

CANADA / JUDGMENT

Aetna Insurance Co. et al. v. The Queen

[1978] 1 SCR 731

COURT

Supreme Court of Canada

DECIDED

29 April 1977

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Aetna Insurance Co. et al. v. The Queen

Collection

Supreme Court Judgments

Date

1977-04-29

Report

[1978] 1 SCR 731

Judges

Laskin, Bora; Martland, Ronald; Judson, Wilfred; Ritchie, Roland Almon; Spence, Wishart Flett; Pigeon, Louis-Philippe; Dickson, Robert George Brian; Beetz, Jean

On appeal from

Nova Scotia

Subjects

Criminal law

Decision Content

Supreme Court of Canada

Aetna Insurance Co. et al. v. The Queen, [1978] 1 S.C.R. 731

Date: 1977-04-29

Aetna Insurance Company et al. Appellants;

and

Her Majesty The Queen Respondent.

1976: December 15, 16; 1977: April 29.

Present: Laskin C.J. and Martland, Judson, Ritchie, Spence, Pigeon, Dickson and Beetz JJ.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA, APPEAL DIVISION

Criminal law—Trade offences—Conspiracy to unduly lessen competition—Elements of offence—Admissibility of evidence of public benefit—“Undue”, “Unduly”—Combines Investigation Act, R.S.C. 1970, c. C-23, s.32(1)(c).

Appellants, 73 insurance companies, were charged with conspiracy to prevent or lessen unduly competition in the price of fire insurance upon property in the Province of Nova Scotia contrary to s. 32(1)(c) (rep. and sub. 1974-75 (Can.), c. 76, s. 14(1)) of the Combines Investigation Act, R.S.C. 1970, c. C-23. Appellants were all members of the Nova Scotia Board of Underwriters and set their fire insurance rates in accordance with the rates set by the Board. There were several other large insurance companies which were not members of the Board which had operated in the Province for many years. These non-member companies did not adhere to the Board's rate schedule. The issues were whether there was an agreement to which appellants were parties evidencing a common design to prevent or lessen competition in the price of fire insurance generally throughout the Province and whether if there were such an agreement it was undue and therefore proscribed by the section. Appellants were acquitted at trial; however the Appeal Division reversed, entered a conviction and imposed fines totalling \$339,700.

Held (Laskin C.J. and Judson and Spence JJ. dissenting): The appeal should be allowed and the judgment at trial restored.

Per Martland, Ritchie, Pigeon, Dickson and Beetz JJ.: The sole question was whether this agreement was entered into in order to prevent or lessen competition “unduly”. The existence of an agreement to prevent or lessen competition does not, of itself, constitute an offence under the section. The illegal character of the agreement lies in the fact that the prevention or lessening is undue. It is only by assessing what the result would be if the agreement were implemented that the undueness can be measured. The trial judge correctly heard evidence as to the effect of the plan on free competition in the insurance business. The evidence indicated that the Board when establishing its rates always took into consideration the competition from non-Board companies; that a large international company could do business in Nova Scotia by paying a licence fee; that the share of the market taken by the non-Board members had increased over the period in question, and particularly in the decade 1960 to 1970, mentioned in the charges. Thus a substantial body of evidence supported the finding of the trial judge that competition was not stifled by the action of the Board. The majority of the Appeal Division erred in finding that whenever a “meaningful segment of the insurance industry” is shown to be involved in the agreement the effect on competition then becomes “undue”. The charges related to the fire insurance industry in the Province and were not made out by proving that a particular group within the industry had agreed to abide by rates set by the Board.

Per Laskin C.J. and Judson and Spence JJ. dissenting: The Crown's appeal to the Appeal Division was properly brought under s. 605(1)(a) of the Criminal Code upon errors in law at the trial with reference to (a) the meaning of "unduly" in s. 32(1)(c) of the Combines Investigation Act; and (b) the admission of defence evidence received over objection by the Crown, and designed to show public benefit in what the accused had conspired to do. In interpreting "unduly" the trial judge felt obliged to determine "whether or not there had been any undue lessening of competition". This ignored the fact that the charge was one of conspiracy and it is not an ingredient of that offence that proof must be made that competition was in fact lessened unduly. The offence is completed if there is a conspiracy which has as its object the inordinate lessening of competition. The effect does not matter, if the object is unlawful. Moreover it was wrong for the trial judge to admit evidence of public benefit. The trial judge further erred in his observation that appellants did not intend their agreement to have the effect of virtually relieving them from the influence of competition. The mens rea of the offence was, in the circumstances, the intention of appellants to enter into the agreement. The undisputed facts as to the portion of the market in the hands of the Board made it unnecessary to consider what the situation would have been if they had a very small portion of the business. There was no onus, as the trial judge appeared to feel there was, on the Crown to establish a monopoly or virtual monopoly.

