# SOME ECONOMIC ASPECTS

# OF

# THE CANADIAN WOODEN MATCH INDUSTRY

# AND

# PUBLIC POLICY

By

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A THESIS

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ABSTRACT

The origins of the monopolisation in 1927 of the Canadian wooden match industry were in the main British, Swedish and American. Numerous match producers appeared in the United Kingdom following the invention in 1827 of the modern type of match. A persistent consolidation of firms subsequently developed under the direction of one of the early British producers. To overcome financial difficulties, several small Swedish match firms introduced to the industry in that country a most compelling force toward monopoly in the person of Ivar Kreuger. He proceeded from a swift achievement of Swedish monopoly to the cartelisation of much of the world's wooden match industry. Acting on the observation that the demand for matches as a whole is highly inelastic, many national governments aided the Swedish financier in ultimately acquiring control of three-quarters of the world output, and established for themselves a reliable source of tax revenue. The dominant firm in the United States frequently used merger as a means of growth.

Stable "rationalisation" of the industry throughout the world required agreement among the three major match producers. After a long series of restrictive arrangements, a more formal and comprehensive scheme of market allocation was created in 1927 with the formation of a British monopoly, which agreed to share the United Kingdom market with the Swedish interests and which held majority ownership in a newly created Canadian match monopoly. The latter was the means of allocating the Canadian market mostly to the British interests and partly to the American interests. The Swedish interests agreed to withdraw for a cash settlement.

The Canadian monopoly maintained its position by aggressive attack against new rivals. In recognition of the elastic demand for individual brands, new firms usually offered their matches at lower prices. The monopolist limited the unfavourable effect on his sales by closing off the distributive channels from the entrants, thereby making unavailable any significant quantity of lower-priced matches from reaching the market. Price maintenance permitted substantial jobber profits, which induced distributors to avoid the products of new firms. The monopolist's profits remained unusually high, even during the great depression of the 1930's.

The technological fact that output of one continuous match-making machine is large relative to the size of the Canadian market indicates that oligopoly, not monopolistic competition, might be an alternative market structure. If price wars ensued, rather than price rigidity, the wooden match monopolist, with

greater financial and productive resources, would more likely survive a price struggle than would new firms. There would likely be either the rigid price structure of an oligopoly or a tendency to return to monopoly.

Legal success against the monopolist had little economic effect. The fines were small relative to the monopoly return. The industry structure was unaltered. More caution by the monopolist, because of his conviction, in buying out rivals might reduce the rate of entry by lowering the prospect of realising a capitalised share of expected future profits. Such expectations appear to have provided some inducement to entry in some instances in the past. Concentration in income distribution, with much of it available to British owners, appears more important than the misallocation of resources in excess capacity. Monopoly power would be curtailed by divestment of the monopolist's book match facilities. The way of divestiture is not legally open. New tax provisions could capture future excess profits but not achieve lower prices. A crown company could eliminate profits, and lower prices. An alteration of the concentration of income, either by fiscal means or by the device of a crown company seems unlikely.

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# Introduction

Canadian combines policy began in 1889, when Parliament passed "An Act for the Prevention and Suppression of Combinations formed in Restraint of Trade."[1] Its substance, incorporated in 1892 into the Criminal Code[2] where it still remains, forms the cornerstone of Canadian anti-combines law. It condemns chiefly conspiracies that "unduly prevent, limit or lessen" the production, distribution, purchase or sale of a commodity, or "unreasonably enhance" its price.

The statute was at first considered to be mainly declaratory of the common law, creating no new offence, no new penalty, and merely serving as a warning to potential transgressors.[3] Shortly after Parliament's removal in 1900 of the word "unlawfully", judicial opinion held that section 520 of the Criminal Code went further than the common law. The new position was clearly expressed by Mr. Justice Osler in the Ontario Court of Appeal:

> "The right of competition is the right of every one, and Parliament has now shewn that its intention is to prevent oppressive and unreasonable restrictions upon the exercise of this right; that whatever may hitherto have been its full extent, it is no longer to be exercised by some to the injury of others. In other words, competition is not to be prevented or lessened unduly, that is to say, in an undue manner or degree, wrongly, improperly, excessively, inordinately, which it may well be in one or more of these senses of the word, if by the combination of a few the right of the many is practically interfered with by restricting it to the members of the combination."[4]

This principle, that an offence lies in conspiring to unduly lessen or eliminate competition, was confirmed by the Supreme Court of Canada in a later civil action. The Chief Justice, Sir Charles Fitzpatrick, also stated more clearly the point that an agreement not unlawful at the common law might be rendered unlawful by the enactment, because of a purpose "to unduly prevent or lessen competition":

> "In effect, clause (d) of section 498 of the Code[5] declares in very plain language that an agreement which might in itself be perfectly lawful as made by the parties in the exercise of the freedom to contract or to abstain from contracting, which the English law has for many years recognized in every individual, is unlawful if the object of the parties is to unduly prevent or lessen competition in an article or commodity which is a subject of trade or commerce. ... It is not necessary ... that the agreement should be in itself fraudulent or otherwise illegal; and all agreements which prevent or lessen competition do not come within the operation of the statute; the mischief aimed at is the undue and abusive lessening of competition which operates to the oppression of individuals or is injurious to the public generally."[6]

Later decisions have supported the emphasis on the suppression of competition by conspiracy. Accepting that the section does extend beyond the common law, Chief Justice Harvey of Alberta held that it nevertheless did not ban an arrangement

"merely to buy out a competitor completely." There was no agreement between persons remaining in the trade to limit competition, and the vendor was left free to continue in competition with the purchaser, if he so chose.[7]

Successor to two earlier pieces of legislation,[8] the Combines Investigation Act, 1923,[9] duplicated in part the Criminal Code provisions, provided more severe penalties, established a continuing enforcement agency, and broadened the scope of anti-combines policy to include both "mergers, trusts or monopolies, so called, which have operated or are likely to operate to the detriment or against the interest of the public," and "combines which have operated or are likely to operate to the detriment or against the interest of the public, and which result from the purchase, lease, or other acquisition by any person of any control over or interest in the whole or part of the business of any other person."

A subsequent trial judgment placed a narrow interpretation upon the clause concerning the acquisition of another business by any person. The various acquisitions involved were held not to be in contravention of the Act either because they had "but small effect" on the trade or because there was no "common purpose between the buyer and the seller acting in a concerted and unlawful way as required in the case of an illegal combine."[10] Since there was no cross-appeal by the Crown in this case, the widening of the scope of anti-combines law was for the moment more apparent than real. The suppression of competition

by conspiracy, principally among oligopolists, remained the central theme of Canadian anti-combines activity.

An amendment, in 1935, differentiated more clearly the two main avenues to private control of competition, the way of the conspirator and the way of the monopolist. Their frequent crossing was, perhaps, implied by the inclusion of both descriptions in one section of the statute and by calling either offence a "combine", but they were now distinguished.[11] The significance of the distinction was to develop as further cases were brought to court under the Act.

A study of the Canadian wooden match industry is of special interest for several reasons. Firstly, the industry illustrates clearly the interdependence between national monopoly and international cartel arrangements, the two concentrations of economic power tending to reinforce each other in their mutual restraining or eliminating of competitive market forces.[12] "From the beginning of the twentieth century, the world's three leading match producers have had a series of close associations with one another for the purpose of restricting competition, on national markets and in international trade, in the production and sale of matches."[13] International agreements preceded and led up to the formation of a monopoly in the Canadian industry.

Secondly, that monopoly was convicted, in 1951, on the charge that the firms involved had

> "been parties or privies to or knowingly assisted in the formation or operation of a combine within the meaning of the Combines Investigation Act, to wit:

> a merger, trust or monopoly which ... substantially or completely controlled throughout Canada, excluding Newfoundland, ... the business of producing, manufacturing, supplying or dealing in wooden matches, ... which merger, trust or monopoly has operated or was likely to operate ... to the detriment or against the interest of the public, whether consumers, producers or others."[14]

Mr. Justice Bienvenue summarized the basis of the conviction thus:

> "By acquiring all the competing industries and placing them under its control, defendant Eddy Match Company, Limited thus formed a combine, a trust or monopoly as defined in the above-mentioned Act. This defendant acted in such a way, with the control it exercised in fact in every part of Canada, with the exception of Newfoundland, that it would have been practically impossible for a new firm to establish itself in this trade. It has been established that those who were engaged in this trade were dislodged from same, defendant Eddy enjoying all the privileges attached to a monopoly."[15]

The extensive use of predatory and aggressive practices to remove competitors lent considerable support to the conclusion that the control possessed was "likely to operate to the detriment or against the interest of the public."[16] The case, therefore, may not be decisive in that mere possession of substantial or complete control of a particular class or species of business, in the absence of "unfair practices" to gain that control, may not be condemned as against the public interest.

Finally, the Eddy Match case affords a clear demonstration that the imposition of penalties permissible under Canadian anti-combines legislation has been vigorous in comparison with the rare and seemingly reluctant use of any of the remedies involved. Parliament has nevertheless added significant new remedies, as well as the possibility of more stringent penalties.[17] There is

a useful opportunity both to examine the effect of the judicial decision, governed as it was by more limited legal provisions than those presently prevailing, on the economic structure of the industry, and to appraise the feasibility, in analogous cases, of making use of more severe penalties and the range of remedies now available in order to effect a significant change in the particular industry, so as to create a market structure more closely approximating that of free competition.

Some improvement in Canadian combines policy may result from greater penalties, making "the punishment fit the crime." There is, however, more prospect of enhancement in the judicial admission of amalgamation in the role of at least a minor villain in the suppression of competition, and in the judicial use of a remedial approach[18] to the problem of departures from free competition.

1. (1889) 52 Victoria, c.41.

2. (1892) 55-56 Victoria, c.29.

3. The preamble to the 1889 Act reads, "Whereas it is expedient to declare the law ..." Both N. Clarke Wallace, sponsor of the legislation, and the Minister of Justice gave assurance that no new offence would be created. See Canada, Debates, House of Commons, Apr.8, 1889, p. 1113, and Apr.22, p. 1438.

4. Rex v. Elliott (1905) 9 O.L.R. 656 at 661.

5. Section 520 was renumbered 498 in Revised Statutes of Canada, 1906, c. 146.

6. Weidman v. Shragge (1912) 46 S.C.R. 1 at 3.

7. Stewart v. Thorpe (1917) 36 D.L.R. 752.

8. Combines Investigation Act, (1910) Statutes of Canada, c.9, and The Combines and Fair Prices Act, 1919, and The Board of Commerce Act, (1919) Statutes of Canada, c.45 and c. 37.

9. (1923) Statutes of Canada, c. 9.

10. Rex v. Canadian Import Company et al. (1934) 61 C.C.C. 114.

11. (1935) Statutes of Canada, c. 54.

12. Canada and International Cartels: An Inquiry into the Nature and Effects of International Cartels and other Trade Combinations, Report of Commissioner, Combines Investigation Act, Ottawa, 1945, p.1.

13. "Report on Restrictive Business Practices in International Trade," Economic and Social Council, Official Records: Nineteenth Session, Supplement No. 3A; E/2675, New York: United Nations, 1955, p. 13. The three leading producers are the Swedish Match Company, Bryant and May, Limited, of the United Kingdom, and the Diamond Match Company of the United States.

14. Rex v. Eddy Match Company, Limited et al. (1953) 104 C.C.C. 39 at 40.

15. Rex v. Eddy Match Company, Limited et al. (1953) 104 C.C.C. 39 at 59.

16. Eddy Match Company, Limited et al. v. The Queen (1954) 109 C.C.C. 1.

17. Court injunctions against the continuation or repetition of an offence and court orders for dissolution are permitted. Fines are now in the discretion of the court. See (1952) Statutes of Canada, c. 39.

18. In Regina v. Goodyear Tire and Rubber Company of Canada, Limited et al. (1953) 107 C.C.C. 88, Mr. Justice Treleaven issued an order prohibiting the continuation or repetition of the offence to which the parties pleaded guilty.

# Part I

## External Conditions --

## Industrial, Legislative and Judicial

# Chapter 1

The first century of the modern wooden match industry ended in the year of the formation of the Eddy Match Company in Canada. That event eliminated competition among Canadian match producers. It was characteristic of developments in the industry throughout the world, and displayed clearly the influence of the world's chief match manufacturers. They were involved in complex interrelated arrangements and agreements, both national and international. Although the finance of the industry had been developed partly in connection with technological changes, the economic condition of the match industry with its strongly monopolistic elements was created primarily for its own sake. Technical change did establish limits and provide particular opportunities. A survey of the technological progress in the manufacture of matches will enhance understanding of the economic implications of the seizing of these opportunities, as they presented themselves, by means of complicated financial connections and numerous trading agreements.

Several chemical discoveries preceded the first important mechanical advances that were achieved. John Walker, a nineteenth century druggist of Stockton-on-Tees, Durham, England, is usually considered to have begun the modern wooden match industry. A sale of his "friction lights" or "Congreves" is first reported in his records on April 7, 1827.[1] Those nonphosphoric matches, using a mixture of the active ingredients of potassium chlorate and antimony sulphide, are properly deemed to be "the lineal ancestors of twentieth century matches."[2] They were of the strike-anywhere type, ignited by being drawn across glass paper.[3] Because the Durham inventor neglected to obtain the protection of a patent, "Lucifers" soon appeared in imitation of his idea.[4] The ignition of these various early matches continued to prove difficult.

It was found that it could be improved by the addition of free sulphur to the composition of the match head, and made even more effective by the use of white or yellow phosphorus.[5] Charles Sauria of St. Lothair, France, created the first phosphorus match in 1830, by replacing the antimony sulphide of the Congreves with phosphorus.[6] A second pioneer's neglect to obtain a patent led to the wide-spread use of Sauria's discovery. The United States patent for the process was obtained in 1837 by Alonzo Dwight Phillips, a powder maker in Massachusetts.[7] The phosphorus used was a lethal form, although many decades were to pass before its use was generally prohibited. Especially among match workers, numerous cases of phossy jaw or necrosis of the

mandible resulted. The earliest reports and descriptions of the disease appeared in Austria in the eighteen forties.[8] At the same time, Anton Schrötter of Austria, R. Böttger of Germany and Gustav Pasch of Sweden were introducing nonpoisonous amorphous phosphorus as a substitute in match-making for the poisonous white phosphorus. Because the nontoxic red phosphorus was impregnated in the rubber, whereas the white phosphorus was part of the composition of the match head, this change marked the first appearance of a safety match.[9]

The Lundström brothers were then operating their small match factory in Jönköping, Sweden, where one of them, Johan Edvard, is credited with having carried out the first successful production of the new safety match in 1855. Evidence of its quick acceptance is found in the immediate acquisition of rights to the Lundström process by F. May of Bryant and May, an English match concern. There were more than forty million of these safety matches used in England during the following year, 1856.[10] The manufacture of safety matches was to remain essentially European until the nineteen twenties.[11]

The first step in the production of nonpoisonous strike-anywhere matches came in 1864, when G. Lemoine prepared sesquisulphide of phosphorus. Sevène and Cahen took out a French patent, which the pioneer Lemoine had neglected to obtain, in 1898 on the sesquisulphide compound.[12] The United States rights were purchased two years later by the Diamond Match Company for one hundred thousand dollars, and a British licence was obtained

by Bryant and May.[13] The formula proved inefficient in the United States because of differences in climatic conditions. However, William A. Fairburn, who was to become the president of the Diamond Match Company in 1915, had successfully adapted the "sesqui" formula to American conditions by the end of 1910.[14]

The granting of a United States patent in 1851 to an I.H. Smith in Massachusetts for a continuous automatic match-making machine[15] seems to establish American priority in the mechanisation of the industry. There was nevertheless almost simultaneous advancement in the use of a continuous machine in the manufacture of matches in both Sweden and the United States.[16] Alexander Lagerman of Jönköping devised a match-making machine in 1872. Slight alterations have been introduced subsequently.[17] The match-making machine on which the United States patent was granted in 1888 to Ebenezer Beecher was fundamentally the present-day high-speed continuous machine.[18]

The elimination of white phosphorus in the production of matches is an interesting semitechnical aspect of the creation of the industry in its modern form. The Finnish prohibition of white phosphorus matches in 1872 marked the beginning of their rather slow elimination. Taxation eradicated them in 1905 in Russia. The following year an international convention against white phosphorus matches was signed at Berne, Switzerland. The British White Phosphorus Match Prohibition Act of 1908, becoming effective in 1910, made phosphorus sesquisulphide available to all match manufacturers upon payment of reasonable royalties to

the patent holder. A tax of two cents per hundred matches, imposed in the United States in 1912, was prohibitive. The Diamond Match Company, at the urging of the President of the United States, deeded its sesquisulphide patent to the public.[19] The modern technological characteristics of the wooden match industry had thus come into being by the second decade of the twentieth century. British, American and Swedish interests had played dominant rôles in the development. These same interests played equally vital rôles in the financial and economic evolution of the industry, which is the more direct concern of this study.

## Appendix to Chapter 1

In 1929 and throughout the 1930's in numerous countries, including Sweden, Great Britain and the United States, various patents were issued covering repeatedly ignitable matches.[1] In spite of denials by at least the British and American members of the world's match triad that such matches have ever met with any commercial success, stories about "everlasting" or re-ignitable matches have persisted.[2] There have been allegations that they have been kept off the market by blocking patents at the instance of existing match producers, which have been stated in the British House of Lords.[3]

Before World War II re-ignitable matches were manufactured in Switzerland and Holland, and in a factory of J. John Masters and Company, Limited, in the United Kingdom. The last named company had been a subsidiary of the Swedish Match Company before becoming a part of the British Match Corporation. The British product was claimed to have been a source of "complaint and adverse comment,"[4] although a United States Department of Justice official declared that the manufacture of the "everlasting" match "was commercially successful in Holland and Switzerland."[5]

Patents covering repeatedly ignitable matches, which could conceivably represent an important advance in match technology, were issued to three main groups: an Austrian Dr. Ferdinand Ringer, the Hungarians Dr. Zoltán Földi and Mr. Rezsö

Kõnig, and the Swedish Match Company. The Swedish Match Company purchased the Ringer and Földi-Kõnig patent rights during the 1930's. Others obtaining patents included Knut E. Olsson and Hans Goldberger and Heinrich Koller. It was reported after World War II that a Jugoslav engineer had invented a 4 inch match, compared with the Ringer 3 inch stick, that could be ignited 100 times, using a new chemical discovered in a Zagreb laboratory. There were few details in the report.[6]

By a 1935 agreement with the Swedish Match Company, Bryant and May assumed 15 per cent of the Swedish company's costs incurred in research and patent acquisitions with respect to the "everlasting" match. Patent costs accounted for more than half the total expenses. Up to February, 1950, Bryant and May had paid to Swedish Match under the agreement a total of £7,586. Bryant and May opposed, unsuccessfully on both occasions, British patent applications of Dr. Ringer in 1929 and 1930 at the suggestion of the Swedish Match Company, and during the war on independent action because of the fear that wartime communications might delay the receipt of the wishes of the Swedish concern.[7]

Without necessarily accepting the claim of Dr. Ringer that news of his "everlasting" match had so depressed the price of Kreuger shares that there ensued the financial embarrassment which brought Ivar Kreuger to his suicide, it has been established that the Swedish Match Company did attach sufficient importance to his patents to purchase them in 1936.[8]

In connection with the United States suit filed in

1944, the viewpoint of the Diamond Match Company was manifestly outlined in a document discovered in that company's files. "The patents have not so long to run and if it becomes a marketable commodity by our pushing it, once the patents are out - as in the case of book matches - it would be a fertile field for the rottenest kind of competition. It is to be hoped that if the item is not put out and pushed by a strong manufacturer, no one else will take it up even after the patents expire." Patents are by no means the only barriers to innovation. Events in the autumn of 1933 offered a succinct reply to Diamond's allegation "that in September 1933 Diamond sent one of its officials to Budapest to investigate the claims made for the Földi and König invention. It was found that the development of said rod was still in an experimental state and that no patents had been granted." Events moved swiftly forward, and the Swedish Match Company purchased the Földi-König patent rights for all countries except Czechoslovakia, Austria and Holland in October of 1933.[9] The affair was in safe hands.

Although the complaints made no specific plea regarding patents, the impressive technological possibilities of the "everlasting" match had struck the United States District Judge with such force that he decreed on this matter at some length.

> Defendant The Swedish Match Company is hereby
> (A) Directed to grant to any applicant making written request therefor an unrestricted and royalty-free license to make, use and sell any product or process, directly or indirectly, relating to everlasting or re-ignitable matches or their manufacture covered by United States letters patent or patent applications, including all divisions, continuations,

extensions or reissues of such patents or patent applications owned or controlled by said defendant on the date of the entry of this judgment, including, but not limited to, the following:

U.S. Nos. 2,015,383 - Földi and König
2,093,516 - Földi and König
1,903,838 - Ringer
1,941,621 - Ringer
2,059,807 - Ringer

(B) Enjoined from instituting or threatening to institute suits for patent infringement or suits to collect royalties which are based upon any of the United States letters patent or patent applications, including all divisions, continuations, extensions, or reissues of such patents or patent applications owned or controlled by said defendant on the date of entry of this judgment, referred to in subparagraph (A) hereof.

Defendant The Swedish Match Company is hereby directed to issue to any applicant making written request therefor, an unrestricted and unconditional grant of immunity under foreign patents or applications for foreign patents corresponding to the United States letters patent and patent applications referred to in Paragraph 12 hereof, to import into, and to sell or use, and to have imported, sold or used in, any country, any match product made in the United States.

Defendant The Swedish Match Company is directed to grant to any applicant therefor a non-exclusive, non-assignable and unrestricted license to make, use and sell, save for a uniform reasonable royalty, under any patented invention of The Swedish Match Company, its subsidiaries, successors, assigns or nominees, conceived within five years after the date of entry of this judgment relating to everlasting or re-ignitable matches. Any applicant for such license who fails to agree with The Swedish Match Company upon a reasonable royalty may apply to this Court, after notice to the Attorney General, to determine the reasonable royalty for such license.[10]

Since the 1946 Consent Decree, Swedish Match has granted at least 44 royalty free licenses regarding re-ignitable matches. The three granted outside the United States went to applicants in Portugal, Canada and the United Kingdom. The rights under these licenses do not appear to have been exercised.[11]

Diamond's appraisal that an innovation such as the "ever-lasting" match requires active promotion by a strong producer would seem to have been realistic. The 1946 Consent Decree might best be described as having achieved a modest modification of the world-wide monopolistic structure of the wooden match industry. That basis structure was not seriously weakened. Without a more thorough reconstruction of the match industry, the assessment of the conduct of the world's leading match producers with regard to technological change by the senior United States official actively involved in the antitrust case might continue to be most pertinent. "The defendants suppressed inventions and improvements in the match art. By the acquisition of patents controlling the 'repeating' or 'everlasting' match, the defendants have been able virtually to suppress its production and use."[12]

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2. Archibald Clow and Nan L. Clow, The Chemical Revolution, Batchworth Press, London, 1952, p. 453.

3. Ibid., p. 453.
Crass, Mar., p. 119.

4. Ibid.

5. Ibid.

6. Crass, June, p. 277.

7. "Match." Encyclopaedia Britannica, 1952, vol. 15, p. 46.

8. Ibid.
Archibald Clow and Nan L. Clow, p. 454.
Crass, Sept., p. 428.

9. Clow, p. 454.
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Raymond Kirk and Donald F. Othmer, ed., Encyclopedia of Chemical Technology, vol. 8, Interscience Encyclopedia, New York, 1952, p. 820.

12. "Match." Encyclopaedia Britannica, 1952, vol. 15, p. 46.
Steuart M. Emery, "Our Lowly Match Has Rounded Out a Century," New York Times, Nov. 27, 1927, X 5:8.
Crass, Sept., p. 430.

13. Ibid.
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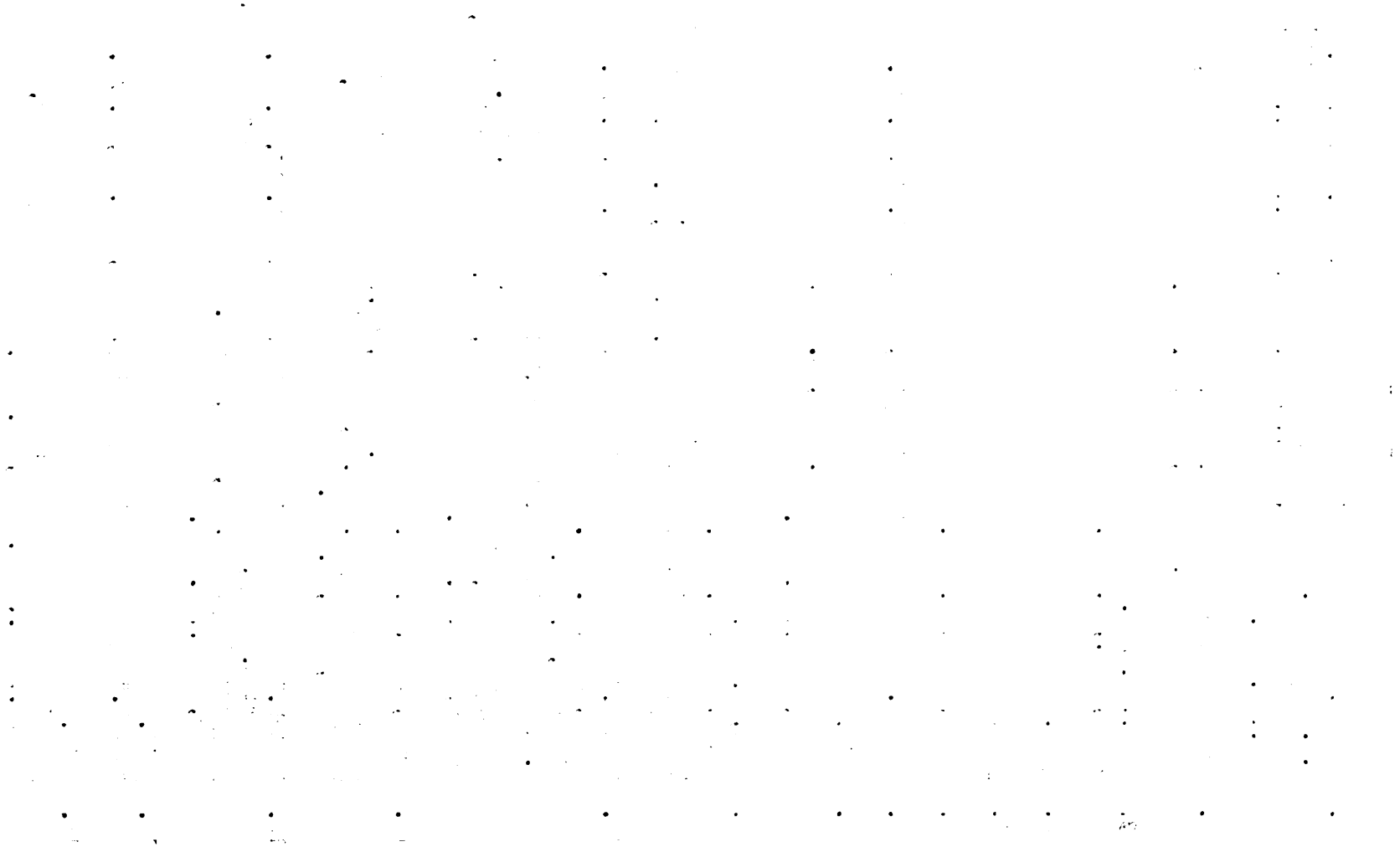

15. Crass, Aug., 1941, p. 380.

16. Report on the Supply and Export of Matches and the Supply of Match-Making Machinery, Monopolies and Restrictive Practices Commission, H.M.S.O., London, 12 May, 1953, p. 34.

17. Isaac F. Marcosson, "The Match King," Saturday Evening Post, Oct. 29, 1929, p. 4.

18. Crass, Aug., 1941, p. 383.

19. Crass, Sept., 1941, pp. 430-31.

Appendix to Chapter 1.

1. United States of America v. The Diamond Match Company et al. (April 9, 1946) Civil No. 25-397, U.S. District Court, S.D.N.Y., Complaint, par. 103; Answer, par. 103.
British Match Report, par. 104.
Chemical Abstracts, 1933, vol. 27, p. 2581.
---- ---- , 1934, vol. 28, cols. 1866, 3236, 4236, 6314.
---- ---- , 1935, vol. 29, col. 7660.
---- ---- , 1937, vol. 31, cols. 2824, 8202.
---- ---- , 1939, vol. 33, cols. 3160, 6600.

2. Civil No. 25-397, Answer, par. 103.

3. Parliamentary Debates, House of Lords, 29 April 1948, col. 584.

4. British Match Report, par. 110.
Chemical Age (London), "Match Industry in the U.K.," May 23, 1953, p. 786.

5. Wendell Berge, Cartels: Challenge to a Free World, Public Affairs Press, Washington, D.C., 1944, p. 190.

6. British Match Report, pars. 104, 108.
Chemical Abstracts, loc. cit.
New York Times, April 19, 1949, p. 27.

7. British Match Report, pars. 104, 107, 112-13.

8. British Match Report, par. 108.
New Yorker, Oct. 11, 1947, pp. 28-29.

9. British Match Report, par. 105.
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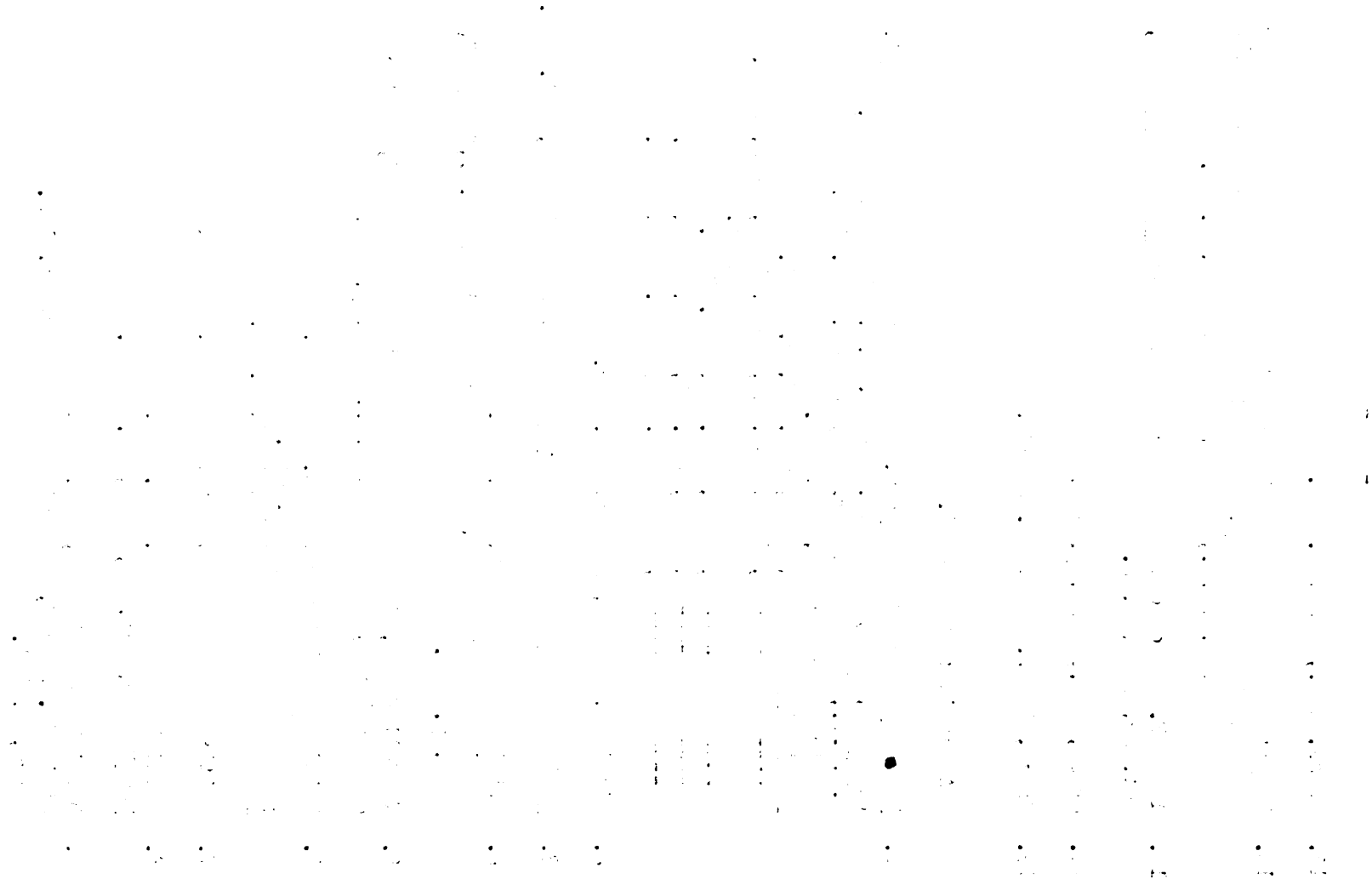


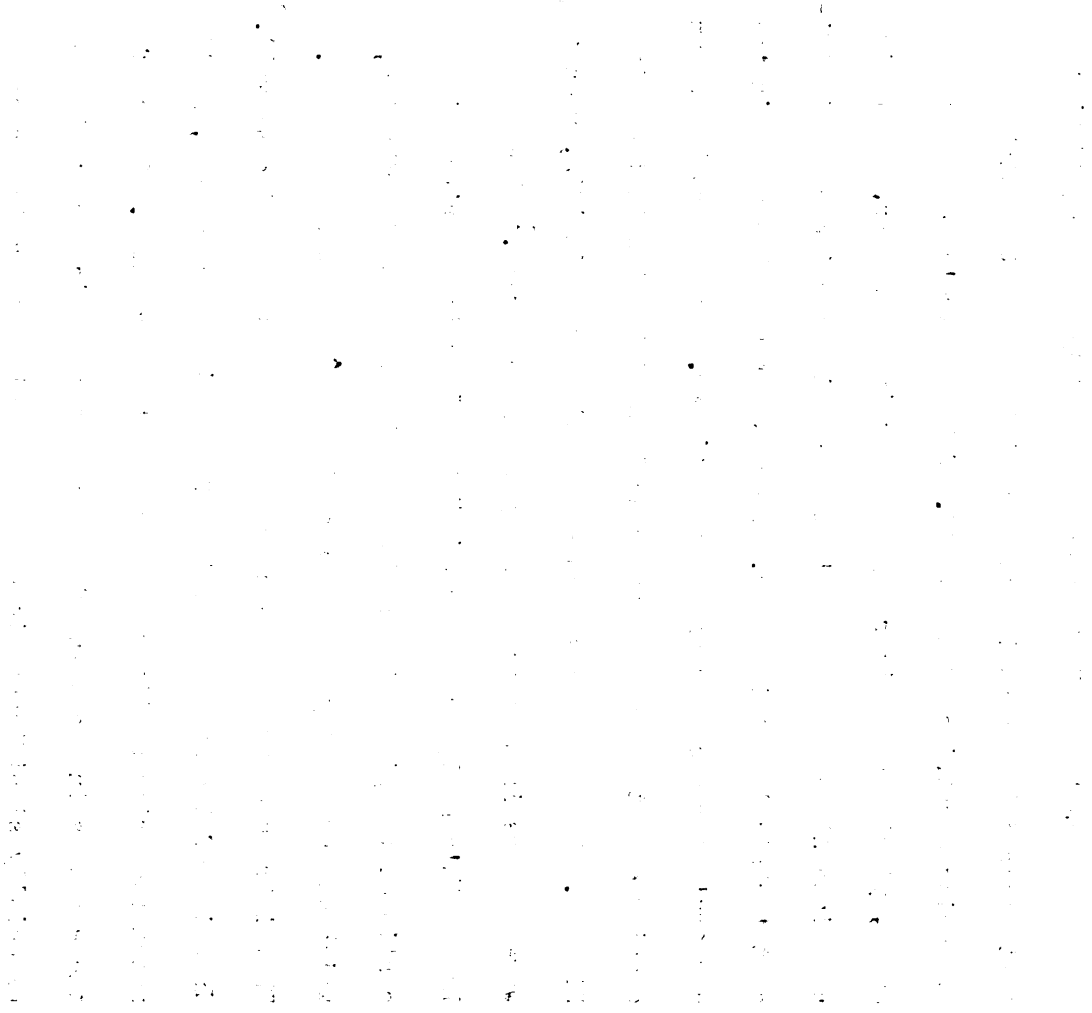
10. Civil No. 25-397, Complaint, Prayer; Judgment, pars. 12-14.

