to Section 562 of the Criminal Code, Statutes of Canada, 1953-54, Chapter 51, the accused admit the following facts:

1. That during the period described in the Indictment eighty (80%) percent—ninety-five (95%) percent of all import pool car traffic coming within the terms of Canadian Freight Association tariffs 70A, 70B and 70C was carried by the Canadian National Railway and the Canadian Pacific Railway.

2. That during the period described in the Indictment approximately eighty-five (85%) percent of all import pool car traffic referred to in Paragraph 1 was handled by the accused corporations, but the portion of the traffic handled by the defendant, Johnston Terminals Limited, was less than three (3%) to five (5%) percent of the total traffic handled by the accused corporations.

(iii) Admissions (Exhibit 14A)

ADMISSIONS
(Exhibit 14A)

Pursuant to Section 562 of the Criminal Code the accused Corporations admit the following:

That during the period described in the Indictment not more than twenty (20%) percent of those articles or commodities imported from the designated area, described in Tariffs 70A, 70B and 70C and routed through the port of Vancouver, which could have been transported by rail in railway pool cars to points in Eastern Canada, east of the Manitoba-Ontario Boundary to the City of Toronto and elsewhere in the Province of Ontario, and to the City of Montreal and elsewhere in the Province of Quebec, were carried by truck transport.

(b) by the Crown:

(i) Admissions (Exhibit 18)

ADMISSIONS
(Exhibit 18)

Pursuant to the Criminal Code Statutes of Canada, 1953-54, Chapter 51, the Crown admits the following:

1. That all truck tariffs published and approved by valid provincial legislation are to be admitted without formal proof.

2. That the tables prepared from Dominion Bureau of Statistics Records attached hereto and numbered 1 to 6, shall be admitted without formal proof.

3. That the volume of traffic handled pursuant to C.F.A. tariffs 70A, 70B and 70C constitute only a small portion of the imports from the area designated in tariffs 70A, 70B and 70C.

1968

THE QUEEN
v.
J. W. MILLS & SON LTD.
et al

Gibson J.

Imports by Weight from Selected Countries

TAIWAN

(tons—2,000 lbs)

Year	*Atlantic Ports*	*Great Lake Ports*	*Pacific Ports*	*Total*
1965	7,967	2,883	15,281	26,131
	30 5%	11%	58.5%	100%
1964	9,217	2,458	11,621	23,296
	39 5%	10 5%	50%	100%
1963	3,957	989	10,706	15,652
	25%	6%	69%	100%
1962	1,883	100	4,540	6,523
	29%	1 5%	69 5%	100%
1961	345	—	4,786	5,131
	7%	—	93%	100%
1960	2	—	2,016	2,018
			100%	100%
1959	5	—	310	315
			100%	100%
1958	—	—	—	—
1957	—	—	—	—
1956	—	—	—	—

Reference: "Cargoes Unloaded at Canadian Ports from Foreign Countries" from *Shipping Report, 1956-65,* Dominion Bureau of Statistics, Queen's Printer, Ottawa.

Imports by Weight from Selected Countries

KOREA

(tons—2,000 lbs)

Year	*Atlantic Ports*	*Great Lake Ports*	*Pacific Ports*	*Total*
1965	23	—	1,145	1,168
	2%	—	98%	100%
1964	—	18	686	704
	—	2 5%	97 5%	100%
1963	270	—	219	489
	55%	—	45%	100%
1962	363	463	74	900
	40 5%	51 5%	8%	100%
1961	—	—	1	1
	—	—	100%	100%
1960	—	—	—	—
	—	—	—	—
1959	—	—	—	—
	—	—	—	—
1958	—	—	—	—
	—	—	—	—
1957	—	—	—	—
	—	—	—	—
1956	—	—	—	—

Reference: "Cargoes Unloaded at Canadian Ports from Foreign Countries" from *Shipping Report, 1956-65,* Dominion Bureau of Statistics, Queen's Printer, Ottawa.

Imports by Weight from Selected Countries

CHINA—MAINLAND

(tons—2,000 lbs)

Year	Atlantic Ports	Great Lake Ports	Pacific Ports	Total
1965	—	170	19,440	19,610
	—	1%	99%	100%
1964	848	190	6,023	7,061
	12%	3%	85%	100%
1963	2,153	56	2,086	4,295
	50%	1 5%	48 5%	100%
1962	1,263	—	1,844	3,107
	40 5%	—	59 5%	100%
1961	16	—	1,399	1,415
	1%	—	99%	100%
1960	34	—	4,771	4,805
	1%	—	99%	100%
1959	—	—	903	903
	—	—	100%	100%
1958	468	—	5,563	6,031
	7 5%	—	92%	100%
1957	34	—	1,357	1,391
	2 5%	—	97 5%	100%
1956	48	—	70	118
	40%	—	60%	100%

Reference: "Cargoes Unloaded at Canadian Ports from Foreign Countries" from *Shipping Report, 1956-65,* Dominion Bureau of Statistics, Queen's Printer, Ottawa.

Imports by Weight from Selected Countries

HONG KONG

(tons—2,000 lbs)

Year	Atlantic Ports	Great Lake Ports	Pacific Ports	Total
1965	14,775	2,652	22,325	39,752
	37%	7%	56%	100%
1964	6,555	2,486	18,450	27,491
	24%	9%	67%	100%
1963	7,134	1,434	15,183	23,751
	30%	6%	64%	100%
1962	3,426	1,300	15,396	20,122
	17%	6 5%	76.5%	100%
1961	1,661	980	12,417	15,058
	11%	6 5%	82 5%	100%
1960	2,655	365	12,350	15,370
	17%	2 5%	80.5%	100%
1959	2,211	—	9,768	11,979
	18 5%	—	81 5%	100%
1958	835	—	9,952	10,787
	7 5%	—	92 5%	100%
1957	1,317	—	12,096	13,413
	10%	—	90%	100%
1956	817	—	23,069	23,886
	3%	—	97%	100%

Reference: "Cargoes Unloaded at Canadian Ports from Foreign Countries" from *Shipping Report, 1956-65,* Dominion Bureau of Statistics, Queen's Printer, Ottawa

1968

THE QUEEN
v.
J. W. MILLS & SON LTD. *et al*

Gibson J.

Imports by Weight from Selected Countries

JAPAN

(tons—2,000 lbs.)

Year	*Atlantic Ports*	*Great Lake Ports*	*Pacific Ports*	*Total*
1965 ..	130,803	42,747	339,672	513,222
	25 5%	8.5%	66%	100%
1964 ..	76,329	24,683	252,684	353,696
	22 5%	7%	70 5%	100%
1963 ..	48,787	20,538	172,721	242,046
	20%	8 5%	71.5%	100%
1962 ..	52,336	11,842	177,747	241,925
	21 5%	5%	73 5%	100%
1961 ..	41,786	11,204	152,916	205,906
	20%	5 5%	74 5%	100%
1960 ..	28,765	9,775	168,103	206,643
	14%	4 5%	81 5%	100%
1959 ..	31,510	710	189,444	221,664
	14%	—	86%	100%
1958 ..	2,299	—	100,942	103,241
	2%	—	98%	100%
1957 ..	3,126	—	123,998	127,124
	2 5%	—	97.5%	100%
1956 ..	3,341	—	170,455	173,796
	2%	—	98%	100%

Reference: "Cargoes Unloaded at Canadian Ports from Foreign Countries" from ***Shipping Report, 1956-65,*** Dominion Bureau of Statistics, Queen's Printer, Ottawa.

Value of Imports from Selected Foreign Countries
In Dollars

Year	*Taiwan*	*Japan*	*Hong Kong*	*China-Mainland*	*Korea*
1966 .	13,088,532	253,050,976	38,910,541	20,594,268	1,763,824
1965 . .	9,332,994	230,144,052	31,042,884	14,445,013	1,467,630
1964	9,063,491	174,388,169	26,321,470	9,420,133	473,128
1963 . .	5,875,412	130,471,048	21,197,324	5,146,500	380,381
1962	2,909,523	125,358,920	18,889,385	4,521,079	98,721
1961 .	1,856,204	116,607,360	14,143,178	3,232,588	76,212
1960 .	1,150,222	110,382,498	15,534,055	5,638,180	404,499
1959 .	715,812	102,669,366	12,969,338	4,840,377	235,026
1958	159,466	70,215,591	8,822,749	5,375,607	24,276
1957 . . .	192,743	61,604,709	7,223,021	5,314,243	34,829
1956	111,655	60,826,294	5,699,077	5,721,189	8,377

Reference: ***Trade of Canada,*** 1956-66, Dominion Bureau of Statistics, Queen's Printer, Ottawa.