[Howard Smith Paper Mills Limited et al. v. R., [1957] S.C.R. 403; Weidman et al. v. Shragge (1912), 46 S.C.R. 1.; Stinson-Reeb Builders Supply Co. Ltd. et al. v. R., [1929] S.C.R. 276; Container Materials Ltd. et al. v. R., [1942] S.C.R. 147 referred to]

APPEAL from a judgment of the Supreme Court of Nova Scotia[1], Appeal Division, allowing an appeal by the Attorney General of Canada from the judgment of Hart J. at trial of a directed verdict of not guilty of a charge against seventy three insurance companies under s. 32(1)(c) of the Combines Investigation Act, R.S.C. 1970, c. C-23 as amended. Appeal allowed, judgment at trial restored, Laskin C.J. and Judson and Spence JJ. dissenting.

R.F. Wilson, Q.C., and R.J. Downie, Q.C., for the appellants.

Keith Eaton, Q.C., for the respondent.

The judgment of Laskin C.J. and Judson and Spence JJ. was delivered by

THE CHIEF JUSTICE (dissenting)—The issues in this appeal raise basic questions respecting our law on illegal combines and have ramifications which go beyond the particular facts of this case. The Crown's appeal from the acquittal of the various accused on a charge under s. 32(1)(c) of the Combines Investigation Act, now R.S.C. 1970, c. C-23, was allowed by a majority judgment of the Nova Scotia Supreme Court, Appeal Division, on the ground of error of law on the part of the trial judge who was sitting without a jury, and a conviction was entered on the findings of fact made by the trial judge. On further appeal to this Court it was contended, inter alia, that there was not a question of law alone involved in the appeal to the Nova Scotia Supreme Court, Appeal Division within s. 605(1)(a) of the Criminal Code. If that is so, it would be unnecessary to deal with any of the other issues raised on the hearing in this Court and the appeal would have to be allowed and

the acquittal restored. It was the position of the Crown in this Court that there were two questions of law upon which the trial judge erred and that in respect of each an appeal from the acquittal of the accused properly lay to the Nova Scotia Supreme Court, Appeal Division. The first alleged error related to the meaning of “unduly” in s. 32(1)(c), and the second concerned the admission of certain evidence, received under Crown objection, adduced by the defence and designed to show public benefit in what the accused had conspired to do.

In my opinion this evidence ought not to have been received and ought not to have been used by the trial judge, as it clearly was, as an aid in determining whether the conspiracy or agreement among the accused to lessen competition in the price, that is, the premiums for fire insurance in Nova Scotia was a conspiracy or agreement to do so “unduly”.

The relevant passages from the trial judge’s reasons on the question of public benefit are as follows:

Counsel for the Crown took objection to the admission of any evidence tending to show that the work of the Board was for the public benefit, on the ground that such evidence was not relevant. In support of this position he relied upon *Howard Smith Paper Mills Limited et al v. The Queen* (1957), 8 D.L.R. (2d) 449, a decision of the Supreme Court of Canada [and on the reasons of Taschereau J. at p. 452]:

...

I admitted the evidence of Mr. Shakespeare and others even though it may be said that it related to a benefit received by the public from the work of the Board, for another reason however. There can be no doubt that if the offence charged is established beyond a reasonable doubt, no amount of good intention on behalf of the participants in the conspiracy will in any way excuse their conduct. This is made abundantly clear by the remarks of Taschereau, J., and is a principle followed regularly by our courts in criminal proceedings. On the other hand, before deciding whether the offence charged has been, in fact, committed, the Court must address itself to the problem of whether or not there has been any undue “lessening of competition”. In making this determination I am satisfied that it is necessary to look at the type of evidence presented by witnesses for the defence, and have done so...

It is clear from these reasons that not only did the trial judge receive evidence which was not admissible on the question of undueness but that he also erred, and erred gravely, in regarding “undueness” as something that had to be established as existing in fact rather than being a matter bound up in the proof of the illegal conspiracy charged in this case. I refer again, for emphasis, to the following statement in the foregoing passage quoted from his reasons:

...before deciding whether the offence charged has been, in fact, committed the Court must address itself to the problem of whether or not there has been any undue ‘lessening of competition’... [The emphasis is mine]

The matter was considered by the Nova Scotia Court of Appeal, and although the majority, speaking through Macdonald J.A., canvassed the authorities and came to the conclusion (in his words) that “the injury to the public does not have to be demonstrated” it appeared to blend this issue with its conclusion of error on the part of the trial judge on the first point raised here by the Crown, that is the meaning of the term “unduly”.