11. British Match Report, par. 115.

12. Berge, p. 186.

## Chapter 2

The Lundström brothers accomplished much at Jönköping that assured Sweden an important position among the match producing countries of the world. Johan Edvard's new safety match, placing nontoxic red phosphorus in the rubber, and their associate Alexander Lagerman's match-making machine were significant technical contributions. There was a valuable asset in the country's large stands of suitable timber. Carl Frans had begun opening export markets as early as 1850 with sales in the United Kingdom. Bryant and May became the sole agents in 1854, when they were dealers in matches but not yet manufacturers.[1] The Lundström's newly organized Jönköping Tändsticksfabriksaktiebolaget continued the pioneering in large scale overseas distribution, which was eventually to play a dominant rôle in world markets. They introduced Swedish matches to Germany at that time as well.[2] In spite of the strong position of the Jönköping company, small match factories proliferated throughout the country. Three of these plants in the town of Kalmar on the Baltic were to become especially significant in the monopolising of Swedish match



production because a Peter E. Kreuger merged them in 1874. He was the grandfather of Ivar Kreuger who was to exert a pervasive influence in the industry by the end of World War I.[3]

In 1903 the Jönköping company and six other large Swedish match concerns amalgamated to form the Jönköping och Vulcan Tändsticksfabriksaktiebolaget, which was to the Swedish match business what the United States Steel Corporation had become to the American steel business. The capital stock of the new firm was seventeen million kronor.[4] Japanese manufacturers were underselling in the Indian market, which had been first pre-empted by Swedish exporters. The Japanese enjoyed a great advantage in lower freight charges to India. It was hoped that the new combine, presenting a solid front, would be more effective in this rivalry.[5]

During this period the young engineer Ivar Kreuger was ranging the earch in a variety of jobs. His earliest stay in the United States had included a visit to the New York Stock Exchange at the time that J. P. Morgan was assembling the vast United Steel Corporation. He returned in the year of the Jönköping-Vulcan merger and played an important part in the construction of the Archbold Stadium at Syracuse University. That project aroused his interest in a new material, reinforced concrete, and led him to take the opportunity of representing Julius Kahn, maker of special iron rods used with the concrete, in Europe. He learned in London in 1907 that a Swedish engineer, Paul Toll, had already requested the European agency. The two men quickly

decided to join forces in Stockholm as building contractors. That was the modest beginning in 1907 of Kreuger and Toll, a firm which would later exert great influence in the world's wooden match industry and have world-wide ramifications in financial circles.[6]

The introduction of American methods into the Swedish building trade brought the firm immediate success. Paul Toll concentrated on construction and Ivar Kreuger devoted more and more of his time to securing contracts, raising capital and launching branch offices in Finland, Russia, Germany and the rest of Scandinavia. In 1911 the original firm became purely a contracting concern called Kreuger and Toll Building Company and Kreuger and Toll itself became a holding company with a share capital of one million kronor. The incorporation of A.B.Kreuger and Toll stated its objectives to be

> "to conduct contracting and building operations and similar business as well as to manufacture and sell building material. The Company may in connexion with its affairs acquire shares in other concerns as investments, but it may not carry on a regular trading business in securities."[7]

The divergent interests of the partners had now taken form in distinct companies. Expansion was rapid. By the time the shares of A.B. Kreuger and Toll were listed on the Stockholm Stock Exchange early in 1914 its capital had been successively increased to three million kroner.

During the previous year Stockholm bankers, holding mortgages on the three plants of his father's floundering match business in Kalmar, had asked Ivar Kreuger to study the situation

in Kalmar. He analysed the entire Swedish match industry and concluded that the ruin threatening the industry arose from the existence of too many small factories and the resulting excessive undercutting of prices. His report led the Stockholm bankers to request him to reorganise the family business.

After hesitating a week or so he consented to enter the family business. Retaining majority control of A. B. Kreuger and Toll, Ivar Kreuger left its active management in the hands of Paul Toll for the time being. He made clear his approach to the industry at a dinner celebrating his appointment as managing director of the Kalmar concern. A match box in hand, he declared that a trivial increase of one-eighth of a cent in the factory price of a box of matches would add millions in income and harm no one.[8] He was at least exploring the alchemy of monopoly profit.

Within two years of his return to Kalmar, Ivar Kreuger had combined about ten independent Swedish match concerns in the United Swedish Match Factories, Limited, sometimes known as the Kalmar Trust. World War I continually increased the seriousness of two problems, the loss of export markets and various shortages of raw materials. The larger Jönköping-Vulcan combine found these difficulties becoming critical. The creator of the Kalmar Trust, on the other hand, installed modern equipment, closed some small plants and enlarged others, acquired domestic sources of important raw materials, and promoted overseas markets by using his Kreuger and Toll branch offices to find outlets in

eastern Europe and by hiring men in London to locate western European outlets. The first foreign plant was established in Norway. Kalmar Trust's profits were rising dramatically at the same time that the Jönköping-Vulcan combine was facing an immediate lack of vital raw materials.[9] In preparation for the end of the struggle between the two combines, the share capital of Kreuger and Toll was raised to six million kronor in 1917. The amalgamation of the two groups formed the new Swedish Match Company (Svenska Tändsticksaktiebolaget), capitalised at 45,000,000 kronor, of which six million were held by A.B. Kreuger and Toll.[10] The Swedish Match Company, having achieved self-sufficiency before the end of the war, was now what its creator called "the vertical trust to the last degree."[11]

The policy of overseas expansion continued after the war with the active involvement of Kreuger and Toll, which had previously been concerned primarily with Swedish building, real estate and match manufacturing. Its capital was again increased in 1918 to sixteen million kronor, the stock being first placed on the market after the declaration of a twenty per cent dividend. The following year two Stockholm banks provided Ivar Kreuger with 60,000,000 kronor for the world expansion of Swedish Match interests on his personal guaranty alone. That same year he founded the American Kreuger and Toll Corporation with a capitalisation of $1,000,000, which was increased to $6,000,000 in 1920 and to $7,000,000 in 1923. A.B. Kreuger and Toll retained only a controlling interest in the new company, selling the rest of the

stock in the United States. Ivar Kreuger had begun the international financing of his enterprises.[12]

Rapidly expanding business organizations have a voracious appetite for funds. The Kreuger and Toll capital was raised in 1921 to 28,000,000 kronor. Confronting a World War I legacy of trade barriers and a pattern of state monopolies that had first appeared in France in 1872, the Swedish Match expansion began in Belgium, Austria and Czechoslovakia in Europe and in recapturing the Indian market in Asia. A combined enterprise with the largest Japanese producer was undertaken, that concern being subsequently brought under the control of the Swedish Match Company.[13]

The creation of the International Match Corporation in the United States in 1923 opened much wider access to American funds. It also brought about the direct entry into Canada of Swedish Match interests. The International Match Corporation acquired the Match Company, Limited, of Berthierville, Quebec, which had been established by Rockefeller interests. The company had started business in the production of match splints, beginning the manufacture of matches in 1922. The name of World Match Corporation, Limited, was assumed when the firm was bought by Ivar Kreuger through International Match in 1923.[14]

The formation in 1925 of the Swedish American Investment Corporation, capitalised at $45,000,000, transferred an important part of the financing of A.B. Kreuger and Toll to the United States. The new company received shares in the Swedish Match

Company, American Kreuger and Toll, and a real estate subsidiary. A. B. Kreuger and Toll took on 76,000 shares. There was a further increase in the capital of Kreuger and Toll in 1927 to 50,000,000 kronor, and "B" shares, carrying only 1/1,000 vote, were introduced on the London Stock Exchange. There was now developing an enormous flow of funds chiefly through the sale of securities of the International Match Corporation and of A.B. Kreuger and Toll in Sweden, England, the United States, Holland, Switzerland, Germany and Belgium under the auspices of a most impressive group of bankers, including Lee, Higginson and Company, Brown Brothers and Company, Dillon, Read and Company, N.M. Rothschild and Sons, Hope and Company, N.V. Hollandsche Koopmansbank, Société de Banque Suisse, Union Financière de Genève, Deutsche Bank, Darmstädter and Nationalbank, Société de Belgique S.A., and Mutuelle Solvay S.A. The prices received were as much as five times the face value.[15]

To aid his machinations Ivar Kreuger needed several means of transferring the large sums obtained in the United States to Europe without any close scrutiny of the transactions. He formed two companies under the uninquisitive laws of Switzerland, Finanz Gesellschaft für die Industrie (Société Financière pour l'Industrie) and the Continental Investment Corporation. Bryant and May, Limited, had some interest in the former company until 1927.[16] The latter company was soon transferred from Zurich to Vaduz, to take advantage of the even more congenial legal atmosphere of Liechtenstein. Many other companies

were created to enlarge the complexity of the activities of Kreuger; the above were more significant with respect to the match interests.[17]

Ivar Kreuger used the vast sums he raised to make loans to a number of national governments. That the amounts were of such a magnitude was clearly seen in connection with the ensuing bankruptcy in the final auditors' report of 1935 by the Stockholm office of Price, Waterhouse and Company, which stated that A. B. Kreuger and Toll and its many associated companies had raised $724,000,000 between 1917 and 1932, from which Ivar Kreuger had diverted to his own personal use without any accounting an amount of $110,000,000.[18] The usual agreement in return for a six per cent loan was a government granted monopoly to the Swedish Match Company, generally covering both production and distribution. It provided for profit-sharing between the government and the Swedish Match Company. That resulted customarily in a twelve per cent total income to the Kreuger interests.[19] What the users of matches got is perhaps best expressed in Kreuger's own words, "excellent matches and the price is fixed."[20] Although there were earlier loans and absolute monopolies had usually resulted, the $75,000,000 loan to France in 1927 may be taken as illustrative of Kreuger's technique. The Swedish Match Company obtained a semi-monopoly in what had been hitherto the closed French market, having been granted a monopoly in match-making machinery and allowed to import under Swedish Match labels and to establish Swedish Match selling agencies.[21] During the same year Swedish

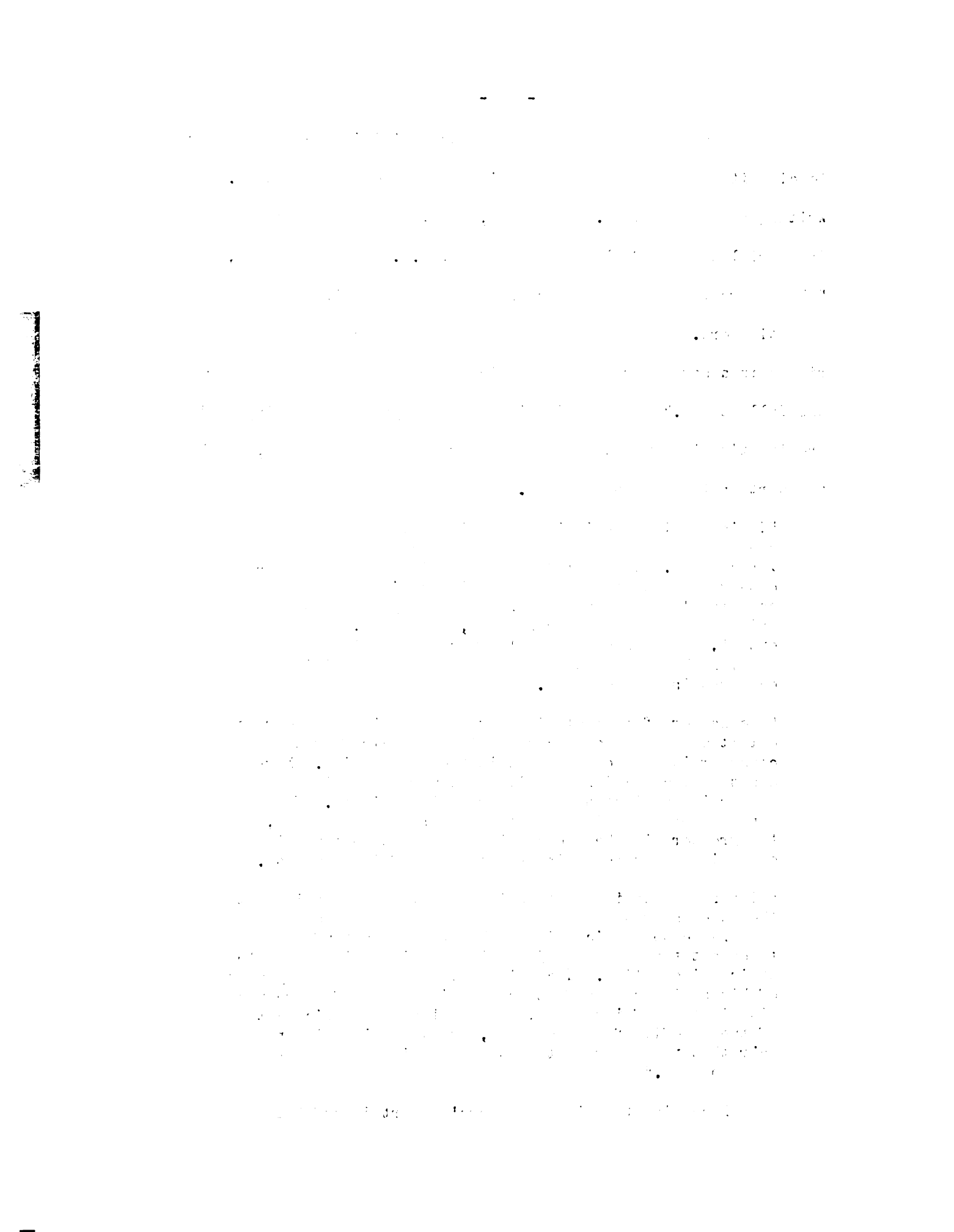
Match and British interests in the United Kingdom and other parts of the British Commonwealth, including Canada, were consolidated.[22]

Within five or six years the private financing of many governments achieved for the Swedish Match Company control of the match trade in over forty countries, including Greece, Peru, Ecuador, Estonia, Latvia, Hungary, Jugoslavia, Rumania, Poland, Danzig, Lithuania, Guatemala, and Turkey, and important interests in France, Germany, Japan, the United Kingdom and other parts of the Commonwealth.[23] Important trading agreements with American match producers had existed for many years,[24] and it was reported at the time of Ivar Kreuger's death in 1932 that he had been striving for a match monopoly in the United States.[25] It was later held that he had virtually completed his scheme to monopolise the match factories of the United States and Canada.[26] Wherever a government loan did not appear feasible, Ivar Kreuger would buy out existing concerns or arrange for a division of the match business. The estimates of the extent of Swedish Match Company control ran as high as 75% of the world's output.[27] In addition to the sprawling match empire and the obfuscating network of secret financial companies, A. B. Kreuger and Toll had considerable interests in A.B. Svenska Kullagerfabriken (S.K.F.), Telefonaktiebolaget L.M. Ericsson, the original engineering construction business, sawmills, sulphate pulp, power, iron ore, gold, silver, copper, real estate in several countries, and banking in a number of countries.[28] The entire complex was a monument to its builder's "insatiable itch for wealth and power."[29]

The magnitude and scope of its activities led one writer to cite it as the example of the high finance of the twenties. Writing about Wednesday, October 23, 1929, when the Times industrial average fell from 415 to 384, J.K. Galbraith noted, "the papers that night went to press with a souvenir of a fast departing era. Formidable advertisements announced subscription rights in a new offering of certificates in Aktiebolaget Kreuger and Toll at $23."[30] The following week the Saturday Evening Post prominently displayed the views of Ivar Kreuger on monoply, which are worth noting in some detail.

> "It is my firm conviction that big business constitutes one of the chief agencies for economic progress in the world today. In order to realize this it is only necessary to look at the wonderful industrial and commercial development which has taken place in the United States during recent year, and which, to a large extent, has been caused by the mass production made possible by the constant growth of the industrial concerns in that country.
>
> "The danger of a trust misusing its position in order to extort unreasonable prices for its products from the consumer is much exaggerated in the public mind. Nowadays public opinion constitutes a very effective protection against any abuse from big business. It must be borne in mind that the larger the enterprise, the greater will be the difficulty for it to conceal any essential facts regarding the conduct of its business.
>
> "With regard to international trusts it may be said that they are under such strong observation and are so vulnerable to public opinion that they cannot afford to expost themselves to justified criticism in regard to their price policy. I consider it to be the primary duty of big business to effect economy in the manufacture and distribution of its goods, and to give the public part of the benefit of such economy, but I consider it only fair that the other part of such benefit should go to the shareholders."[31]

Recalling the final auditors' report is sufficient



comment on the "strong observation" of international trusts. It is interesting to note the immediate journalistic reaction to Ivar Kreuger's suicide on March 12, 1932, in Paris as a parry to his quoted remarks concerning the strong protection of public opinion. There was a British reference to him as a financier of governments, primarily an industrialist seeking stable markets for matches.[32] A French article called him a man who

> ". . . a vecu dans une fièvre continuelle, échafaudant sans cesse de nouvelles affaires, étendant surs l'univers entier l'emprise de ses trusts et des ses sociétés, banquier des nations, martyr de la fortune dont il avait été l'artisan, mais dont il n'était plus le maître. Un jour est venu où, dans la crise mondiale, l'édifice a crequé, l'ensevelissant sous ses ruines."[33]

That was a far cry indeed from public scrutiny of abuses. Once the incredible extent of his fraud began swiftly to unfold, there was expressed a new concept of Ivar Kreuger as "le plus grand escroc du siècle."[34]

A later recapitulation of the affairs of his billion dollar empire suggested the following division of interests:[35]

| | |
|---|---|
| Kreuger and Toll, | $400,000,000 |
| Heterogeneous operations, | $570,000,000 |
| Match operations, | $365,000,000 |
| (Swedish Match Company, $140,000,000) | |

The widespread moral or at least intellectual bankruptcy, which had permitted the financial bankruptcy to assume such proportions, makes the proximate cause of the empire's dissolution of special import. In connection with a proposed acquisition of Kreuger's telephone holdings by the International Telephone and Telegraph Company, J.P. Morgan and Company had insisted upon a proper audit,[36] an almost unique event in the annals of the Swedish Match

Company and its affiliates.

The rapid collapse of Kreuger's empire after his suicide entailed the quick evaporation of many almost fictitious holding companies. They were simply sets of books in trusted employees' homes. Many of the sound enterprises among his holdings passed into the control of separate groups. The structure of the Swedish Match Company, which had come so close to a world monopoly, proved most durable. Its reorganisation, with the capitalisation vigorously reduced to one quarter -- 90,000,000 kronor, was swiftly consummated before the end of 1932. It had quickly become evident that many of the monopoly grants would lapse if the Swedish Match Company did not continue. The bankruptcy proceedings of the International Match Corporation in Manhattan soon revealed that there had been an extensive penetration in the American match market, allegedly unknown to the dominant firm in the United States, the Diamond Match Company. The newly organised Swedish Match Company, with headquarters moved to Jönköping, had representatives of the British Match Corporation, an affiliate, on its board of directors, and an executive of S.K.F. as the chairman of its executive committee.[37]

In the fall of 1933 the security holders and creditors of A.B. Kreuger and Toll, the Swedish Match Company, and the International Match Corporation commenced working in harmony and suspended their legal actions against one another. Their mutual benefit seemed best served by retaining the entire group of match monopolies in one system and by preventing the bankruptcy of the

Swedish Match Company. Three years later it was announced that the company, at an extraordinary meeting in Jönköping, had increased its share capital to 117,500,000 kronor, thereby setting up the means to acquire the match-making facilities held by the bankrupt International Match Company and A.B. Kreuger and Toll. Nearly 1,100,000 "B" shares were bid for all the European, except Turkish, assets. Almost 900,000 of these shares plus $8,500,000 were offered for the European assets of the International Match Corporation and its Philippine properties. The expected result was to be the consolidation and strengthening of the position of the Swedish Match Company. It could hardly be less. The formal offer was made on May 15, 1936, at 1:50 p.m. New York time. Preferred stockholders of the International Match Corporation raised two specific objections: the likelihood of Kreuger being alive and the undue favouring of the Swedish Match Company. The second objection was surely more than a flight of fancy. Advertisements describing the intended sale appeared in newspapers in Amsterdam, London and Paris.

There was no other bid. Setting aside a sum for the objectors, Oscar W. Ehrhorn, the referee in bankruptcy in the United States, approved the proposal as part of a comprehensive settlement. Unsecured claims were scaled down by $171,008,138 and secured claims by $16,156,112. The secured claims then amounted to $49,390,031 and the unsecured to $48,003,141. An interesting contrast presented itself between the American and Swedish handling of certain claims alleging a measure of culpability. Claims against

former International Match directors, including $31,416,534 against the estate of Percy A. Rockefeller, the nephew of John D. Rockefeller who had sold Kreuger a Canadian match factory in the 1920's, and $100,000,000 against the estate of S.F. Pryor, totaling $150,000,000 were settled out of court for $1,500,000. Claims of 15,000,000 kronor against Ivar Kreuger's brother, Torsten, were settled by payment of 1,100,000 kronor ordered by the Supreme Court of Sweden. A six minute fifty-one dollar trans-Atlantic telephone talk between the Irving Trust Company, 1 Wall Street, and the Enskilda Bank of Stockholm completed the $12,776,079 exchange.[38]

The International Match estate then held the entire stock of the American-Turkish Investment Corporation, which manufactured matches under a Turkish monopoly agreement, non-interest bearing notes of the Turkish Republic of $14,255,598 face value, discounted at $7,427,257, and the entire stock of the Vulcan Match Company, which had been the Swedish Match Company's sales subsidiary in the United States and which held all the common shares of the Union Match Company and 61.9% of the common shares of the Federal Match Corporation. The proceeds of the sale to Swedish Match added to the holdings of the estate because of its ownership of the Liechtenstein concern, the Continental Investment Company, which had become the direct owner of many of the overseas properties of the Swedish Match Company.[39]

A Turkish bank bid of $2,500,000 for the Turkish assets was rejected in the face of a bid for all the remaining assets,

except the shares of Union Match and Federal Match. *These assets, with the exception noted, were purchased for $7,250,000 by a Bermuda company established for the purpose of carrying out an orderly and gradual liquidation of the assets to protect holders of International Match Corporation participating preferred shares. They included the Vulcan Match Company's cash balance of $1,500,000, largely created by the separate disposal of the Union Match and Federal Match stock. Referee Ehrhorn had rejected the Bermuda company's bid of $800,000, because a bid of $996,000 was made by an Irving Reynolds of Manhatten. Strenuous efforts were made to link him with some American match firm and approval of his purchase was delayed. No connection was established at the time and his purchase was approved.[40] Because of the denials of both Reynolds and various match companies that any American company was interested in his purchase, it is significant to note that the affair is described in a Fortune article in 1939. In 1937 Diamond Match Company distributed to its stockholders the stock of the Pan-American Match Corporation. The son of the vice-president of the Diamond Match Company had been made secretary of Pan-American "to keep an eye on things for Diamond." One of its subsidiaries was the Federal Match Corporation which was stated to have been bought in the Kreuger bankruptcy by Irving Reynolds, acting for Pan-American.[41]

The durability of the monopolistic empire of the Swedish Match Company is dramatically outlined by its reported condition at the end of 1936. There were subsidiaries in Norway, Denmark,

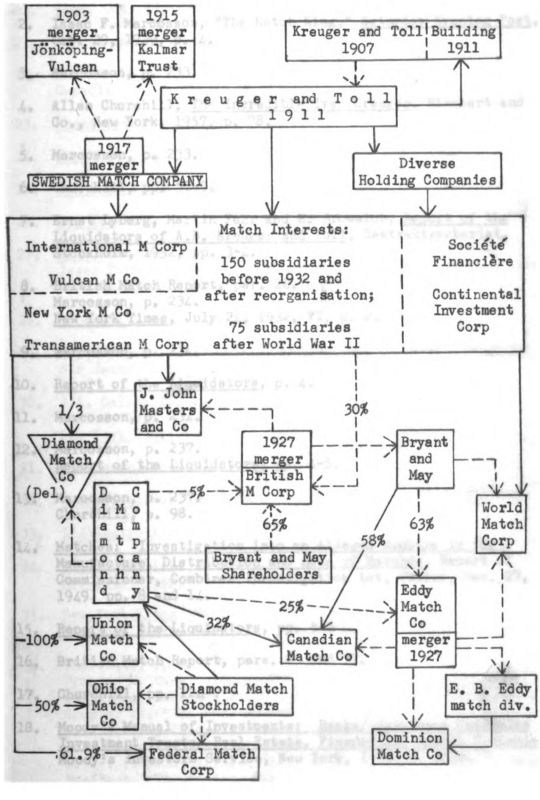
Finland, Estonia, Latvia, Lithuania, Poland, Danzig, Germany, Holland, Belgium, Gt. Britain, France, Switzerland, Austria, Hungary, Rumania, Jugoslavia, Egypt, India, Ceylon, China, the Philippines, and Japan. Other interests were held in Gt. Britain, Jugoslavia, Australia, Guatemala, Nicaragua, Colombia, Peru, Chile, the Argentine, and Brazil. Contrasting with the loss of 522,791,360 kronor in 1932 at the time of the Kreuger debacle, the following table of profits for the Swedish Match Company demonstrates the strengthening of its position that was achieved during the liquidation:

| YEAR | PROFIT (kronor) |
|---|---|
| 1933 | 4,403,413 |
| 1934 | 3,625,670 |
| 1935 | 11,198,737 (partly 1934 earnings received in free currencies) |
| 1936 | 12,826,888 |
| 1937 | 14,828,903 |
| 1938 | 14,318,484 |
| • | • |
| • | • |
| 1946 | 17,767,882 |
| • | • |
| • | • |
| 1951 | 11,611,789 |
| 1952 | 10,777,495 |
| 1953 | 13,000,000 |

The company was described in 1938 as having match-making interests in more than thirty countries with about one hundred factories out of a total of one hundred and fifty subsidiaries. The combined annual output was given at 450,000,000,000 matches, with its Swedish annual output at 90,000,000,000. The Swedish Match Company remains an important element in the world's wooden match industry.[42] One of its annual reports after the reorganisation

expressed what was apparently the continuing philosophy of operation of the Swedish Match Company: "The company is also cooperating with most of the more important independent match manufacturing concerns in the world, and this contributes to the stabilisation of market conditions, with beneficial results to all parties."[43]

SWEDISH MATCH INTERESTS IN
THE UNITED STATES, THE UNITED KINGDOM, AND CANADA



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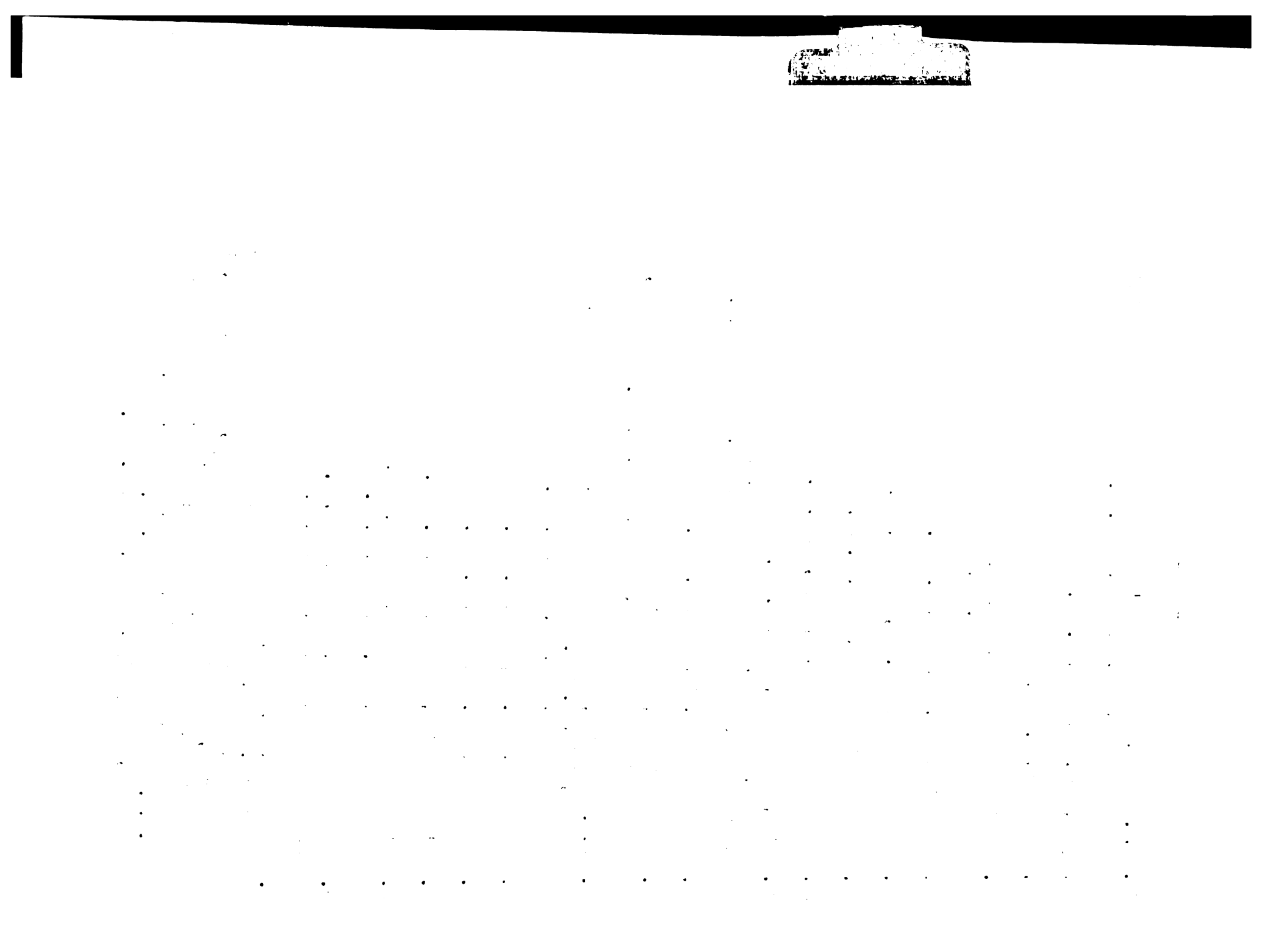

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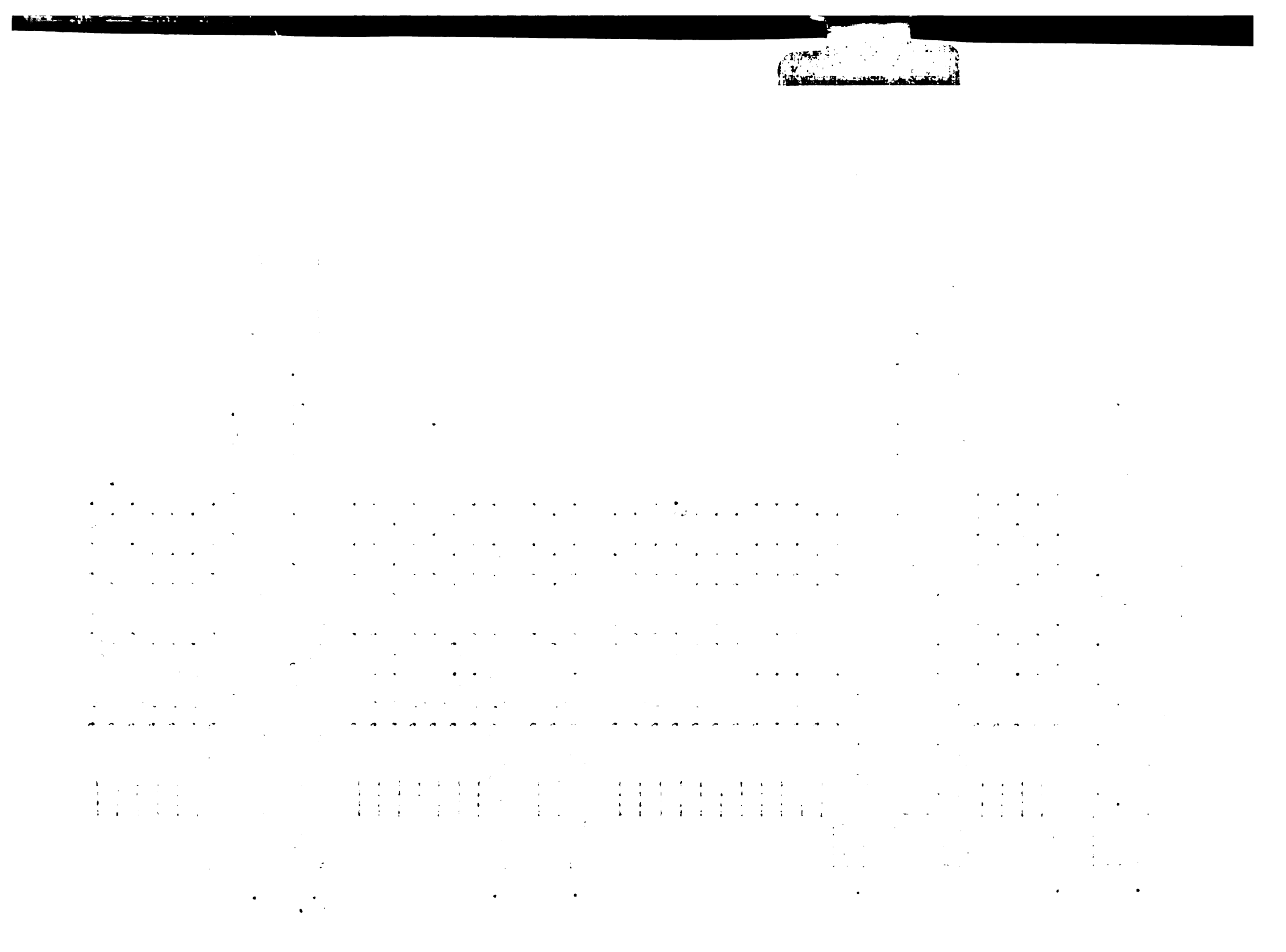

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43. New York Times, June 10, 1937, p. 33.