(ii) Admissions (Exhibit 18A)

ADMISSIONS

(Exhibit 18A-

Amending Exhibit 18)

Pursuant to the Criminal Code Statutes of Canada, 1953-54, Chapter 51, the Crown admits the following·

1. That all truck tariffs published and approved by valid provincial legislation are to be admitted without formal proof.

2. That the tables prepared from Dominion Bureau of Statistics Records attached hereto and numbered 1 to 6, shall be admitted without formal proof.

3. That the volume of traffic handled pursuant to C F A. tariffs 70A, 70B and 70C constitute only a small portion of the imports *to Canada as a whole of the nature described therein* from the area designated in tariffs 70A, 70B and 70C.

(iii) Admissions (Exhibit 302)

ADMISSIONS

(Exhibit 302)

Pursuant to the Criminal Code Statutes of Canada, 1953-54, Chapter 51, the Crown admits the following.

1. That all the persons, firms or corporations, who appointed the accused, J W. Mills & Son, Limited, Kuehne & Nagel (Canada) Limited, Overland Import Agencies Ltd, or Denning Freight Forwarders Ltd. agents by executing and delivering a General Authorization, carried on business in and about the City of Toronto, in the Province of Ontario or the City of Montreal, in the Province of Quebec.

2. That each of the said accused, J W Mills & Son, Limited, Kuehne & Nagel (Canada) Limited, Overland Import Agencies Ltd, and Denning Freight Forwarders Ltd, maintained sales offices or agents for solicitation and other purposes related to the business carried on by the said accused in the said City of Toronto and the said City of Montreal during the whole of the period described in the said Indictment and during the period that the accused carried on business

3 That persons representing owners of transportation namely, trucks, aircraft and vessels operating into the ports of New York, N Y, Halifax, Nova Scotia; St John, New Brunswick; Montreal, Quebec; and Toronto, Ontario, also solicited the principals of the accused during the period covered by the Indictment.

This evidence establishes that the accused Leimar, Mills and Kuehne & Nagel (Canada) Limited, by their collusive actions obtained substantial market power (or bargaining power) in the market in which they operated their

1968

THE QUEEN v. J. W. MILLS & SON LTD. et al

Gibson J.

respective businesses. In particular, in considering this, the factual situations that obtained at the following times are significant, that is to say:

(a) in October 1958, the time of the Mills and Leimar agreements;

(b) in October 1960, the time of the Denning agreement with Leimar and Mills in settlement of the civil action for conspiracy; and

(c) the period after November 1960, the date of the Johnston agreement with Leimar and Mills, to August 1, 1966, during which period Johnston had no success in obtaining an appreciable percentage of the business in this market, and Freight Consolidators of Canada Limited had practically no success at all.

So much for the facts.

As to the law, the two broad issues for adjudication in this case require:

(1) a determination of whether or not the Indictment and the Particulars thereof alleges and the evidence adduced has proven in this criminal trial a correct relevant competitive market; and

(2) whether the behaviour or conduct of the accused in such relevant market in its collusive aspects during the alleged period of time had the element of "undueness" so as to constitute an offence under section 32(1)(*a*) of the *Combines Investigation Act* or under section 32(1)(*c*) of the Act, or both.

Speaking generally, as I understand it, the pertinent legislative purpose of the said subsections of the Act, and evidence necessary to prove breaches of them may be put in this way:

The legislative purpose of both sections 32(1)(*a*) and 32(1)(*c*) of the *Combines Investigation Act* relate to lessening of "competition" "unduly", and is to protect the public interest in "free competition" as judicially understood.

In the cases there have been many attempts to define "unduly" but in none of the cases have the Courts laid down any specific portion of the relevant market that

must be accounted for by the parties to any anticompetitive trade practice or policy to prove an offence has been committed.

Also there has been no reference to what the Canadian Courts mean by competition except that it must be "free competition".

Nevertheless, the concept of "competition" is central to the determination of whether or not an offence has been committed contrary to section 32(1)(*a*) or section 32(1)(*c*) of the *Combines Investigation Act,* because in relation thereto, the Courts in Canada rely on the *market* to give the kind of business "competition" considered desirable.

As a consequence, in every adjudication under these subsections of the Act there is an examination of two competitive features in their collusive aspects and these relate to (1) the market structure and (2) the behaviour or conduct of the participants; and in respect to both, the way in which the "relevant market" is defined, is of the essence.

(In most cases, however, the problem of defining the relevant market is not too difficult. Illustrative of this are the decisions in a number of Canadian cases where the relevant market was defined by reference to only two characteristics or dimensions, namely, commodities and geography (see cases in Schedule "B"). In such cases it was not necessary for the purpose of defining the relevant market to engage in prolonged economic investigations and to adduce lengthy evidence in respect thereto. Indeed, also even in cases where the problem of defining the relevant market is complex, as for example, either in product (or service) or geographical characteristics or dimension, adequate evidence is usually available from the business records seized and put in evidence (for the purpose of section 41 of the *Combines Investigation Act*[6]. Very often also the conspiracy or combination itself delineates the relevant market with sufficient clarity.

[6] See, e.g., how Duff J., as he then was, defined "the relevant market" in terms of both commodity and geography in the case of *Mordecai Weidman et al v. Bernard Shragge* (1912) 46 S.C.R. 1 at p. 37, viz: "in an important article...throughout a considerable extent of territory".

1968

THE QUEEN v. J. W. MILLS & SON LTD. et al

Gibson J.

In cases where this does not obtain, some economic evidence may be necessary.

In the subject case, the defence led with economic evidence and there was substantial cross-examination. Evidence was given of many of the usual characteristics or dimensions which sometimes should be considered in defining a relevant market. And in these reasons, consideration is given to these characteristics or dimensions generally and to the specific ones which the parties in evidence and argument relied on in defining what, in their respective submissions, was the relevant market in this case.)

The examination for the purposes of section 32(1)(*a*) and section 32(1)(*c*) of the *Combines Investigation Act* of (1) the market structure, and (2) the behaviour or conduct of the participants, as I understand it, may be done (i) by ascertaining whether or not a relevant market has been alleged in the Indictment and Particulars and has been proven; and then (if alleged and proven) (ii) by considering the behaviour or conduct of the participants in such relevant market, to ascertain whether "undueness" has been proven. The onus of proof on the Crown, of course, in relation to both matters, is the usual onus in any criminal prosecution.

Re the relevant market

In examining and assessing the competitive feature of the market structure, what is pertinent is the boundaries of the market because the determination of what competition is relevant is one of the key issues, and unless the relevant market in every case is defined it is not possible to weigh the element of "undueness" in any factual situation within the purview of section 32(1)(*a*) of section 32(1)(*c*) of the *Combines Investigation Act*.

As Laskin J. stated in *The Queen v. K. J. Beamish Construction Company Limited* (Court of Appeal of Ontario, unreported):

> Undueness in any agreed upon scheme of lessening competition in, for example, the sale, transportation or supply of an article, involves advertence to the area of operation of the competition in question. An agreement to lessen competition unduly in respect to the matters defined in section 32(1)(*c*) must be assessed in relative terms. The very notion of competition which the Act undergirds envisages a market within which it may operate without an illegal agreement of restriction.

As a matter of law of course there is no definition of the "market" in relation to which the evidence of any alleged violation of sections 32(1)(*a*) and 32(1)(*c*) of the *Combines Investigation Act* may be examined. What is the relevant market in every case is a matter of judgment based upon the evidence.

As Laskin J. also put in the said case:

> It is obvious that a Court may be required to exercise a judgment on the evidence on whether the market specified in the indictment or the particulars, or of which proof is accordingly made, has not been artificially limited to suit the available evidence

For analogous purposes, other salutary words have also been employed elsewhere in respect to other statutes, in cautioning the prosecution not to tailor the market artificially to fit a subject case. (See Schedule "C").