The seriousness of the trial judge’s error in reviewing evidence of public benefit to blunt the Crown’s case on whether the conspiracy was one to lessen competition unduly in the price of fire insurance is amply demonstrated by the assertions of public benefit in the evidence accepted by the trial judge, those assertions being repeated in argument of counsel for the accused appellants in this Court and being as follows:

1. The operations of the Nova Scotia Board of Insurance Underwriters were intended to secure the solvency of the member companies.
2. Through such operations costs were minimized. 3. The Board’s operations involved useful assistance to fire departments in Nova Scotia on fire prevention.
4. It provided technical assistance in connection with assessment of risks.
5. It was of assistance to municipalities in the Province on fire prevention methods.

The question of public detriment (as to which evidence of public benefit would be admissible) is a matter that arises on charges of unlawful mergers or unlawful monopolies, and it was a crucial question in the recent judgment of this Court in *The Queen v. K.C. Irving Limited et al.*[2] Where the charge is one of conspiracy, whether it be conspiracy in general terms to lessen competition unduly or, as in this case, conspiracy to lessen unduly competition in the price of fire insurance premiums, the statute does not require proof of public detriment nor correlatively does it prescribe or import a defence of public benefit. If there is any dominant theme that is reflected in the case law on illegal conspiracies under the present Combines Investigation Act and under predecessor legislation, it is that of the public interest in competition, which the statute is designed to protect as being the ultimate good in a market economy and not to be diluted by any showing that the impugned combination has brought benefits to the public, either in price or in services or otherwise.

As long ago as *Weidman v. Shragge*[3], Anglin J. pointed out that the definition of the offence of conspiracy to lessen competition did not warrant equating “unduly” with “unreasonably”. The issue arose in that case, a civil case concerning the enforceability of a contract, because the common law of restraint of trade was qualified by the notions of reasonableness of the restraint in the interests of the parties to the challenged transaction and in the interests of the public. This country’s long standing statutory policy on criminal combinations to lessen competition rejected the common law qualification and introduced the standard of undue-ness, related directly to competition and without any alleviation according to the goodness or badness of the conspiracy to lessen it.

Succeeding cases appeared to take for granted the distinction made in *Weidman v. Shragge*, excluding private advantage as well as public benefit as alleviating factors upon a charge of an illegal conspiracy. A specific reference to it was made by Mignault J. in *Stinson-Reeb Builders Supply Co. v. The King*[4], at p. 280 where he said that

...the advantage thus obtained by the manufacturers and dealers of the association is not the proper test... Injury to the public by the hindering or suppressing of free competition, notwithstanding any advantage which may accrue to the business interests of the members of the combine is what brings an agreement or a combination under the ban of [the law]:

“Injury to the public” in the passage above quoted was not intended to suggest that it was open to accused persons to show or provide evidence to indicate the contrary, and thus to justify a finding by the trial judge that the Crown had not proved the illegal conspiracy beyond a reasonable doubt. However, counsel for the appellants took that very point in his submissions, and supported it by referring to the evidence thereon given by Shakespeare, the manager of the Nova Scotia Board of Insurance Underwriters, evidence which the trial judge accepted and upon which, it is clear, that he acted.

The issue of public benefit was raised squarely in *Howard Smith Paper Mills v. The Queen*[5]. In his reasons in that case, Taschereau J. (as he then was) referred to what Mignault J. said in the *Stinson-Reeb* case, and which I quoted above, and made clear that public benefit has no place in Canadian statutory policy to defeat a charge of an illegal conspiracy to interfere with or lessen competition. I refer to what he said, at pp. 406-7:

It has been argued on behalf of the appellants that the offence is not complete, unless it has been established by the Crown beyond a reasonable doubt, that the agreement was detrimental to the public, in the sense that the manufacture or production was effectively lessened, limited or prevented, as a result of the agreements entered into. It has also been suggested that there is no offence, if it is shown that the acts complained of were beneficial to the public. With these submissions I entirely disagree. Conspiracy is a crime by itself, without the necessity of establishing the carrying out of an overt act...

The public is entitled to the benefit of free competition, and the prohibitions of the Act cannot be evaded by good motives. Whether they be innocent and even commendable, they cannot alter the true character of the combine which the law forbids, and the wish to accomplish desirable purposes constitutes no defence and will not condone the undue restraint, which is the elimination of the free domestic markets.

It is my strong view that traders, manufacturers and producers cannot, as the law now stands, monopolize a substantial part of the markets of the country in given industries, to promote their own business interests, and then set themselves up as public benefactors, by saying to the Courts that the conspiracy was organized in order to achieve the stabilization of prices and production.