# Chapter 3

The bankruptcy proceedings, especially those concerning the International Match Corporation, following the suicide of Ivar Kreuger on March 12, 1932, which revealed a great deal of information relating to the world-wide operations of the Swedish Match Company, disclosed also considerable detail about the Diamond Match Company and its many interests throughout the match industry in the United States. The light cast upon the activities of the three chief match concerns of the world in a 1944 United States Complaint against the Diamond Match Company, The British Match Corporation, Svenska Tändsticks Aktiebolaget, and Others, is not everywhere perfectly clear. Many of the allegations were neither proved nor admitted, the case concluding in 1946 in a Consent Decree.[1] It is fortunate that the wealth of material made available by the Canadian Eddy Match case[2] and by the British Report of the Monopolies and Restrictive Practices Commission[3] provides confirmation of several significant points in dispute.

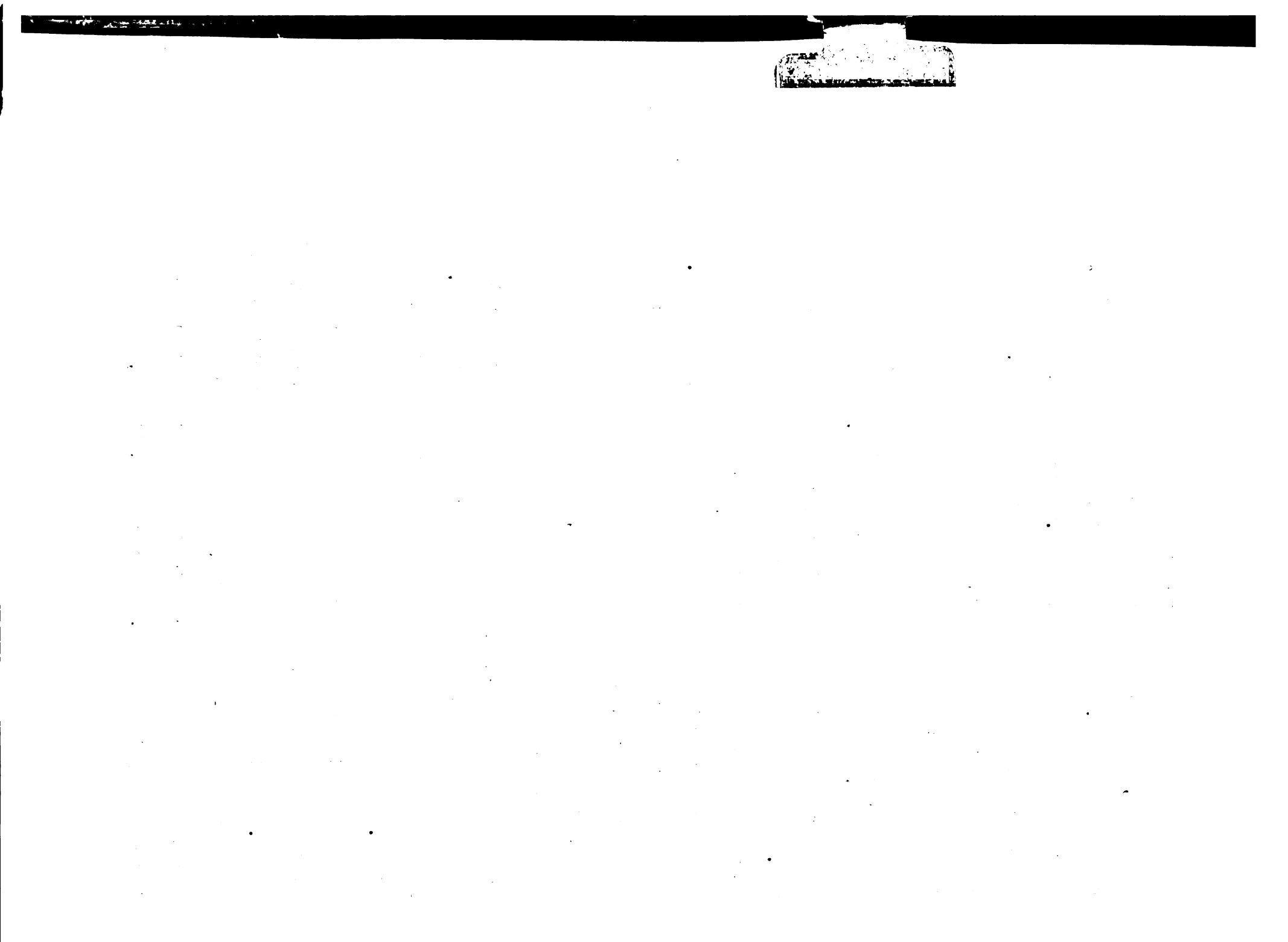
An amalgamation of ten of the largest match producers in the United States in 1880 created the Diamond Match Company of

Connecticut, a predecessor to the present-day Diamond Match Company of Delaware. Five more companies were brought into the combination before the end of the year.[4] Its purpose, reported to be the termination of senseless destructive competition, was clearly stated in 1889 by Chief Justice Sherwood of the Supreme Court of Michigan:

> "Its object was to monopolize and control the business of making all friction matches in the country, and to establish the price thereof."[5]

Its control of the industry was virtually complete by the end of 1880. In buying up the property of independent match manufacturers the Diamond Match Company obtained a contract from the seller that he would not enter into competition for a period of twenty years. After inveighing against monopoly in such terms as "destructive of free institutions" and "repugnant to the instincts of a free people," the Supreme Court of Michigan, in handling a dispute with regard to one of these restraining contracts, could but declare that both parties stood in pari delicto and therefore could not look to the courts for the enforcement of the restrictive terms.[6] It was the year before the enactment of the Sherman Antitrust Act of 1890.

Working relationships were established by the three principal match manufacturers at the beginning of the twentieth century. Finding no purchaser for the British patent rights on its new continuous match-making machine, the Diamond Match Company began the manufacture of matches in the United Kingdom in 1895 at a large factory in Liverpool. Bryant and May, Limited, the



leading British producer, soon realised that the new process, which was reported to use only twenty-five per cent of the hand labour needed in other processes, endangered its predominant position in the British industry. In 1901 Bryant and May and the British Diamond subsidiary entered into an agreement whereby Bryant and May acquired the rights and assets of the British Diamond company and, in return, the Diamond Match Company acquired 54.5% of the share capital and almost the entire voting stock in Bryant and May. They agreed at the same time to a division of markets. Diamond would abstain from the manufacture or sale of matches anywhere in the British Commonwealth, except British Colonies in North America and the West Indies, and Bryant and May would abstain from manufacture in North America and the West Indies, and would limit exports thereto to the value they had attained in the previous year.[7]

Although the Diamond Match Company alleged that, at its request, the agreement was modified in 1911 and cancelled in 1914, it appears rather that the 1901 Agreement was replaced in 1914 by an agreement which imposed no restriction on the overseas manufacture or sale by Bryant and May, but which required Diamond to continue to abstain from manufacture in those areas, which had been previously allocated to Bryant and May. The Monopolies and Restrictive Practices Commission of the United Kingdom considered that the 1914 arrangements remained binding on the parties in 1952.[8] Most of the United States interest in Bryant and May was acquired by British shareholders, so that by 1920 it amounted to

about one-eighth of the voting stock. That was exchanged in 1927 for slightly more than five per cent of the voting stock of the British Match Corporation, a consolidation embracing 95% of the production in the United Kingdom.[9] William A. Fairburn was a director of Bryant and May from 1915, when he became the President of the Diamond Match Company, and a director of the British Match Corporation from the time of its inception in 1927. The records of the Eddy Match Case revealed that the President of the Diamond Match Company kept in touch with officers of Bryant and May and participated actively in the management of the Eddy Match Company, of which Bryant and May was the principal stockholder. That somewhat blunts the sharp implication in the allegation that William A. Fairburn never attended a directors' meeting of either Bryant and May or the British Match Corporation.[10]

Working arrangements with the Swedish Match Company started in 1903 with an agreement that made the Diamond Match Company the exclusive selling agent in the United States for strike-on-box matches produced by the Swedish Match Company, its predecessors or affiliates. With the possible exception of the period from 1917 to 1920, when the newly created Swedish Match Company was carrying out aggressive expansion in what was perhaps an example ". . . of internal cartel dissension, particularly between the two leaders of the American and Swedish groups,"[11] the exclusive agency agreement was in effect at least well into World War II. Negotiations in 1920 between William A. Fairburn, President of the Diamond Match Company, and Ivar Kreuger,

Managing Director of the Swedish Match Company, resulted in a memorandum agreement, referred to by Mr. Fairburn as "the Peace Treaty with the Swedes." The exclusive selling agency was to continue for ten years, but was later extended to the end of 1935. It was then continued on a three months' basis.

The consequent promotion by the Diamond Match Company of the sale of Swedish Match products was described by an employee of Diamond as "depressing and killing business on our own brands." Prices were apparently determined on behalf of Swedish Match by the Vulcan Match Company until 1932 and subsequently by the New York Match Company. The arrangements survived the suicide of the head of the Swedish Match Company. Although allegedly on purely economic grounds, the Diamond Match Company did, in 1925 or 1926, dismantle its facilities at Savannah, Georgia, for the production of strike-on-box matches. That curtailment could nevertheless have been brought about in compliance with the alleged requirement of the 1920 Memorandum Agreement that the Diamond Match Company drastically reduce its manufacture of strike-on-box matches.[12]

The 1927 Trading Agreement between the Swedish Match Company and Bryant and May, J. John Masters and Company and the British Match Corporation is pertinent with regard to the withdrawal by Diamond from various South American markets. It provided for a division of overseas markets. The British Match Corporation and its associates were confined to the British Dominions and Colonies outside Asia and to the South American countries of Argentina, Brazil and Colombia. In 1923 the Diamond

Match Company had sold its interest in a Brazilian match firm, Companhia Fiat Lux, to Bryant and May, thereby enhancing the latter company's position in the Brazilian market. The sale of Diamond's interest in a Colombian match manufacturer in 1928 to Bryant and May left that company and the Swedish Match Company the sole stockholders of Companía Fosforera Colombiana. Regardless of the alleged reasons for these transfers, the sales of stock by Diamond were in complete harmony with the existing Swedish-British understandings.[13]

The entire network of agreements, some parts of which were neither admitted nor proved in the United States Consent Judgment, among the three main match manufacturing firms in the world covered market allocations, reserving many national markets exclusively to one concern and dividing others by quotas, price fixing, joint ownership and operation of match-making facilities in some countries, and various other forms of eliminating competition such as exclusive agencies and the arbitrary curtailment of both manufacture and international trade. By the Consent Judgment of April 9, 1946, the defendants, including the three chief producers, were severally and jointly enjoined and restrained from participating in any restrictive arrangements, and from carrying out or reviving any of the understandings alleged or known to have been established in the past.[14]

Nevertheless the activities of the dominant American match producer have "more than maintained its industry position in wooden matches."[15] Its sphere of influence apparently

comprises from 83%[16] to 90%[17] of the total production in the United States. The widespread influence of the Diamond Match Company can be readily illustrated by an examination of several intercorporate relationships that were built up after World War I. It is significant also to see that the Swedish Match Company has played at least a remarkably catalytic rôle in the advancement of the Diamond Match Company's power.

Until 1929, the Diamond Match Company owned 80% of the stock of the Berst-Forster-Dixfield Company, the sole producer of square stick "strike-on-box" matches in the United States. From 1929 until 1947, Diamond held 49% of the stock. The William Gordon Corporation, controlled by trustees for the sons and grandchildren of William A. Fairburn, President of Diamond, owned the other 51%. That interest was acquired by Diamond in 1947, and the Berst-Forster-Dixfield Company was merged into Diamond. The intimate connection of the William Gordon Corporation with Diamond is demonstrated by a letter from the auditor of the Diamond Match Company to the treasurer of a Canadian match company.

August 6, 1935.

Mr. Philip B. Keyes, Treasurer,
Commonwealth Match Co. Ltd.,
St. Johns, Quebec, Canada.

Dear Mr. Keyes:

As you know, we have been sending you, through U.C.P. a credit memo for $600.00 monthly, to cover certain items with which you are familiar.

Please be advised that beginning with the month of August U.C.P. will send you a credit memorandum

monthly for $135.00. This will be an estimate to cover half of Conway's salary and expenses. Beginning with the month of August, you will please pay in cash Charette and Lebel $150.00 each per month. The William Gordon Corporation will send you each month, in reimbursement, a check for $300.00.

If, in any month, you do not receive check from William Gordon Corporation, due to temporary delay on account of inability to get signatures, please obtain the needed cash from Commonwealth, as a personal advance, and make payment to the two men in question, regularly and consistently each month.

In the event that it becomes necessary for you to obtain these funds from Commonwealth, that company will be reimbursed by the William Gordon Corporation.

Yours very truly,

(signed W. W. Howe)

WWH-EM Auditor.

P. A. Conway, who had formerly been the Vice-President of Columbia Match and, before that, the Sales Manager of World Match, was then in charge of sales for the Commonwealth Match Company. Lebel and Charette had been associated with the Canada Match Company, which was at that time an ostensibly independent concern. J.W. Charette was the original President of Canada Match, and after his resignation acted as a nominee of the Eddy Match Company in holding Canada Match stock. It was established that U.C.P. referred to Uniform Chemical Products, Inc., a wholly-owned subsidiary of the Diamond Match Company. The closely working harmony of interests between the Diamond Match Company and the William Gordon Corporation would seem to ensure that the jointly owned Berst-Forster-Dixfield Company would scarcely be at odds with Diamond's policies.

The pervasive community of interests between the Berst-Forster-Dixfield Company and the Diamond Match Company merits a further illustration. A statement of the Eddy Match Company discloses an informative series of stock transfers, which took place at the end of 1929. At the creation of the Eddy Match Company Mrs. L. R. Fairburn received from the Canadian Match Company 681 shares of the common stock of Eddy Match, which were apparently included in the transfers of the following year:

December 9, 1929 - W. A. Fairburn to Mrs. L. R. Fairburn, 1634 Common
December 10, 1929 - Mrs. L.R. Fairburn to Westways Investment, Inc., 2315 Common
December 11, 1929 - Westways Investment, Inc., to Berst-Forster-Dixfield Co., 2315 Common
December 16, 1929 - Berst-Forster-Dixfield Co. to B. C. Snead, 2315 Common

Mr. Fairburn was the President of the Diamond Match Company and Chairman and Managing Director of the Eddy Match Company. Mr. Snead was Corporation Counsel of Diamond and Deputy Chairman and Deputy Managing Director of Eddy.[18] The Diamond Match Company seemingly used without difficulty the Berst-Forster-Dixfield Company as a facilitating agent to transfer, and to accomplish the shift with an interesting subtlety, nominal ownership of shares of stock in the Canadian company.

An amalgamation in 1923 of nine American match companies created the Federal Match Corporation. By 1929, Ivar Kreuger had acquired 61.9% of the common stock of Federal and the entire common stock of the Union Match Company. The latter company had been purchased on behalf of Kreuger by the Treasurer of Union, who delivered the stock certificates to F. Atterberg,

the Vice-President of the International Match Corporation and the President of the Vulcan Match Company, the American sales subsidiary of International. Federal took over the Union plant, running it at 25-30% of capacity. Diamond's annual report for 1931 asserted that Swedish Match's purchase of Federal should have no effect on Diamond. That a significant change in viewpoint took place within a few years was revealed by a transaction involving the bankrupt International Match.

Diamond brought about the incorporation of the Pan-American Match Corporation in 1937 and distributed its stock as a dividend to the stockholders of Diamond. The Federal and Union holdings were found among the assets of the Vulcan Match Company, the appraised value of the American companies being $1,328,000. Irving Reynolds, partner in the Manhattan law firm of Mudge, Stern, Williams and Tucker, submitted a bid for these properties. Efforts were made without success to link him with some American match company. After these efforts failed and both Reynolds and various companies issued disclaimers, the referee in bankruptcy approved the sale of the stock in Federal and Union for $996,000 and the controlling shares were delivered in his own name. It was soon obvious that Reynolds had been acting for Pan-American because the company obtained the Federal and Union stock in the same year. The allegation that Pan-American and its successor, the Universal Match Corporation, was an active competitor of Diamond is best met quickly by the fact that, in 1937, the son of Diamond's Vice-President Howard F. Holman, Richard A. Holman was

made Secretary of Pan-American "to keep an eye on things for Diamond."

Federal and Union were merged in 1939 under the Federal name, and the remaining stock was acquired by Pan-American in 1940. In 1937 and 1938 Pan-American obtained a majority interest in the Universal Match Securities Corporation, which held the stock of the then existing Universal Match Corporation and the West Virginia Match Corporation. The two Universal companies merged under the name of the Universal Match Corporation. The balance of its stock was acquired by Pan-American in 1940, at which time Federal, Universal and West Virginia became operating units of Pan-American and were subsequently dissolved. A year later the name was changed to the present Universal Match Corporation, held to be the second largest match manufacturer in the United States.[19]

A Canadian holding company, the Ledburn Company, was incorporated in 1933, acquiring a thirty per cent interest in the Commonwealth Match Company and a substantial holding in the National Development Company, a Delaware corporation. Some of the original shareholders of Ledburn pointed up the widening interests of Diamond. Of the 7,127 outstanding shares, the following were of particular interest:

1183 shares - John G. Daniel, Vice-President of North American Match
3551 shares - H. I. Lundquist, Industrial Management Engineers
1204 shares - P. B. Keyes, Vice-President and Treasurer of Commonwealth and formerly with Diamond Match in California

3 shares - W. F. Reynolds, Jr. subsequently with Uniform Chemical Products and later Purchasing Agent of the Diamond Match Company

That Diamond was the beneficial owner of the Ledburn holdings was seen from the fact that Diamond supplied the funds for Ledburn's purchase. That Diamond controlled the operations of both the Ledburn Company and the Commonwealth Match Company was demonstrated by directives sent to Mr. Keyes from B. Chandler Snead. A paragraph from a letter of July 19th, 1934, to Mr. Keyes from John C. Sebright of the office of B. Chandler Snead, is illustrative:

> "I am enclosing herewith the entries for Commonwealth and Ledburn, as prepared by Mr. Howe, and call your attention to his instructions respecting the charge to Commonwealth and the refund to the D.M. Co of the $300.00 exchange cost."

The purchase of the Ledburn stock in 1935 by a new Canadian holding company, the Hilton Company, represented no real change in ownership. The President, Hilton S. Pedley, "a friend of Mr. Fairburn's," had been at one time employed by the Swedish Match Company in Japan and subsequently by the Diamond Match Company to carry out a survey of the Japanese match industry. In 1936 Diamond loaned money to Mr. Pedley as exclusive sales agent for an incorporated association in the United States of importers of Japanese matches. That arrangement at least made possible the control of quantities and prices with regard to Japanese matches sold in the United States. By 1936 Ledburn had obtained a substantial holding of stock in the Universal Match Securities Corporation. The object of nominees holding the stock was to conceal the real ownership. Diamond's concern in that respect was

established in a letter of March 12, 1936, to Mr. Keyes from B. Chandler Snead:

> "Referring to our recent telephone conversation, I am enclosing herewith the report of the auditors of the Universal Match Securities Corporation as at December 31st, 1935, which please return to this office in due course. Please see that The Diamond Match Company is not brought into any of your discussions and also impress upon your auditors that any and all information in the premises is to be obtained through you, and that under no circumstances are they to correspond with either the Universal Match Securities Corporation or its auditors."

The entire holdings of Ledburn, the thirty per cent interest in Commonwealth and more than 41,000 shares of Universal Match Securities, were sold in 1937 to the Pan-American Match Corporation, the cash proceeds were distributed to the Hilton Company, and Ledburn was dissolved. The continuing involvement of Diamond was shown at the time when Pan-American's name was changed to Universal. A problem had arisen with respect to a transfer tax assessment by the Province of Quebec. It was significant, in the light of later protestations by Diamond that it did not control Universal, that John C. Sebright, who had succeeded to the various positions of B. Chandler Snead, dealt with the matter, expressing himself in the following terms:

> "With respect to the change of ownership from Pan-American Match Corporation to Universal Match Corporation, this also should not be taxed as nothing was involved here except a change of name;"

Any separation of interests did not in any way, throughout these transactions, make itself evident.[20]

In 1928 the Diamond Match Company caused the North American Match Corporation to be organised. The controlling

shares were distributed as a stock dividend to the stockholders of the Diamond Match Company. William A. Fairburn, President of Diamond, upon hearing that Ivar Kreuger had become interested in the Ohio Match Company, bought its entire stock from the E. J. Young family for $7,000,000. North American acquired fifty per cent of the stock, and the other half went to Kreuger for $6,000,000. It was held by the Swiss affiliate, Société Financière pour l'Industrie. In 1935 the creditors of Kreuger and Toll approved its sale for $2,800,000 to John G. Daniel, Vice-President of North American Match Corporation. The stock so acquired was retired and in 1936 that Ohio Match Company and North American were merged into the present Ohio Match Company. W. A. Fairburn installed his friend Louis H. Meade as Chairman, operating Vice-President and Treasurer. It is of further significance that the old Ohio Match had been made a sub-agent of Diamond, under its exclusive selling agency agreement with the Swedish Match Company, in 1921, seven years prior to Kreuger acquiring a stock interest. Swedish Match influence was at least catalytic in the extension of Diamond's power throughout the American match industry.[21]

Before its merging into the present Ohio Match, North American brought about the organisation of the Smokers Match Corporation, which acquired a substantial stock interest in the old Lion Match Company and in the Lumen Corporation, which owned Lion Match stock. In 1935 the Smokers Match stock was distributed to the stockholders of North American. Control had been initially

with the Diamond Match Company and then with its stockholders; evidence, such as the North American participation in the Canadian holding company, Ledburn, supports the view that Diamond's control was not relinquished. In 1937 the merger of the old Lion Match Company, the Lumen Corporation and Smokers Match Corporation created the present Lion Match Company. The shares were distributed to the holders of Smokers Match stock, which meant North American stockholders. That in turn placed control in the hands of the stockholders of Diamond.[22]

In the American civil action, which culminated in the 1946 Consent Judgment, the Diamond Match Company persistently argued that its stock and the stocks of Universal, Ohio and Lion were actively traded in independently. That, of course, by no means denied directly the allegation that Diamond, through its officers, nominees and stockholders, controlled the policies of those companies. Independent dealing in the various stocks established merely the possibility that Diamond's control could have been dissipated. The Diamond Match Company caused the organisation of the companies, North American, Smokers and Pan-American, which initiated the centralisation of control in the hands of Diamond stockholders of the three separate groups of American match producers.[23] It would appear unreasonable to assume that Diamond's ultimate purpose was to dispose of the control it had so persistently acquired.

That such control was in fact retained by Diamond was shown by various incidents connected with the Commonwealth Match

Company, owned seventy per cent, through nominees, by Bryant and May, and thirty per cent, through nominees, by Diamond. The Diamond interest in the Canadian company was held, from 1937 to 1947, by Universal or its predecessor, Pan-American. In 1947 Commonwealth became wholly owned by the Valcourt Company,[24] itself a wholly-owned subsidiary of the Eddy Match Company, in which the principal shareholders were Bryant and May and Diamond. During the period when the Universal Match Corporation owned thirty per cent of its stock, the Treasurer of the Commonwealth Match Company regularly sent financial statements to W. A. Fairburn, President of Diamond.[25] Further evidence that Diamond's contention of independence between itself and such companies as Universal must fall to the ground is seen in a letter of November 8, 1946, shortly before the Commonwealth stock was transferred from Universal, from W. A. Fairburn to the Vice-President of Eddy Match. The letter, containing references to the son of W. A. Fairburn, W. A. Fairburn, Jr., the President of Industrial Management Engineers and of its Canadian subsidiary, Management Engineers of Canada, J. E. Duffey, the General Sales Manager of Eddy Match, E. P. Miller, and an officer of Bryant and May, dealt with problems which had arisen because of a proposed change in the information required by the British Companies' Act.

Mr. Fairburn's wording indicated clearly the community of interest between Diamond and Universal, which had persisted from the Diamond inspired inception of its predecessor, Pan-American:

". . .

"Because of certain Government activities in Canada, it seems necessary for E.P.M. to keep in the background when it comes to correspondence and letters in file in his Montreal office. Will endeavor to have W.A.F.Jr. contact him in regard to this phase of the matter. It is understood, of course, that the matter that you require will be obtained for you by W.A.F.Jr., who can appear in the picture as a representative of Bryant and May, and he has no direct contact, holds no official position and is not on the payroll of Diamond. As you know, Diamond has no stock interest in Commonwealth, but is interested, as is Bryant and May, in the Eddy Company. There is no objection to your personal conversations with E.P.M. It would seem that E.P.M. could keep in touch with Canada, Federal and Valcourt affairs, but should have no contact, as far as the files are concerned, with Commonwealth, or with officials of that Company. J.E.D., as set forth on the bottom of page 1 of your letter, should be the clearing-house for all Commonwealth figures, and such figures could reach you through W.A.F.Jr.

"I am writing to Mr Hacking to-day, to ascertain the name of the Bryant and May official who will handle details by correspondence in regard to this revision in accounting. I do not desire to have copies of regular correspondence sent to me, but when statements are completed to your satisfaction, shall be glad to have you send them to me, and I will forward them to Mr Hacking.

"I think that it is highly desirable for you to have letterheads printed with your own name and personal address, or a box at the Pembroke postoffice, that would be separate and distinct from the Eddy and Canadian Splint companies, and no copies of correspondence dealing with this matter (if Commonwealth is mentioned therein) should be in Eddy files.

. . ."[26]

The President of the Diamond Match Company showed both his influence upon the subsidiary of an ostensibly independent company and his eagerness to conceal the true position of Diamond.

It is of interest to note that the various penetrations by Swedish Match interests into the United States market led

ultimately to the extension of the power of the Diamond Match interests. That represented, of course, simply a change in the identity of the monopoliser rather than any change in the fact of monopolising. One further significant penetration concerned directly the Diamond Match Company. Although alleged negotiations for a merger in 1929 of Diamond and International Match were neither admitted nor proved, William A. Fairburn did reject a proposal for a merger made by Ivar Kreuger. A consent judgment being far from an ideal means of establishing the truth, some events following Fairburn's rejection remain obscure, but the main outline is quite clear. The 1920 Agency Agreement with Swedish Match was renewed for four years, continuing it until the end of 1934. It was extended after that on a three months' renewal basis. In a recapitalisation of the Diamond Match Company, apparently designed by Fairburn to cope with the desire by some Diamond directors and stockholders for a merger with the International Match Corporation, two-thirds of the common stock was issued to the owners of the predecessor company and one-third of the stock in the new Delaware Corporation was offered "to bankers with the expectation by William A. Fairburn that Kreuger would purchase the same . . ."[27] Those 350,000 shares of Diamond were found among the Kreuger holdings after March 12, 1932, and were repurchased by the Diamond Match Company for $7,750,000 less than they had been sold for two years previously.[28]

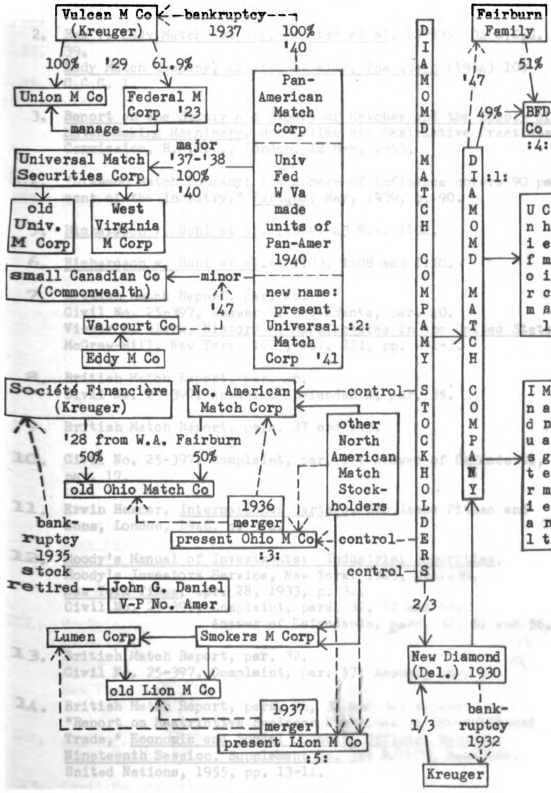
That the dominant position and widespread power of the Diamond Match Company in the United States wooden match industry

has been maintained is carefully set down in a 1955 investment banking report, in connection with the growing diversification of Diamond,[29] which has become a general wood products concern, handling in addition to matches, pulp and paper, lumber, building materials and woodenware.[30] Its match sales first accounted for less than half the total sales in 1938, and now account for less than twenty per cent of the total.[31] Satisfaction is expressed with regard to wooden matches. "Diamond has more than maintained its industry position in wooden matches. . ."[32] The expectation that Diamond will improve its position in the book match field is firmly stated. "Diamond has long been the unquestioned leader in wooden matches and by placing emphasis on book matches, expects to be able to win for itself in that field a similar position."[33]

The economic implications of both national monopolisation and international market allocation are, perhaps inadvertently, well described in the report. "Wooden matches also have shown greater price stability than book matches. ... Diamond's match business has demonstrated remarkable earnings stability over the years and management relies on it as a firm and reliable source of profit on which it can base expansion into other fields of forest products."[34] The effect on the owners of the company has been most gratifying. "Diamond has earned a profit and paid common dividends in every year since 1882. Diamond has not changed its quarterly dividend rate, except to raise it, for more than 35 years."[35] The assertion that "Diamond achieved its dominant position in the match industry in the United States in large part

through its superior research activity" stresses the significance of such technical accomplishments as Mr. Fairburn's adaptation of the Sevène and Cahen process for sesquisulphide of phosphorus. Without deprecating that achievement in any way, a proper balance may be best restored in an appraisal of Diamond by recalling its original creation in 1880 by financial merger for the purpose of controlling the United States match industry and fixing the price of the product.[37] The record has shown that the undertaking has been attended with some success.

CORPORATE RELATIONSHIPS OF MATCH COMPANIES IN THE UNITED STATES

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3. Report on the Supply and Export of Matches and the Supply of Match-Making Machinery, Monopolies and Restrictive Practices Commission, H.M.S.O., London, 12 May, 1953.

4. "Diamond Match Company; its sphere of influence covers 90 per cent of the industry," Fortune, May, 1939, p. 90.

5. Richardson v. Buhl et al. (1889) 43 N.W. 1102.

6. Richardson v. Buhl et al. at 1103, 1108 and 1110.

7. British Match Report, par. 26.
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9. British Match Report, pars. 37 and 193.

10. Civil No. 25-397, Complaint, par. 17; Answer of Defendants, par. 17.

11. Ervin Hexner, International Cartels, Sir Isaac Pitman and Sons, London, 1946, p. 374.

12. Moody's Manual of Investments: Industrial Securities, Moody's Investors Service, New York, 1943, p. 1430.
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13. British Match Report, par. 32.
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14. British Match Report, pars. 26, 32 and 34; Appendix 4.
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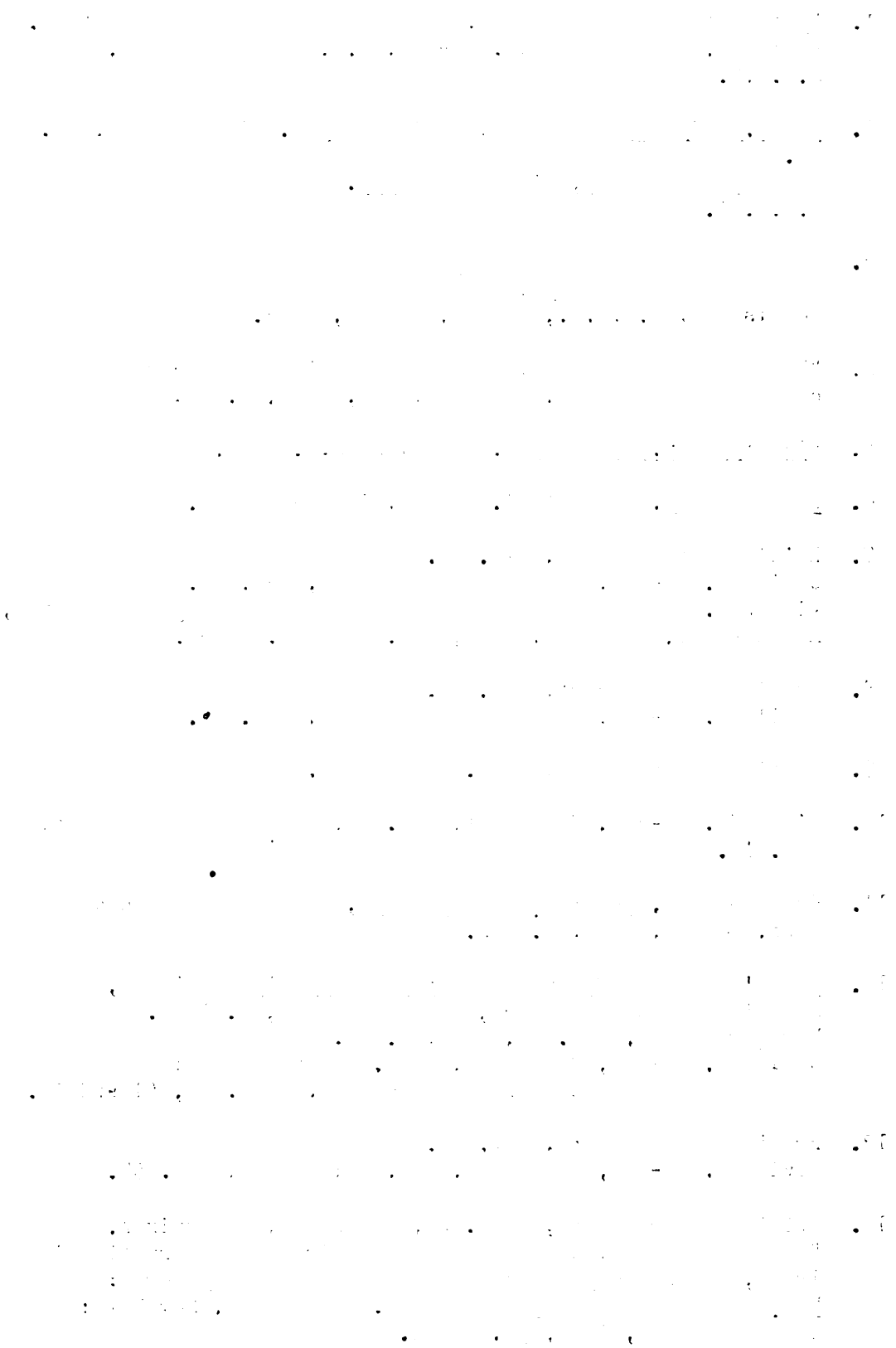

15. "The Diamond Match Company: A report for the investor," Blyth and Co., Inc., New York, 1955, p. 10.