(There is also no legal definition capable of describing the shape of competition. This is a changing matter (as for example, new products may come into direct competition, or service requirements re-arrange the geographical nature of a particular market).)

But speaking generally, it is of importance to bear in mind that the term "market" is a relative concept. In one sense, there is only one market in an economy since, to some extent, all products and services are substitutes for each other in competing for the customer's dollar.

In another sense, almost every firm has its own market since, in most industries, each firm's product is differentiated, to some extent, from that of all other firms.

Defining the relevant market in any particular case, therefore, requires a balanced consideration of a number of characteristics or dimensions to meet the analytical needs of the specific matter under consideration.

At one extremity, an ill-defined description of competition is that every service, article, or commodity, which competes for the consumer's dollar is in competition with every other service, article, or commodity.

At the other extremity, is the narrower scope definition, which confines the market to services, articles, or commodities which have uniform quality and service.

In analyzing any individual case these extremes should be avoided and instead there should be weighed the various factors that determine the degrees of competition and the

1968

THE QUEEN v. J. W. MILLS & SON LTD et al

Gibson J.

dimensions or boundaries of the competitive situation. For this purpose the dimensions or boundaries of a relevant market must be determined having in mind the purpose for what it is intended. For example, two products may be in the same market in one case and not in another.

And many characteristics or dimensions may be considered in defining the relevant market. All are not of the same order. And, in any particular case, usually, not all of the many characteristics or dimensions will have to be considered. In some instances, the definition may turn on only one characteristic or dimension or two (see again cases in Schedule "B"). However, in order to make a correct choice of the appropriate characteristics or dimensions, it may be necessary to review several types before selecting the proper one or ones.

Hereunder are noted some pertinent characteristics or dimensions that may be considered in defining a relevant market, but this list is not exhaustive. The classification also may be arranged in various ways.

(a) Product substitutability.

(The term economists use for this is "cross-elasticity of demand". The terms "substitutability" and "cross-elasticity" are synonymous. As an example, the demands for two products have a high cross-elasticity if a change in the price of one results in a large measure, in purchasers substituting it for the other. How to measure the degree of cross-elasticity in any given case is usually difficult.)

(b) Actual and potential competition.

(The problem sometimes in competition analysis is whether to confine the "relevant market" to existing competition or to consider potential (sometimes called "poised") competition as well).

(c) Geographical area.

(The geographical dimensions of a market are frequently an important factor in competitive analysis —e.g., should the relevant market be analyzed on a national basis, a regional or local area).

(d) Physical characteristics of products or service. (Selecting products that have the same physical

characteristics, or services that have the same features, is the simplest basis for defining a relevant market. But in some cases, for example, it may be correct legally to consider products with fairly dissimilar physical characteristics or services with somewhat dissimilar elements, as in the same market).

(e) End uses of products.

(The factor of end uses is closely related to physical characteristics in defining the relevant market. For example, if a product has different end uses in the hands of buyers, the definition of the relevant market may not be based solely on physical specifications. Also, for example, consideration of differences in uses is particularly important in studying markets for services).

(f) Relative prices of goods or services.

(The prices of goods or services may define the relevant market).

(g) Integration and stages of manufacture.

(Because of differences between the activities of competitors, problems of integration arise. In determining the relevant market, the problem is what products at what stage of manufacture to include or exclude).

(h) Methods of production or origin.

(Methods of production and the product resulting, and origin of material, as e.g., whether or not imported, are often important factors to consider in defining the relevant market).

Having employed some or all of the above significant characteristics or dimensions in making a judgment as to what is the relevant market in a particular case, the Court may in some cases then wish to consider some or all of the following additional features or indicators of the structural characteristics of such relevant market for the purpose of testing whether or not strong monopoly elements could endure, i.e. in weighing whether or not "undueness", could be proven under any factual situation, that is to say:

1. The number and concentration of competition.

(This criterion covers the number of firms and their relative sizes. It often, however, does not provide a direct measure of the degree of competition.)

1968

THE QUEEN
v
J. W MILLS & SON LTD. et al

Gibson J.

2. Barriers to entry.
(The relative ease or difficulty of entry into a market by a new firm is a prime factor in analyzing market structure. Generally speaking, if there are no substantial barriers to entering a market, strong monopoly elements will have great difficulty enduring, and conversely.)

3. Geographical distribution of buyers and sellers.
(Transportation costs are probably the most important factor in this element of market structure).

4. Differences in the degree of integration of competition.
(This matter arises when some competitors supply their own products or services while others are required to sell or purchase those same products or services. The former competitors at some stage of manufacture may have the power to squeeze its unintegrated competitor between high costs and low selling prices. Integration can also affect differences in competitors' costs.)

5. Product differentiation.
(Every firm seeks if possible, to build its own monopoly of a market by product differentiation. In this they are sometimes assisted through the use of trade marks and design features. The significance of product differentiation is dependent upon consumer information concerning product qualities and features.)

6. Countervailing power.
(This factor is sometimes difficult to measure. Its mere existence, however, may reflect substantial anti-competitive elements in the market. For example, the fact that one large firm has the ability to manufacture an article or a commodity may substantially limit the monopoly power of the established firm manufacturing such articles or commodities).

7. And again, cross-elasticity of demand.
(Because such affects both the nature of the competition within the relevant market, and also the definition of the relevant market).

Re the behaviour or conduct of the participants in the relevant market.

In examining and assessing the competitive feature of the behaviour or conduct of the participants in a relevant market, in its collusive aspects, what is germane since the 1960 amendment to the *Combines Investigation Act* is to consider the proof of any of the "devices" which were contemplated being employed (or also, if applicable, the employment of any of them) by the parties to any alleged conspiracy, combination, agreement or arrangement, relating to one or more of the following: (a) prices, (b) quantity or quality of production, (c) markets or customers, (d) channels or methods of distribution, and (e) if the proof does not relate to any of the devices listed in section 32(2)(*a*) to (*g*) and section 32(3)(*a*) to (*d*) of the Act, then to proof that the parties contemplated employing (and if applicable, employed) some other "device" which had as its result, that "the conspiracy, combination, agreement or arrangement...restricted or is likely to restrict any person from entering into or expanding a business in a trade or industry".

(In relation to both this competitive feature, and the other competitive feature, market structure, it may be observed that proof of the behaviour or conduct of the sellers in the relevant market in most cases under the *Combines Investigation Act* is usually much more extensive than proof of the other competitive feature, firstly because it is more frequently the more substantial issue, and secondly, because such proof fits into the process of litigation by the adversary system more readily.

But it is also important to bear in mind that behaviour or conduct features are not clearly distinct from the market structure features. Some aspects of structure may be so dependent on behaviour, that lines of demarcation between the two must be arbitrary.

In addition, it should also be noted that analysis of behaviour or conduct of sellers frequently calls for consideration of the conduct of buyers as well.)

So much for the legislative purpose and evidence necessary to prove breaches of these subsections of the Act.

The specific defences of each of the accused are now considered.

1968

THE QUEEN v. J. W. MILLS & SON LTD. et al

Gibson J.

The facts concerning Denning are sufficiently set out above.

In essence, the submission of Denning (in addition to the defence submission of the accused Leimar and Mills and Kuehne & Nagel (Canada) Limited, hereinafter referred to, which it also adopted) was that in June, 1959 it entered into the freight forwarding business in Vancouver; in 1960 was subject to a rate war conducted against it by Leimar and Mills which resulted in loss in its Vancouver operation of $32,000 in six or seven months causing it to be on the brink of bankruptcy; that in respect to this said predatory action of the accused Leimar and Mills it instituted a civil action against them for damages for civil conspiracy which was settled in October 1963 by formal agreement which agreement was in release of all damages for the claim for civil conspiracy and provided for a method of paying the damage settlement agreed upon[7]; that by one of the terms of this agreement it could be renewed after the expiry of the term of it namely, five years, at which time, if not renewed, Denning was free to re-enter the freight forwarding business, but if renewed for a period of one further year, Denning would be paid a commission of 15 per cent on business contracted.