In the same case, Kellock J. emphasized (at p. 411) that public benefit is embedded in the statutory policy of freedom of competition, and Cartwright J. (as he then was) took the same point in saying (at p. 427) that “the Court, except I suppose on the question of sentence, is neither required nor permitted to inquire whether in the particular case the intended and actual results of the agreement have in fact benefited or harmed the public”.

This, in my view, states the law as it has been understood for the past sixty-five years, and there can have been no doubt about it, at least since the judgments in the Howard Smith case. The trial judge, in the passages I quoted from his reasons, while apparently saying that evidence of public benefit was as such inadmissible, nonetheless admitted that very evidence as having a bearing on whether there was undueness in the conspiracy. I confess to great difficulty in appreciating how that evidence can be relevant to undueness and be admitted in that respect when its thrust is public benefit and it is inadmissible for that purpose and hence inadmissible on the question of undueness. This error by the trial judge is itself enough to warrant an appellate court in setting aside the acquittal.

That, however, is not the only error committed by the trial judge. In the very passage of his reasons which I quoted and in which he decided to look at the evidence of public benefit, he asserted that in order to determine whether the offence charged against the appellants had been committed he was obliged to determine “whether or not there has been any undue lessening of competition”. This ignores the fact that the charge is one of conspiracy. It is not an ingredient of the offence that proof must be made that competition was in fact lessened unduly. Even assuming (although the trial judge nowhere says so) that proof of an actual lessening of competition might provide support for a finding that there was a conspiracy to that end and that it was directed to an undue lessening, the absence of any proof of actual lessening of competition, let alone of an undue lessening, does not conclude the matter against the Crown.

This second error, even if a subordinate one in itself, is connected with what I consider to be a major error as to the meaning of “undueness”, which the trial judge regarded as requiring proof that the accused intended their agreement to have the effect of lessening competition unduly and hence evidence of an absence of such an intention would remove a necessary prop of the Crown’s case. After reviewing the evidence, most of it relating to public benefit and hence inadmissible because irrelevant to the issues in the case, the trial judge approached the critical question of undueness after making the findings set out in the following passage of his reasons:

There can be no doubt that there was in fact here an agreement among all of the defendants to lessen competition in the price of insurance. This agreement is spelled out very clearly in the Constitution, By-Laws, Rules and Regulations of the Nova Scotia Board of Insurance Underwriters of which unincorporated association all of the defendants were members. I am further satisfied from the oral testimony given at the hearing that the members knew that they were agreeing to virtually eliminate competition among themselves when undertaking to abide by rates established by the Board for all of them. The question remaining is whether or not the lessening of competition in the price insurance comes within the meaning of “unduly” as interpreted by the Courts.

There followed in the trial judge's reasons an extensive examination of the case law, with copious quotations from a succession of judgments, including those of this Court. In my opinion, the trial judge has, in his reasons, misconstrued the decisions of this Court on the nature of the offence charged against the accused.

He stated his conclusion as follows:

After considering all of the evidence I find that the agreement under which the defendants marketed insurance between 1960 and 1970 was not criminal in nature. Although it had the effect of lessening competition among the members of the Board it did not lessen competition throughout the industry in a manner that could be said to be improper, inordinate, excessive or oppressive. Nor do I believe that the defendants intended their agreement to have the effect of virtually relieving them from the influence of free competition. In my opinion the defendants have not conspired or agreed to lessen unduly competition in the price of insurance on property in this Province.

There are three obvious faults in this application of the law to the evidence. First, proof of the offence does not require that the conspiracy have the effect of lessening competition improperly, inordinately, expressively or oppressively. The offence is completed if there is a conspiracy which has as its object the inordinate lessening of competition; effect does not matter if the object is unlawful. This is clear from the judgment of Kerwin J. for the majority of the Court in *Container Materials Ltd. v. The King*[6], at pp. 158-159, and it is clear as well from the reasons delivered in the *Howard Smith* case. The second fault resides in the trial judge's observation in the passage quoted that the defendants did not intend their agreement to have the effect of virtually relieving them from the influence of free competition. Again this is not what this Court has laid down. Kerwin J. in the *Container Materials* case addressed this point directly when he referred to the argument of the accused in that case that "the agreement or arrangement must have been intended by the accused to have [the] effect [of unduly to prevent or lessen competition]". He then continues as follows:

This is not the meaning of the enactment upon which the count was based. *Mens rea* is undoubtedly necessary, but that requirement was met in these prosecutions when it was shown that the appellants intended to enter, and did enter, into the very arrangement found to exist.

Even apart from the third fault to which I will refer, the foregoing errors again make it impossible in my view for the acquittal to stand; and, indeed, on the very findings made by the trial judge I am of the opinion that the majority judgment of the Nova Scotia Supreme Court, Appeal Division was correct in not only setting aside the acquittal but in entering a conviction.