16. Civil No. 25-397, Complaint, par. 29.

17. Fortune, May, 1939, pp. 89, 176 and 178.

18. Blyth and Co., p. 6.
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Canadian Match Report, pp. 22, 30, 48 and 49.
Eddy Match Case Transcript, vol. 4, p. 580; vol. 5, p. 1056; vol. 6, p. 1208; vol. 12, p. 2904; Factum of the Respondent, vol. 2, p. 217.

19. Moody's Manual of Investments: Industrial Securities,
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1938, p. 2996.
1941, p. 1753.
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20. Moody's Manual of Investments: Industrial Securities,
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21. Moody's Manual of Investments: Industrial Securities, 1932, p. 828.
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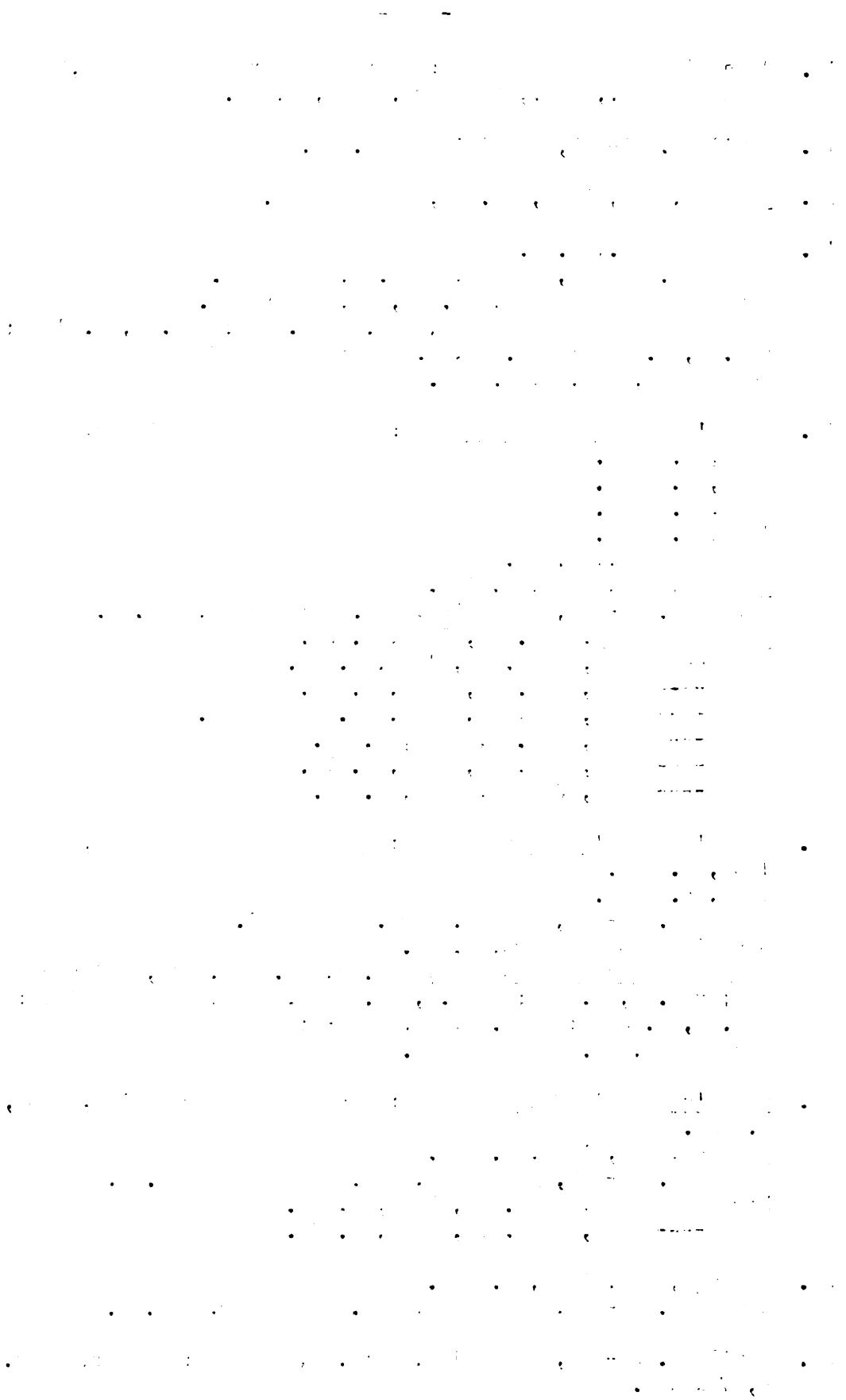
New York Times, Sept. 28, 1932, p. 27.
---- , Sept. 13, 1935, p. 31.

22. Fortune, May, 1939, p. 173.
Civil No. 25-397, Complaint, par. 8; Answer, par. 8.

23. Civil No. 25-397, Complaint, pars. 6, 7 and 8; Answer, pars. 6, 7 and 8.



24. Eddy Match Case Transcript, Factum of the Respondent, p. 114.

25. Eddy Match Case Transcript, vol. 9, pp. 2105, 2141, 2149, 2162, 2174, 2215 and 2250.

26. Eddy Match Case Transcript, vol. 10, pp. 2571-2.

27. Civil No. 25-397, Answer, par. 74.

28. Moody's Manual of Investments: Industrial Securities, 1943, p. 1430.
Fortune, May, 1939, p. 170.
Civil No. 25-397, Complaint, pars. 74 and 78; Answer, pars. 74 and 78.
New York Times, June 24, 1932, p. 27.
---- , June 30, 1932, p. 31.
---- , July 1, 1932, p. 33.

29. Blyth and Co., pp. 6-7.

30. Ibid.

31. Ibid.
Moody's Manual of Investments: Industrial Securities, 1943, p. 1430.

32. Blyth and Co., p. 10.

33. ---- , p. 11.

34. ---- , pp. 10-11.

35. ---- , p. 30.

36. ---- , p. 22.

37. Richardson v. Buhl et al. (1889) 43 N.W. 1102.

# Chapter 4

The desirability of a more detailed examination of the British match industry rests upon the fact of its principal members having an enduring influence on the Canadian industry. Many of the modes of conduct of those firms have had significance on the Canadian scene. The initial preclusion of competition from Canadian match production by the creation of the Eddy Match Company, Limited, was simply a constituent of the world-wide abrogation of competition in the manufacture and distribution of matches. The formation of the British Match Corporation, Limited, was a more important component of that same decline.

The enterprising Lundström brothers began exporting from their Jönköping factory to the United Kingdom in 1850, marking the inception of more than a century of close association between the Swedish and British industries. Four years later Bryant and May, at that time merely dealers in matches, became the sole United Kingdom agent for the Jönköping factory. In 1855 Bryant and May purchased the United Kingdom patent rights for Johan Edvard Lundström's safety match, and undertook their manufacture six

years later. They had witnessed the rapid growth in sales of the imported matches.[1]

In 1871 the British Government attempted pioneering in the alchemy of monopoly profit by the Chancellor of the Exchequer proposing a tax on matches. American experience indicated easy collection. The tax would discourage reckless use. It was to be a halfpenny per 100 or part thereof on wooden matches and a penny on the "more aristocratic" wax lights. The Chancellor's proposed motto -- Ex Luce Lucellum -- would have lent appropriate irony to the endeavours of Ivar Kreuger some forty years later.[2] Four days after the introduction of the bill into the House of Commons the Matchmakers' Procession, reportedly led by Mr. May, reached Bow Bridge four miles from Parliament. Because no more than ten might bear a petition to Parliament, they had encountered a police inspector at the bridge. There was thought to have been some violence after the procession disbanded. The tax bill was withdrawn two days later on Wednesday, April 26, 1871.[3] That defeat of a nineteenth century public effort to obtain "from light a little profit" is a sharp contrast to the success of private efforts in the twentieth century.

In 1903 F. Löwenadler, a London export agent, initiated an amalgamation of six of the largest Swedish factories to form the Jönköping and Vulcan Match Company, Limited. Its sole agent in the United Kingdom until 1910 was the Match Agency, Limited, a subsidiary of Bryant and May. The agency then went to a British subsidiary of Jönköping-Vulcan. The Diamond Match Company had

entered into an agreement, so durable as to survive into World War II, making it the sole United States agent for the Swedish combine from its very beginning in 1903. During the early years of the twentieth century Continental match exports to the United Kingdom increased steadily, accounting for more than 50 per cent of British consumption by 1912. More than half the British imports were Swedish.[4]

The Diamond Match Company had begun manufacturing in Liverpool in 1895, introducing in its plant the following year a continuous match machine similar to the Lagerman development in Sweden. The incongruity of the hand processes common in the United Kingdom dramatised to Bryant and May that the new method endangered its position as the leading British producer. In 1901 an exchange with Diamond's British subsidiary was agreed upon. All the British goodwill, property, rights and assets went to Bryant and May; 54.5 per cent of the capital of Bryant and May and virtually all its voting power went to the Diamond Match Company. By agreement the same year each party undertook to abstain from the manufacture or sale of matches in the other's agreed markets. That indenture was modified at the request of Diamond in 1911, the year of the United States Supreme Court's orders of dissolution in the Standard Oil and American Tobacco cases. In 1914 the year that the United States Congress passed the Federal Trade Commission Act and the Clayton Act, the 1901 compact was allegedly ended at the request of Diamond by an agreement binding Diamond to remain clear of those areas previously allotted to Bryant and

May, but no longer restricting the operations of the British concern. The new agreement provided for the exchange of technical information and for the non-exclusive cross-licensing of patents. It seems quite likely that the changes were more of form than of substance. The British Monopolies and Restrictive Practices Commission at least suggested that the covenant continued without fundamental alteration. Diamond admitted that "match machinery, processes or inventions were made available until about 1923."[5] The triangular nature of understandings among the Swedish, British and American interests in the world's match industry had been manifest before World War I.

Two years after the creation of the Swedish Match Company by Ivar Kreuger in 1917, J. John Masters and Company, Limited, had control of its interests and holdings in the United Kingdom. At the same time, individuals of Swedish nationality or origin held 52.5 per cent of the shares in Masters. Ivar Kreuger's holding was 32.5 per cent. This grouping comprised three of the 17 match manufacturers in the United Kingdom. Bryant and May controlled seven in 1920, and obtained control of six more through its acquisition of Maguire, Paterson and Palmer, Limited, in 1922. The seventeenth concern ceased operations. Bryant and May and Swedish Match had thus corralled British match production. The British firm's 1922 purchase brought it 100 per cent interest in the Canadian Splint and Lumber Corporation, Limited, of Pembroke, Ontario, thereby assuring a valuable supply of match splints of Canadian poplar and expanding its activities in the

Canadian market.[6]

The British Match Makers' Association, formed in 1905 by the seven main producers in the United Kingdom to safeguard their common interests, to regulate prices and output, and to establish quotas within a pooling scheme, had been a precursor of the more formal consolidations of the early twenties. All its members were to become integral parts of the Bryant and May organisation by 1922. The rising imports into the British market required Masters to make substantial compensation payments to the British manufacturers under the terms of a 1920 Agreement. That agreement had been arrived at in the same year as the Diamond Match Company President Fairburn's "Peace Treaty with the Swedes." The main provision was the sharing of the British market, 18/32 going to the Bryant and May interests, 5/32 to the British factory of Masters and 9/32 to Continental interests of Swedish Match. Two important modifications occurred in 1923. The price fixing and pooling arrangements were altered to count independent Continental imports in excess of 1,250,000 gross as sold by Swedish interests for purposes of compensation. With no competition between the British Match Makers' Association and Masters from 1921 to 1926, but with Masters having to make substantial payments because of imports from independent Continental factories, Swedish Match reduced this external competition by buying up the main competing plants. The second significant change was the establishment in 1923 of a more direct relationship between the British Association and the Continental affiliates of Swedish Match by means of the joint

financing of a Swiss company, Société Financière pour l'Industrie, for the purpose of acquisitions in all phases of match production and distribution.[7] The elements of the match triangle, especially the Swedish and British, were becoming more and more closely interlocked.

The year 1927 marked the termination of the 1920 Agreement and meant that the Swedish Match Company and Bryant and May had reached a point where they "must either collaborate or else embark upon a prolonged and exhaustive struggle"[8] in those markets where both were operating. Vital changes in status had taken place during the seven years. The operations of Bryant and May in various parts of the British Commonwealth and in several Latin American countries had been extended. The energy of Ivar Kreuger had impelled the Swedish Match Company along a course of unremitting expansion of particular interest in at least two respects. Entry into the Canadian market was accomplished by the purchase from Rockefeller interests of the World Match Corporation, Limited, of Berthierville, Quebec. Entry into the domestic market of the Diamond Match Company came chiefly through the International Match Corporation and its diverse holdings. The rapidly rising match imports into the United Kingdom increased pressure upon Bryant and May from the Swedish element of the world industry.

The fusion of the twin interests of the British industry by the formation of the British Match Corporation, Limited, in 1927 brought together financially the United Kingdom companies of Bryant and May and of Masters, representing Swedish Match, and

resolved some conflicting interests. British Match acquired the shares of both Bryant and May and Masters. Swedish Match received 30 per cent of the shares in British Match; the shareholders of Bryant and May received the other 70 per cent. The Diamond Match Company's holdings of Bryant and May shares had been greatly reduced by sales to British stockholders, so that Diamond received 5 per cent of the shares in British Match in exchange for its remaining shares in Bryant and May. British Match and its two subsidiaries, Masters and Bryant and May, entered into a trading agreement, with a term of 25 years, with Swedish Match. Its impact may be best viewed in the light of the several transfers of property consummated at that time.[9]

Swedish Match obtained the resources of Bryant and May in Italy and Japan, and its share in Société Financiére pour l'Industrie. Bryant and May acquired control of the Australian Federal Match Company of Sydney by obtaining some shares from the Swedish Match Company, which retained a minority interest. Swedish Match also retained a minority interest in Bryant and May (Proprietary) Limited of Melbourne. Acquisitions from Diamond enhanced the South American position of Bryant and May. The entire capital of the World Match Corporation passed from Swedish Match to Bryant and May. That was an important piece in the assembling of the Eddy Match Company to create a match monopoly in Canada. It was but one aspect of the reconciliation of the conflicting interests of the leading match producers of the world. Of the original nine directors of the new Canadian company, two,

G. W. Paton and C. E. Bartholomew, represented British Match and Bryant and May, two, W. A. Fairburn and B. C. Snead, represented Diamond Match and two, Ivar Kreuger and F. Atterberg, represented Swedish Match and International Match. The two Swedish qualifying shares were transferred to a nominee of Diamond on September 22, 1932, following the death of Ivar Kreuger and the bankruptcy of the International Match Corporation. With masterly understatement, official British reports described the 1927 arrangements. "This industry is largely dominated by a trust headed by the Swedish Match Company."[10] Considering the consolidation of British operations, Bryant and May was "said to maintain friendly relations with the Swedish Match trust."[11] The newly created corporate relations, achieved by extensive transfers of assets and with at least the facilitating acquiescence of Diamond, were strongly supported by new trading arrangements.[12]

Against a background of existing agreements, some of which involved the American member of the triangle, Swedish Match and British Match, the latter considering itself the "junior partner," entered into general trading agreements in 1927. Although it had a stated term of 25 years, "it was the intention of the parties that their association should be permanent."[13] The 1927 Trading Agreements covered the manufacture and sale of matches by the parties and their associates, dividing and sharing markets, co-operating in technical information and providing for the supply of machinery and materials. That Swedish Match was to be the chief source of technical information and machinery and materials

was recognized by the assignment as the quid pro quo of more than 40 per cent of its holding of British Match shares. Handling the two Irish markets in separate, subsidiary agreements, the 1927 Agreements assigned to British Match 51 per cent of the British Isles, the British Commonwealth outside Asia and Brazil. The Canadian market was shared with Diamond through the Eddy Match Company. Varying arrangements embodied the sharing with Swedish Match of Australia and New Zealand, Trinidad, Argentina, Colombia and different parts of Africa. Swedish Match was assigned 49 per cent of the market of the British Isles, Continental Europe, Asia and the remainder of Spanish America. There was to be no encroachment on the agreed assignments. Even accepting Diamond's denial of compliance with its agency agreement with Swedish Match, allowing Diamond's explanation of having no export trade on the grounds that it "could not profitably or successfully export matches," and recognizing that, whether or not in accord with any agreement, Diamond's withdrawal from Latin American concerns usually meant a transfer of interests to Bryant and May, the 1927 financial and contractual arrangements comprised a de facto comprehensive allocation of world markets and interests among the three principal match manufacturers.[14]

Subsequent to and in spite of the 1927 Trading Agreements and the separate understandings between Bryant and May and Diamond and between Swedish Match and Diamond that had been reached in the early years of the twentieth century, Ivar Kreuger had embarked upon an ambitious programme of penetration

into the United States market. The formation of the Diamond Match Company of Delaware, which held the stock of the operating company, was the instrument by which a direct interest in the leading American producer was acquired by Swedish interests, though not amounting to control. One third of the outstanding shares of the new holding company were sold "to bankers with the expectation by William A. Fairburn that Kreuger would purchase the same." Although Diamond denied that the transaction was undertaken on the condition of the renewal of the 1920 Agency Agreement, which had replaced the original 1903 Agreement, the 350,000 shares were sold in 1930, the agency agreement was renewed that same year for four years, and the Diamond stock was discovered in 1932 among the holdings of the bankrupt International Match Corporation, pledged by Kreuger as collateral. His death did not impair the agreement.[15]

Negotiations for a further renewal of the agency agreement now due to expire on December 31, 1934, were begun in the middle of that year in Jönköping between the Treasurer of Diamond and the new Swedish Match President, who had formerly been in charge of operations and sales. One result of the discussions, which culminated in a renewal, was that Swedish Match agreed not to purchase the Federal Match Company from the trustee in bankruptcy of International Match, clearing the way for its later acquisition by Diamond interests. It was but another confirmation of the frequent experience that "penetrations by Swedish Match interests into the United States market led ultimately to the

extension of the power of the Diamond Match interests."[16] The agency agreement was renewed in 1935 for an indefinite term. World War II obscured the situation and the 1946 Consent Judgment interposed a legal barrier with respect to certain further agreements and exclusive agencies. That barrier comprehended also all past arrangements, including among many others, the 1901 Agreement with Bryant and May, the 1903 Agreement with Swedish Match and its several successors, the 1920 Agency Agreement, the 1930 Renewal Agreement, the 1934 and 1935 Agreements and the tentative 1939 Agreements.[17]

After March 12, 1932, it was disclosed that, contrary to agreement, British Match shares had been pledged as security against a personal loan to Ivar Kreuger. That provided the occasion for British Match to press for an immediate revision of terms in its favour. It had been making substantial payments to Swedish Match for exceeding its trading quota in the British Isles. A 1932 Supplemental Agreement raised the British Isles quota for British Match from 51 per cent to 55 per cent. During this period, the Kindersley family, Sir Robert and his son Hugh, who occupied in succession the position of Chairman and Managing Director of Lazard Brothers and Company, Limited, participated actively in the reorganisation of the Swedish Match Company, which sustained its durability. In 1946 Hugh K.M. Kindersley became Deputy Chairman of the British Match Corporation and a director of the Swedish Match Company on the recommendation of Swedish Match; he succeeded Arthur Hacking as Chairman of British Match. The

reorganisation plan placed two English representatives on the twelve man board of Swedish Match. In contrast to the original four Swedish Match nominations on the twelve man board of British Match, "two of the ten present directors of the British Match Corporation are of Swedish origin."[18]

In 1938 the existing British-Swedish agreements were replaced by a new one running until the end of 1961. Each of three separate parts was considered an aspect of the single whole, setting out the essential give and take nature of the 1938 Trading Agreements. The 1932 sales quotas for the British Isles were retained. Compensation payments by British Match had averaged £93,500 per year since 1927. The new agreement provided similar compensation payments, except that British Match would not be liable if its excess were the result of the failure of Swedish Match to supply quantities in response to orders received. Competitive matches involved a lower rate of payment. There was fixed a limit of £37,500 on the total compensation payable in any one year. British Match was required to make a further payment outside the limit, whether or not Swedish Match handled all orders received, on sales exceeding both the agreed 55 per cent and its own sales average for the preceding three years, based upon the excess over the greater of those two figures. As a moving average calculation was used, the more compensation paid in one year, the higher the sales level permitted the following year before another compensation payment would be required. Swedish Match undertook not to manufacture matches, materials or

machinery in the British Isles, unless a protective duty were imposed rendering, in the opinion of the Swedish Match, undesirable the continuation of match exports to the British market. After a mandatory discussion, a failure to agree would give Swedish Match the right to manufacture in the parts of the British Isles concerned. British Match had the sole right of manufacture and sale in Canada and Brazil, and a share in the markets of Argentina, Colombia and Uruguay. There was to be British-Swedish co-operation in all other parts of the British Commonwealth outside Asia.[19]

The British Match Corporation had organised the two Irish markets independently of the 1938 Trading Agreements by way of arrangements carried out by Bryant and May. An agreement regarding the Irish Republic was completed in 1938. Northern Ireland was dealt with in a 1939 agreement. Each Irish company was to confine its activities to its domestic market; Bryant and May was to refrain from offering similar types of matches in the Irish markets. Bryant and May nominated two directors on each board. The English company received stock in each company in exchange for goodwill and trade marks. Its stock interest was expanded to 49 per cent of the voting power in Maguire and Paterson (N.I.), Limited, and to 31 per cent in Maguire and Person, Limited, of Dublin. That scheme of things was significant in the consideration of the British Isles as a unit in the 1938 Trading Agreements with the Swedish Match Company.[20]

Australia and New Zealand were handled in yet another way. Bryant and May, Swedish Match and two subsidiaries of

Bryant and May agreed that the Australian companies should buy a high proportion of their materials requirements from the Swedish Match Company or pay Swedish Match a commission on purchases from elsewhere. They would pay Bryant and May a £5,000 annual consulting engineering fee. They would not export and would purchase all matches from either Bryant and May or Swedish Match. Swedish Match was to pay Bryant and May 40 per cent of any commission regarding materials received from the Australian companies. Bryant and May was to remit an annual £1,200 of its consulting engineering fee to Swedish Match. British Match interests and Swedish Match interests were to pay each other 10 per cent of any price received from matches sold to the Australian companies. British Match was granted an option on any Australian shares that Swedish Match might purchase, and in turn agreed to secure Swedish Match representation on the boards of directors of the two Australian companies. Any Australian business was to be conducted through the two companies.[21]

The two New Zealand match manufacturing concerns were affiliated with Bryant and May, Bell and Company, Limited, being a subsidiary formed in 1910 and New Zealand Wax Vesta Company, Limited, being 50 per cent owned by Bryant and May. Their combined output did not meet the local demand. British Match was to have 85 per cent of the market, counting both the local production and British Match imports, and Swedish Match was to have 15 per cent of the New Zealand market. Compensation was to be paid on sales in excess of those quotas at a rate roughly equivalent to the profit.

Reportedly 50 per cent of match imports into New Zealand were from independent sources.[22]

The 1938 Trading Agreements went beyond the 1927 Agreement with respect to technical co-operation and the supply of machinery, bringing into the system two German match machinery producers, Maschinenfabrik A. Roller of Berlin and Badische Maschinenfabrik und Eisengiesserei. At its inception in 1917, Swedish Match, through Ivar Kreuger's original Kalmar Trust, United Swedish Match Factories, Limited, had obtained control of the two Swedish concerns responsible for the development of the Swedish continuous match machine. Their capacity met the Swedish demand for machinery but could not meet the heavy export demands arising from the foreign expansion of the Swedish Match Company. In 1919 Swedish Match had therefore entered into an agreement with the two German firms, obtaining the rights to their entire output and guaranteeing an annual order of an agreed minimum value. The agreements expired in 1924, but were renewed in 1926 because of further expansion of Swedish Match. The depressed conditions of 1930 made difficult Swedish Match absorbing the German output. That year Bryant and May assumed responsibility for one quarter of the financial obligation of Swedish Match, perhaps as a quid pro quo for the benefits received from such machinery arrangements under the terms of the 1927 Trading Agreement. In 1931 Swedish Match gained control of Badische. Bryant and May assumed one quarter of the holdings of Swedish Match in the German concern, disposing of them five years later.[23]

The world's three leading match producers were all involved in another matter regarding match machinery. That joint operation resulted in the output of an American match machinery manufacturer being denied to competitors of Diamond, British Match and Swedish Match. The Bell Machine Company of Oshkosh, Wisconsin, had supplied a temporarily independent Canadian match company with machinery in 1931. In 1934 the Alliance Sales Corporation of New York, acting on behalf of the Diamond Match Company without Bell being aware of that relationship, entered into an agreement for the purchase of Bell's match business with rights to use in Canada and the United States Bell machines, patents, trade marks and designs. Alliance was to pay $64,000 and 10 annual payments of $50,000 each. The Bell Machine Company agreed not to manufacture or sell matches or machinery in Canada or the United States for ten years. Alliance also had an option to extend the agreement for an additional five years and to purchase similar rights for other countries. Within a month the President of Diamond wrote to the Chairman of Bryant and May and of British Match, describing the unusual ability, originality and resourcefulness of the Bell family, and pointing out that, through Alliance, Diamond had been able to "nip in the bud" well financed and ambitious plans which would have cost Diamond "a vast amount of money." In his capacity as a director of Bryant and May and of British Match, Wm. A. Fairburn strongly recommended that British Match take up the option on Bell's foreign rights at a cost of an initial payment of $25,000, with $5,000

of that being recoverable from Diamond, and of 10 annual payments of $20,000 each, with $5,000 per year being recoverable from Diamond. By November of 1934 Bryant and May had entered into an agreement with Alliance to that effect. The Bell rights, including those granted to it under license by a second Oshkosh Company, the Pine-Ihrigh Company, were available through sub-license from Alliance to Diamond, Lion, Ohio, Eddy and Bryant and May. British Match subsequently obtained the co-operation of Swedish Match to assume 50 per cent of the commitment of British Match. Prior to the Alliance agreement, Bell had supplied machinery to an independent Canadian company, in which Bell held a stock interest, to a new South African company, and to the first new firm to enter production in the United Kingdom after the creation of the British Match Corporation. In oral evidence before the British Monopolies and Restrictive Practices Commission, British Match stated that "the effect and purpose of the agreement with the Alliance Sales Corporation was to deny machinery to its competitors and to those of Swedish Match."[24]

In 1937 Union Allumettière, S.A., a Belgian subsidiary of the Swedish Match Company, entered into an agreement with a Belgian match company, S.A. Fonderies Générales pour l'Industrie Allumettière, to restrict the Belgian company to producing machinery only for its own match factories. The Belgian company was to receive 10 annual cash payments in compensation. In negotiating for a renewal in 1947, Swedish Match kept in mind its obligations under the terms of the United States Consent

Judgment of 1946 and insisted upon exempting the United States or ending the agreement. The agreement terminated in 1948. British Match had been willing to assume 25 per cent of the cost, as requested by the Swedish Match subsidiary in 1947, but was prevented by the refusal of the Bank of England to permit the necessary transfer of currency. Its share would have averaged £1,374 annually. The British Match Corporation attached importance to this matter because of the possibility of exporting match machinery to its Brazilian market.[25]

Although competition from independent producers in the United Kingdom is insignificant, some aspects of such activity are illustrative of the strength of the position of British Match. The formation in 1928 of the United Match Industries, Limited, placed independent match output at 0.6 per cent of the total British market, domestic and imported. With the appearance of the North of England Match Company, Limited, in 1933 and of the Anglia Match Company, Limited, in 1934, the independent share of the total British market rose to a maximum of 4.1 per cent in 1937. Two other United Kingdom concerns, one of them being the Co-operative Wholesale Society, Limited, considered entering the match industry but did not succeed in doing so. The Co-operative encountered difficulties regarding technical information and modern machinery. A letter in 1934 from the President of Diamond to the Chairman of Bryant and May set out clearly the problem of the second firm:

Dear Sir George,

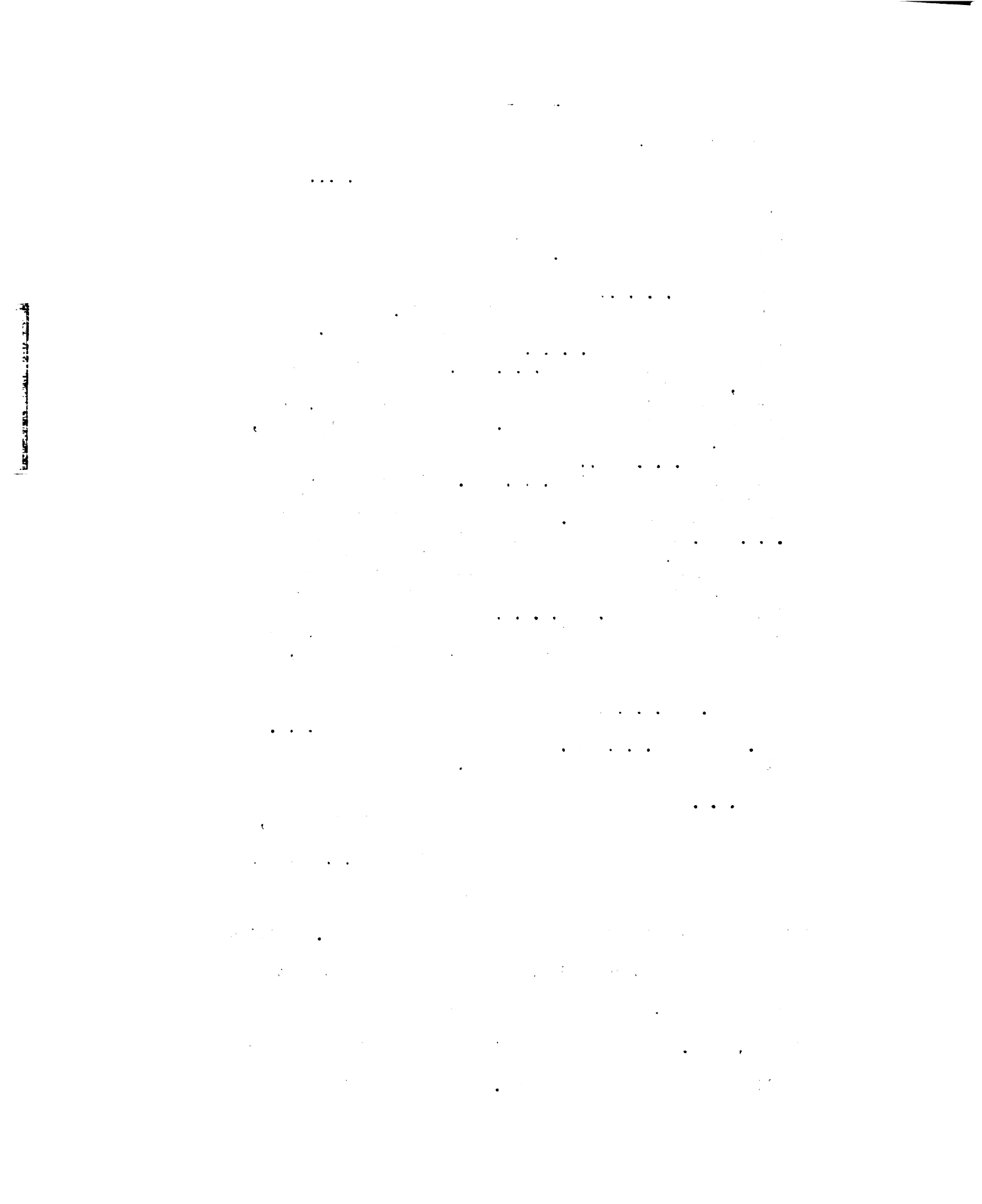
I have arranged to have friends employ Mr. ... on some experimental work that has nothing whatever to do with the British Match Industry and will not affect to the slightest degree any of the operations abroad in which you are interested. My friends have had to reach a definite understanding and make a confidential agreement with Mr. . . ., which under no condition must be given publicity either here or in Britain. They have obligated themselves to pay him $600.00 per month. It is understood that Mr. . . . may be called from the United States to work for . . . Ltd. (an English company), and if he is called to go to England to do work for these people with whom he has a prior contract, he will not be paid by my friends. It has also been agreed, however, that he will tactfully and earnestly work to discourage . . . Ltd., that he will do nothing to get out of his contract with . . . Ltd. which would encourage them to hire some other expert or have machines made for them elsewhere. If he succeeds in discouraging . . . Ltd. and in getting out of his obligation to these people, then he will work exclusively for my friends for a period of three years and during this period of time will not do any outside for any other interest whatsoever. Mr. . . . has told my friends that he personally is tired of the English company, who have been continually deceiving him, putting him off, and have been unable to date to get responsible people on your side to go forward with matters as promised and outlined. Mr. . . . thinks that in the near future that he will be able to drop all connections with . . . Ltd. and that . . . Ltd. will cease to exist as a living match producing possibility.

. . .