In my view, considering the whole of the evidence, such does not constitute an offence by Denning Freight Forwarders Limited either under Count 1 or Count 2; and therefore it is not necessary to consider in relation to this accused the additional defence of the accused Mills, Kuehne & Nagel (Canada) Limited and Leimar, which it adopted, and as a consequence Denning Freight Forwarder Limited is acquitted.

In respect to Johnston Terminals Limited, it also adopted the defence submission of Leimar and Mills, but in addition, it submitted that at no time did it conspire or agree with Leimar or Mills about anything.

The facts concerning Johnston are also sufficiently set out above.

On these facts, I am of opinion that Johnston Terminals Limited in October 1960 did agree with Leimar and Mills

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[7] cf. Thompson J. in *Trim Trends Canada Limited v. Dreomatic Metal Products Limited et al,* Supreme Court of Ontario, 29 September, 1967, unreported.

to publish a tariff and live by it in the future; and that in pursuance of that agreement they did publish a tariff with roughly equivalent rates to those of the tariffs of the accused Leimar, Mills and Kuehne & Nagel (Canada) Limited. Johnston was at that time just getting into this business and, it is a reasonable inference, probably agreed to this in part because it was not familiar with the actual costs to it of carrying on this business. Other than that Johnston did not engage in any anti-competitive trade practice or policy with Leimar and Mills and by 1961 was in "free competition" with Leimar and Mills as those words are understood by the courts.

The only other matter to consider in relation to this accused (other than the defence submission of the accused Leimar and Mills which Johnston adopted) is whether what Johnston did had the necessary criminal element of "undueness" so as to constitute an offence under Count 1 or Count 2 or both. Without detailing all of the *indicia* which are apparent from the facts already set out, I am of opinion, on considering the whole of the evidence, that what Johnston did, did not have such necessary element either under Count 1 or Count 2; and therefore it is also not necessary to consider in relation to the accused the additional defence of the accused Mills, Kuehne & Nagel (Canada) Limited and Leimar which Johnston adopted, and as a consequence, Johnston Terminals Limited is acquitted.

The defence of the accused Mills, Kuehne & Nagel (Canada) Limited and Leimar was twofold namely:

1. that the Crown in the Indictment and Particulars thereof did not allege and define a true and realistic competitive market but instead in this respect (in the words of counsel for Leimar) did some "economic gerrymandering" in defining what it considered the relevant market; and
2. that if the Indictment and Particulars had specified the true competitive market that the elements of what the accused did lacked the necessary criminal element of "undueness" as relating to:
   (i) limiting "the facilities for transporting" etc., (section 32(1)(*a*) of the *Combines Investigation Act*); and also

1968

THE QUEEN
v.
J. W. MILLS & SON LTD. et al

Gibson J.

(ii) the prevention or lessening of "competition in transportation" etc. (section 32(1)(*c*) of the Act).

The defence witnesses relating to the relevant market were Dr. James Alexander Sherbaniuk, an economist of Simon Fraser University called by counsel for Mills; and Mr. K. R. Woodcock of Canadian Pacific Railways, Mr. Whalen of a steamship company which did business transporting articles and commodities from the Orient to the Port of Vancouver among other places, Mr. W. R. Sparks of Eatons of Canada Limited, Mr. I. F. Mardock, President of Mills and Mr. S. H. Garrod of the Canadian Pacific Railways, all of whom were called by counsel for Leimar.

The purpose of their evidence was to attempt to show that the relevant market in which these accused operated their businesses was not confined to articles or commodities defined in said Tariffs 70A, 70B and 70C, imported from the said designated area of the Orient, and shipped by sea to the Port of Vancouver and by rail in mixed carloads or by truck to Toronto or Montreal; but instead included in addition a much greater range of articles and commodities which were shipped by all manner of vessels from the Orient to either New Orleans, New York, Halifax, Montreal or Toronto and also where applicable, were trucked from these Ports to importers in Toronto and Montreal; and in addition included air traffic transportation of articles or commodities from the Orient to importers in Toronto and Montreal. In the defence economic evidence of Dr. Sherbaniuk, adduced to prove this, he stated that the following of the above mentioned characteristics or dimensions were significant in defining the relevant market as envisaged by the defence, namely: (*a*) product substitutability (cross-elasticity of demand), (*b*) actual and potential "poised" competition, and (*c*) geographical area.

These accused also sought to establish by their evidence, and submission in relation thereto, that the Indictment and Particulars did not delineate the relevant market, alleging that strong monopoly elements could not endure because there were no barriers to entering the market in which the accused operated, but on the contrary that it was very easy to get into this business which was in a much larger market than charged in the Indictment and Particulars, in that (1) the cost to establish a freight forwarding

business in Vancouver for this purpose would be modest—of the order of about $2,000; and that (2) it was not necessary to have offices in Toronto and Montreal; and in that (3) the number of persons required to be employed was small in number and that they could be trained within a very short space of time.

These accused by their evidence and submission in relation thereto, also sought to prove that because the substantial part of their fee was a fixed charge, namely, the amount payable to the railway, and that the variable, that is the floor-ceiling within which they could vary prices, was very narrow and in relation to the total charged was minuscule, therefore, whatever they did even by conspiring could not have the necessary criminal element of "undueness" so as to be an offence under either subsection of the Act.

These accused also sought to prove by its economic evidence and submission that the competitive situation in the relevant market in this case was one which an economist would call oligopoly; and that according to the economic theory of oligopoly, even in the absence of an agreement, the long run pricing behaviour would not likely be significantly different than did obtain here; and therefore no offence was committed.

In brief, these accused in evidence and argument submitted that what these accused did, did not result in them obtaining that quantum of market power to enable them to monopolize or tend to monopolize the business in the alleged relevant market, as envisaged by them, in this case; and that in any event, their conduct, employing whatever market power they did have, did not have the necessary criminal element of "undueness" in that they did not have the power to raise prices as they chose or to exclude competition when they desired to do so.

In respect to the Denning incident, the defence of these accused was that it was a perfectly natural and proper thing to do, viz., to eliminate a competitor, and that anything they did in this regard was not illegal.

Counsel for the Crown in submitting argument as to the import of the economic evidence adduced, stated that "it was proper to submit economic evidence to the Court, and that there should be a welding of law and economics

1968

THE QUEEN v. J. W. MILLS & SON LTD et al

Gibson J.

in combines cases". Crown counsel also agreed and submitted (*a*) that there shoud be no invention of markets, economic gerrymandering of the market, tearing a market out of context, creating a market out of bits and pieces of the whole market, deciding illegality as a prelude to determining the market, all for the purpose of obtaining a conviction; (*b*) that the exclusion of true substitutes is wrong; (*c*) that the exclusion of true competitors is wrong; (*d*) that "unduly" should be considered within the boundaries of the true relevant economic market; (*e*) that in defining the true relevant market in this case that the following characteristics or dimensions should be considered, namely, (i) product substitutability; and (ii) geographical area; and (*f*) that in testing whether the relevant market has been correctly defined, the additional features or indicators of the structural characteristics of such relevant market, of competitors and "poised" competition should also be considered.[8]

So much for the submission of counsel in respect to the Indictment against the accused Mills, Leimar and Kuehne & Nagel (Canada) Limited.

As to these accused, I now deal with the evidence of the competitive features in their collusive aspects, firstly, in relation to market structure, and secondly in relation to behaviour or conduct.

In my view, firstly, there were no substitute services for this service business in which the accused operated, that is to say, the facilities solely by ship and solely by air and the transportation business in connection therewith in relation to articles and commodities transported from the said designated area of the Orient to Toronto and Montreal were and are in another market and not the market in which these accused carried on their businesses.