The third fault has to do with the question of market which the trial judge, as I read his reasons, took to be all fire insurance business throughout Nova Scotia. It appeared to be his view that, that being so, it was incumbent on the Crown to establish an undue lessening of competition throughout the whole province. As Macdonald J.A. noted in his majority reasons on appeal, the trial judge appeared to be putting an onus on the Crown to establish a monopoly or virtual monopoly. Clearly, this is not what is called for on a charge of conspiracy. The undisputed facts as

to the portion of the market in the hands of members of the Nova Scotia Board of Insurance Underwriters make it unnecessary to consider what the situation would have been if they had a very small portion thereof. I should emphasize as well that the charge against the appellants relates to the price of fire insurance premiums and not to competition in other aspects of the business, and it is as to that element, which is specifically mentioned in the definition of the offence, that the question of market must be considered. It is enough to say, finally, that the Board of which the appellants were members was not a mere information centre but a command post requiring of its members observance of premium rates.

I would dismiss the appeal.

The judgment of Martland, Ritchie, Pigeon, Dickson and Beetz JJ. was delivered by

RITCHIE J.—This is an appeal from a judgment of the Appeal Division of the Supreme Court of Nova Scotia allowing an appeal by the Attorney General of Canada from the judgment rendered at trial by Mr. Justice Hart whereby he had directed the entry of a verdict of not guilty of a charge preferred against Aetna Insurance Company and 72 other insurance companies that they

...between January 1, 1960, and December 31, 1970, both dates inclusive, at or near the City of Halifax, in the County of Halifax, in the Province of Nova Scotia, unlawfully did conspire, combine, agree or arrange together and with one another and with 64 other insurance companies and Wilfred G. Shakespeare or with some of them or one of them and with persons unknown to prevent, or lessen, unduly, competition in the price of fire insurance upon property in the Province of Nova Scotia, and did thereby commit an indictable offence contrary to s. 32(1)(c) of the Combines Investigation Act. Section 32(1) of the Combines Investigation Act, R.S.C. 1970 c. C-23 as amended, reads, in part, as follows:

Every one who conspires, combines, agrees or arranges with another person...

- (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, ...

is guilty of an indictable offence and is liable to imprisonment for two years.

The essence of this charge is that the appellants were parties to an agreement “to prevent or lessen unduly competition in the price of fire insurance upon property in the Province of Nova Scotia.” This charge, in my view, relates to the fire insurance business as a whole within the Province and the questions to be determined are whether there was an agreement to which the appellants were parties evidencing a common design to prevent or lessen competition in the price of such insurance generally throughout the Province, and whether if there were such an agreement, it was undue and therefore proscribed by the section.

All the accused companies and other companies referred to in the charge were at some time during the period therein mentioned members of an unincorporated association known as the Nova Scotia Board of Underwriters (hereinafter referred to as the “Board”) which, since January 5, 1857, had operated in Nova Scotia where its members issued policies of insurance upon property in that Province at prices or rates that were promulgated or issued to them by the Board and which also as a group worked for such things as improved fire protection in co-operation with local authorities and which provided inspectors of properties for rating purposes.

The facts giving rise to this prosecution are elaborately discussed in the comprehensive judgment of the learned trial judge which is conveniently reported at 19 C.C.C. (2d), pp. 449 to 507, and the accuracy of his factual analysis does not appear to me to be seriously questioned in the judgment of the Appeal Division, which is reported at 22 C.C.C. (2d), pp. 513 to 553. In the latter Court Mr. Justice Coffin delivered a dissenting opinion affirming the judgment at trial and Macdonald J.A., with whom Cooper, J.A. agreed, prefaced his majority opinion with the words: “I have had the opportunity of reading the opinion prepared for delivery by my brother Coffin in which he clearly and completely summarizes the facts and issues involved herein”.

It is not seriously contested that one of the purposes envisaged in the organization of the Board was that its members should agree among themselves to provide insurance at the same rate or price, but the sole question is whether this agreement was entered into in order to prevent or lessen competition “unduly”.

The meaning to be attached to the word “unduly” in this context has been discussed in a great number of cases, the majority of which are referred to at length in the judgments of the courts below. I think, however, that the most helpful discussion of the subject is to be found in the reasons for judgment of the various members of this Court in *Howard Smith Paper Mills Limited et al v. The Queen*[7]. In that case the offence of which the appellants had been convicted was provided for by s. 498(1)(d) of the Criminal Code, R.S.C. 1927 c. 36, and the language of which was in all essentials the same as s. 32(1) of the Combines Investigation Act. The section reads, in part, as follows:

498. (1) Every one is guilty of an indictable offence... who conspires, combines, agrees or arranges with any other person...