Very cordially yours,

(Signed) W.A.Fairburn

The remaining paragraph of the letter raised the question of British Match contributing to the $600 monthly expense. British Match agreed to remit one third, which was the payment that Diamond was making, and continued the monthly payments of $200 until May, 1943. That was an ingenious old man of the sea for the struggling English company to carry. The touch of irony in the



complaint of the hired and disguised interloper that the company was deceiving him was surely noteworthy. Some of the actual competition was removed in 1937 by the United Match Industries entering into an agreement with Bryant and May. The independent share in 1938 dropped to 2.3 per cent. It did not again reach 4 per cent and stood at 2.5 per cent in 1951. Whenever the United Match Industries secured extensive business for them, they encountered competition in the form of a better price usually offered by the Standard Match Company, Limited, for matches of identical quality sold at a reduced profit. Standard was a subsidiary of S. J. Moreland and Sons, Limited, one of the subsidiaries of Bryant and May. It became inactive in 1949.[26]

Regarding commercial espionage, the British Commission expressed the view that the methods of British Match and its associates went "beyond those normally employed in business." Suppliers dealing both with the British Match group and with the few independent firms frequently kept British Match informed about enquiries from competitors. An interesting variation came into being with the 1929 purchase by British Match of an independent match importer. The owner was to continue to manage the enterprise for 15 years, retaining the shares as trustee for British Match. There was a £500 penalty in the event of any disclosure destroying the semblance of independence that was being maintained. He received an annual salary of £2,000 and hit the mark by keeping up friendly relations with competitors of British Match. Free of any suspicion of his actual connection, he was able to

obtain "much valuable information." The dominant position of the British Match group provided exceptional opportunities for collecting information from a wide variety of informants.[27]

From 1940 to 1949 Statutory Orders governed the distribution of matches in the United Kingdom. The staff, with one exception, was provided without expense to the Government, by the British Match group of companies. The Matches Controller had an advisory committee, the chairman of which in 1941 was the Chairman of Bryant and May. In that advisory capacity and stating that it was not an order, the Chairman of Bryant and May recommended that the North of England Match and Anglia Match charge the maximum allowed to provide a uniform price for a particular type of match. Customers would not always be able to obtain their preferred brand, and hence price uniformity would facilitate the working of the Control. To fix the maximum prices the costs reviewed were those only of Bryant and May, representing a little over half of the industry output and one of the higher cost situations in the industry. The supposedly regulated firms appeared actively engaged in both the formulation and the administration of the regulations.[28]

Russian imports have been the strongest "competitive" element in the British market. From 1928 until choked off by World War II, they represented up to 11.5 per cent of the British market. That peak was reached in 1934. A subsidiary of the United Match Industries was the British agent for Russian matches during a period of falling prices from 1934 to 1937. In 1937 the sole

British agent for Vsesojuznoje Objedinenije "Rasnoexport" of Moscow became Swedish Match. The United Match Industries and its subsidiary had become affiliated with British Match in 1937, when British Match had acquired about 49 per cent of the voting power in United. The 1937 Russian-Swedish agreement limited Russian exports to the British market to 2,100,000 gross (144 boxes of 50 matches each -- 7200 matches) a year and assigned to Swedish Match the right to fix resale prices. When Swedish Match transferred, by the terms of the 1938 Trading Agreements, the sole agency for Russian matches to the British Match Corporation, the United Match subsidiary, Continental Match Distributors, Limited, continued to handle Russian imports. British Match obtained a guaranteed profit and the right to fix resale prices. British Match assumed responsibility for 45 per cent of any compensation payments Swedish Match might have to make to Rasnoexport in lieu of Russian shipments, as provided for in the 1937 Russian-Swedish agreement. Such payments ranged from £4,323 to £17,359. World War II closed off all shipments and the agreement was not renewed upon its expiration in 1942.[29]

Match imports, all from Swedish Match sources, reached the historic low of 1.5 per cent of the British market in 1944. After the war, import sources of matches accounted for 24.7 per cent of the British market by 1947. Roughly 10 per cent of the imports were from independent sources, a negligible amount being Russian. About one third of the British market was supplied by imports by 1952, independent sources accounting for 16 or 17 per

cent of the imports or just over 1,000,000 gross boxes. Less than 250,000 gross were Russian in origin. A new Anglo-Russian trade agreement would allow up to £500,000 worth of Russian match imports in exchange for British woolen and worsted textile exports. That would amount to about 2,500,000 gross boxes, compared with a peak pre-war importation from Russia in 1934 of 2,172,545 gross, introducing a measure of competition. Speaking in the House of Commons in June of 1953, the Right Honourable H. Wilson spoke of the Anglo-Soviet textile-match trading arrangement as "a very good opportunity of breaking down the monopoly of the British Match Corporation."[30] That avenue, however, might be more carefully described as the way to sporadic politico-economic rivalry rather than the highway to enduring competition. Alterations in the composition of the foreign trade sector of the British match supply might leave barely touched the fundamental structure of the monopolistic domestic industry.

The formation of the Eddy Match Company in 1927 had dramatised the alliance of the world's leading match manufacturers. Each member of the match triad, Swedish, British and American, was represented on the board of directors of the Canadian company. The Swedish Match company had agreed to withdraw from the Canadian market, which was to be occupied solely by Eddy; Bryant and May or British Match and Diamond were to share the market, which was at the same time British and North American. There was corporate embodiment of the rationalisation of the world's wooden match industry.

The conduct of Bryant and May and its extension, British Match, gave kaleidoscopic illustration, always changing aspects of unchanging components, of the means of achieving and maintaining monopoly power. The recurrent ebb and flow of power among the members of the match triangle introduced change in their numerous arrangements. The results, however, were but variations on a theme, not shattering the spirit of the dream nor diverting the fixity of purpose. The earliest relationship of the Swedish industry with the British market involved the curbing of competition by an exclusive agency agreement. Its scope was widened later with the appearance of a British trade association.

Such relatively flexible schemes were soon embellished with more enduring stock acquisitions, setting aside competition in both national and international markets. Joint ownership buttressed market-sharing agreements with their elaborate provisions for exclusive areas, divisions, quotas, compensation payments and price fixing. Two basic causes, force majeure and the waxing and waning of the power of the co-operative parties, gave rise to revisions of the details concerning the fundamental theme of not competing. The 1938 Trading Agreements between the British Match Corporation and the Swedish Match Company provided for reviewing the agreements "in view of the complex nature of the match trade . . . and the constant changes occurring in it and also because conditions and circumstances beyond the control of either party may require revisions to be made herein in order that the spirit of this Agreement which rests upon harmonious co-operation may be

preserved . . ."[31]

The cartel weakness for internecine warfare did mean an occasional market invasion, although not leading to any widespread destruction of the triad's interests. The Diamond Match Company's 1895 entry into the British market with a factory at Liverpool, for example, led shortly to Diamond obtaining a majority stockholding in Bryant and May. As the shares were gradually disposed of, the longer run effect was the important addition to the manufacturing facilities of Bryant and May. The destruction of the plant by German bombing in World War II made the result less enduring than it would otherwise have been. The immediate effect of the Swedish Match penetration of the United States market in the 1920's was mounting market pressure on the Diamond Match Company. After the death of Ivar Kreuger, the ultimate result was an extension of Diamond's influence over additional American match producers.

Several anticompetitive measures were especially significant in that they both sustained co-operation among the existing members of the industry and prevented entry by potential competitors. These measures included the pooling of technical information, the cross-licensing of patents and controlling match machinery production, excluding outsiders. An example of a similar control of raw material sources was noteworthy. From 1929 British Match controlled, as a subsidiary or as an associate with the majority of its board of directors appointed by British Match, the sole United Kingdom producer of sesquisulphide of

phosphorus and of amorphous phosphorus. The claim of British Match that materials were not withheld from independent match manufacturers raised two significant points. The independent buyers of splints, chlorate of potash and phosphorus derivatives paid higher prices, as much as 77 per cent more, than did the British Match companies. The sole supplier of sesquisulphide of phosphorus paid Bryant and May a commission on its total United Kingdom business, including sales to the independent match firms.[32]

Some less frequently used and more commonly condemned devices demonstrated that monopolising influences permeated the entire industry. "Fighting brands" played their accustomed rôle on occasion against a new entrant. A technical expert, under prior contract with a potential competitor, received regular payment from two members of the match triad on the understanding that he would give disheartening advice to render the independent concern infirm of purpose. That was the hiring of a saboteur to smuggle in "expert pessimism." A rather wider use of commercial espionage brought to British Match much valuable information.

Government regulation of the British match industry, introduced early in the war in 1940 and continued in some form until 1951, laid bare vital problems arising from an attempt at regulating monopoly. Even more critical than the difficult matter of prices and costs was the fundamental question of the intrinsic motivation of the regulating staff. The personnel of Matches Control was recruited with one exception from the British Match companies. Was the true allegiance of the regulators held by

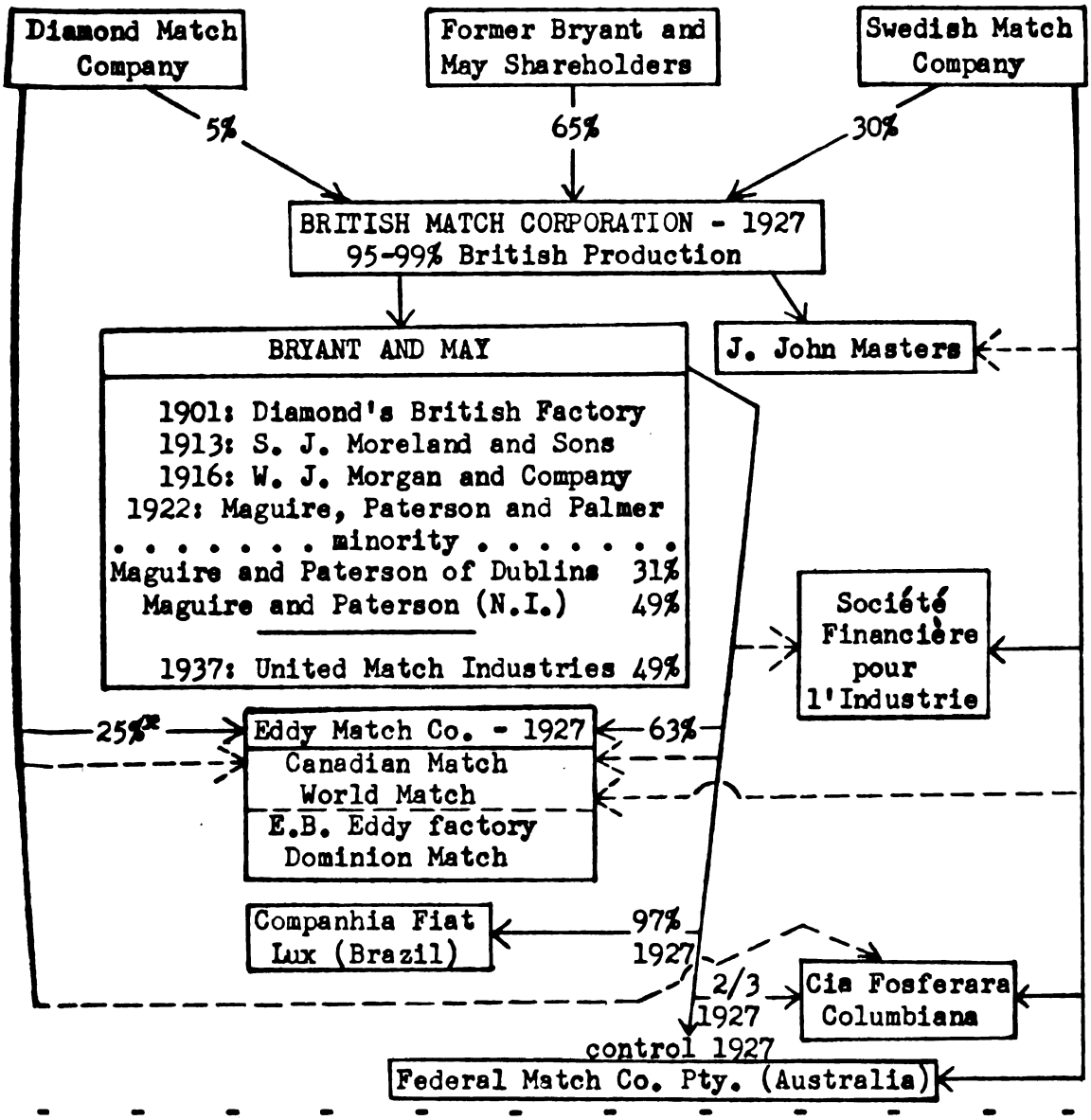
their lifetime connection, likely to be renewed at the disbandment of the Control Office, or by the transitory regulating organisation?

The death of Ivar Kreuger removed an impelling force for the rationalisation of the world's wooden match industry and opened up the possibility, perhaps even the likelihood, of a crumbling of the monopolistic structure. Financial advantage, however, which had been the cynosure in the creation of the cartel, kept the edifice intact. The continuance of the Swedish Match Company, which had been more crucial than British Match in building the world-wide monopoly, meant continuing monopoly gain. That greater prospect of recovering handsomely from the bankruptcies of some of the Swedish Match interests brought immediate response from the numerous creditors and stockholders. The strenuous efforts by many prominent persons, exerted on an international scale, toward the restoration of the durable Swedish Match empire met with signal success.[33]

Whether or not[34] the historic conduct of British Match and its predecessor Bryant and May was typical in all instances of the general policy, the behaviour did demonstrate the effectiveness of the means employed both to achieve monopoly and to retain it. The British actions were by no means either unique or always original within the industry. They had often been carried out in concert with one or both of the other leading match producers. Each member of the match triad, Swedish, British and American, was from time to time the instigator of one or more of

the many schemes of monopolising that have been described. The greater relevance of the British pattern of behaviour rests upon the fact that the British Match Corporation has always been the majority stockholder in the Eddy Match Company and has therefore had the uninterrupted ability to determine and direct the activities of its Canadian subsidiary, although active American management was characteristic of Eddy during much of its existence.

THE POSITION OF THE BRITISH MATCH CORPORATION
IN BRITISH AND WORLD MARKETS




M A R K E T  A L L O C A T I O N

| Diamond Match | British Match | Swedish Match |
|---|---|---|
| | British Isles | |
| United States | British Commonwealth outside Asia | Continental Europe |
| | | Asia |
| | Canada[x] | |
| | Trinidad | |
| | Australia - N.Z. | |
| | Brazil | Spanish America |
| | Argentina | |
| | Colombia | |
| | Africa | |

x Diamond sold its interest in Eddy Match in 1956.

1. supra, ch. 1, p. 12; ch. 2, p. 23.
Canadian Match Report, p. 7.
British Match Report, pars. 16, 20.
Isaac F. Marcosson, "The Match King," Saturday Evening Post, Oct. 29, 1929, p.4.

2. supra, ch. 2, p. 26.

3. Parliamentary Debates, House of Commons, Apr.20, 26 and 27, 1871, cols. 1414-16, 1723, 1775-76.
New York Times, May 24, 1927, p. 26.

4. Supra, ch. 3, p. 48.
British Match Report, par. 20.
Marcosson, p. 233.
United States of America v. The Diamond Match Company et al. (April 9, 1946) Civil No. 25-397, U.S. District Court, S.D.N.Y., Complaint, pars. 40, 41; Answer, pars. 40, 41.

5. supra, ch. 3, p. 47.
British Match Report, pars. 26, 75, 96.
Canadian Match Report, p. 14.
Civil No. 25-397, Answer, pars. 35, 99.

6. Report of a Sub-Committee Appointed by the Standing Committee on the Investigation of Prices to Enquire into the Price of Matches (Cmd. 924 : 1920), p. 10.
British Match Report, pars. 19, 22, 122, 125.

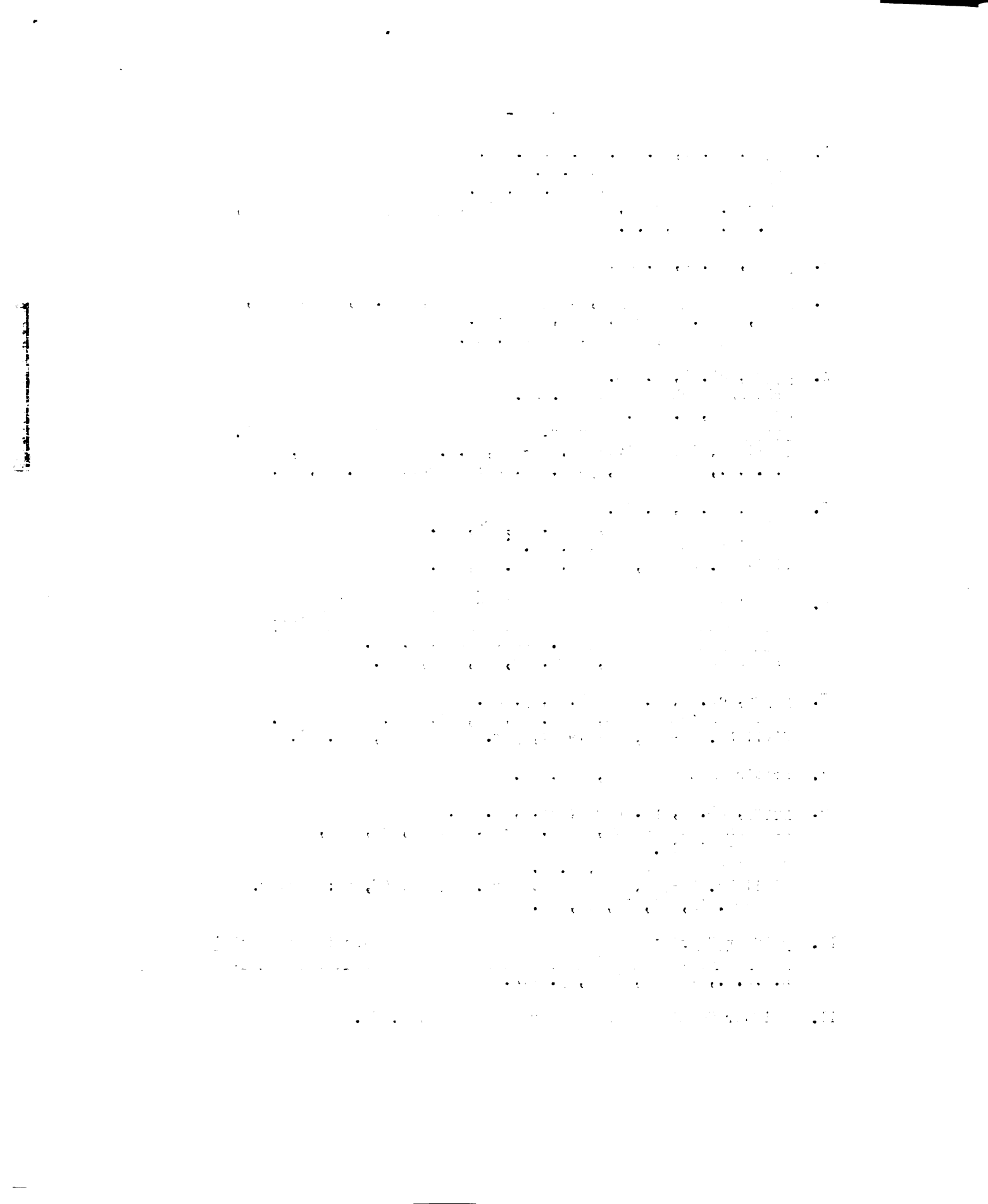
7. supra, ch. 2, p. 29; ch. 3, p. 49.
British Match Report, pars. 18, 23, 24, 138, Appendix 2.
Civil No. 25-397, Complaint, par. 51; Answer, par. 51.

8. British Match Report, par. 28.

9. supra, ch. 3, pp. 48-50; ch.2, p. 36.
British Match Report, pars. 26-28, 30, 32, 37, 138, Appendix 11.
Canadian Match Report, p. 9.
Civil No. 25-397, Complaint, pars. 54, 55, 57, 58; Answer, pars. 54, 55, 57, 58, 59.

10. Balfour Committee on Industry and Trade; Factors in Industrial and Commercial Efficiency, Part I of a Survey of Industries, H.M.S.O., London, 1927, p. 114.

11. Balfour Committee on Industry and Trade, p. 85.



12. supra, ch. 3, pp. 49, 50.
British Match Report, pars. 31, 66, 72.
Canadian Match Report, pp. 14, 15, 18.
Eddy Match Case Transcript, vol. 12, pp. 2902, 2911, 2913.
Civil No. 25-397, Complaint and Answer, pars. 54, 55, 57, 58.

13. British Match Report, par. 35.

14. British Match Report, pars. 26, 27, 29, 32, 35, 36, 40, 48.
Civil No. 25-397, Answer, pars. 56 and 57.

15. Civil No. 25-397, Complaint and Answer, pars. 67, 68, 70-73, 74, 75-78.
Fortune, May, 1939, p. 170.
New York Times, June 24, 1932, p. 27.

16. supra, ch. 3, p. 61.

17. Civil No. 25-397, Complaint, par. 88; Answer, pars. 79-84, 86, 87, 88; Final Judgment, pars. 3-5, 15, Appendix A.
New York Times, Dec.4, 1932, II, p. 5.

18. supra, ch. 2, p. 34.
British Match Report, pars. 33, 37, 48.
New York Times, Nov.30, 1932, p. 27.
---- , Jan. 7, 1934, II, p. 7.
---- , Mar. 6, 1934, p. 9.
---- , Mar. 10, 1934, p. 3.
---- , Apr. 6, 1935, p. 27.
---- , May 24, 1935, p. 31.

19. British Match Report, pars. 34, 49, 51, 65, Appendix 4A, sec. 12.

20. British Match Report, pars. 40, 41.

21. British Match Report, par. 66.

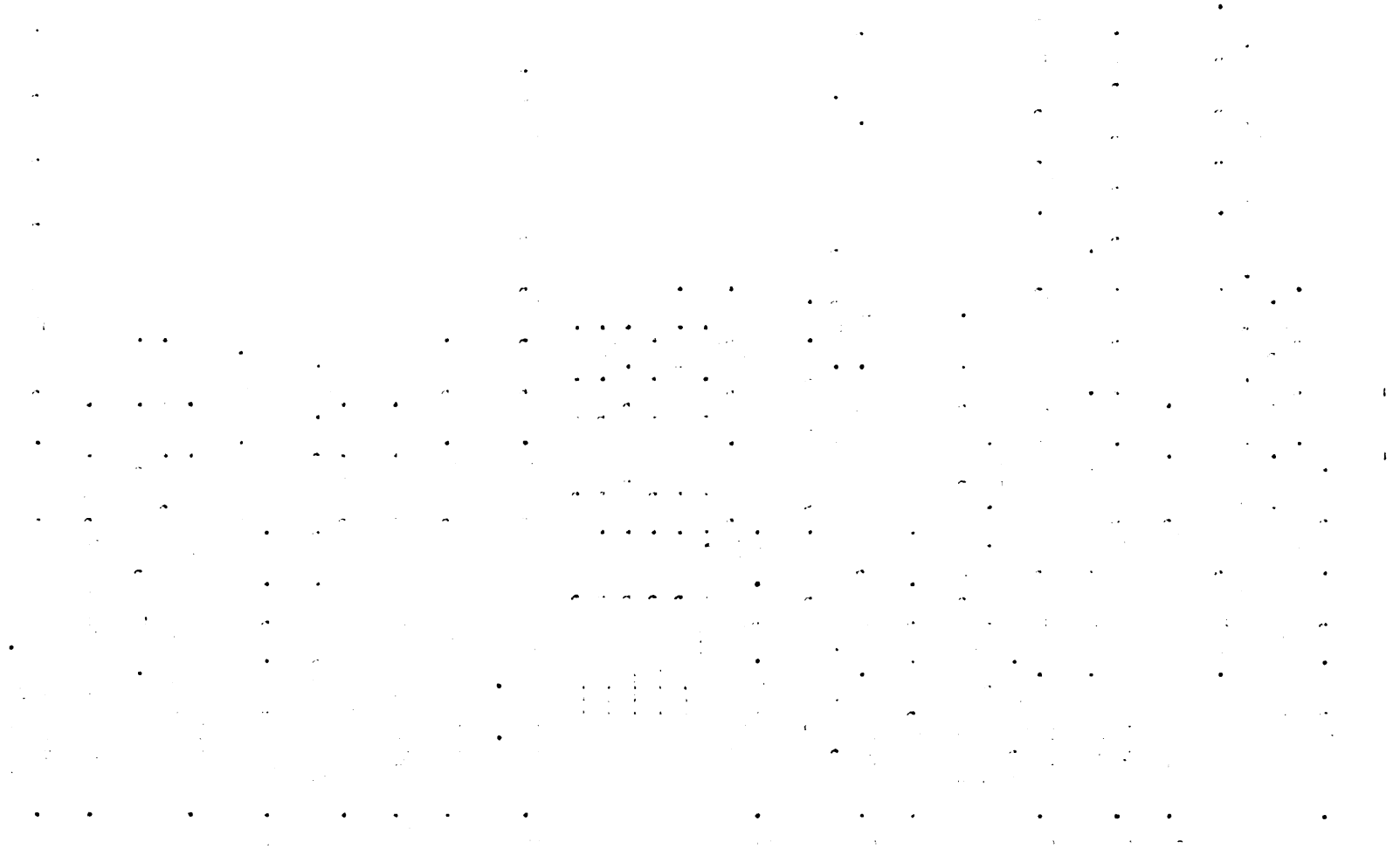
22. British Match Report, par. 67.
The Times, Sept. 29, 1955, p. 14.

23. supra, ch. 2, p. 26.
British Match Report, pars. 77-83.

24. British Match Report, par. 85.
Canadian Match Report, pp. 38, 105.
Civil No. 25-397, Answer, par. 102.

25. British Match Report, par. 88.

26. British Match Report, pars. 38, 133-41, 144, 145, 147, 199, Appendix 7.



27. British Match Report, pars. 133, 148.

28. British Match Report, pars. 14, 142, 166.

29. British Match Report, pars. 42, 130, 131.

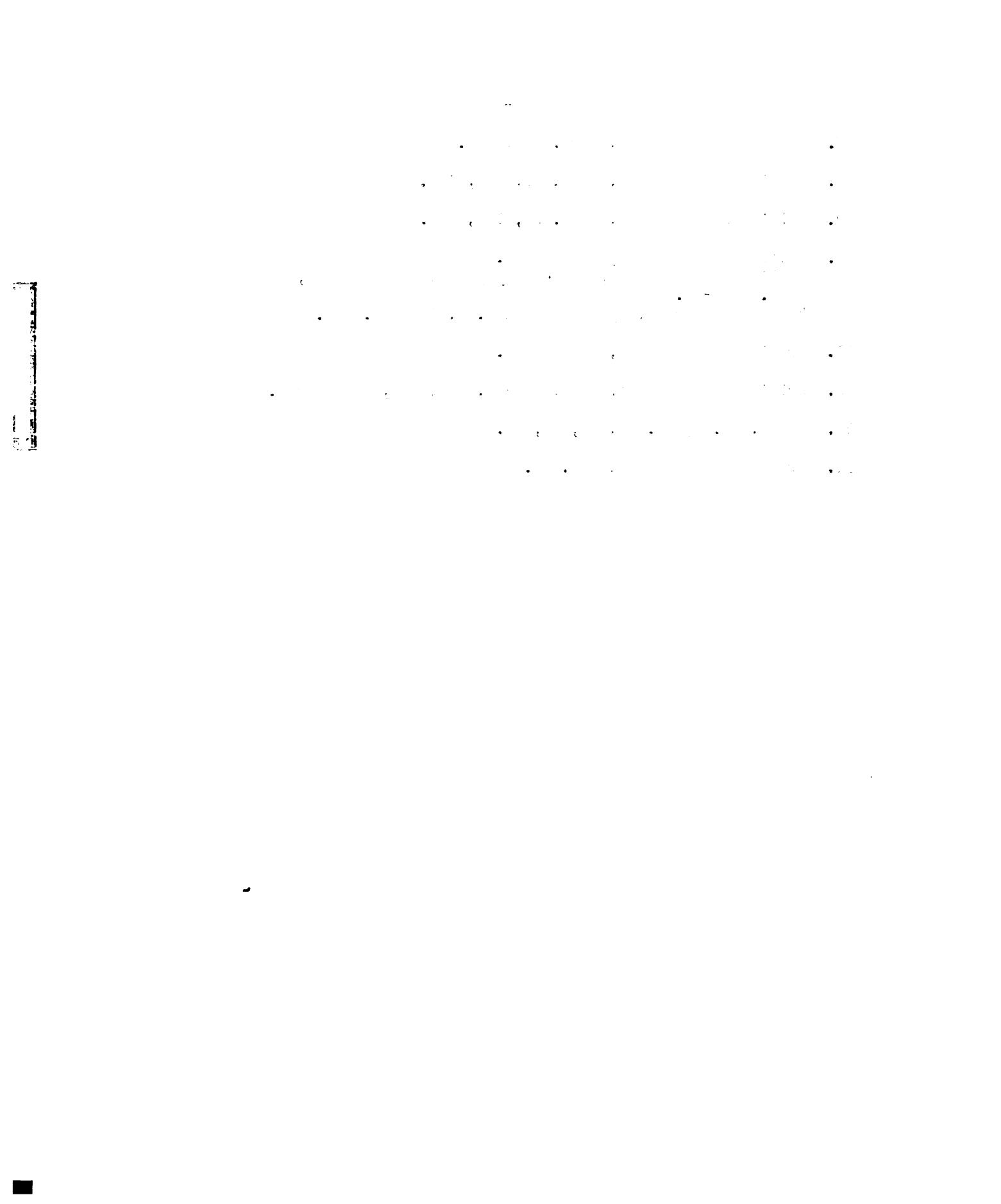
30. British Match Report, Appendix 5.
Parliamentary Debates, House of Commons, 25 June 1953, cols. 2076-77.
"More Red Matches," Economist, Aug. 1, 1953, p. 346.

31. British Match Report, Appendix 4.

32. British Match Report, pars. 118-23, 127, 128, Appendix 3.

33. supra, ch. 2, pp. 34, 35, 38, 39.

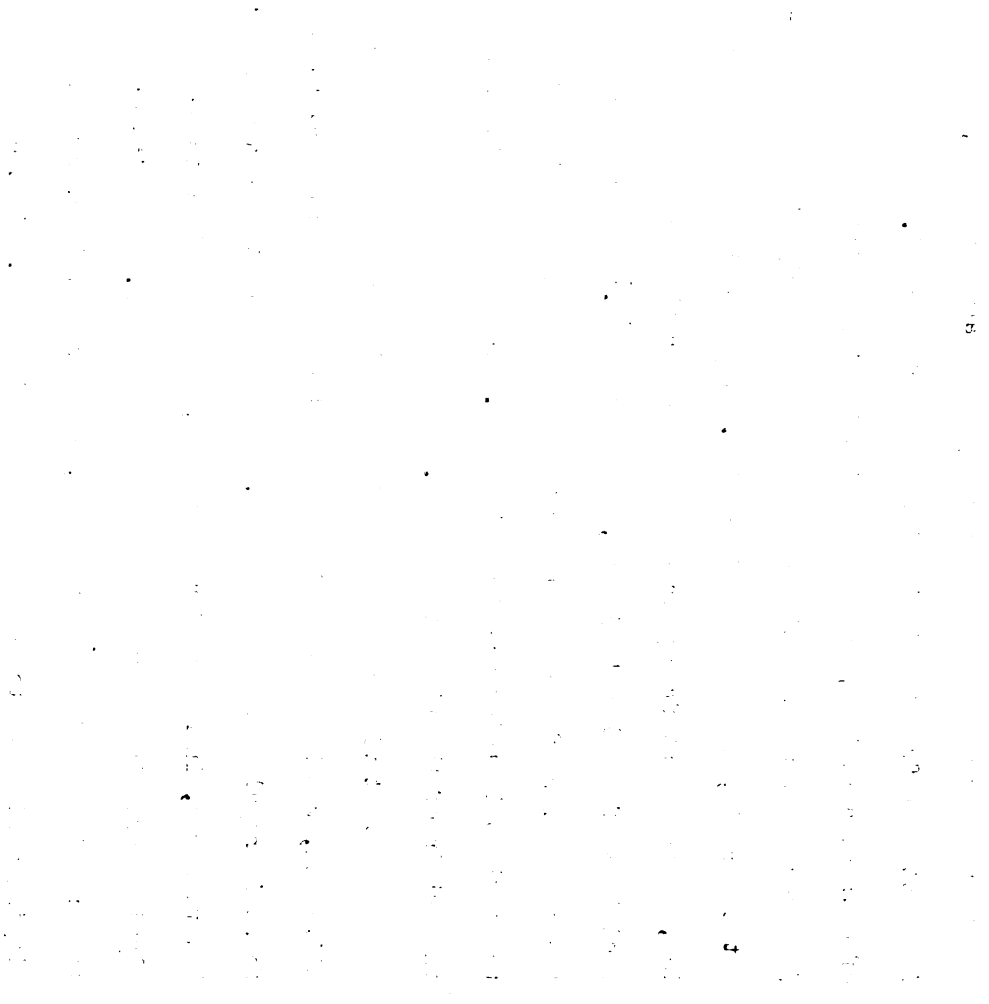
34. British Match Report, par. 89.



## Chapter 5

The independent growth of the English Common Law, indigenous and less and less influenced by Roman and Canon Law, stemmed in great part from the judicial reforms of Henry II. The Assize of Clarendon in 1166, marking the institution of itinerant justices who would shortly be making almost yearly visits throughout the realm, marked a turning-point. The growth of the Common Law, by precedent from year to year based on the successive decisions of the king's judges, had well begun.[1] The vigour of the opposition of the common law to monopoly and restraint of trade gives it relevance for this study. In the common law lay the origin of the right to compete.[2]

That vigour was much evident during the reign of Queen Elizabeth, who had become pleased with the abundant treasure to be found in royal grants of monopoly. One such grant gave a courtier Edward Darcy, in return for an annuity, the sole right to make playing cards in England for a term of 21 years. In spite of that royal monopoly grant to Darcy, another man,Allen, caused playing cards both to be made and to be imported. In the



resulting lawsuit the monopoly license was declared unlawful. There has been little improvement on the statement concerning the monopoly problem found in that case.

> The sole trade of any mechanical artifice, or any other monopoly, is not only a damage and prejudice to those who exercise the same trade, but also to all other subjects, for the end of all these monopolies is for the private gain of the patentees; and although provisions and cautions are added to moderate them, it is folly to think that there is any measure in mischief or wickedness: and, therefore, there are three inseparable incidents to every monopoly against the commonwealth. First, that the price of the same commodity will be raised, for he who has the sole selling of any commodity, may and will make the price as he pleases. . . . The second incident of a monopoly is, that after the monopoly granted, the commodity is not so good and merchantable as it was before: for the patentee having the sole trade, regards only his private benefit, and not the common wealth. Third, it tends to the impoverishment of divers artificers and others, who before, by the labour of their hands in their art or trade, had maintained themselves and their families, who now will of necessity be constrained to live in idleness and beggary.[3]

The opposition of the common law to monopoly is here focussed upon monopoly created by an act of the ruler. Private efforts at restraint had been and were being equally condemned. If there were to be restraints on trade, they were to arise in Parliament.

That staunch position was reinforced in the reign of James I by the famous Statute of Monopolies, which declared, "all Monopolies . . . are altogether contrary to the Laws of this Realm, and so are and shall be utterly void and of none Effect, and in no wise to be put in Use or Execution." Provision was made that persons "hindred, grieved, disturbed or disquieted" by monopolies "shall recover Three Times so much as the Damages which he or they sustained."[4] In less than 100 years a breach

was made in the apparently impregnable wall against monopoly.

Reynolds had leased a bakery to Mitchell for five years and undertaken not to carry on the trade of baker during that time within the parish. There was a penalty of £50 for breaking the agreement. Mitchell brought suit because of Reynolds returning to baking. The defendant pleaded that the bond was void because it was a restraint on trade. The court held the bond and its restraint good, declaring

> That to obtain the sole exercise of any known trade throughout England, is a complete monopoly, and against the policy of the law.
> That when restrained to particular places or persons (if lawfully or fairly obtained), the same is not a monopoly.
> That it is lawful upon good consideration, for a man to part with his trade.
> That no man can contract not to use his trade at all.

Voluntary restraint of a man's working his lawful trade was firmly defended by the court in these words, ". . . a man may, by his own consent, for a valuable consideration, part with his liberty."[5] A parish was a narrow confine to a monopoly, but it was wider than a ban.

That smooth sailing did not lie ahead for monopoly was manifest in the middle of the eighteenth century in a matter concerning separate proprietors of salt works in Droitwich. They had made an agreement, under penalty of £200, not to sell salt under a certain price which exceeded the price then received for it. Although the articles of agreement had been subsequently cancelled, the court granted an information regarding the affair.

> Lord Mansfield declared, that if any agreement was made to fix the price of salt, or any other necessary of life (which salt emphatically was), by people dealing in that commodity, the Court would be glad to lay hold of an opportunity, from what quarter soever the complaint came, to shew their sense of the crime; and that at what rate soever the price was fixed, high or low, made no difference, for all such agreements were of bad consequence, and ought to be discountenanced.[6]

There had not yet been any giving ground with respect to fixing prices by agreement, an activity of considerable fascination to many engaged in various businesses.