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[8] In reference to the feature or indicator of "poised" competition, c.f Spence J. in *Regina v. Howard Smith Paper Mills, Limited et al* [1954] O R. 543 at 578:—

> At best it is a fringe type of competition where the lower-priced and coarser products of the accused mills might find some competition from the coarse paper mills and in industry there is always a possibility of substitution if the product becomes substantially too high in price. If the public had to rely on this distant possibility its protection would be slight indeed

Secondly, the barriers of entry to the alleged relevant market were high. Part of the proof of this is the fact that new persons did not get into this market (Mr. Mardock confirmed this (see Exhibits 273,207 and 280)); what happened to Denning is an example; Johnston also was only able to get five per cent of this market; and Freight Consolidators of Canada Limited obtained a negligible amount of this business; Denning experienced "operation clobber" put in effect by Leimar and Mills, which cost it $32,000 in six to seven months in its Vancouver operation; and Mills and Leimar were successful in stopping newcomers to this market to have access to the ships manifests (see Exhibits 265-188).

In this connection also, Leimar and Mills succeeded in preventing the truckers from getting O.C.P. preferential rates (see Exhibits 263-148).

In addition, the problem of getting customers in this market was substantial. Only if you have had some close relationship with importers, as for example, customs brokers, was it possible to enter. That is how Leimar, Mills, Kuehne & Nagel (Canada) Limited and Denning got into this market. But even the FCC Company run by a group of customs brokers has not had much success. And Johnston with all its connection in the trucking business was only able to get about five per cent of the market.

Thirdly, there was really no issue about the geographical market even though it was raised in the evidence.

Fourthly, the evidence established that in relation to this alleged relevant market (*a*) where the buyer of these services required transportation without regard to time, he used water transportation; (*b*) where the buyer required fast transportation he used ship-rail or in some cases trucks; (*c*) that the truckers did not have the benefit of O.C.P. rates; (*d*) that the accused Leimar, Mills and Kuehne & Nagel (Canada) Limited agreed to use all possible measures to exclude trucks and other freight forwarders from the market; (*e*) that the agreement between the accused Leimar, Mills and Kuehne & Nagel (Canada) Limited was to exclude all competitors including truckers; (*f*) that the railways were not real competitors because of Railway Rule 43, among other things; (*g*) that the importers (who could not take advantage of the tariff)

1968

THE QUEEN v. J. W. MILLS & SON LTD. et al

Gibson J.

were not real competitors; (*h*) that the airlines were not real competitors; (*i*) that at the best time, the truckers serviced only 20 per cent of the market; (*j*) that many importers preferred railway transport over truck (door to door) deliveries; (*k*) that all substitutes were imperfect and that the competitors (outside of pool cars) were not true competitors; (*l*) all of the customers of the freight forwarders resided in Ontario and Quebec, mainly in Toronto and Montreal; (*m*) that O.C.P. rates, incidental benefits, and preferential rail rates were available only to persons residing in points east of the Manitoba-Ontario boundary; (*n*) that the combination of transportation by ship and rail provided speedy transit (as compared to water transportation) and economical rates; (*o*) that while water transportation was cheaper than ship-rail transportation, that when speed of delivery was important, that the customer used ship-rail transportation; (*p*) that apart from water transportation that the only substitute for "mixed pool car" was transportation by truck; and (*q*) that apart from very large importers, it was impossible for the average importer to obtain the benefit of the preferential rail rate unless he used the services of a pool car consolidator.

In brief, putting the matter in another perspective, it was established by the evidence that when the Board of Transport Commissioners approved C.F.A. Tariffs (series 70) they created a specific market available to all buyers of the service available therein. Such buyers were all those persons residing in Canada east of the Manitoba-Ontario boundary who wished to import goods from the areas of the Orient designated in these tariffs; and such buyers were entitled to obtain the benefit of these preferential rail tariffs if they were able to consolidate carload shipments of commodities, free of any collusive action by the accused Leimar, Mills and Kuehne & Nagel (Canada) Limited.

For these reasons, and considering the whole of the evidence, I am of opinion that (1) the Indictment and Particulars alleged the true relevant market; and (2) the evidence proved such was the true relevant market in which these accused carried on their respective businesses at the relevant times, beyond a reasonable doubt.

So much for the market structure.

As to the other competitive feature, namely, the behaviour or conduct of the participants in this relevant market, it is clear from the facts recited above from the evidence that the devices employed therein by these accused related to:

(a) prices;

(b) markets or customers;

(c) channels of distribution; and

(d) that the conspiracy, combination, agreement or arrangement restricted persons from entering into or expanding a business in this service industry.

As to any of these, in my view, no dispute can arise from the evidence.

The Crown has proven an agreement or conspiracy by Leimar, Mills, and Kuehne & Nagel (Canada) Limited to fix prices; to divide the markets and customers between themselves; to control the channels of distribution; and to prevent people from entering this service industry; to restrict Denning from entering into or expanding a business in this service industry; and also to restrict Johnston and F.C.C. Company Limited from expanding their business in this service industry.

The fact that there was a ceiling above which it was impossible to raise prices does not affect the question of the behaviour or conduct of these accused in this relevant market (see *Regina v. Northern Electric Co. Ltd. et al*[9]). This is true in every combines case. If the monopoly charges too high a price, the customer will choose, an imperfect substitute as for example, in the case here, water transportation, or will go to the outsider that is, to truckers because the rates are cheaper. Every monopoly is faced by ceilings.

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

The only other question is whether or not such anti-competitive behaviour or conduct of these accused in

[9] [1955] 3 D.L.R 449 at 476.

1968

THE QUEEN v. J. W. MILLS & SON LTD. et al

Gibson J

employing the said devices as they did, had the criminal element of "undueness" so as to constitute an offense under section 32(1)(*a*) or section 32(1)(*c*) or both.

The Crown has proven, as stated, that Leimar, Mills and Kuehne & Nagel (Canada) Limited were able to do what they did by obtaining sufficient market power by their said agreements and conspiracy in relation to this service business in this said relevant market.

The Crown has proven also that the object of these accused at all material times was twofold, namely, (1) to limit the facilities for transporting or dealing in the said articles or commodities that may be the subject of trade or commerce, and also (2) the prevention or lessening of competition in the transportation of such articles or commodities also, in such relevant market.

The success of these accused in interfering with "free competition" in this service business in this relevant market at all material times was most substantial. For this reason and also because of the gross predatory practices engaged in by these accused, above mentioned, the conclusion is inescapable that the conduct and behaviour of these accused in relation to "free competition" at the material times in relation to both Count 1 and Count 2 of the Indictment, had the inordinate quantum against the public interest so as to be "unduly" beyond a reasonable doubt, as that word is judicially meant in the cases, and within the meaning and import of that word as employed in both section 32(1)(*a*) and section 32(1)(*c*) of the *Combines Investigation Act*.

The verdict of the Court therefore is that the accused Overland Import Agencies Ltd. (Leimar Forwarding Co.), J. W. Mills & Son Limited and Kuehne & Nagel (Canada) Limited are guilty on both Count 1 and Count 2 of the Indictment herein.

SCHEDULE "A" to
REASONS FOR JUDGMENT

IN THE EXCHEQUER COURT OF CANADA

HER MAJESTY THE QUEEN

against

J. W. Mills & Son, Limited (sometimes known as J. W. Mills & Son, Ltd. and as J. W. Mills & Son Limited)

Kuehne & Nagel (Canada) Limited (sometimes known as Kuehne & Nagel (Canada) Ltd.)

Overland Import Agencies Ltd. (formerly known as Mardock Enterprises Ltd)

Denning Freight Forwarders Ltd.

Johnston Terminals Limited

J. W. Mills & Son, Limited (sometimes known as J. W. Mills & Son, Ltd. and as J. W. Mills & Son Limited)

Kuehne & Nagel (Canada) Limited (sometimes known as Kuehne & Nagel (Canada) Ltd)

Overland Import Agencies Ltd. (formerly known as Mardock Enterprises Ltd.).

Denning Freight Forwarders Ltd.

Johnston Terminals Limited

stand charged

1. That between the first day of January, 1956, and the first day of August, 1966, both inclusive, within the Province of British Columbia, did unlawfully conspire, combine, agree or arrange together and with one another and with

Leithdyke Forwarders Limited (sometimes known as Leithdyke Forwarders Ltd.)

Thomas Meadows & Company Canada, Limited

Leith Services Ltd., and Mardock Enterprises Ltd. (formerly carrying on business under the firm name and style of Leimar Forwarding Co.)