(d) to unduly prevent or lessen competition in the... price of insurance upon person or property.

In the course of the reasons for judgment rendered on behalf of himself and Rand and Fauteux, JJ., Mr. Justice Kellock had occasion to refer to the characterization of the word “unduly” contained in the reasons for judgment of Anglin J. in *Weidman et al v. Shragge*[8], where he said, of the agreement in that case at pp. 42 and 43:

...the prime question certainly must be, does it, however advantageous or even necessary for the protection of the business interests of the parties impose improper, inordinate, excessive or oppressive restrictions upon that competition the benefit of which is the right of everyone.

Mr. Justice Kellock also noted that this judgment of Anglin J. received the approval of this Court in *Stinson-Reeb Builders Supply Company v. The King*[9], was later described by Kerwin J. in *Container Materials Ltd., et al v. The King*[10], where he said:

Under the decision in the *Stinson-Reeb* case, the public is entitled to the benefit of free competition except in so far as it may be interfered with by valid legislation, and any party to an arrangement, the direct object of which is to impose improper, inordinate, excessive or oppressive restrictions upon that competition, is guilty of an offence.

In the course of his reasons for judgment in the *Howard Smith Paper Mills* case, Kellock J., also referred to the reasons for judgment of Duff C.J.C. in the *Container Materials Ltd.*, case, *supra*, where the Chief Justice had said, at p. 151:

The second point arises from the contention of the appellants that the essence of the offence is an agreement to do something injurious to the public; that such injury to the public must appear from the evidence and must be found as a fact in order to establish a legal basis for a conviction.

And later at p. 152 in the same case, where Duff C.J.C. had said of the protection afforded by the section:

This protection is afforded by stamping with illegality arrangements which when carried into effect, prevent or lessen competition unduly and making such arrangements punishable offences; and as the enactment is aimed at protecting the public interest in free competition it is from that point of view that the question must be considered whether or not the prevention or lessening agreed upon will be undue. In commenting on the submission made by counsel for the appellants in the *Howard Smith Paper Mills* case, Kellock J. said, at p. 411:

With respect to question five it is not necessary in my opinion to discuss the argument which was addressed to us in so far as that argument was founded upon matters of evidence. The essence of the argument is that although the agreement which the courts below have found to contravene the provisions of s. 498(1)(d), continued without break throughout the period mentioned in the indictment, and although s. 498(1)(d) remained unrevoked, the agreement ceased to come within the ban of the section during the period of war time controls for the reason that all possibility of competition in fine papers was eliminated by virtue of the legislation then in effect.

In my opinion the short answer to this contention is contained in part of the reasons for judgment of Duff C.J.C. in the *Container Materials* case, *supra*. At p. 153 the learned Chief Justice after pointing out that the Court of Appeal had held that the aim of the parties to the agreement there in question had been to secure effective control of the market in Canada and that they had been very largely successful in that aim went on to say: 'But the fact that such was the agreement affords in point of law a sufficient basis' for a finding that the section had been contravened.

Mr. Justice Cartwright delivered a separate opinion on behalf of Mr. Justice Locke and himself in which he discussed the test theretofore applied in determining the meaning of unduly in the context of s. 498(1)(d) saying, at p. 425:

I must confess that I have found difficulty in discerning just what that test is. As was pointed out by Anglin J., in *Weidman et al. v. Shragge*, supra at p. 41, the conclusion is inescapable that Parliament contemplated that there may be agreements to prevent or lessen competition which do not fall within the prohibition of s. 498(1)(d); the intended prevention or lessening must be 'undue' to render the agreement criminal. 'Undue' and 'unduly' are not absolute terms whose meaning is self-evident. Their use presupposes the existence of a rule or standard defining what is 'due'. Their interpretation does not appear to me to be assisted by substituting the adjectives 'improper', 'inordinate', 'excessive', 'oppressive' or 'wrong', or the corresponding adverbs, in the absence of a statement as to what, in this connection, is proper, ordinate, permissible or right.

And later at p. 426: In essence the decisions referred to appear to me to hold that an agreement to prevent or lessen competition in commercial activities of the sort described in the section becomes criminal when the prevention or lessening agreed upon reaches the point at which the participants in the agreement become free to carry on those activities virtually unaffected by the influence of competition, which influence Parliament is taken to regard as an indispensable protection of the public interest; that it is the arrogation to the members of the combination of the power to carry on their activities without competition which is rendered unlawful; ...