The frequent calls on Adam Smith in defense of private enterprise being left to its own devices make most illuminating some examination of the Scot's observations on merchants and manufacturers. He considered that, although they had frequently persuaded others that their interest was the public interest, the merchants' judgment was actually much better regarding their own interest and, at the same time, was not always given with the greatest candour. Concluding them to be an order of men "who have generally an interest to deceive and even to oppress the public, and who accordingly have, upon many occasions, both deceived and oppressed it," Adam Smith held that any proposal from dealers "ought never to be adopted till after having been long and carefully examined, not only with the most scrupulous, but with the most suspicious attention." The idea of some restraints being valid, propounded in the case of the bakers,[7] had had no discernible effect on his 1776 appraisal of the merchant and competition.

> The interest of the dealers, however, in any particular branch of trade or manufactures, is always

> in some respects different from, and even opposite to, that of the public. To widen the market and to narrow the competition, is always the interest of the dealers. To widen the market may frequently be agreeable enough to the interest of the public; but to narrow the competition must always be against it, and can serve only to enable the dealers, by raising their profits above what they naturally would be, to levy, for their own benefit, an absurd tax upon the rest of their fellow-citizens.[8]

The champion of free enterprise was thus renewing the plea for competition and sounding the alarm against restraint of trade at the close of the eighteenth century. Private firms could well be left free of government interference whenever competition had destroyed their separate abilities to "deceive and oppress" the public. His firm charge to view with the "most suspicious attention" proposals from dealers would have come to be sometimes dishonoured by the public's gullible assent.

The confines of the validity of a partial restraint were gradually being widened by the shifting opinions of the British justices. A late eighteenth century common law case concerned a surgeon and his assistant. The defendant Mason had been taken on as an assistant to a Thetford surgeon, to remain so at the pleasure of the plaintiff, under a £200 bond not to practice himself within ten miles of the town for fourteen years after leaving the service of the surgeon. Dismissed after two years, Mason did not keep his undertaking. The court ruled for the plaintiff, holding the bond good in law. The court's conviction in the matter was expressed in the words of the chief justice:

> This question has been at rest ever since the case of Mitchell v. Reynolds. A bond in restraint of trade cannot be arbitrarily taken, and without consideration; some consideration must appear. But here, the plaintiff being established in business as a surgeon at Thetford, the defendant wished to act as his assistant with a view of deriving a degree of credit from that situation; on which the former stipulated that the defendant should not come to live there under his auspices and steal away his patients: this seems to be a fair consideration for the bond. Then it was objected that the limits within which the defendant engaged not to practice are unreasonable: but I do not see that they are necessarily unreasonable, nor do I know how to draw the line. Neither are the public likely to be injured by an agreement of this kind, since every other person is at liberty to practise as a surgeon in this town.[9]

The common law was displaying some of the characteristics of shifting sand, moving in a changing environment. A further extension of the valid bounds of particular restraints was accomplished within a decade in a case involving London attorneys.[10] A practising attorney relinquished his business and recommended his clients to two other attorneys for the valuable consideration of two separate £1,000 payments and seven yearly payments of £600. He agreed not to practise within London and 150 miles thence. The larger space and unlimited time may have been thought by the court a quid pro quo for the more handsome consideration. That issue was not raised. The contract was held valid.

Three years earlier the law had taken a different turn in regard to two important questions -- monopoly and the vesting of a private concern with public interest. The monopoly case dealt with rumours and actions designed to enhance the price of hops, which were endowed at law with the European quality of a

victual. The treatment was swift and sure with 4 months' imprisonment and a £500 fine. The court offered an instructive comparison of private and public, in the guise of the Crown, acts of this kind.

> This in its nature is like the offence of monopolizing, which has never been denied to be highly criminal at common law, tending to the destruction of trade and to the enhancing of the price of commodities to the public. It would be absurd to suppose that this power which has been denied to the Crown should be considered as a lawful practice in an individual. For before the stat. 21 Jac. 1, c.3, the procuring licenses from the Crown for a monopoly was an offence at common law.[11]

Matters appeared as firm as they had been regarding monopoly in the playing card case of monopolies[12] in 1602.

The refusal in 1800 by the London Dock Company to accept for storage 40 pipes of wine was cause for a significant action. The company's warehouse was the only lawful place for storing imported wine without payment of duty. The complaint was based upon the refusal when it had been established that there was sufficient space available. The chief justice addressed his remarks to the problem of any duties that a private concern might bring upon itself under such circumstances.

> The question on this record is whether the London Dock Company have a right to insist upon receiving wines into their warehouse for a hire and reward arbitrary and at their will and pleasure, or whether they were bound to receive them there for a reasonable reward only. There is no doubt that the general principle is favored both in law and justice, that every man may fix what price he pleases upon his own property or the use of it: but if, for a particular purpose, the public have a right to resort to his premises and make use of them, and he have a monopoly in them for that purpose, if he will take the benefit of that monopoly, he must as an equivalent perform the duty attached to it on reasonable terms.
>
> . . .

> Here then the company's warehouses were invested with the monopoly of a public privilege, and therefore they must by law confine themselves to take reasonable rates for the use of them for that purpose. . . . as long as their warehouses are the only place which can be resorted to for this purpose, they are bound to let the trade have the use of them for a reasonable hire and reward.[13]

Although the company's right to renounce a use of its premises which vested them with a public interest was not directly examined, the court stated without qualification that there was no right of a partial renouncement.

The common law at the opening of the nineteenth century was proscribing the private fixing of prices regardless of the effect on prices. Swift and stern punishment awaited those individuals who sought to enhance prices by monopolistic practices or otherwise. Although the emphasis on the original royal creation of monopoly persisted, that the common law brought under its band private monopolising was directly declared in court pronouncements such as: "It would be absurd to suppose that this power which has been denied to the Crown should be considered as a lawful practice in an individual." The law was holding that public use of private property endowed it with a public interest, thereby binding its private owners to receive only a reasonable reward for its use. From an earlier complete prohibition on restraints of trade, the common law was now drawing a distinction between general restraints, which continued to be found unlawful, and particular restraints, which were being held valid and in circumstances of wider and wider compass. Reasonableness opened the floodgates to particular restraints. Reasonableness remained

a moot question.

The forceful separation of the American colonies from England gave rise to a change more in the form than in the substance of government. The American Revolution was not a revolt against the common law of England. The emergence of the American nation brought forth a new species of the same genus. Variations would arise between the species, English and American; some measure of their organic unity would survive. Distinct legislative development would play, of course, an increasingly important role, though by no means cutting off entirely the historic continuity of the common law. Confederation, accomplishing the peaceful creation of the Canadian nation in 1867, would introduce a third common-law species, Canadian, which was to remain closer to its progenitor until separate legislative enactment transformed it.

An early nineteenth century dispute in Massachusetts pointed up the common legal currents flowing in England and America and brought forth, as well, evidence of the ever-changing character of judicial decisions. In support of its decision, the Massachusetts court chose to cite an English case from the reign of James I before the passage of the Statute of Monopolies. That was from a world that was, at the same time, judicially defending competition against impairment by royal fiat and abetting its impairment by particular private restraints. This ebb and flow ran from the perpetual conflict between freedom to contract and freedom to compete. Without the taint of conspiracy, the former would prevail in many situations. The English affair was a matter

of shopkeeping at Newport on the Isle of Wight. One Jollyfe had sold "divers old and sullied wares" to shopkeeper Broad for their original cost of £300 although they were not then worth half that. For that Jollyfe "assumed he would not then any longer keep a mercer's shop in Newport." He nevertheless did and Broad claimed £500 damages. One justice dissenting, the court rejected a medieval judgment that a similar obligation was void, because an element of compulsion made it inapplicable in this case, and held the shopkeepers' agreement good at law for three specific reasons: first, the arrangement was voluntary; second, there was valuable consideration; and third, the restraint was confined to a particular place. The plaintiff was awarded £40. That judgment was affirmed by the justices and Barons of the Exchequer in 1621,[14] just two years before the enactment of the Statute of Monopolies.

The American court had thus reached back for common-law support of its decision much further than was the custom of its contemporary English counterparts. Running a stage from Boston to Providence was the subject of the Massachusetts suit. Joseph Pierce had bought for $290 the stage-coach, horse and "privileges benefit and profit" of the defendant, who had been running a stage. For $1 Stephen Fuller had agreed, under penalty of $290, not to run a stage any longer. Such an agreement was held valid in these terms:

> Bonds to restrain trade in general are unquestionably bad, as tending to create monopoly injurious to the public. But bonds to restrain trade in particular places may be good, if executed for a sufficient and reasonable consideration.
>
> . . .

> The public appear to have no interest in this question. If the plaintiff did not run his stage, the defendant might run a stage; for it could not be in opposition to the plaintiff's stage. And it is indifferent to the public, which of these run a stage.[15]

The common-law acceptance of partial restraints of trade was clearly operating on both sides of the Atlantic. Only the precept of Allnutt v. Inglis might mitigate the apparently ominous outlook for competition seen in the Massachusetts court's declaration that the "public appear to have no interest in this question." That precept might demand only "a reasonable reward," thereby avoiding the "absurd tax" warned against a generation earlier by Adam Smith. Such a contingency was not before the court.

Two cases, one Canadian and one American, decided in 1871 contrasted the divergent developments of the common law. An 1844 act of the Houses of Parliament was significant in the Canadian judgment, which extended still further the area in which monopolistic elements might lawfully operate. That act, effective on July 4th, abolished in Great Britain the common-law offences of "forestalling, regrating, and engrossing."[16] Its influence on the common law was felt in Ontario, which was soon to incorporate in its statutes the Imperial Statute of Monopolies of James I. It was perhaps honoured more in the breach than the observance; the life of the Statute of Monopolies has been long rather than vigorous.

The Canadian Salt Association, comprising 7 companies, had been formed as a domestic sales cartel for the mutual protection of the member companies and for selling salt on terms such

as to secure as far as possible a fair share for their invested capital. All salt produced was to be sold through the Association. A suit was brought against a member selling outside the group. The defense rested upon the agreement being against public policy because it tended to a monopoly and was in restraint of trade. The opinion of the court will be quoted in some detail to mark clearly the position that "successive decisions of the king's (and the queen's) judges" had established.

> It is out of the question to say that the agreement which is the subject of this bill had for its object the creation of a monopoly, inasmuch as it appears from the bill that the plaintiffs and defendants are not the only persons engaged in the production of salt in the province, and therefore the trade in salt produced here by other persons, and in salt imported from abroad, will remain unaffected by the agreement, except in so far as prices may possibly be influenced by it. The objection on this head is rather that the agreement has for its object the raising the price of salt, and for that reason is illegal, as constituting the old common-law offence of "engrossing," or at least is void as being against public policy.
>
> . . .
>
> The common law which was so severely applied in this case (referring to The King v. Waddington) has since been abolished in England by the statute 7-8 Vic., c.24; and although I have been unable to discover that any similar legislation has taken place in this country, I cannot suppose that a law which would strike at a vast number of transactions which, with manifest benefit and profit to the community, are daily being entered into without the least suspicion on the part of those engaged in them that they are doing wrong, would now be applied as part of our common law. . . . I must therefore conclude that long usage has brought about such a change in the common law since the decision in The King v. Waddington, that even if it could be said that the object of the parties to the agreement in question here was to enhance the price of salt, the contract would be neither illegal nor against public policy.
>
> Were I to hold this agreement void on any such ground, I should be laying down a rule, which if applied, would cause great inconvenience in trade, and one, the necessity for which would at this day be discountenanced by all public and scientific opinion.

> . . .
> I think a distinction would be found in the consideration that here the article, the price of which was to be regulated, was not to be purchased in the market, but was actually to be produced by the parties themselves, and this product they could not be compelled to part with except on their own terms. Then the object of the agreement was not unduly to enhance the price, but as it is expressly alleged in the bill, to enable the parties by concerted action to combat an attempt on the part of foreign producers and manufacturers unduly to depreciate it. I know of no rule of law ever having existed which prohibited a certain number (not all) of the producers of a staple commodity agreeing not to sell below a certain price -- and nothing more than this has been agreed to by the parties here.

The contract was held valid. As long as some remained outside, the number in such an agreement, be it 20 or 2, was irrelevant. It was a partial restraint of trade by equal partners, with no one submitting to the will of a majority. The court had sustained freedom of contract against freedom of competition on the grounds that a contract should not be made void on an opinion of public policy.[17] The successive judges had carried the common law very far indeed in two and a half centuries. They had heralded the legislative banishment of the common law across the Atlantic and had ignored the napping watch-dog from the days of James I. Adam Smith's admonition to view business proposals with the "most suspicious attention" went unheeded.

The American case of that same year turned its attention to the coal industry. Five Pennsylvania coal firms had made a contract to divide the two coal regions they controlled, thereby acquiring control of the entire market for bituminous coal in northern Pennsylvania. The court's decision expressed a position in sharp contrast to that of the Ontario court and more in

keeping with the English judicial position of the previous century. The following part of the opinion begins speaking to the allegation that the purpose of the agreement was lowering costs.

> This is denied by the defendants; but it seems to us it is immaterial whether these positions are sustained or not. Admitting their correctness, it does not follow that these advantages redeem the contract from the obnoxious effects so strikingly presented by the referee. The important fact is that these companies control this immense coal field; that it is the great source of supply of bituminous coal to the State of New York and large territories westward; that by this contract they control the price of coal in this extensive market, and make it bring sums it would not command if left to the natural laws of trade; that it concerns an article of prime necessity for many uses; that its operation is general in this large region, and affects all who use coal as a fuel, and this is accomplished by a combination of all the companies engaged in this branch of business in the large region where they operate. The combination is wide in scope, general in its influence, and injurious in effects. These being its features, the contract is against public policy, illegal, and therefore void.

The court indicated that it felt there was a "baleful influence" against the public in restricting supply and raising prices. It addressed itself also to the question of a distinction between individual and collective acts.

> The effects produced on the public interests lead to the consideration of another feature of great weight in determining that illegality of the contract, to wit, the combination resorted to by these five companies. Singly each might have suspended deliveries and sales of coal to suit its own interests, and might have raised the price, even though this might have been detrimental to the public interest. There is a certain freedom which must be allowed to every one in the management of his own affairs. When competition is left free, individual error or folly will generally find correction in the conduct of others.[18]

That decision indicates an awareness that combination may set running riot against the public those individual hindrances, which

would be separately and unaided by concerted action of small avail. The combined danger goes beyond the simple sum of the little dangers. "The combination is wide in scope, general in its influence, and injurious in effects."

At this same period the 1870 Constitution of the State of Illinois had declared "all elevators or warehouses where grain or other property is stored for a compensation, whether the property be kept separate or not, . . . to be public warehouses." An act of the legislature the following year set maximum rates for storage and handling. Munn and Scott operated a warehouse, public under these legal circumstances, in Chicago without the proper license or bond; they charged rates higher than those established by the 1871 law. The lawsuit was an attempt to put into effect the business proposition that government interference was not to be countenanced. The 14 Chicago grain warehouses, owned by about 30 persons, were controlled by 9 firms, which had got into the knack of charging agreed rates that were published each year. The court maintained that ". . . it is apparent that all the elevating facilities . . . may be a 'virtual' monopoly." Setting forth that the common law supported the Illinois legislation, the court held that the facts of the situation, irrespective of constitution or law, endowed the business with a public interest. The power to regulate under such conditions was explained by the court.

> Undoubtedly, in mere private contracts, relating to matters in which the public has no interest, what is reasonable must be ascertained judicially. But this is because the legislature has no control over such a contract. So, too, in matters which do affect the public interest, and as to which legislative control

> may be exercised, if there are no statutory regulations upon the subject, the courts must determine what is reasonable. The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charge, as one means of regulation, is implied. In fact, the common-law rule, which requires the charge to be reasonable, is itself a regulation as to price. Without it the owner could make his rates at will, and compel the public to yield to his terms, or forego the use.[19]

That was certainly an acceptance of the common-law position in 1800 in Allnutt v. Inglis[20] and possibly an extension. It was an old legal principle given new effect. The common law was now appearing to be in more vigorous opposition to monopoly and its attendant abuses in the United States than in Canada.

The successive British decisions were continuing their design of grander provinces open to particular restraints of trade. An 1880 decision of some interest covered the whimsical but profitable world of champagne. It was sought to restrain by injunction a nephew, departed from the family importing firm, from representing any other champagne house for 10 years. That scheme had earlier enjoyed the nephew's approval. He was now, however, looking to other champagne provinces. The court denied him in these terms, enhancing the scope of particular restraints:

> There is no absolute rule that a restraint of trade which extends to the whole kingdom is void.
>
> . . .
>
> The question of extent is really a question of reasonableness, and the reasonableness must vary with the facility of the means of communication. If a trade is carried on over a wide extent, either through a whole country or through a whole continent, there is nothing unreasonable in the restraint being equally extensive.[21]

An injunction restrained nephew Rousillon from importing champagne into Britain for 10 years. The entire world of champagne was encompassed now by the accomodating common law.

A more notable historic figure played a part in impelling judicial attention to the broad affair of conspiracy. Charles Stewart Parnell and his colleagues showed no concern for restraints of trade; they had more active involvement in conspiracy. The court outlined the tenet that a combining converts private wrongs, with their customary civil remedies, into public wrongs which enter the criminal sphere, extending properly to the prevention of their recurrence. That principle has relevance, of course, in a study of Canadian, or American, policy toward the entire problem of monopoly and of trade restraints in particular. On the question of the law of conspiracy, the court stated,

> . . . it is not intended to confine the definition to an act that would in itself be a crime or an offence; but that law extends to and may embrace many cases in which the purposes of a conspiracy, if done by one only, would not be a criminal act, as for instance, if several combined to violate a private right, the violation of which would be wrongful if done by one, though not in itself criminal. . . . Conspiracy has been aptly described as divisible under three heads--where the end to be attained is in itself a crime; where the object is lawful, but the means resorted to are unlawful; and where the object is to do injury to a third party or to a class, though if the wrong were effected by a single individual it would be a wrong but not a crime.[22]

In contrast with American antitrust action, which may move forward by either civil or criminal proceedings, the Canadian anti-combines policy is effected only through criminal proceedings. The basic statute lies in the Criminal Code, a field reserved to the Dominion Government. There is found in the "cease and desist" orders and the consent decrees of the United States more flexibility, which may, of course, bend more than one way, in accomplishing the

prevention of a recurrence of acts or arrangements that have been established as undesirable. Before entering further, however, into the statutory means of carrying out public policy, it will be useful to sum up the legal and judicial position regarding monopoly and restraint of trade, and to sketch the economic developments, which prevailed at the time of the historic enactment of the original Canadian and American laws.

The English common law ban on all restraints of trade, arising in medieval times, had become less than universal. Its denunciation of monopolies created by government had received statutory support. From lack of application that statute of James I was becoming drastically weaker, perhaps moribund. At the very moment monopoly was being declared against the public interest because it brought about higher prices, poorer quality, and the reduced incomes accompanying unemployment, particular restraints of trade were being found valid--but a slight breach in the defence of competition. The issue generally concerned a private, restrictive contract and was usually raised by the aggrieved party seeking enforcement. The violator, in an aptly cunning way, often sought refuge in the defense that the restraint was against public policy and therefore void. Such a finding by a court meant the contract was unenforceable and, by way of a prize for the ruse, not actionable. In spite of its apparent temptation, that course of action for the repudiator was not too frequently wise; the justices were accepting without compunction restrictions of wider and wider compass, especially in affairs between vendor

and purchaser. The aggrieved ones had neglected their Latin, caveat emptor. Valid restraints were simply being extended as trade was ranging further and further. At least by the early nineteenth century American judges were adopting a similar line of reasoning. New state laws defining areas of conspiracy were at the same time introducing new limits to the scope of restrictive covenants that would be enforced. Aside from that mild check, the courts persistently found valid contracts in restraint of trade, once they were satisfied that the terms were reasonable in regard to the interests of the parties; they did not find such contracts against public policy and hence void, even though reasonableness with respect to the public interest was declared criterion in such cases.

From the mid-eighteenth century when the activities of the Droitwich salt producers had elicited Lord Mansfield's dictum that agreements fixing price, high or low, "were of bad consequence and ought to be discountenanced," there had been a steadfast ban on price-fixing arrangements, with no "reasonable" excape route left open for the fixers. The career of monopoly was more checkered. The Statute of Monopolies of 1623 introduced formally the idea of a patent, rewarding a new idea with a monopoly for a definite term of years. A Victorian law ended the offences of forestalling, regrating and engrossing, but did carry on specifically the offence of "knowingly and fraudulently spreading or conspiring to spread any false Rumour, with Intent to enhance or decry the Price of any Goods or Merchandise."[23] The outright

banishment of these sturdy curtailments to the monopolists came about in large part through default, by the customarily severe penalties being imposed less and less frequently. Historians have been typically silent on the rôle that the rising business interests may possibly have played in this statutory repeal of the common law. There may have been differences between the interests of business and the public interest.[24] After a seemingly hopeful but fruitless search for a like repeal in his country, a nineteenth century Canadian justice, in another "salty" case, drove off the common law protection against enhancing price on the grounds that otherwise too many current transactions would be affected. He fortified that astonishing position with the observation that monopoly could not have been the object of the 20 salt producers concerned, because it had not been completely accomplished. As well as being left unhindered in their combining, the Ontario salt manufacturers were thus praised implicitly for their unquestioned ability to reach their self-appointed goals. And an extra pathway was shown to prospective monopolists--producers are distinguished from mere marketers in that the former may do as they like with their own manufacture.

The beginning of the nineteenth century in England saw the firm establishment of the principle that private properties enjoying government franchises -- duty-free warehouses, docks and the like -- were vested with a public interest. As long as that public interest survived, because of the particular use of the private property, regulation was the right, if not even the duty,

of the government or the courts in order to prevent the private levying of Adam Smith's "absurd tax." American adoption of that precept took on much wider significance, holding that private property, not always endowed by government with any special position, once invested with a public interest because of its economic position or an appropriate use, was clearly open to regulation, extending to the specific form of price control.[25] In some contrast to the nineteenth century Canadian position, there were American decisions setting forth that the act of combining made unlawful some acts that would in an individual have been detrimental to the public but nevertheless not preventable. The combining was the essence of the offence. English agreeing, restraining, and combining continued apace only mildly checked by judicial rulings; many former bans had become ghosts.

Adam Smith's powerful indictment of the governmental interferences of mercantilistic times unleashed strong forces worshipping his "unseen hand." The mood of the time leapt over his stern warning of the likely conflict of interest between business and the public. But for him competition was the sine qua non of uncontrolled private enterprise; that was what destroyed the ability of individual businesses effectively to deceive or oppress the public. That vital heart of the rationale of free enterprise was overlooked. As any lingering suspicion that private good and public good do not necessarily melt into one general good waned, the early restraints on the corporate form of conducting business were discarded. The English consolidation in

1845 of laws regulating companies was silent on the crucial matter of one company owning shares in others.[26] In the United States, almost at the very moment the trust device, so vastly useful in promoting monopoly, was being weakened in the public interest, the State of New Jersey broke new ground in 1888, in what was to become a competition in laxity among the states, with a law permitting a corporation to own stock in other corporations. The holding company had been born. The knell of the old companion of monopoly truly sounded the debut of a sturdier ally -- an unheeded tocsin for the public.

That was also the year of a Congressional investigation of trusts. Although the first great wave of combining in the United States was to come at the turn of the century, the early ones were much in evidence before the Sherman Act. To cite but a few for illustrative purposes -- Pennsylvania coal had fallen into the hands of a few by the 1870's; the Standard Oil trust controlled about 90 per cent of the industry by 1882; the "meat trust" was catalytic in the Congressional action that produced the Sherman Act; the Diamond Match consolidation of virtually the entire industry soon after 1880 was a phenomenon described by the Chief Justice of the State of Michigan as "destructive of free institutions" and "repugnant to the instincts of a free people." British combination was to be essentially a twentieth century phenomenon, although it is of interest to note at least a single nineteenth century achievement. The first British joint-stock industrial consolidation was the Salt Union of 1888, which had

acquired control of 90 per cent of the industry in the United Kingdom. Much had been done since the Droitwich pronouncements of 1758. Strong beginnings had been made in Canada in such products as newsprint, coal, groceries, barbed wire, coffins, and in fire insurance, although the first flood of combinations was to come at the end of the first decade of the twentieth century.[27]

The process of monopolising was under way. There was no automatic governor, which would halt the process as it accelerated. If the results were inimical to the public interest, then combining to achieve those results would necessarily be criminal in a world of Anglo-Saxon legal history. Did a remedy lie in the common law indictment of criminal conspiracies? Monopoly and its denunciation had been living in the world together too long to make tenable the thesis that an adequate remedy could be found in the common law. The proscriptions needed to be more definite and exact, independent of the shifting economic outlook of the judges. Legislation should define the crime and prescribe the penalty.[28]

1. C.W. Previte-Orton, The Shorter Cambridge Medieval History, 2 vols., Cambridge University Press, England, 1952, pp. 606, 805 et passim.

2. Vernon A. Mund, Government and Business, Harper and Brothers, New York, 1950, p. 56.

3. Darcy v. Allen (1602) (Moore, K.B. 671) 77 E.R. 1260 at 1263.

4. (1623) 21 Jac. I, c.3.

5. Mitchell v. Reynolds (1711) (1 P. Wms. 181) 24 E.R. 347 at 349-50.

6. The King v. Norris et al. (1758) (2 Keny. 300) 96 E.R. 1889.

7. supra, ch. 5, p. 103.

8. Adam Smith, An Inquiry into the Nature and Causes of the Wealth of Nations, J.M. Dent and Sons, London, 1910, pp. 231-32 (Book I, Chapter XI).

9. Davis v. Mason (1793)(5 T.R. 118) 101 E.R. 69 at 70.

10. Bunn v. Guy (1803) (4 East 190) 102 E.R. 803.

11. The King v. Waddington (1800) (1 East 143) 102 E.R. 56 at 67.

12. supra, ch. 5, p. 102.

13. Allnutt v. Inglis (1800) (12 East 527) 104 E.R. 206 at 210.

14. Broad v. Jollyfe (1619) (Cro. Jac. 596) 79 E.R. 509.

15. Pierce v. Fuller (1811) 8 Mass. 223 at 225 and 227.

16. (1844) 7-8 Vic., c. 24.

17. Ontario Salt Co. v. Merchants Salt Co. (1871) 18 Ont. Gr. 540 at 541-44 et passim.

18. Morris Run Coal Co. v. Barclay Coal Co. (1871) 68 Pa. 173 at 184-87.

19. Munn v. Illinois (1877) 94 U.S. 113 at 114 and 131-34.

20. supra, ch. 5, p. 107.

21. Rousillon v. Rousillon (1880) 14 Ch. D. 351 at 355-56.

22. The Queen v. Charles Stewart Parnell et al. (1877-82) 14 Cox C.C. 508 at 513.

23. (1844) 7-8 Vic., c. 24, s.4.

24. supra, ch. 5, pp. 104-105.

25. "Lord Hale and Business Affected with a Public Interest," Harvard Law Review, March, 1930, p. 759.

26. (1845) 8-9 Vic., c. 16.

27. A variety of economic history books.
Richardson v. Buhl et al. (1889) 43 N.W. 1102 at 1110.
Report of the Royal Commission on Price Spreads, Ottawa, 1935, p. 28.
Report of the Royal Commission in re the Alleged Combination of Paper Manufacturers and Dealers (1902) 1-2 Edw. VII Sessional Paper No. 53.

28. Arthur M. Allen, "Criminal Conspiracies in Restraint of Trade at Common Law," Harvard Law Review, May, 1910, p. 548.

# Chapter 6

The absence of any significant British legislation coping with either monopoly or restraint of trade for more than another half century leaves uninterrupted further examination of the course of the common law, obdurate in the face of rapidly changing economic conditions. The American and Canadian enactments, giving expression to the rising concern over the increasing concentration of economic power, seemed to have no discernible impact upon British opinion. There was to be, on the other hand, considerable impact upon the Canadian scene originating at the common law. Early Canadian legislation in this field was to have but slight effect upon the course of the common law <u>in Canada</u>. English common law was to be especially influential for many more years, because of the fact that the House of Lords remained the highest court of appeal in the Canadian judicial system.

A decision in 1892 added considerably to the effective scope of valid restrictive covenants, continuing in England that particular aspect of common law development at a time when

Canadian and American legislation was attempting to impose narrower limitations on monopolistic activities. The suit concerned shipping. A shipowners' association, which excluded some shipowners, was regulating schedules and sharing cargoes. It offered a 5 per cent rebate to shippers for using only ships belonging to members of the association. On suitable notice members were at liberty to withdraw from the association. One of the excluded shipowners, the Mogul Steamship Company, brought an action, alleging a conspiracy to injure that company. The associated owners had sent extra ships to ports of the Far East where Mogul was looking for business, and offered reduced rates which were for Mogul unremunerative. It was admitted that this procedure was for the object of preventing competition. The judgment of the Court is instructive regarding the common law position.

> And, upon a review of the facts, it is impossible to suggest any malicious intention to injure rival traders, except in the sense that in proportion as one withdraws trade that other people might get, you, to that extent, injure a person's trade when you appropriate the trade to yourself.

The Court considered that line of argument to be a sufficient reductio ad absurdum to dispose of it as a suggestion of unlawfulness. The scheme of the shipowners was held to be the lawful carrying out of the lawful object of protecting and extending trade and increasing profits. An uncritical appraisal of price-cutting in combination was set out by the Court.

> All commercial men with capital are acquainted with the ordinary expedient of sowing one year a crop of apparently unfruitful prices, in order by driving

> competition away to reap a fuller harvest of profit in the future; and until the present argument at the Bar it may be doubted whether shipowners or merchants were ever deemed to be bound by law to conform to some imaginary "normal" standard of freights or prices, or that law courts had a right to say to them in respect of their competitive tariffs, "Thus far shalt thou go, and no further."
>
> . . .
>
> There is nothing in the evidence to suggest that the parties to the agreement had any other object in view than that of defending their carrying-trade during the tea season against the encroachments of the appellants (Mogul) and other competitors, and of attracting to themselves custom which might otherwise have been carried off by these competitors. That is an object which is strenuously pursued by merchants great and small in every branch of commerce; and it is, in the eye of the law, perfectly legitimate.

There was silence with regard to the economic distinction between such conduct on the part of an individual and on the part of a monopolistic combination. The Mogul Steamship Company was denied relief.[1]

The next British judgment of note followed in two years. A patentee, in consideration of £200,000 paid to him, transferred his business and patents to a company manufacturing guns and ammunition with the stipulation that he would not engage, directly or indirectly, in such business for 25 years, except on behalf of the purchaser. Regardless of the agreement the seller made business arrangements with another manufacturer, whereupon the first company sought to have the contract enforced. Reversing the trial judgment, the Court of Appeal upheld the agreement on the basis that it was no wider than necessary for the company's protection and not injurious to the public interest. The Judicial Committee

of the Privy Council, recalling that as late as 1793 a county town and 10 miles round was so wide as to be unreasonable but noting also that restrictions may agree with the area in which the protection is required, sustained the Court of Appeal and held the agreement valid in a judgment that was to be frequently cited in the future.

> It appears, however, to me that the time for a new departure has arisen and that it should be now authoritatively decided that there should be no difference in the legal considerations which would invalidate an agreement whether in general or partial restraint of trading. These considerations, I consider, are whether the restraint is reasonable and is not against the public interest. In olden times all restraints of trading were considered primâ facie void. An exception was introduced when the agreement to restrain from trading was only from trading in a particular place and upon reasonable consideration, leaving still invalid agreements to restrain trading at all. Such a general restraint was in the then state of things considered to be of no benefit even to the covenantee himself; but we have reached a period when it may be said that science and invention have almost annihilated both time and space. Consequently there should no longer exist any cast-iron rule making void any agreement not to carry on a trade anywhere. The generality of time or space must always be a most important factor in the consideration of reasonableness though not per se a decisive test.[2]

Widening commercial activity could bring justification for broader and broader restraints of trade.

Recalling that the eighteenth conduct of salt producers had elicited a court dictum against price-fixing gives special interest to a later lawsuit involving salt. A combination, successor to the Salt Union of 1888, regulating the supply and keeping up prices, had practical control of the inland salt market in England. The Electrolytic Alkali Company, not a member of the combine, agreed to sell to the combination 18,000 tons of salt

each year for four years at a fixed price and to produce no other salt for sale. It then sold salt in violation of the contract, ensuing the salt combine to sue for the enforcement of the restrictive agreement. The outsider's defence was weakened by the failure to raise directly the question of an illegal contract and the reliance on evidence showing illegality as against public policy. Court rules of procedure meant that illegality could enter only if the plaintiff's case indicated that the contract was ex facie illegal. The trial judge held the agreement valid. A majority of the Court of Appeal ruled the contract void on the grounds that it had to be read with the agreement to combine. It was then quickly seen to be part of a scheme for securing a monopoly and therefore unlawful. A further appeal to the House of Lords resulted in the restoration of the trial judgment holding the contract enforceable. Although that decision rested partly upon the procedural matters raised by the bumbling defence omitting material evidence which could not later be introduced, there was another important element, reminiscent of the Ontario Salt case:[3]

> In the present case there was no attempt to establish a real monopoly, for there might have been great competition from abroad or from other parts of these islands than the part which was the field of the agreement.

The rules of procedure prevented the presentation of evidence that might upset that judicial conjecture, once the original pleadings began with the fatal error of omission.[4] The decision was to be cited on several occasions without qualification. A decision becomes a precedent, whether or not the barristers were the most able

in the realm. Scant import was attached here to the impact upon a potential competitor of the element of combining or conspiring by the members of the shipping ring. There was evident an insensitivity to the substantive change in the effect of an act, such as sending in more ships, because of it being in concert, not individual.

That the courts, making decisions at common law, would more closely circumscribe the restraints that might be enforced between employer and employee, than those between buyer and seller, was demonstrated in a 1916 judgment relating to the manufacture of hoisting machinery in the United Kingdom. The individual in question had worked for the country's leading concern since leaving school at the age of 15. After some years he was in their employ as an engineer under contract, which required the company giving him 4 months' notice and which bound him for 7 years after the end of his employment with the company not to engage in any business connected with the sale or manufacture of hoisting equipment in the United Kingdom. There was a further provision that he was to divulge no company information to outsiders. After leaving the company, he worked for a French competitor when he was unable to find non-competitive work. He joined a Manchester competitor before the 7 years had elapsed. The company then started an action to obtain an injunction preventing him from continuing his new employment. It subsequently dropped its claim under the clause against divulging information. The trial judge declared the restraint reasonable with regard to the firm because of the

special nature of its work, and one that he would enforce between vendor and purchaser. The restrictive covenant was nevertheless unreasonable with respect to the man and prejudicial to the public and therefore not enforceable. Two appeals left the trial judgment untouched, the contract void. Extended quotations from the final judgment illustrate the court's outlook regarding several matters. The initial attempt of the company to bring a claim on the grounds of information being divulged entered the judgment in a prevocative way, suggesting to prospective monopolists the wisdom of not trying too hard.