Muirhead Forwarding Limited

Ian F. Mardock (formerly known as Ian F. Gee) the late R. Stanley Leith.

or with some or one of them to limit unduly the facilities for transporting or dealing in articles or commodities that may be the subject of trade or commerce, to wit, articles or commodities, imported from designated areas in the orient into the Province of British Columbia and *which could be* transported by railway in railway cars, the railway cars each ordinarily containing a pool shipment of two or more different kinds of the said articles or commodities, at east bound import freight rates, to points in Canada, east of the Manitoba-Ontario boundary, to the City of Toronto and elsewhere in the Province of Ontario and to the City of Montreal and elsewhere in the Province of Quebec and did thereby commit an indictable offence contrary to section 32(1)(*a*) of the Combines Investigation Act.

2. That between the first day of January, 1956, and the first day of August, 1966, both inclusive, within the Province of British Columbia, did unlawfully conspire, combine, agree or arrange together and with one another and with

Leithdyke Forwarders Limited (sometimes known as Leithdyke Forwarders Ltd.)

Thomas Meadows & Company, Limited

Leith Services Ltd., and Mardock Enterprises Ltd. (formerly carrying on business under the firm name and style of Leimar Forwarding Co.)

Muirhead Forwarding Limited

Ian F. Mardock (formerly known as Ian F. Gee)
the late R. Stanley Leith

or with some or one of them, to prevent, or lessen, unduly, competition in the transportation of articles or commodities that may be the subject of trade or commerce, to wit, articles or commodities imported from designated areas in the orient into the Province of British Columbia and *which could be* transported by railway in railway cars, the railway cars each ordinarily containing a pool shipment of two or more different kinds of the said articles or commodities at east bound import freight rates, to points in Canada, east of the Manitoba-Ontario boundary, to the City of Toronto, and elsewhere in the Province of Ontario, and to the City of Montreal and elsewhere in the Province of Quebec and did thereby commit an indictable offence contrary to section 32(1)(*c*) of the Combines Investigation Act.

Dated this 6th day of
November, 1967, at
Vancouver, Province of
British Columbia.

"R. P. ANDERSON"
Agent of the Attorney General of Canada.

IN THE EXCHEQUER COURT OF CANADA

HER MAJESTY THE QUEEN

against

J. W. MILLS & SON, LIMITED
KUEHNE & NAGEL (CANADA) LIMITED
OVERLAND IMPORT AGENCIES LTD.
DENNING FREIGHT FORWARDERS LTD.
JOHNSTON TERMINALS LIMITED

ADDITION TO PARTICULARS

WITH REFERENCE TO THE PARTICULARS OF THE INDICTMENT, DATED NOVEMBER 6, 1967, THE CROWN FURTHER STATES:

3. (A). IT is not alleged that JOHNSTON TERMINALS LIMITED committed any of the specific aforementioned overt acts, save and except with regard to Paragraph 2 (*a*) (*b*) (*c*) and (*e*) of the said Particulars.

DATED at the City of Vancouver, in the Province of British Columbia, this 6th day of November, A.D. 1967.

"R. P. ANDERSON"
AGENT OF THE ATTORNEY GENERAL OF CANADA

To: The Exchequer Court of Canada
And to: R. M. Hayman, Esq.,
And to: J G Alley, Esq
And to: B D. Kenny, Esq.
And to G S. Cumming, Esq.

These PARTICULARS are furnished by R. P. Anderson Esq, Agent of the Attorney General of Canada, whose place of business and address for service is Suite 220, 890 West Pender Street, Vancouver 1, B.C.

IN THE EXCHEQUER COURT OF CANADA

HER MAJESTY THE QUEEN

against

J W. MILLS & SON, LIMITED
KUEHNE & NAGEL (CANADA) LIMITED
OVERLAND IMPORT AGENCIES LTD.
DENNING FREIGHT FORWARDERS LTD.
JOHNSTON TERMINALS LIMITED

PARTICULARS

WITH REFERENCE TO THE PARTICULARS OF THE INDICTMENT, THE CROWN STATES.

1. THE fundamental ingredients of the alleged (i) conspiracy (ii) combination (iii) agreement or (iv) arrangement are the facts that will be proved by the Crown as constituting the offences charged in the indictment. These offences consist of collusion amongst the accused and co-conspirators to limit unduly the facilities for transporting or dealing in articles or commodities and to lessen unduly competition in the transportation of the said articles or commodities, all of which are subjects of trade or commerce and are imported from a designated geographical area, and include, inter alia, glassware, baskets, artificial flowers, furniture, footwear, groceries, clothing, rugs, musical instruments, imitation jewellery, electrical appliances, sporting goods, toys, optical goods, cutlery and woodenware, such list not being limitative, a complete list of the said articles or commodities being listed, inter alia, in the following Canadian Freight Association Eastbound Import Freight Tariffs and in the supplements and amendments thereto:

(a) Canadian Freight Association #70A—effective July 11, 1951;

(b) Canadian Freight Association #70B—effective June 23, 1961;

(c) Canadian Freight Association #70C—effective May 29, 1963;

all such Tariffs having been issued by the authorized Agent of the Canadian Freight Association, such an Association consisting, inter alia, of all railways with termini in Canada, which Canadian Freight Association Tariffs stipulate, inter alia, the unit price for minimum mixed carload weights of specified articles or commodities, at which certain designated carriers, including the Canadian Pacific Railways and the Canadian National Railways, may carry the said articles or commodities, all of which originated in a designated geographical area, as described in the said Tariffs and land by vessel in the Port of Vancouver, in the Province of British Columbia, and are carried by rail from the said Port to points in Canada in the Provinces of Ontario and Quebec, such points being east of the Saskatchewan-Manitoba Boundary, copies of the said Tariffs and supplements and amendments thereto having been supplied to counsel for the accused.

2. THE alleged (i) conspiracy (ii) combination (iii) agreement or (iv) arrangement is a continuing one during the period between the first day of January, 1956 and the first day of August, 1966, the said (i) conspiracy (ii) combination (iii) agreement or (iv) arrangement being manifested, inter alia, by the following overt acts of the accused or the co-conspirators, or some of them, or their agents, in furtherance of the said (i) conspiracy (ii) combination (iii) agreement or (iv) arrangement:

(*a*) Preparing, writing, signing and sending letters, telegrams, memoranda, rate-sheets, schedules of customers or consignees (hereinafter known as "consignees") or other documents to one another or to some other participants, or to other persons and the said documents, without limiting the foregoing, are more particularly identified and set forth as those being seized in:

VANCOUVER—by the authorized representatives of the Director of Investigation and Research, appointed under the Combines Investigation Act, R.S.C. 1952, Chapter 314 at 340 Burrard Street, Vancouver, B.C. on or about January 31, 1961 and by the R.C.M. Police at 1045 Pender, Vancouver, B.C. on or about June 23, 1966;

TORONTO—by the authorized representatives of the Director of Investigation and Research, appointed under the Investigation Act, R.S.C. 1952, Chapter 314, at 159 Bay Street, Toronto, Ontario, on or about February 2, 1961 and, by the R.C.M. Police at 159 Bay Street, Toronto, Ontario, on or about June 23, 1966;

MONTREAL—by the authorized representatives of the Director of Investigation and Research, appointed under the Combines Investigation Act, R.S.C. Chapter 314, at 485 McGill Street, Montreal, P.Q. on or about February 2, 1961 and by the R.C.M. Police at 485 McGill Street, Montreal, P.Q. on or about June 22, 1966;

VANCOUVER—by the authorized representatives of the Director of Investigation and Research, appointed under the Combines Investigation Act, R.S.C. 1952, Chapter 314, at 1035 West Pender Street, Vancouver, B.C., on or about February 2, 1961 and August 4, 1961, and by the R.C.M. Police at 1035 West Pender Street, Vancouver, B.C., on or about June 24, 1966;

MONTREAL—by the authorized representatives of the Director of Investigation and Research, appointed under the Combines Investigation Act, R.S.C. 1952, Chapter 314, at 407 McGill Street, Montreal, P.Q., on or about January 31, 1961, and by the R.C.M. Police at 407 McGill Street, Montreal, P.Q., on or about June 23, 1966;