There being substantial agreement as to the meaning of the word "unduly" and no material difference existing as to the facts, the issue raised by the difference of approach at trial and on appeal is whether the facts, which are not seriously disputed, disclose an agreement to prevent or lessen competition "unduly" as that word is explained in the cases in this Court which are referred to and followed by both Mr. Justice Hart and Mr. Justice Macdonald.

The fact that an agreement existed to prevent or lessen competition in the price of insurance does not of itself constitute an offence under the section; the illegal character of the agreement lies in the fact that the prevention or lessening is undue and it appears to me that the best if not the only way in which to determine this is by considering whether competition would be unduly prevented or lessened if the design evidenced by the agreement were carried into effect. In my view it is only by assessing what the result would be if the agreement were implemented that the elusive quality of undueness can be measured, and it was for this reason that the learned trial judge in the present case heard evidence as to the effect of the plan on free competition in the insurance business.

In my view this was well put by Mr. Justice Coffin in the course of his dissenting judgment in the Court of Appeal where he said, at p. 534:

I am of opinion that the trial Judge was not in error in admitting the defence evidence. I accept the position that it is not the actual result of the agreement with which we are concerned, but the effect which the agreement would have if carried out. Nevertheless, in my view the trial Judge was entitled to look at this evidence to satisfy himself on the question whether the object of the agreement was to lessen competition unduly. It was relevant in his search for the design and plan of the agreement.

The burden lying upon the Crown in this case is to establish beyond a reasonable doubt first, that the respondents intended to enter into a conspiracy, combination, agreement or arrangement and, secondly, that that conspiracy, combination, agreement or arrangement if it were carried into effect would prevent or lessen competition unduly. These are questions of fact and the only question of law to which this appeal can be said to give rise is the meaning of unduly in the context of s. 32(1)(c).

After his comprehensive analysis of the facts and his review of the cases, the trial judge concluded as to this question at p. 504, 19 C.C.C.:

This review of the various statements on the meaning of 'unduly' as it relates to the offence of lessening competition brings me to these conclusions. An agreement to prevent or lessen competition alone is not an offence. What is criminal is an agreement that is intended to lessen competition improperly, inordinately, excessively, oppressively or one intended to have the effect of virtually relieving the conspirators from the influence of free competition. There is no requirement for the Crown to prove the existence of a monopoly and it is a question of fact as to whether the agreement reaches the point of intending to lessen competition unduly and therefore becomes a criminal conspiracy.

In my view this is an accurate assessment of the meaning of unduly as it has been construed in the various cases and it does not appear to me that the respondent or the majority of the Court of Appeal seriously dispute it. The learned trial judge, however, had said at p. 487:

There can be no doubt that there was in fact here an agreement among all of the defendants to lessen competition in the price of insurance. This agreement is spelled out very clearly in the constitution, by-laws, rules and regulations of the Nova Scotia Board of Insurance Underwriters of which unincorporated association all of the defendants were members. I am further satisfied from the oral testimony given at the hearing that the members knew that they were agreeing to virtually eliminate competition among themselves when undertaking to abide by rates established by the Board for all of them. The question remaining is whether or not the lessening of competition in the price of insurance comes within the meaning of 'unduly' as interpreted by the Courts.

This passage was the subject of the following comment by Mr. Justice Macdonald in the Appeal Division at 22 C.C.C. (2d), at p. 551:

In the first-quoted passage the learned trial Judge found as a fact that the members of the Board entered into an agreement among themselves to virtually eliminate competition amongst themselves. When this finding, which is completely supported by the evidence, is looked at in light of the proven fact that the Board members held the majority portion of the fire insurance market in the Province during the material period of time it seems to me that what existed is the very type of situation in which the quoted authorities say that 'undueness' undoubtedly exists.

And he later observed at p. 552:

The situation as it appears to me is that once the Crown established that the Board companies, who underwrote the majority of the property insurance risks in the Province, agreed, as the learned trial Judge found, to virtually eliminate competition as to the price of fire insurance among themselves, then 'undueness' if not presumed was certainly established. My understanding of the law is that it is not necessary for the Crown to establish that the whole of the fire insurance industry was adversely affected by, or involved in, such agreement of the Board members or that the object of the agreement was to so affect or involve the industry. Rather, all that is required is that a meaningful segment of the insurance industry be shown to have been involved in the agreement.

These comments by Mr. Justice Macdonald are at variance with the evidence of the Board Manager, Mr. Shakespeare, of whom the trial judge said, at p. 469 of the report:

His evidence was forthright and credible, and from it I find the following facts.

The learned trial judge proceeded at p. 470 to cite the following portions of Mr. Shakespeare's evidence:

Mr. Shakespeare indicates that the Board when establishing its rates must always take into consideration the competition from non-Board companies which has been increasing in recent years. A large international insurance company, such as Lloyds, as long as it is registered in Ottawa, can do business in Nova Scotia by paying a licence fee. These companies are always available to those who seek them but although they may be in a position to grant a lower rate, they normally do not maintain the type of service to clients in the Province that is provided through the Board, or through resident non-Board companies.