> The matter, though to a great extent immaterial, since the appellants admit they cannot establish that any breach of this covenant was committed by the respondent, or even threatened, is not without some significance inasmuch as it tends to show that what the appellants desired from the first was that the respondent should be restrained from using in the service of some other employer that skill and knowledge which he had acquired by the exercise of his own mental faculties on what he had seen, heard, and had experience of in the employment of the appellants themselves.

There was considerable concern expressed over the way in which the contract has sought to deprive Saxelby of his most appropriate means of livelihood; in that context the breadth of the restriction was deemed "oppressive."

> If that is what is meant, then such oppression, if it existed, does not concern him alone. The general public suffer with him, for it is in the public interest that a man should be free to exercise his skill and experience to the best advantage for the benefit of himself and of all those who desire to employ him. And, in cases like the present, the public interest in respect of such restrictions and the interest of the covenantor if they are not coterminous certainly overlap.

In giving recognition to the strife between the rights

of competition and of contract, the court stated that "no person has an abstract right to be protected against competition per se in his trade or business." The onus of establishing the reasonableness of a restraint rests on the person so alleging; that having been satisfied, the onus of establishing that such a contract is injurious to the public and hence void rests on the person so alleging. The court drew a definite distinction between a sale involving goodwill, which is enhanced in value by restrictive contracts, and the employer-employee relationship.

> Trade secrets, the names of customers, all such things which in sound philosophical language are denominated objective knowledge--these may not be given away by a servant; they are his master's property, and there is no rule of public interest which prevents a transfer of them against the master's will being restrained. On the other hand, a man's aptitudes, his skill, his dexterity, his manual or mental ability--all those things which in sound philosophical language are not objective, but subjective--they may and they ought not to be relinquished by a servant; they are not his master's property; they are his own property; they are himself. There is no public interest which compels the rendering of those things dormant or sterile or unavailing; on the contrary, the right to use and to expand his powers is advantageous to every citizen, and may be highly so for the country at large.

This discountenancing of restricting the availability of a man's talents to advance himself and the welfare of the community offers a contrast to some decisions that have already been examined. The court stated the basis underlying cases concerned with restraints, which may shed some light on the apparent inconsistencies:

> . . . when such an agreed restraint is made the basis of a claim for injunction, (1.) it is not enough to table the agreement; (2.) facts and circumstances must be set forth which would warrant the law being invoked,

> and the statement of these facts and circumstances must set out the specialties affecting the relations of parties, or the particular necessities of the case, so as to overcome the presumption which the law makes in favour of the free disposal of one's own labour; (3.) if such facts and circumstances be relevantly set forth, the onus of proof is upon the party averring them to satisfy the Court of their sufficiency to overcome the presumption; while (4.) as the time of the restriction lengthens, or the space of its operation extends, the weight of that onus grows.

The attention of the court was directed more closely to the problem of monopoly by the citing of Mitchell v. Reynolds (1711) 24 E. R. 347 at 350:

> The true reasons of the distinction upon which the judgments in these cases of voluntary restraints are founded are, 1st, the mischief which may arise from them, 1st, to the party, by the loss of his livelihood, and the subsistence of his family; 2ndly, to the public by depriving it of an useful member.
>
> Another reason is, the great abuses these voluntary restraints are liable to; as for instance, from corporations, who are perpetually labouring for exclusive advantages in trade, and to reduce it into as few hands as possible; as likewise from masters, who are apt to give their apprentices much vexation on this account, and to use many indirect practices to procure such bonds from them, lest they should prejudice them in their custom, when they come to set up for themselves.

In holding out that case to be the "most outstanding and helpful authority," one of their lordships described the decisions varying, at least on the surface, over the years in terms of the precedent laid down by the judgment in Mitchell v. Reynolds:

> These principles, my Lord, are far-reaching and enlightened. In my opinion they may have been now and then in the course of these two centuries obscured; they have never been lost.[5]

That might almost be taken as an announcement of the revival of the earlier common law indictment of restraints of trade after a

time of obscurity so great as to seemingly foreshadow oblivion. For although a partial restraint was approved by the court, it was narrowly construed. The dangers of voluntary restraints of trade were described by this "most outstanding and helpful authority" to include the perpetual efforts of corporations to secure exclusive advantages and to confine the industry to as few hands as possible. In spite of these resounding pronouncements, the common law was shortly to play no part at all during the creation of such vast consolidations in the 1920's as Imperial Chemical Industries. Direct acquisition of competing properties was not to come under the indictment of conspiring to eliminate competition.

The next landmark case faced the significant economic question of freedom of entry but was, unfortunately for the desirability of a concise judgment on that specific issue, clouded by the parties coming to court with unclean hands. The National Federation of Retail Newsagents, Booksellers and Stationers was devoted to the purpose of limiting the number of shops in any given area. The attempt to accomplish that was by means of having members stop purchasing from a wholesaler who supplied any retailer opening without permission of the union. In these circumstances Sorrell, a retail newsagent, switched his buying from an offending wholesaler to Watson and Sons. The first wholesaler raised the problem with the Circulating Managers' Committee of the principal London daily newspapers. The newspapers took the view that restricting the number of retail outlets was injurious

to their interests. The Committee therefore threatened to stop supplying Watson and Sons unless that wholesaler cut off papers to Sorrell. Sorrell's contract was thereupon terminated. He sought an injunction to restrain the wholesaler from that action in combination or otherwise. The injunction granted by the trial judge was withdrawn in the Court of Appeal. A further appeal affirmed the withdrawal of the injunction, thereby establishing that the newspaper combination was lawful. The court spoke to two chief issues: the distinction between lawful and unlawful combination and problem of a dispute between trader and trader over different policies to further their separate sets of interests.

> (1.) A combination of two or more persons wilfully to injure a man in his trade is unlawful and, if it results in damage to him, is actionable.
>
> (2.) If the real purpose of the combination is, not to injure another, but to forward or defend the trade of those who enter into it, then no wrong is committed and no action will lie, although damage to another ensues.
>
> The distinction between the two classes of cases is sometimes expressed by saying that in cases of the former class there is not, while in cases of the latter class there is, just cause or excuse for the action taken.
>
> . . .
>
> . . . on the one hand a lawful act done by one does not become unlawful if done with an intent to injure another, whereas an otherwise lawful act done by two or more in combination does become unlawful if done by the two or more in combination with intent to injure another.
>
> . . .
>
> . . . motive or intent when the act itself is not illegal is of the essence of the conspiracy.

Thus a combination, injuring another business while acting on a coldly selfish motive, will find that its selfishness is its way to exoneration. The importance of selfishness in sustaining a

combine makes that a valuable legal precept for combining firms. That the vital economic issue of freedom of entry was beclouded, perhaps not actually met at all, is seen by the court's attention to the differing policies of the retailers and the newspapers.

> The plaintiff struck the first blow, and when it was countered by a similar blow struck by the defendants ran to the Court for protection. His attitude recalls the saying of a French author: "Cet animal est très méchant; quand on l'attaque, il se défend." Apparently he forgot that if the defendants were acting illegally then so was he, and that if he was acting illegally a Court of equity would hardly be disposed to help him. I think that in this case it was proved that the defendants took action for the sole purpose of protecting their own trade, and accordingly that they have not committed or threatened to commit any wrong and are not liable to any proceedings.[6]

Keeping out of their minds the prospect of injuring a real or imaginary competitor, a combination might proceed with impunity to corral the industry for itself.

After decades of silence regarding the second criterion for determining the validity of a partial restraint of trade--reasonableness with respect to the public interest,[7] the courts exhumed "the public interest" to void an innocuous restrictive covenant. The plaintiff had been retired for nearly ten years on a pension, which his former employers had granted him on the understanding that it would cease if he were to enter the wool trade, which was the business of the firm. The plaintiff, of course, had no such intention. As an economy measure in the 1930's the firm terminated his pension payments. The 70 year old plaintiff sought relief in the courts. It was held that he was not entitled to the pension as a right on either of two counts: it had been

voluntary and gratuitous, giving rise to no legal obligation or it was a restraint of trade that was void by reason of being against public policy. Other examples of departure from the generally accepted view that restraints reasonable to the parties are in the public interest are unknown.[8] That use of the "disinterred public interest" surely fell short of being a blow for freedom of competition, although it might be argued it was a step in the direction of considering economic policy.

That there were limits imposed on partial restraints of trade was shown in an appeal from the Canadian courts, which had declared the agreement valid in a case apparently involving simply the sale of a restriction. Two Vancouver firms held brewers' licenses. One had brewed only sake from rice; the other had brewed only beer. There were no other brewers in the city and only a few others in the province. In a 1927 agreement the sake producer, for $15,000, sold and assigned the goodwill of its license except for sake to the beer producer. The vendor agreed not to engage in the beer business for 15 years, under a $15,000 penalty. On subsequently receiving legal advice that the contract was probably not enforceable, the sake producer warned of proposed action in disregard of the contract. Action was brought by the purchaser for a declaration that the agreement was valid and for an injunction to prevent the sake producer from engaging in the brewing or selling of beer. Noting in a judgment that reversed the Canadian judgments that the "beer goodwill" of a firm that had not made beer must be a most insubstantial item, the Privy

Council declared,

> It was a case, . . ., not of restrictive covenants in aid of a sale, but of a sale in aid of restrictive covenants.
>
> . . .
>
> The restrictive covenants in the present agreement, when submitted to those tests, are at once seen to present unusual features. They are not inserted as being reasonably necessary to render a sale effectual in the interest of both parties, for there is no transaction of sale to be protected. Nothing has been sold. Nor is it a case of an arrangement among traders to submit themselves to mutual restrictions on their activities in the common interests of all parties. It is simply a case of the appellants undertaking to the respondents in consideration of a sum of money paid to them that they will not for fifteen years carry on a particular branch of business. That is the whole substance of the agreement. If there was any sale, it was a sale by the appellants of their liberty to brew beer and a purchase by the respondents of protection against the possible competition of the appellants in the brewing of beer.

Observing that a "bare covenant not to compete" had never been upheld, the final judgment found the agreement invalid and unenforceable. Its ban had extended to the whole world. In view of the implied approval of rather comprehensive restraints suggested in the above quotation, it may be worth marking a further statement of the court: ". . . his liberty to trade is not an asset which the law will permit him to barter for money except in special circumstance and within well recognized limitations."[9] Such law, of course, even where it does discountenance the restrictive conduct of firms, affords no protection to the public interest in freedom of competition, unless there is a falling out among those combining to lessen or eliminate competition. Under those conditions the refusal of the courts to enforce certain contracts in restraint of trade is at best a mild deterrent to other

potential monopolisers and a usually weak punishment for those in current conflict over their earlier agreement. The English common law leaves the matter in the state of "Heads they win; tails they forget about it." For outside parties who may be injured incidentally by the covenant, the law may be stated succinctly: "A contract in unreasonable restraint of trade is unenforceable; it is not illegal in any criminal sense, nor does it give a cause of action to any third party injured by its operation."[10]

A recent judgment striking down a contract in restraint of trade appears to rest upon two considerations, one of which is relevant to this study. The defendant had become an employee of the plaintiff after having been in the service of another credit draper. In an agreement entered into some time after his joining the second firm, the defendant undertook that for 5 years after the termination of his employment with the plaintiff he would not solicit any customers on the firm's books during the immediately preceding three years. The firm on the other hand had agreed to give the defendant two weeks' notice. A large proportion of the customers had dealt with the defendant during his previous employment. Upon his leaving the plaintiff and continuing to solicit the same customers, an action was brought seeking to restrain the defendant from further breaches of contract. A county court judged the contract quite unreasonable and therefore void. The court of Appeal sustained that decision and denied leave to appeal further. The appeal judgment spoke to two question--free

competition and the employer-employee relationship. There is certainly the possibility that the second carried more weight in determining the judgment. The court's statements may be weighed.

> . . . the customers of one credit draper can always be canvassed and are likely to be canvassed by other credit drapers. In a sphere where competition is normally free, since every householder is a potential purchaser, and where successful selling must to some extent depend on the personal abilities of particular salesmen and also to some extent on the quality or attractiveness of the goods which the salesman's employer can offer, a period of five years' banishment from particular doorsteps seems to me to be in any event of wholly unwarranted duration.

Although that might be interpreted to indicate some concern for keeping open free channels of trade, a concern perhaps strong enough to have decided the case, nevertheless many earlier decisions suggest that the matter of the usually limited bargaining position of an individual employee is more likely to have been the prevailing consideration. The court's attention in this regard was expressed as follows:

> During the last forty years the courts have shown a reluctance to enforce covenants of this sort. They realise that a servant has often very little choice in the matter. If he wants to get or to keep his employment, he has to sign the document which the employer puts before him; and he may do so without fully appreciating what it may involve. Moreover, if these covenants were given full force, they would tend to reduce his freedom to seek better conditions, even by asking for a rise in wages; because if he is not allowed to get work elsewhere, he is very much at the mercy of his employer.[11]

In any event the restrictive covenant was struck down, succeeding judgments may choose to rely on the "competitive" argument to support subsequent declarations that similar restraints are invalid. The possibility is there; judicial opinion will choose.

A final English case treats of the difficulties arising from a national effort to curb the activities of international combinations. Some of the implications will be examined more fully later in the study. As a part of the world-wide cartel arrangements in the chemical industry, a 1946 agreement between the American company, du Pont, and the British company, Imperial Chemical Industries, Limited, assigned the du Pont patents for the manufacture of nylon in most of the British Commonwealth to ICI. The following year ICI entered into a contract granting exclusive licenses under those patents to British Nylon Spinners, Limited. The latter company was 50 per cent owned by ICI and 50 per cent owned by the major British textile concern, Courtaulds.[12]

A diversion into the mysteries of English company law will provide some insight of value in understanding the subsequent developments in the British nylon industry. The matters which are especially relevant deal with the relationship between a company and its stockholders and with the question of determining whether or not a company is the subsidiary of another company. A late nineteenth century decision of the House of Lords settled the first point; the second point rests upon statute.

After many years as a leather merchant and boot manufacturer on his own account, one Aron Salomon sold his business to a limited company with 40,000 shares authorized capital. The business was solvent at the time of the sale. He received 20,001 shares and six members of his family received 1 share each, making up the total of 20,007 shares outstanding. An outsider, Mr.

Broderip, held some bonds and Mr. Salomon held some debentures. Slightly more than a year after the incorporation, default on the bond interest brought the company into compulsory liquidation. The extinguishment of the Broderip claim left a balance of about £1055 to satisfy the unsecured creditors' claims of over £7700 and the claims of debenture holder Salomon. The courts had found that a succession of strikes had caused the insolvency. The lower courts had ruled that Salomon was personally liable for the total debts--the trial court on the grounds that the company was the mere agent for the appellant, Salomon, and the Court of Appeal on the basis that the company was the trustee of the appellant. The House of Lords denied both grounds, reversed the lower decisions and allowed the appeal. They held it was irrelevant who owned the debentures. It was common knowledge that the law gives priority in a winding-up over trade creditors to debenture holders. Judicial decision could not rest upon a dissatisfaction with that law. The position of the artificial creature of the state was cogently described.

> The company is at law a different person altogether from the subscribers . . .; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them.[13]

A company is without doubt a separate, distinct, independent entity before the law.

The statutory definition of a subsidiary makes it possible for companies, through careful planning, to enjoy a situation that is at least superficially an anomaly. It may be

that a jointly owned company is held to be independent of the owners, being the subsidiary of neither. The appropriate statutory provision is best cited directly.

> . . . a company shall, . . ., be deemed to be a subsidiary of another if, but only if--
> (a) that other either--
> (i) is a member of it and controls the composition of its board of directors; or
> (ii) holds more than half in nominal value of its equity share capital; or
> (b) the first mentioned company is a subsidiary of any company which is that other's subsidiary.

"Control" is stated strictly to mean "without the consent or concurrence of any other person."[14]

The examination of the lawsuit of British Nylon Spinners may now be continued. In 1952 a United States District Court ordered, subject to a saving clause allowing ICI to comply with laws outside the United States in spite of the judgment in the Southern District of New York, the cancellation of the 1946 du Pont-ICI agreement and the reconveying to du Pont of all patent rights that had been assigned to ICI. In an action brought by British Nylon Spinners to obtain performance of their exclusive contract with ICI, the English Court of Appeal found the agreement to be a good one between two English parties, beyond the reach of the law of the United States, thereby entitling British Nylon Spinners to performance. It was disclosed that the agreement in question had replaced a 1939 du Pont-ICI agreement that assigned the nylon market in England and certain parts of the Commonwealth exclusively to ICI. Two points are noteworthy. The exclusive contract was declared valid on the basis that British

Nylon Spinners is an independent company. Most national efforts at handling international cartel arrangements are going to impinge on the comity of nations, and are likely to be greatly weakened in so doing. The Court of Appeal spoke to this, pointing out that the case

> involves the extent to which the courts of one country will pay regard and give effect to the decisions and orders of another country. I certainly should be the last to indicate any lack of respect for any decision of the district courts of the United States, but I think that in this case there is raised a somewhat serious question whether the order, in the form it takes, does not assert an extra-territorial jurisdiction which the courts of this country cannot recognise, notwithstanding any such comity.[15]

Although that particular device of the chemical cartel members proved immune to American antitrust proceedings, there was a most noticeable effect on the Canadian scene. It was ironic that the impact occurred where the law has customarily a minimal influence--corporate consolidation. One of the orders of the 1952 judgment required that du Pont and ICI terminate most of their joint ownerships, which had been one way of stabilising market-sharing arrangements. The two companies decided to split up their Canadian company, Canadian Industries Limited, in which each held 41.3 per cent of the capital, the remainder being in the hands of the public. Du Pont obtained in its piece, du Pont of Canada, 3 plants producing nylon and cellophane, involving 2800 employees and $74,000,000 in assets with a $60,000,000 annual sales volume; $16,800,000 in cash and securities compensated for the smaller asset value, and an undisclosed sum was the quid pro quo for the CIL trade mark. The British piece was temporarily

called CIL (1954), but is now again under the original name, Canadian Industries Limited. It comprises 20 plants producing farm chemicals, plastics, paints, explosives and chemicals, with 6,000 employees and assets worth $101,000,000 with an annual sales total of $100,000,000; it retains the CIL trade mark. The long run effect of the split may be vaguely in the direction sought by the United States District Court, although a duopoly does not represent a startling change from a monopoly. One observer has reported the short run effect of the division in these words: "Officials of the two companies are as chummy as ever, habitually sit together at the 'CIL table' in the Montreal Engineers Club. Presidents Smith and Lank fraternize publicly, name each other to civic committees."[16] The new companies are subsidiaries even in the strict British sense, but they are operating under Canadian law, which has not so far brought them under attack.

Aside from Parliamentary enactments, dealing principally with the misuse or disuse of patents, the nationalisation of industries, and monopoly and restrictive practices, English law, attached to the tenet of individual freedom of trade (and of contract) in a world that has become increasingly involved in collective organisation to promote the economic interests of the combining group and to oppose the interests of outsiders, has not raised significant barriers to monopolising. In these circumstances monopoly has often been achieved by the group most powerful at the outset of the struggle. The Mogul Case[17] drew broadly indeed the confines of legally valid combination. It is

perhaps not too extreme to suggest that only pure vindictiveness unaccompanied by economic self-interest would strike down mutual restraints of trade. The trenchant assessment of a competent legal observer states the matter thus:

> The courts have gradually come to recognise as legitimate, within very wide limits, the power of group organisation to replace the individual in the economic struggle. The recognition, at first halting in the case of collective labour action, is now extended to all types of labour, trade and professional organisations, and the checks imposed by the test of reasonableness (in regard to conspiracy, restrictive covenants and blackmail) would operate only in very exceptional cases.
>
> The public at large, representing the bulk of consumers and users, in the absence of group organisation, remains no more than a spectator and, often, a victim in the struggle of organised interests. In dealing with restraint of trade, conspiracy and similar problems, the courts have conspicuously failed to develop the notion of "public interest" to any real significance. The first major attempt to give expression to the interest of the unorganised public may be found in the statutes nationalising a number of basic industries and creating consumer councils.[18]

The common law has not availed; nationalisation is a route apart from that of this analysis. Relevant are those statutes bearing on patents and those affecting monopoly and restrictive practices.

Revocation as a remedy for the abuse of the monopoly created by a patent has a long English history, beginning at least as early as the Statute of Monopolies[19] in the seventeenth century. The power to order compulsory licensing in situations where the requirements of the public were not being reasonably met was granted to the Board of Trade in the nineteenth century.[20] The power lay inactive for the most part. There were no cases reported while the jurisdiction was in the hands of the Judicial

Committee of the Privy Council.[21] Mild activity followed the return to the Board of Trade of the power to grant licences or revoke patents.[22] Following World War II the British government delved more deeply into the possible impeding of technological advance by the monopolistic abuse of patents.

Although the departmental committee of the Board of Trade appointed in 1946 for that purpose found little evidence of monopolistic groups relying on patent abuse for support of their monopoly power, it did see reason for vigilance. Claiming it to be easy to overestimate the rôle of patent abuse in cartel activity, the Second Interim Report went on to point out,

> Nevertheless, it is sufficiently clear that patents do often play a part in the formation and maintenance of cartels, and that this use of patents is foreign, and may be inimical to, the purposes for which the patent system was instituted. . . . it is wrong in principle that a patent should be used to establish a monopoly wider in scope and longer in duration than that conferred by a patent in itself, and it is obviously desirable that the patent law should keep in step with any measures which may be adopted in the future to limit or control monopoly in the public interest.[23]

Amendments in 1949 arising from the recommendations of the committee of the Board of Trade enhanced the power of the law to restrict patentees, whenever such curtailment of the monopoly power of patents is deemed in the public interest.[24] The effectiveness of these governmental limits to a previously almost untrammelled monopoly lies essentially in their administration; that will be tested in time.

In recent years in England there has been a direct legislative approach to the problem of monopoly and restrictive

practices. It has been put into effect by means of three important enactments[25] between 1948 and 1956, representing a most lively legislative programme after such an extended abandonment to the ineffectual common law remedies. The English point of departure was that control of at least one third of the supply of some good would warrant an investigation upon a reference by the Board of Trade. The Monopolies and Restrictive Practices Commission, starting with no aspect of industrial behaviour specifically condemned, inquired into the facts and appraised the effect on the public interest. It might then make recommendations. Any changes wrought as a result of the examination of an industry would be by way of negotiation by the relevant government department or of Parliamentary action. The Ministers of the Crown and Parliament were the final judges; the judiciary played a small part. Statutory orders occurred rarely.

The Matches Report published in 1953 is a convenient example of the first method established by Parliament. The significant change in 1953 permitted groups of members of the Monopolies Commission to exercise fully the powers of the Commission, thereby making possible a higher level of investigative activity with the same personnel. The conclusions, recommendations and subsequent action are the most vital elements of an inquiry. The last is of course outside the scope of the Commission. Control of the match industry by British Match and Swedish Match was found to be almost complete-- 95 per cent of domestic production, accounting for two thirds of the matches

supplied to the United Kingdom market, and about 85 per cent of the imports, accounting for the other third.[26] Prices were fixed by British Match; world markets were allocated or shared; most match machinery was from manufacturers controlled by Swedish Match.[27]

British Match was found able "effectively to determine the volume of imports into the United Kingdom."[28] Its share of the market, 67 per cent instead of the 55 per cent set forth in the Agreement with Swedish Match, could be maintained at a small annual cost, made most worthwhile by the net profit being in excess of the payment required by Swedish Match. Further increases, however, seemed improbable "without putting an intolerable strain on the continuance of the agreement."[29] The Commission saw "no prospect of any sustained increase in independent competition in the future,"[30] chiefly because of the monopolistic practices of the dominant concerns which were described earlier.[31] Competition from independent imports was found to be unlikely "except from Eastern Europe, because of the strength of Swedish Match in other manufacturing countries." It was felt that the volume from that source was likely to be determined by considerations other than commercial; it was also pointed out that Swedish Match had managed pre-war agreements even there.[32] The Monopolies Commission observed that the very great stability in the United Kingdom market had a price-- first, a continuing obligation to import a substantial quantity of matches; secondly, an absence of stimulus to greater efficiency in production and distribution; and thirdly,

a price fixed for matches high enough to provide a comfortable profit for the highest cost plant of British Match. There was no evidence of a policy of consistently concentrating production in the lowest cost factories. There was nevertheless little rise in manufacturing and distributive costs between the outbreak of war in 1939 and 1950, in part due to the destruction by bombing of the high cost Liverpool plant. The largest of the British Match group was the highest cost. The corporation stated that its policy was to earn maximum profits. The safeguard of competition curtailing the achievable level was absent. The high profits were the logical outcome of the successful attempts to eliminate competition. The Monopolies Commission concluded that there was scope for a reduction in both costs and profits. The British Match argument that small price reductions cannot be conveniently made is insubstantial. Consumers can enjoy lower prices on the purchase of half-dozen or dozen lots of boxes. The number of matches in a box can be altered for or against the consumer. The industry argued that it would entail considerable adaptation of machinery; it was carried out, however, when the Board of Trade granted permission to reduce the number of matches in boxes from 50 to 47 or 100 to 95.[33]

With respect to the overseas business assigned to British Match under the Trading Agreement, the Commission concerned itself only with the public interest of the United Kingdom. It agreed with the British Match contention that the British group, without the market-sharing arrangements, "would lose on balance

from competition in world markets with this powerful monopoly." (Swedish Match) It appeared doubtful that export earnings in the match trade would be increased, especially "in view of the extent to which B.M.C. depends on Swedish Match for its machinery and the attitude of mind which has prevailed over the last 25 years among those directing the policy of B.M.C."[34]* The remaining element of interest in the maintenance of this complete and integrated monopoly is control of the manufacture of match-making machinery. There are no important patents. The basic machines have a very long life. The total world demand is neither large enough nor sufficiently steady to make possible the survival of a company producing only match machinery. Concentration of orders appears to bring some economies. On the other hand that policy had made the British industry dependent on Swedish Match and has seriously curbed the expansion of independent competitors.[35]

The Monopolies Commission brought in a finding that the system as a whole operated, and was likely to operate, against the public interest with regard to both matches and machinery. The root of the detrimental conditions was held to be the absence of competition. Having established that, the Commission spoke to it in these terms:

> To obtain effective free competition, it would therefore be necessary not only to sever the connection between B.M.C. and Swedish Match but also to break up B.M.C. into two or three independent and competing concerns and to deal with B.M.C.'s interest in companies controlling the supply of raw materials in such a way as to secure supplies on equal terms to each of these concerns. We are not satisfied that this, even if

* underlining supplied.

> practicable, would bring benefits to the public commensurate with the disturbance that would be caused, or that its results would prove lasting. There is, indeed, some force in B.M.C.'s argument that in almost all producing countries a monopoly has been formed, and that such, in some form or other, is probably the natural organisation for this trade.[36]

It went further in opposing changes that might lead to the termination of the Agreements with Swedish Match, on the grounds that this relatively small industry with little prospect of expansion did not justify taking great risks, which a more important and growing industry might. It followed that the Commission recommended that alternative of government regulation of the monopoly in the public interest.[37]

There was recommended a continuing supervision, stricter than wartime price control, of the costs and prices of producers, importers and distributors of matches. The value of the considerable detail outlined by the Commission in this respect does not warrant its repetition. Uniform prices for raw materials should be charged all United Kingdom match producers, subject only to a uniform quantity discount of "reasonable" amount. The Commission recommended modifications of the existing arrangements, which were suggested in the first instance by British Match. It advised that the Board of Trade receive from the industry on a continuing basis considerable financial and commercial information. The Commission rejected the idea of a publicly controlled wholesaler to set up the power of a monopoly buyer in opposition to the monopoly seller. It recommended a relaxing of restrictions concerning the manufacture of machinery and a cessation of

payments to a Finnish firm for refraining from manufacturing.[38]

Three of the 10 Commissioners, Professor G. C. Allen, C. N. Gallie and Mrs. Joan Robinson, added a vigorous dissent because in their view "the remedy proposed is hardly in accord with the condemnation of the practices of this monopoly." They thought that the disadvantage to the public interest of allowing the substantial continuance of the existing arrangements outweighed the risk of introducing a drastic remedy. They held that any decision limiting imports should be made by the government under powers granted by Parliament. They recommended the abolition of the quota arrangements between British Match and Swedish Match. Agreeing with the rejection of the remedy of dissolution, the dissenting 3 recommended the creation of a public purchasing agency to handle all matches in the United Kingdom, equipped with complete information on costs and following a policy of seeking low cost sources of supply. An alternative would be to have the public agency confined to imported matches, thereby competing with British Match. These possibilities were proposed, not as definite recommendations but to have the government determine whether the public interest would not be better served by going further than the majority recommendations.[39]

The British Match response was that the report was misleading. Brigadier Hugh K. M. Kindersley (later to become Lord), Chairman of British Match and Managing Director of Lazard Brothers in London, stated that the danger of monopoly power had been overstated and the threat of competition underrated with a

good deal of it still existing. He had no knowledge of evidence that costs were high and claimed that profits were not high compared with other industries, which did not quite meet the Commission finding that profits were "very high having regard to the relatively slight trading risk." He also noted that the group's overseas business was twice that in the United Kingdom.[40] It is valuable background to recall the British Match view of competition being inimical to its interests at the time when the Co-operative Wholesale Society was considering entry. Regardless of significant differences with respect to employment in the United Kingdom, the permanent or sporadic nature of the competition, and the part that the government might feasibly play in each case, the establishment by an outsider of a match factory in the British Isles was on the same footing, in the eyes of British Match, as import competition from Russia.[41]

Independent reaction to the disclosures in the report was a mixture of disapproval of the monopoly and of caution in the remedy. The Times said plainly, "The evidence that an effective monopoly of matches exists, with the dangers of stagnation and of occasional profiteering which that implies, is incontrovertible." On the other hand, noting the tendency to monopoly in every country, arising either from the dictates of fiscal policy or from a standard product with low distributive costs leading to the extinction of competition, the paper went on to say, "The real answer is still obscure. The American answer would have been simple; the group would have been split

into its Brymay, Masters, and Moreland constituents, while the international and national agreements would have been outlawed." It was suggested that difficulties, not mentioned, lay in that solution.[42] The Economist raised the serious possibility of active Swedish Match rivalry working against the British industry and playing havoc in the precarious overseas markets.[43] Without bringing competition into the international scene, changes in the structure of the British industry alone were certainly likely to lead simply to oligopoly.

The Board of Trade proceeded with negotiations which culminated in the termination of the domestic market-sharing arrangements. The President of the Board of Trade explained that part of the change in the House of Commons.

> In this new agreement the arrangements about quotas and compensation have been eliminated and there is no provision for sharing the United Kingdom market between the British Match Corporation and the Swedish company in a predetermined proportion. There is no restriction on the expansion of United Kingdom manufacturing capacity or of sales of matches either by the British Match Corporation or by the Swedish company.[44]

British participation in overseas marketing arrangements was left undisturbed. It was further agreed that there would be no more discrimination in the sale of raw materials to independent British manufacturers. The sale of imports from Swedish Match and its affiliates would now occur at prices set by Swedish Match and no longer by British Match. Imports had increased since the negotiations following the Matches Report.[45] There had not been a drastic reorientation of the British industry. The new arrangements in the match industry following the inquiry permitted the

inference that the promotion and maintenance of British exporting had priority over the interests of domestic consumers. If that were actually the case, the schedule of priorities had now been established by the appropriate public authority, not by the leaders in a private, rationalised industry.

With both the Labour and Conservative parties claiming to approve of legislation in this field, lively discussion often accompanied the announcements of new reports in the House of Commons.[46] In 1955 there was a general study undertaken of restrictive practices such as exclusive dealerships and collective boycotts. Seven of the 10 members of the committee recommended a departure in the British procedure with the legal prohibition of certain practices with possible exemptions. Three members advocated registering restrictive agreements and carrying on the case-by-case method of investigation already in use. They were opposed to any general prohibition. The new act[47] incorporated much of the minority view and a concession to the majority position in the prohibition of the collective enforcement of resale price maintenance, marking the first condemnation of a business practice without reference to a specific situation. Provision was made in the act for the legal enforcement of individual resale price maintenance.

The 1956 legislation made compulsory the registration of restrictive agreements and created a Registrar and a Restrictive Practices Court of 5 justices and not more than 10 others chosen for their knowledge or experience in industry, commerce

or public affairs. It may sit as a single court or in two or more divisions. The old commission is renamed the Monopolies Commission, which had been its popular title, and is confined with a reduced membership at the original 10 to cases where at least one third of a market is controlled by one person or an interconnected group. In contrast to a lack of demerit sometimes being sufficient to sustain a restrictive agreement, the new Court on the Registrar's application may find a restriction against the public interest unless it has merit on one of only 7 specific counts. There are also a number of exempted restraints, including exclusively export schemes, analogous to the American Webb-Pomerene provision. In describing the many exceptions as "regrettable," the Economist warned that, "Unless private industry can shake itself clear of the accusation of restriction and monopoly, it will have no defence against the creeping tide of public control and collective ownership."[48] That is a stern admonition from the side in favour of individual enterprise and a market economy.

There is no appeal on a question of fact from the Restrictive Practices Court; a question of law may be appealed to the Court of Appeal or the Court of Session. On the surface that plan seems to leave facts to be settled by a majority of the court, which might easily mean a decision by the lay members. A question of law is determined by the opinion of the puisne judges sitting. It has been observed that the judiciary will necessarily have a vital influence in the field of restrictive practices under

the new legislation because, "The characterisation of issues as ones of 'fact' or 'law' is, itself, a question of law. Therefore, the opinion of the legally qualified members of the new court will immediately prevail on this vitally important matter and, ultimately, the opinion of the House of Lords." On the British attempt to avoid "dogma" or general prohibitions, as found in the North American approach, the same observers remark, "The examination of the facts alone will not take the court all the way in deciding the issues before it. The likely effects of the removal of a restriction cannot be arrived at by an examination of the facts of the present situation. Recourse to some 'theory' is inevitable, however much the reluctant 'theorist' may try to conceal this from himself, and however much he may seem to be distilling conclusions from observed facts."[49]

Several issues appear unresolved at this stage in the British experiment. In dividing responsibility for attacking restrictive practices and monopoly, there is the danger of turning the very extended borderline between the two into a kind of no man's land, where numerous detrimental business activities might come safely to rest. The government's almost total rejection of the recommendation to establish definite prohibitions may add more to confusion than to equity. That there may be soundness in setting out the crimes for all to see was suggested by the Economist in an analogy with a criminal trial. Murder is set down as a crime. Arraigned for killing his mother-in-law, a person may make one of a number of pleas; two are analogous

with commercial situations. He may plead that the circumstances justified the act; he may plead that he did not do the killing. Similarly, with a trade arrangement declared an offence before the court opens, what special mitigating circumstances would bring a reprieve should be the concern of the court, composed of judges or appointed by Parliament.[50] In the light of the past record of lawyers and judges in dealing with matters of economic and social policy, the recent shift in England toward increasing judicial influence is not ex facie a bold step toward a more thorough and effective control of restrictive practices and monopoly.