VANCOUVER—by the authorized representatives of the Director of Investigation and Research, appointed under the Combines Investigation Act, R.S.C. 1952, Chapter 314, at 2020 Yukon Street, Vancouver, B.C., on or about February 9, 1961, and by the R.C.M. Police on premises used or occupied by the said accused at 2020 Yukon Street, Vancouver, B.C., on or about June 23, 1966;

TORONTO—by the authorized representatives of the Director of Investigation and Research, appointed under the Combines Investigation Act, R.S.C. 1952, Chapter 314, at 200 Bay Street, Toronto, Ontario, on or about February 3, 1961, and by the R.C.M. Police at 200 Bay Street, Toronto, Ontario, on or about June 28, 1966;

MONTREAL—by the authorized representatives of the Director of Investigation and Research, appointed under the Combines Investigation Act, R S C. 1952, Chapter 314, at 759 Victoria Square, Montreal, P.Q., on or about June 27, 1966;

TORONTO—by the authorized representatives of the Director of Investigation and Research, appointed under the Combines Investigation Act, R.S C. 1952, Chapter 314, at 185 Bay Street, Toronto, Ontario, on or about March 17, 1961, and by the R C M. Police at 185 Bay Street, Toronto, Ontario, on or about June 28, 1966;

MONTREAL—by the authorized representatives of the Director of Investigation and Research, appointed under the Combines Investigation Act, R S C. 1952, Chapter 314, at 759 Victoria Square, Montreal, P Q , on or about June 27, 1966;

TORONTO—by the authorized representatives of the Director of Investigation and Research, appointed under the Combines Investigation Act, R S.C. 1952, Chapter 314, at 185 Bay Street, Toronto, Ontario, on or about March 17, 1961, and by the R.C.M. Police at 185 Bay Street, Toronto, Ontario, on or about June 28, 1966;

MONTREAL—by the R C M Police at 1155 Dorchester Blvd West, Montreal, P Q , on or about October 12, 1966, and at the C N R. Turcott Yards, Montreal, P Q , on or about October 13, 1966;

copies of all the said documents having been supplied to counsel for all the accused.

(*b*) Having, keeping, or retaining in their possession or in the possession of their agents, or on their premises, or on premises used or occupied by them, the said letters, telegrams, memoranda, rate sheets, schedules of consignees or other documents received or obtained from another accused or other accused or another co-conspirator or other co-conspirators, or some of them or their agents, as cited in paragraph 2(*a*) above;

(*c*) Arranging to publish similar or identical rates, which rates were to be charged to their consignees;

(*d*) Arranging to assess similar or identical charges to consignees or their agents for a certain category or type of information or advice sent via their communication facilities in the Port of Vancouver to the said Cities of Toronto and Montreal and to provide, free of charge, to the said consignees or their agents another category or type of information and advice sent via the said communication facilities from the said Port of Vancouver to the said Cities,

(*e*) One of the accused agreeing with a co-conspirator that the former would not solicit, or attempt to solicit, any import business relating to articles or commodities imported from the said designated geographical area to the said Port of Vancouver for carriage by railway pool car from the said Port to the said Cities, in return for which the latter would not solicit or attempt to solicit any domestic traffic for carriage by railway pool car from the said Port to the said Cities;

(*f*) Arranging, by certain written agreements which provided, inter alia, that there would be no reduction of rates, or varying or cancellation of terms, or soliciting of listed consignees, without prior notice being given to, and the concurrence of, the other parties to the said document or documents, all such documents being contained among those cited in 2(*a*) above;

(*g*) Arranging for, participating in, or attending meetings or conferences, for the purpose of attempting to persuade persons and agents of shipping companies or shipping lines, located in the Port of Vancouver, to refuse access of certain documents to a competitor, which documents related to the said imported articles or commodities being carried from the Port of Vancouver to the said Cities;

(*h*) Issuing rate sheets and terms to their consignees, which rate sheets and terms became effective at similar times, the said rates usually being below the normal rates normally charged by them to the said consignees, all with the prime object of forcing another competitor from the import pool car business with regard to articles being carried from the Port of Vancouver to the said Cities;

(*i*) Two of the accused agreeing with a co-conspirator that the latter would represent them in some of the negotiations with another accused with regard, inter alia, to the cessation of a rate war and the withdrawal by the latter said accused from the import pool car traffic originating in the Port of Vancouver and terminating in the said Cities;

(*j*) Three of the accused agreeing with a co-conspirator that one of the accused would withdraw all of its facilities from the Port of Vancouver, in the implementation of one of the terms stipulated in certain written agreements;

(*k*) Arranging to utilize certain non-competitive solicitation methods concerning consignees;

(*l*) Arranging to furnish, or furnishing each other or exchanging with each other, lists of consignees, which consignees had been solicited by another of the accused, a co-conspirator or some of them or their agents;

(*m*) The payment by three of the accused to another accused of monthly commissions for the exclusive right to solicit the latter's former consignees which consignees had, by agreements, been allocated by one of the accused to three of the said accused,

3. (A) ALL of the accused, together with some of the co-conspirators or their agents, were engaged in the business of railway pool car consolidations of the said articles or commodities and the facilities, functions and methods carried out or used by them in the operation of the said business were essential to, and formed an integral part of, the said transportation by rail as described in paragraph 1, herein.

(B) THE facilities were offices, equipment and furnishings and those railway pool car consolidation functions and methods, carried out or used by the accused, together with some of the co-conspirators or their agents, concerned with or relating to the said articles or commodities imported by vessel from the said geographical area and transported by rail pool car from the Port of Vancouver to the said points, all of which functions and methods are within the knowledge of the accused and the co-conspirators, and consist, inter alia, of

(*a*) All of the offices, staff, equipment and furnishings of the accused corporations and their agents, in the Cities of Vancouver, Toronto and Montreal, including communication facilities owned or rented, which facilities were frequently utilized for rapid communication of certain information and advice from the Port of Vancouver to the Cities of Toronto and Montreal and from the Cities of Toronto and Montreal to the Port of Vancouver.

(*b*) Arranging for the consolidation of the said articles or commodities, in order to obtain the benefit of the said tariffs, inter alia;

(*c*) Advising the consignee in advance of the approximate date of arrival in the Port of Vancouver by steamship of the said articles or commodities;

(*d*) Obtaining information from a steamship company or line or their agents regarding the said articles or commodities, all such information normally being listed in the steamship manifest of the said vessel;

(*e*) Arranging for the release of the said articles or commodities from the steamship company or vessel agent;

(*f*) Preparing the necessary documentation for the immediate loading and carriage of the said articles or commodities by railway pool car, the railway pool cars normally consisting of a consolidation of two or more of the said imported articles or commodities;

(*g*) Preparing and transmitting the necessary instructions and details to the dock operators in the Port of Vancouver, or their agents, concerning the loading, handling, nature and mode of carriage of the said articles or commodities,

(*h*) Delivering, by means of their own employees inter alia, written instructions to the Canadian Pacific Railways or the Canadian National Railways, or their agents, regarding the number of pool cars that the said railway Companies should immediately dispatch to a particular dock or shed area, in the said Port of Vancouver, for the purpose of loading certain pool car consolidations, consisting of the said articles or commodities, into the said railway pool cars;

(*i*) Instructing the said railway Companies, or their agents, concerning any particular temperature conditions or other specific precautions or measures that should be taken by them with regard to the preservation or safety of particular articles or commodities being carried in a railway pool car from the said Port of Vancouver to the said Cities;

(*j*) Preparing the necessary documentation, required, inter alia, by Canadian Customs, to facilitate the rapid and efficient dispatch of the said articles or commodities, via railway pool cars from the said Port to the said Cities;

(*k*) Obtaining from the said railway Companies, following the loading of the said pool cars, information regarding the car numbers and the way bill numbers for the noting of the same on the invoice normally forwarded by the accused or co-conspirator to particular consignees, which invoice includes in one charge, inter alia, (1) the freight due to the said railway Companies by a consignee and (2) the pool car consolidation fees also due by a consignee,

(*l*) Notifying a particular consignee of the time of departure from the said Port of Vancouver of the said articles or commodities by railway pool car and the expected date of arrival at the ultimate railway destination;

(*m*) Advising the consignee of any ocean freight, or other charges, which may be due to the vessel which transported the said articles or commodities to the said Port of Vancouver;

(*n*) Advising the consignee of any shortages or damages in the said articles or commodities and, if necessary, attempting to trace the location of any articles or commodities and placing damage claims or reports with the suitable authorities or their agents,

(o) Assuming the responsibilities of, and acting as, a shipper, vis-a-vis the said Canadian Pacific Railways and Canadian National Railways, with regard to the articles or commodities carried from the said Port of Vancouver to the said Cities;

It is not alleged that the accused corporations own or control the physical means of carriage, the physical means of carriage from the Port of Vancouver being, in every case, provided by, and, to the Crown's knowledge, owned by, the said Canadian National Railways and the Canadian Pacific Railways.