When these observations are taken in conjunction with the fact that the share of the market taken by non-Board members has increased over the period in question, and particularly in the last half of the decade referred to in the charge, it becomes apparent that Mr. Justice Macdonald in the passage quoted from his reasons for judgment was overstating the matter considerably in making his own finding of fact to the effect that the agreement as to price made between the Board companies inter se of itself established undueness. There is a substantial body of evidence to support the view of the trial judge that competition was not stifled by the Board's actions and with all respect, I think that the majority of the Appeal Division were wrong in finding that wherever a "meaningful segment of the insurance industry" is shown to be involved in the agreement, then it becomes undue. In the penultimate paragraph of his judgment, the learned trial judge had said, at pp. 506 and 507:

After considering all of the evidence I find that the agreement under which the defendants marked insurance between 1960 and 1970 was not criminal in nature. Although it had the effect of lessening competition among the members of the Board it did not lessen competition throughout the industry in a manner that could be said to be improper, inordinate, excessive or oppressive. Nor do I believe that the defendants intended their agreement to have the effect of virtually relieving them from the influence of free competition. In my opinion the defendants have not conspired or agreed to lessen unduly competition in the price of insurance on property

in this Province.

Of this passage, Mr. Justice Macdonald observed at p. 551 and 552 of the report:

...the learned trial Judge was obviously considering the whole of the insurance industry and not just the Board part thereof. Considered in such light the learned trial Judge found that the agreement did not lessen competition unduly throughout the industry. I would interject here that the charge is not that the respondents lessened unduly competition in the price of fire insurance but rather, that they conspired to do so.

The learned trial Judge as noted concluded the last-quoted passage by saying that in his opinion the respondents had not conspired or agreed to lessen unduly competition in the price of insurance on property in this Province.

In summary, it is my opinion that the learned trial Judge was considering the effect of the agreement on Board members in the first passage and on the whole industry in the second.

As I have indicated, I am in agreement with Mr. Justice Coffin in concluding that the trial judge was justified in considering the evidence of Mr. Shakespeare and others as to the measure of competition evidenced in the fire insurance business during the decade in review for the purpose of satisfying himself on the question of whether the object of the agreement was to lessen competition unduly. It was, as Mr. Justice Coffin has said: "relevant in his search for the design and plan of the agreement". It was in this sense and not as evidence related to a benefit received by the public that Hart J. admitted the testimony of Mr. Shakespeare and concluded that the agreement of the Board was not for the purpose of lessening competition unduly.

Notwithstanding the argument of counsel in this Court, I am satisfied that this latter conclusion formed the basis upon which the learned trial judge found the appellants to be not guilty of the charge preferred against them under s. 32(1)(c) of the Combines Investigation Act and that his verdict was not based upon any finding that the agreement in question was of benefit to the public. This appears to me to be indicated in the following passage in the reasons for judgment of Mr. Justice Hart where he said:

I admitted the evidence of Mr. Shakespeare and others even though it may be said that it related to a benefit received by the public from the work of the Board, for another reason however. There can be no doubt that if the offence charged is established beyond a reasonable doubt, no amount of good intention on behalf of the participants in the conspiracy will in any way excuse their conduct. This is made abundantly clear by the remarks of Taschereau, J., and is a principle followed regularly by our courts in criminal proceedings. On the other hand, before deciding whether the offence charged has been, in fact, committed, the Court must address itself to the problem of whether or not there has been any undue 'lessening of competition'. In making this determination I am satisfied that it is necessary to look at the type of evidence presented by witnesses for the defence, and have done so...

As I have indicated at the outset, I am of opinion that the charge here laid is one relating to the fire insurance industry as a whole within the Province and it is not made out by proving that a particular group within the industry have agreed with each other to abide by rates promulgated by the Board.

For all these reasons I would allow this appeal and restore this judgment rendered at trial.

Appeal allowed, judgment at trial restored, LASKIN C.J. and JUDSON and SPENCE JJ. dissenting.

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[1] (1975), 13 N.S.R. (2d) 693, 22 C.C.C. (2d) 513.

[2] [1978] 1 S.C.R. 408.

[3] (1912), 46 S.C.R. 1.

[4] [1929] S.C.R. 276.

[5] [1957] S.C.R. 403.

[6] [1942] S.C.R. 147.

[7] [1957] S.C.R. 403.

[8] (1912), 46 S.C.R. 1.

[9] [1929] S.C.R. 276.

[10] [1942] S.C.R. 147.

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