(C) THE facilities referred to, or some of them, were located at all those points at which the accused, together with some of the co-conspirators or their agents, carried out or performed the said pool car consolidation functions and methods;

(D) THE conspiracy, combination, agreement or arrangement is to be inferred from all the evidence which will be adduced by the Crown. Detailed particulars of many of the acts and declarations cannot be given without setting out all of the evidence upon which the Crown will rely but the important overt acts which illustrate the nature and extent of the limiting of facilities and the preventing or lessening of competition are set out herein

DATED at the City of Vancouver, in the Province of British Columbia, this 6th day of November, A D. 1967.

"R. P. ANDERSON"
AGENT OF THE ATTORNEY GENERAL OF CANADA

To· The Exchequer Court of Canada
And To: R. M. Hayman, Esq.
And To: J. G. Alley, Esq.
And To: B. D. Kenny, Esq.
And To G. S. Cumming, Esq

These PARTICULARS are furnished by R. P. Anderson, Esq., Agent of the Attorney General of Canada, whose place of business and address for service is Suite 220, 890 West Pender Street, Vancouver 1, B C.

SCHEDULE "B" to
REASONS FOR JUDGMENT

"RELEVANT MARKETS" IN CANADIAN COMBINES CASES DEFINED IN TERMS OF "COMMODITY" AND "GEOGRAPHY"

	Commodity	*Geography*
R v Master Plumbers et al (1907) 14 O.L R. 295	Plumbing Supplies	Province of Ontario
R v. Hobbs Glass Ltd. et al [1950] S C. of Ont.	Glass	Provinces of Ontario and Quebec
R v. McGavin Bakeries Limited et al (No. 6) (1951) 3 W.W.R. 289	Bread and Bakery Products	Provinces of British Columbia, Alberta and Saskatchewan
R v. Goodyear Tire & Rubber Co. of Canada Ltd. et al (1954) 108 C C C 321	Rubber Products	Canada
R v. Howard Smith Paper Mills Limited et al [1954] 4 D L R. 161	Fine Papers	Provinces of Ontario and Quebec
R v. Crown Zellerbach Canada Ltd. et al (1955) 14 W W.R. 433	Coarse Papers	Province of British Columbia
R v Dominion Steel and Coal Corporation Ltd. et al (1957) 116 C.C C. 117	Steel Wire Fencing and related products	City of Toronto and City of Montreal
R v. D. E. Adams Coal Ltd et al (1957) 23 W.W R. 419	Coal	City of Winnipeg
R v Gair Company of Canada Limited (1958) Trial, Quebec Court of Queen's Bench	Paperboard Products	City of Montreal and elsewhere in Canada east of the Province of Saskatchewan
R v. Lyons Fuel Hardware and Supplies Limited et al (1961) 131 C.C C. 189	Coal	City of Sault Ste. Marie
R v. Electrical Contractors Association of Ontario and Dent (1960) 127 C C C. 273 (Trial)	Electrical Construction Materials and Equipment	Province of Ontario
R v. St. Lawrence Corporation Limited et al (1966) Trial Supreme Court of Ontario (unreported)	Corrugated Box Containers	Toronto and elsewhere in Canada
R v. Stinson-Reeb Supply Co, Ltd et al (1929) 52 C C C. 66	Gypsum Products	City of Montreal

SCHEDULE "C" to
REASONS FOR JUDGMENT

Public Policies Toward Business Third Edition 1966, p. 156 by Clair Wilcox, Ph D.

The Line of Commerce

To determine a relevant market, a court may find it necessary to define the commodity with which it is concerned. This problem does not arise with products such as cigarettes and shoe machinery. But where a product has close substitutes, the court must decide whether to exclude or include them when it measures market power. If substitution were to be ignored, every brand would have a monopoly. If all possible substitutes were to be taken into account, monopoly would be rare indeed The question is where to draw the line

Like products may have different physical characteristics; they may have different end uses; they may sell in different price lines; their markets, therefore, may be distinct. *Like products,* on the other hand, *may be readily interchangeable; their market, therefore, will be the same* The degree of interchangeability is to be measured by cross-elasticity of demand. Cross-elasticity defines the extent to which a change in the price of one product affects the sales of another If a slight change in the price of product A results in a large change in the sales of product B, cross-elasticity is high. Conversely, if a sharp change in the price of A has little effect on sales of B, cross-elasticity is low In the first case, substitution occurs so readily that the two products can be held to occupy a single market In the second, the possibility of substitution is so remote that the markets for the two must be regarded as separate.

Competition and the Law, p 42 by Sumner Marcus, (quoting in part from *U S. v. Continental Can. Co. et al* case).

. . . the Court . . chooses . . . to invent a line of commerce the existence of which no one, not even the government, has imagined; for which businessmen and economists will look in vain; a line of commerce which sprang into existence only when the merger took place and will cease to exist when the merger is undone.

Other critics of these two decisions have accused the Court of "economic gerrymandering".

Competition and Monopoly—Legal and Economic Issues, p. 453, footnote 211, by Mark S Massel.

"The market, then, does not perform the function of a rule of law. It operates, rather, to orient, systematize and classify factual situations so that anti-trust policies can be properly applied *As a tool of factual analysis, the market concept should not be a draw-string, which is tightened for illegality* and slackened for lawfulness. To attain the clarity of thought necessary for intelligent policy formulation and the rudiments of predictability essential to the administration of this body of law, the concept of the market should remain a constant" Note, "The Market· A Concept in Anti-trust," *Columbia Law Review,* Vol. 54 (1954), pp. 580, 603.

Antitrust Policy—An Economic and Legal Analysis (1959), p. 134 by Carl Kaysen and Donald F. Turner

. . . *Without a minimally reasonable definition of markets, criteria based on quantitative shares become whimsy*

Stanford Law Review—Oligopoly Power, p. 306 by Bradley

> . . . Indeed, the conclusion seems inescapable that in *Alcoa-Rome* and *Continental Can the market definition was not so much the prelude to the conclusion of illegality as the conclusion of illegality was the prelude to the market definition.*

United States v. Grinnell Corporation et al (U S. S.C.R. 16 L ed 2d) p. 795

> In section 2 cases, *the search for "the relevant market" must be undertaken and pursued with relentless clarity. It is, in essence, an economic task put to the uses of the law.* Unless this task is well done, the results will be distorted in terms of the conclusion as to whether the law has been violated and what the decree should contain.

page 798

> *The gerrymandered market definition approved today* totally excludes from the market consideration of the availability in Pittsburgh of cheaper but somewhat less reliable local alarm systems, or of more *expensive* (although the expense is reduced by greater insurance discounts) *watchman service,* or even of unaccredited central station service which virtually duplicates the Holmes service.
>
> Instead, and in the name of "commercial realities", we are instructed that the "relevant market"—which
>
> *(384 US 592)
>
> totally *excludes these locally available alternatives—requires us to look only to accredited central station service, and that we are to include in the "market" central stations which do not furnish burglary protection and even those which serve such places as Boston and Honolulu.

United States v. Continental Can Co. et al (378 US 441, 12 L ed 2d 953, 84 S Ct 1738) p. 975

> In any event, *the Court* does not take this tack. *It chooses instead to invent a line of commerce the existence of which no one, not even the Government, has imagined; for which businessmen and economists will look in vain; a line of commerce which sprang into existence only when the merger took place and will cease to exist when the*
>
> *(378 US 477)
>
> *merger is undone.*