Two recent examples demonstrate that there is something to control. The acquisition of British Celanese by Courtaulds gives the new firm nearly 90 per cent of the United Kingdom market, if the half interest in British Nylon Spinners may be counted in spite of the English court decision in 1952. Although it was not under attack at the time of writing, the Economist advised, "The merged concern will need to convince its customers that though a monopoly, it does not intend to behave like one. It will not be helped by the practice so highly developed by British Celanese (but practised by Courtaulds, too), of competing with the Company's own customers-- the textile spinners, manufacturers and makers up." Having first attempted the merger before World War II, Courtaulds has difficulty in arguing that the merger is simply to prepare for the European Common Market.[51]

The British Oxygen Company, producing 98.5 per cent of the oxygen and dissolved acetylene supplied in Britain, was the object of an inquiry before the 1956 Act. It was found that profits were "unjustifiably high" in a relatively riskless situation. Unanimously agreed that the monopolistic British Oxygen Company was against the public interest, the old Commission's recommended change was a periodical review by the Board of Trade of costs and prices. There was no suggestion of a dissolution. The inquiry and resulting report were called ". . . a resounding defeat for the British principle of 'empiricism' in dealing with monopoly."[52] The common law was quiet about combination and silent about mergers; statutory schemes are whispering, not shouting.

1. Mogul Steamship Co. v. McGregor, Gow and Co. (1892) A.C. 25 at 36-37 and 42-43.

2. Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co. Ltd. (1894) A.C. 535 at 565-66 and 575.

3. supra, ch. 5. p. 111.

4. North Western Salt Co. v. Electrolytic Alkali Co. (1914) A.C. 461 at 469.

5. (Herbert) Morris, Ltd. v. Saxelby (1916) 1 A.C. 688 at 698-700 and 714-15.

6. Sorrell v. Smith et al. (1925) A.C. 700 at 712, 715 et passim.

7. supra, ch. 5, p. 119.

8. Wyatt v. Kreglinger and Fernau (1933) 1 K.B. 793.
W. Friedmann, "Monopoly, Reasonableness and Public Interest in the Canadian Anti-Combines Law," Canadian Bar Review, Feb., 1955, p. 146.

9. Vancouver Malt and Sake Brewing Co. v. Vancouver Breweries (1934) A.C. 181 at 188 and 192.

10. Halsbury's Laws of England, gen. ed. Lord Hailsham, 2nd ed., Butterworth and Co., London, 1939, vol. 32, p. 342.

11. M. and S. Drapers v. Reynolds (1956) 3 All E.R. 814 (C.A.) at 819-20.

12. British Nylon Spinners v. Imperial Chemical Industries (1952) 2 All E.R. 780 (C.A.).

13. Salomon v. Salomon and Co. (1897) A.C. 22 at 51.

14. Companies Act, 1947, 10-11 Geo. 6, c. 47, s. 18

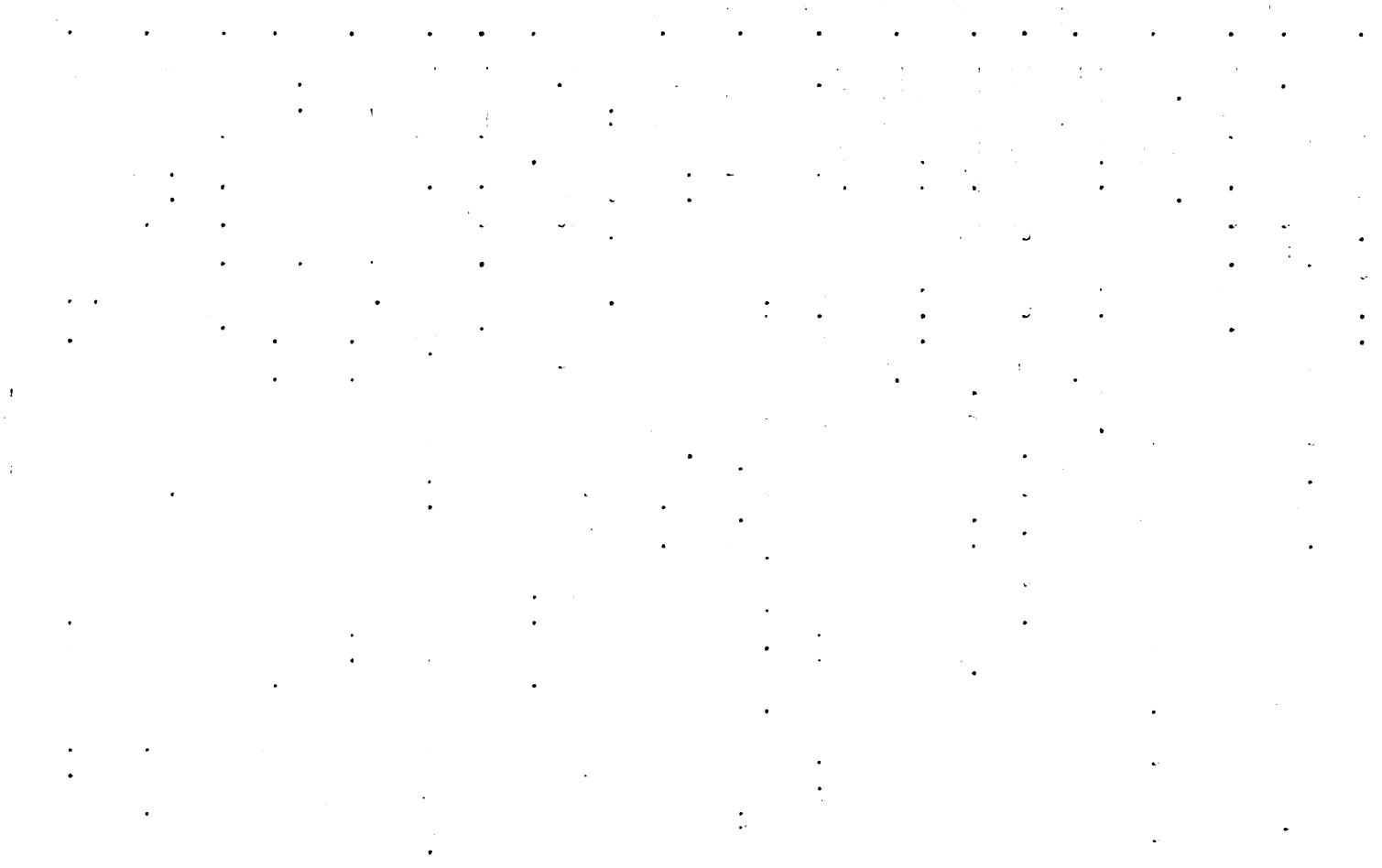
15. British Nylon Spinners v. Imperial Chemical Industries (1952) 2 All E.R. 780 (C.A.) at 782.

16. "Splitting a Company in Twain," Business Week, Jan. 21, 1956, pp. 98-100.

17. supra, ch. 6, p. 126.

18. W. Friedmann, Law and Social Change in Contemporary Britain, Steven and Sons, London, 1951, p. 131.

19. (1623) 21 Jac. 1, c.3.



20. Patents, Designs, and Trade Marks Act, 1883, 46-47 Vic., c. 57, s. 22.

21. Patents Act, 1902, 2 Edw. 7, c. 34, s. 3.

22. Patents and Designs Act, 1907, 7 Edw. 7, c. 29.

23. I. M. MacKeigan, "Notes on 'Patents in Relation to Monopoly,'" Canadian Journal of Economics and Political Science, Nov., 1946, p. 470, quoting the Second Interim Report, p. 6. Friedmann, p. 23.

24. Patents and Designs Act, 1949, 12, 13-14 Geo. 6, c. 62, ss. 24, especially 19.
Patents Act, 1949, 12, 13-14 Geo. 6, c. 87, ss. 32 and 37.

25. Monopolies and Restrictive Practices (Inquiry and Control) Act, 1948, 11-12 Geo. 6, c. 66.
Monopolies and Restrictive Practices Commission Act, 1953, 1-2 Eliz. 2, c. 51.
Restrictive Trade Practices Act, 1956, 4-5 Eliz. 2, c. 68.

26. British Match Report, par. 193.

27. op. cit., pars. 193-95.

28. op. cit., par. 196.

29. op. cit., par. 198.

30. op. cit., par. 199.

31. supra, ch. 4, pp. 83-89 and 93-94.

32. British Match Report, par. 200.

33. op. cit., pars. 124, 155, 202-07.
New York Times, Aug. 22, 1951, p. 8.

34. British Match Report, pars. 208-09.

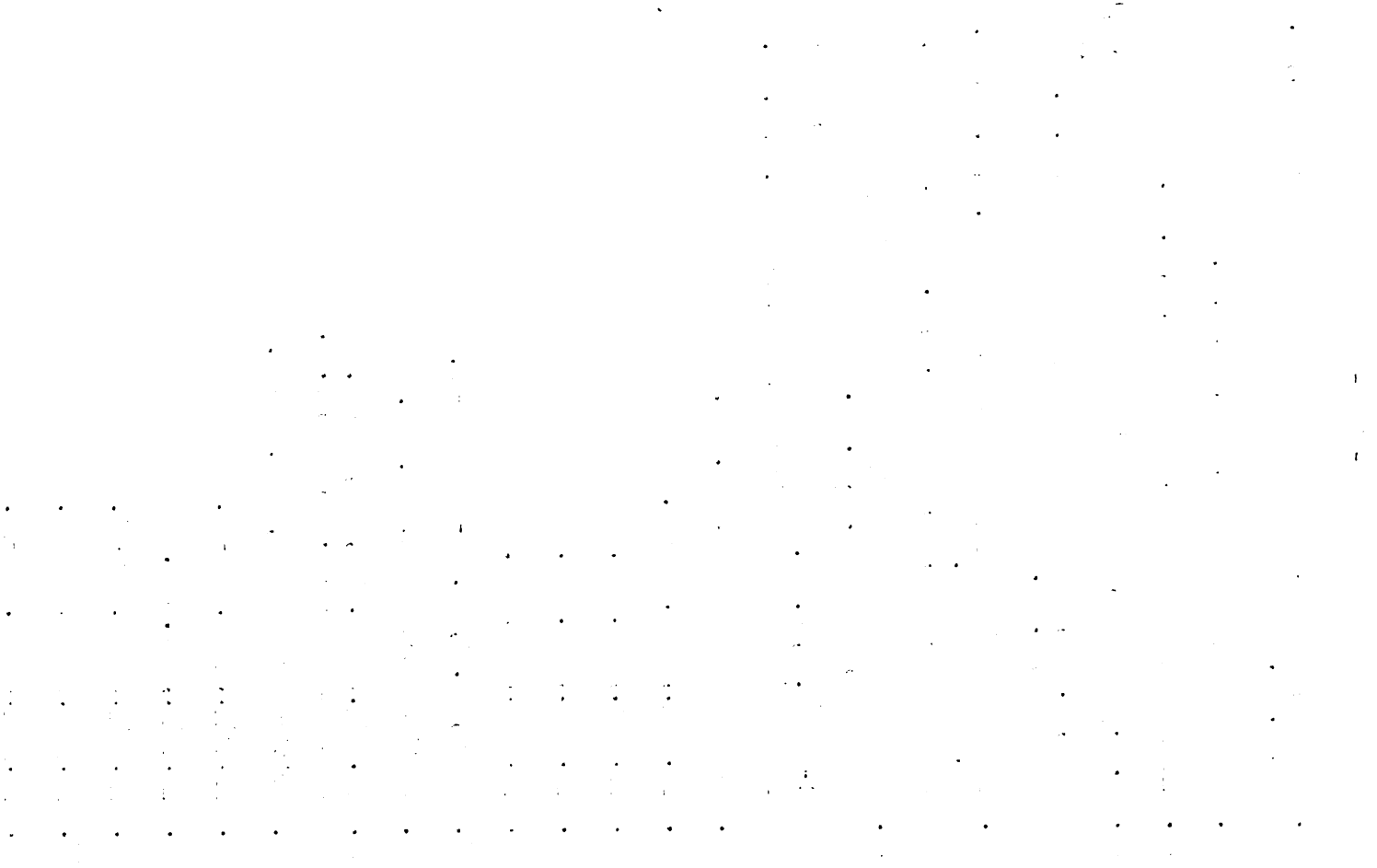
35. op. cit., pars. 210-13.

36. op. cit., par. 219.

37. op. cit., pars. 220-21.

38. op. cit., pars. 222-27.

39. op. cit., pars. 228-33.



40. Chemical Age, July 4, 1953, p. 27.
---- , Sept. 26, 1953, p. 651.
Chemical and Engineering News, Nov. 2, 1953, p. 4594.
Times, June 26, 1953, p. 3.
--- , Sept. 17, 1953, p. 13.
British Match Report, par. 206.

41. British Match Report, par. 49.

42. Times, June 26, 1953, p. 7.

43. Economist, June 27, 1953, p. 925.

44. Parliamentary Debates, House of Commons, 5 Apr. 1954, written answers, col. 9.

45. Parliamentary Debates, House of Commons, 3 Feb. 1955, col.1259.
---- , 18 June, 1953, cols. 1156-57.
---- , 25 June 1953, cols. 2076-77.
---- , 22 Oct. 1953, cols. 2144-45.
--- , 21 Feb. 1956, written answers, cols. 24-25.
Times, Apr. 6, 1954, p. 9.

46. W. T. Wells, M.P., "The Attack on Monopoly," Fortnightly, Aug., 1954, pp. 111 and 115.

47. Restrictive Trade Practices Act, 1956, 4-5 Eliz. 2, c. 68.

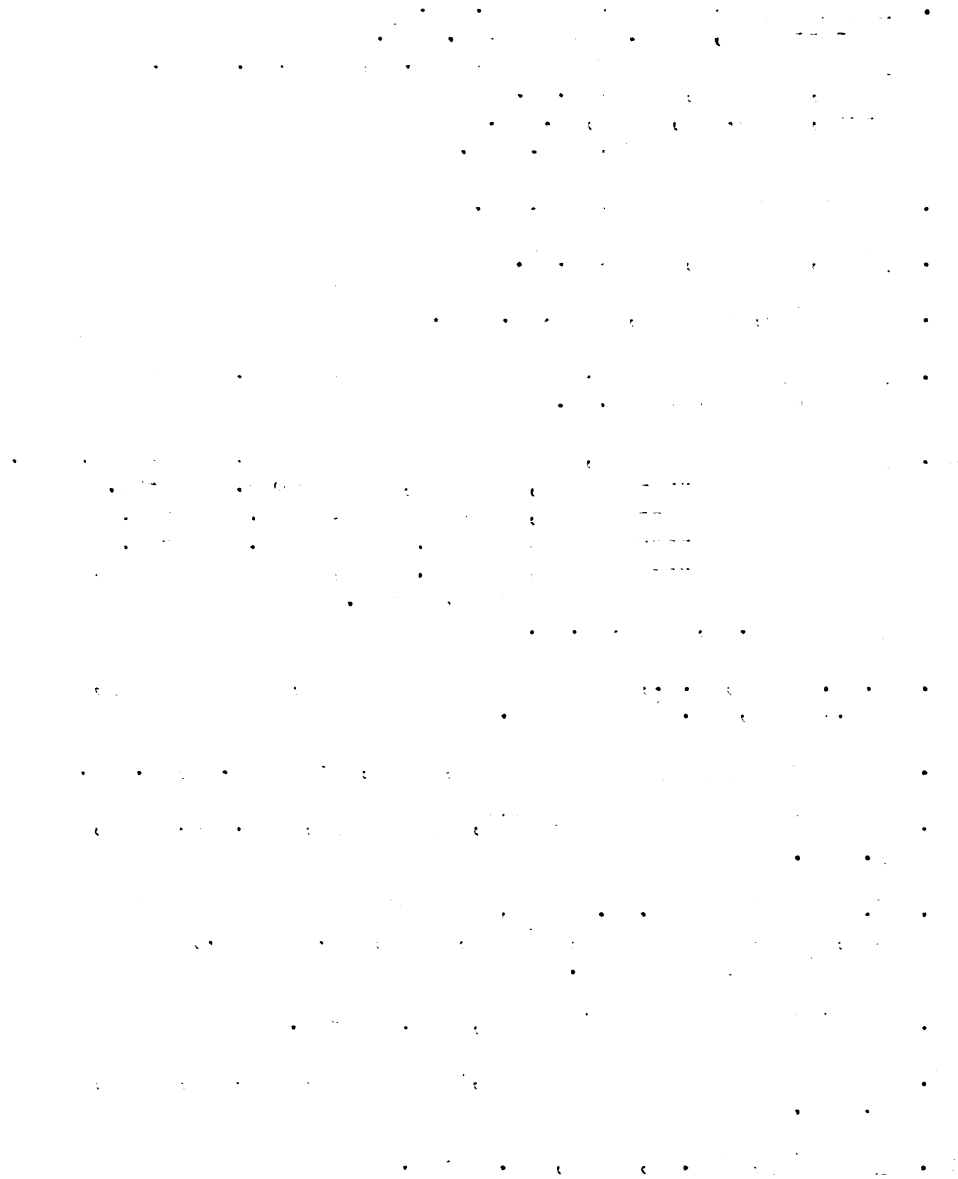
48. "Awaiting the Monopolies Bill," Economist, Nov. 12, 1955, p. 542.

49. C. Grunfeld and B. S. Yamey, "Restrictive Trade Practices Act, 1956," Public Law, Winter, 1956, pp. 313 ff., especially 333 and 317.

50. "Awaiting the Monopolies Bill," pp. 541-42.

51. "Courtaulds Swallows Celanese," Economist, Apr. 20, 1957, p. 242.

52. Economist, Jan. 5, 1957, pp. 59-60.



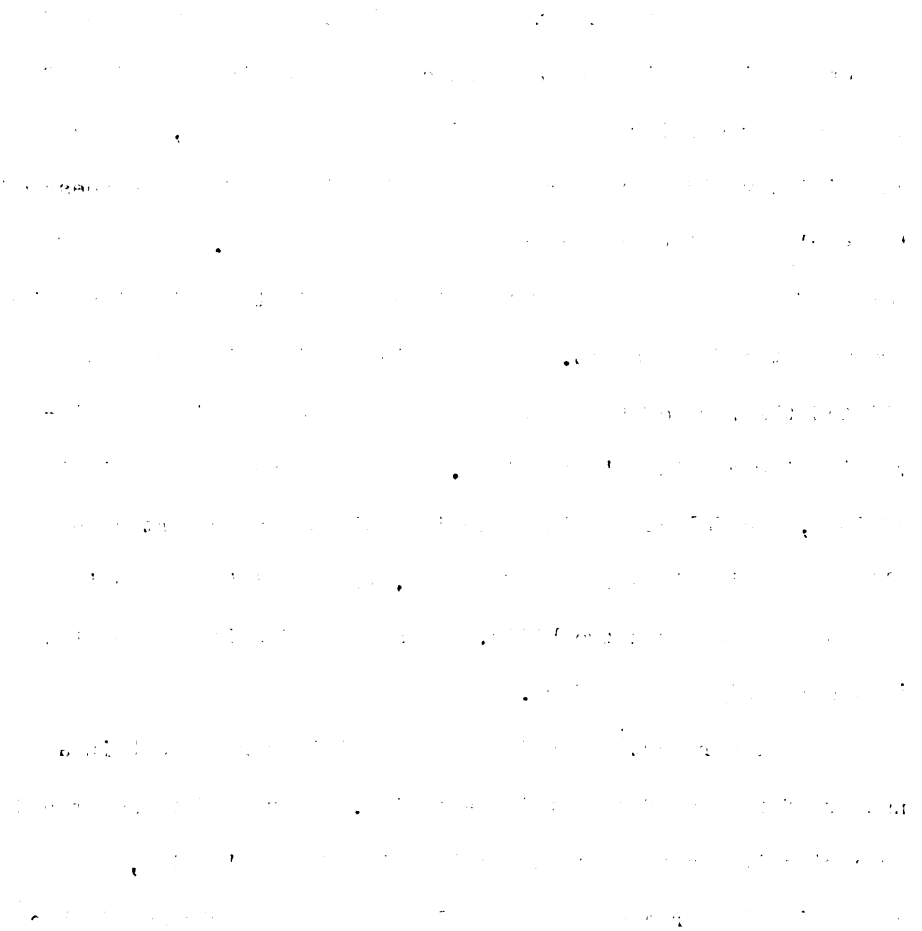
# Part II

## The Canadian Situation --
## Legislative, Judicial and Industrial

# Chapter 7

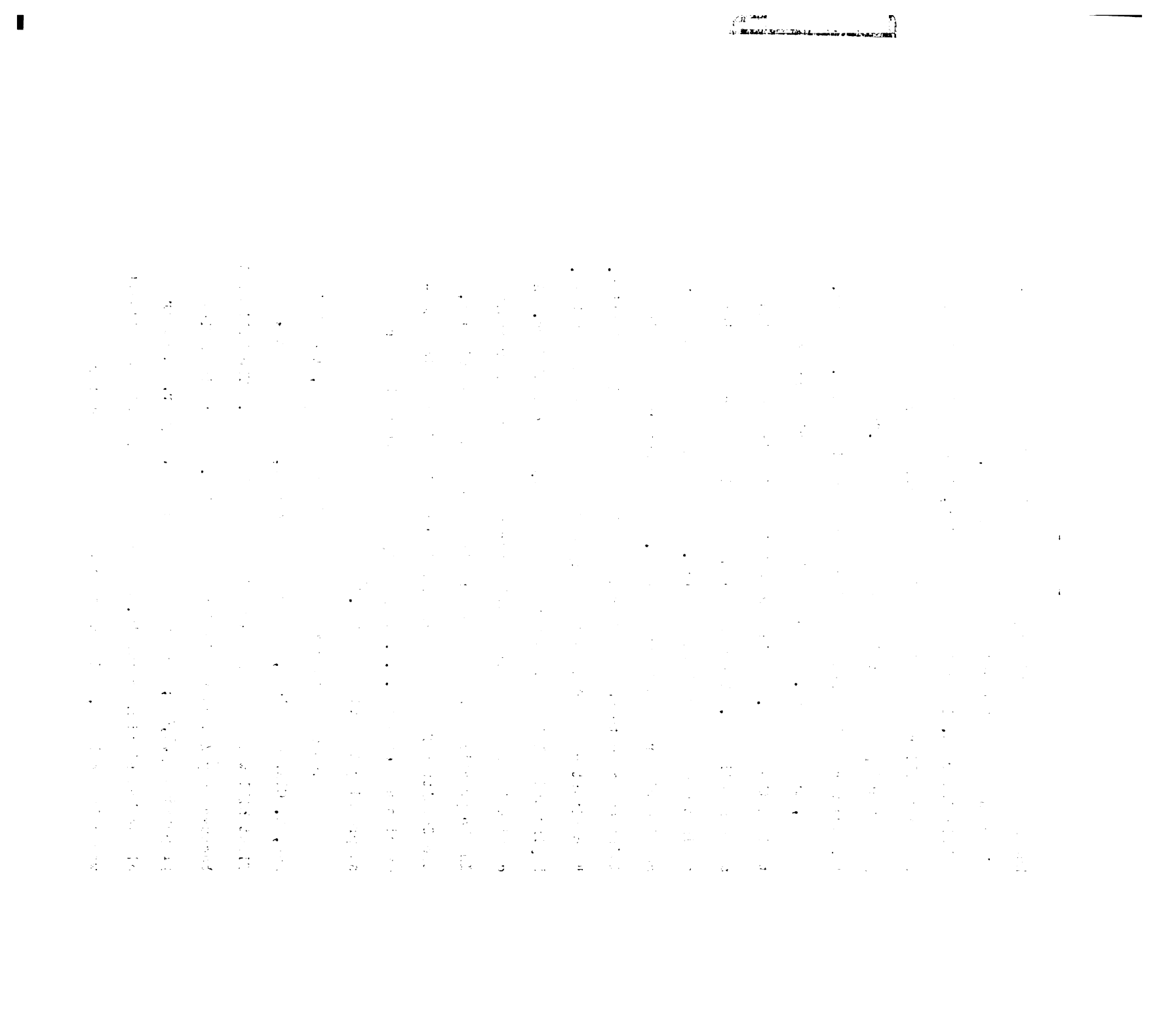
Perhaps tempted to buncombe by the Canadian House of Commons having legislated against combinations in restraint of trade a year earlier than the United States Congress, even a chauvinist would be rendered mute by knowledge of the weakness of the early Canadian attack on elements of monopoly. The undefended border filtered out much of the fierceness in the agitation which produced the Sherman Act. The Canadian legislative process diluted the fury of the denunciations that echoed from the investigating committee's findings. Appointed near the beginning of 1888, the Select Committee to investigate and report upon alleged combinations in manufactures, trade and insurance in Canada brought forth two bills, the second of which became law in a seriously amended form.

The report[1] described the conditions prevalent in a number of fields of commercial activity. In regard to sugar and groceries it was found that the Dominion Grocers' Guild, comprising 95 per cent of the wholesalers in Ontario and Quebec



had initiated the previous year between itself and the sugar refiners a combination called by the Committee, "obnoxious to the public interest, in limiting competition, in enhancing prices, and by the familiar use of its growing and facile powers tending to produce and propagate all the evils of monopoly."[2] Fraudulent tenders were being used by coal combinations in London, Toronto, Ottawa, and Montreal. These combines kept up prices and controlled the market.[3] Prices were being maintained on biscuits and confectionery. There was an American inspired combination against Canadian watch case makers. There had been an attempted combine with respect to barbed wire, and another covering binder twine had come to an end after the beginning of the investigation. "Exorbitant charges" were levied by coffin makers and undertakers. Buying and selling prices were controlled by oatmeal millers. A combination of egg dealers buying for export depressed prices.[4] In the practices of the Canadian Fire Underwriters Association, the Committee found "sufficient evidence of their injurious tendencies and effects . . . to justify legislative action for suppressing the evils arising."[5]

Ten days after committee hearings had ended, the chairman, N. Clarke Wallace, member for York West, introduced the first bill which proposed a variety of punishments. The bill died because only 4 days remained in the session. The maximum fine proposed was $1,000; the maximum prison term, 1 year. Another clause had aimed more surely, as can be seen from Clarke Wallace's words in the House, which also provided some reason for



legislative action:

> The next clause provides that any company that is incorporated by the laws of the Dominion of Canada, and that has been found guilty of misdemeanors of this kind, shall forfeit its charter.
>
> . . .
>
> But in those States of the Union the combinations are so powerful and they have exerted such a great influence on the Legislatures, that it has been found impossible to pass an Act sufficiently stringent to suppress them. These matters in Canada to-day are yet in their infancy, and I think this is the time when they should be strangled, when it can be done more easily than at a future time.[6]

The prospect of charter forfeiture might well have introduced caution in corporate activities. Noting that it was too late in the session for enactment, Sir John A. Macdonald, Prime Minister, expressed confidence that the hearings, report, introduction of the bill and publication of the evidence gathered would have a beneficial effect.[7] That idea of the value of publicity in curbing detrimental conduct would reappear many times with even more vigour. The expressed approval of a Conservative Prime Minister is of interest as the record of anti-combines activity in Canada unfolds.

Rather late in the session of 1889 Clarke Wallace presented a substitute bill which he claimed created no new offence. He indicated that there had been some objection to the previous bill in that it appeared to create a new offence, and it might be given severe judicial interpretation. It was indicated that the second bill was supported by the Dominion Grange, the Knights of Labor, and the retail grocers in the major cities of Ontario and Quebec.[8] There had been a noticeable softening in approach since the first introduction of the bill two months earlier, when

Clarke Wallace had stated its object was to prevent the granting of exclusive privileges and the undue restraining of traffic or production.[9]

Before its final appearance in the House of Commons, the bill was substantially amended by both the Banking and Commerce Committee and the Senate. The sponsor's own words describe the atmosphere of the Committee, with emphasis on the part played by,

> . . . those men who have formed those illegal combinations and who have come down in great force to defeat the Bill. They did not come down to defeat the old Bill, which the hon. member for P. E. I. (Mr. Davies) says had some merit, but they came down before the Banking and Commerce Committee at its last meeting, with a great array of lawyers from Montreal and Toronto, and with amendments carefully considered, to legislate this Bill out of existence. If this Bill is so innocent and harmless why should those people have gone to so much trouble and expense to defeat it.[10]

From that committee came the addition of the word "unlawfully." It was a devastating change. The Senate weakened the wording further by bringing in the words, "unduly" and "unreasonably." The final wording of the principal section of the Act[11] shows the effect of the amending:

> 1. Every person who conspires, combines, agrees or arranges with any other person, or with any railway, steamship, steamboat or transportation company, <u>unlawfully</u>, ----
>
> (a.) To <u>unduly</u> limit the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article or commodity which may be a subject of trade or commerce; or --
>
> (b.) To restrain or injure trade or commerce in relation to any such article or commodity; or --
>
> (c.) To <u>unduly</u> prevent, limit, or lessen the manu-*

* underlining supplied to show the effects of changes by the Banking and Commerce Committee and by the Senate.

facture or production of any such article or commodity, or to unreasonably enhance the price thereof; or --

(d.) To unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply of any such article or commodity, or in the price of insurance upon person or property, --

Is guilty of a misdemeanor and liable, on conviction, to a penalty not exceeding four thousand dollars and not less than two hundred dollars, or to imprisonment for any term not exceeding two years; and if a corporation, is liable to a penalty not exceeding ten thousand dollars and not less than one thousand dollars.[x]

It was further provided that the accused had the option of a trial without jury. Monopoly power remained simply under the restraint of the common law. The effective result of the action of the Parliament of Canada was merely to provide the jury option and to place a statutory limit on the penalties that might be imposed. Had the turn of the century not brought vital change to the Act, the history of the investigation and legislation of 1888 and 1889 would indeed have been "a tale told by an idiot, full of sound and fury, signifying nothing." Although nothing came of it, the original sponsor urged the removal of "unduly" and "unreasonably" at the next session of Parliament;[12] that would have missed the mark in any event, because "unlawfully" was the great defect, leaving the Act simply a statement of the common law.

In 1897, the year after a Liberal Government had been elected, there was an important amendment to the customs law, providing for the investigation of the possibility of the existence of detrimental combinations or agreements. The remedy was that,

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x underlining supplied to show the effects of changes by the Banking and Commerce Committee and by the Senate.

> If the judge reports that such trust, combination, association or agreement exists, and if it appears to the Governor in Council that such disadvantage to the consumers is facilitated by the duties of customs imposed on a like article, when imported, then the Governor in Council shall place such article on the free list, or so reduce the duty on it as to give the public the benefit of reasonable competition in such article.[13]

The first judicial interpretation of the 1889 Act, the substance of which had become section 520 of the Criminal Code in 1892,[14] arose in a case involving the American Tobacco Company of Canada. It made exclusive contracts, providing special commissions for agreeing to handle only American Tobacco cigarettes, and engaged in fixing prices. In view of the word "unlawfully" in section 520, the judge held that what the law forebade,

> must be acts which were before the passing of that Article 520 unlawful acts under the Common Law, forcing thereby upon the Courts to find as to whether such acts or proceedings were, before the passing of such article, unlawful.
>
> I have read that contract over and over again, and I must say that I fail to see anything of the kind. It is true that it may be considered a very shrewd contract, a very shrewd combination, and an attempt to give as much as possible, the greatest circulation to the cigarettes manufactured by them, but yet I cannot see that it would have been unlawful to agree with as many parties as they could find, that they would consent to sell only their cigarettes exclusively . . .[15]

Monopoly power was still functioning in a world of only common law prohibitions.

Section 520 was amended in 1899 by the removal of "unduly" and "unreasonably."[16] The following year those words were restored and "unlawfully" was deleted,[17] extending the ban beyond that of the common law. The following year marked the start of a

unique event, initiated by a complaint to the Minister of Finance from the Canadian Press Association in regard to an alleged combination of paper manufacturers and dealers. Hon. Henri T. Taschereau, Judge of the Superior Court of the Province of Quebec, was appointed Commissioner under the Customs Tariff Act, 1897. In his report[18] Judge Taschereau stated, "the alleged combination does exist." The Paper Makers Association of Canada, formed in 1900 with antecedents dating back to 1879, had complete power in the industry and fixed and maintained prices. The price enhancement was calculated at from 35 to 47 1/2 cents per short hundredweight with prices ranging from $2.25 to $2.50 per 100 pounds. According to the Commissioner, the "enhancement of prices and other disadvantages to consumers caused by the combination whose existence is proved, admitted and reported, are . . . undue, unreasonable and oppressive."[19] He rejected a comparison with the higher price in the United States, declaring that that market was controlled by "one huge corporation," . . . "one single monopolising organization." After examining the zone pricing based on selected mill points, especially chosen to protect wholesalers from customers buying from mills where there were no wholesalers, Judge Taschereau noted the discriminatory nature of the scheme and the phantom freight paid by customers in a mill town that was not a mill point.[20]

Within 3 months of the report being submitted on November 15, 1901, an Order in Council reduced the customs duty on newsprint from 25 per cent ad valorem to 15 per cent. In spite of

the able analysis by the Commissioner and the appropriate response by the government, the procedure raised at least two important questions. Was strength and influence of the order of that possessed by the Canadian Press Association required to ensure the the Dominion Cabinet would appoint a Commissioner? There were surely inherent in its complaint against a newsprint association at least some aspects of a bilateral monopoly situation. Was the customs reduction of much significance when the largest single external source of newsprint was a market in which prices were higher and monopolistic control was present? It was in addition a market in which demand customarily outran supply; importing, rather than exporting, was the order of things in the United States market. The affair was most memorable for the judge's early understanding of the discriminatory nature of a zone pricing system, which is a variant of the basing point system. It was the end as well as the auspicious beginning of such procedure, although the statutory possibility continued in effect.

The year 1903 saw the introduction of compulsory licensing as a remedy for failure to work in Canada within 2 years from the granting of a patent,[21] and the establishment of a Royal Commission on the Tobacco Trade, concerned chiefly with the alleged exclusive contract system employed by the American Tobacco Company of Canada and the Empire Tobacco Company.[22] The report concluded that, although other manufacturers of cigarettes were put at a disadvantage by it, the exclusive contract system in existence was not illegal at common law or by Dominion statute.

There was in 1904 an extended debate in the House of Commons focussed on the American Tobacco Company, which was described as having watered its 1890 capital of $25,000,000 up to $300,000,000 in 10 years. Having "invaded" Canada in 1895, it was accounting for 84 per cent of the cigarette business in the country.[23] Within a few days of the debate the Inland Revenue Act was amended to empower the Minister to cancel a licence where exclusive-contract contracts are used with respect to goods subject to an excise duty.[24] The appearance of new brands of cigarettes indicated a measure of success for the threat to American Tobacco in the legislation.[25]

Horizontal resale price maintenance came to the attention of the courts that same year. The Drug Section of the Retail Merchants' Association of Canada had an agreement with the Wholesale Druggists' Association to maintain a $1 retail price on a product of Wampole and Company. The retail group also had a similar contract with the Henry K. Wampole firm. The judge, rejecting the manufacturer's claim that he needed protection from his product being confused with cheaper items, declared the contracts void. The judgment was upheld by the Quebec Court of King's Bench. The object of the agreements was to protect the profit margins on the retailers' sales. The court spoke of the position that would obtain if the producer did have a legitimate interest in the arrangement:

> . . . je ne vois rien de contraire à la liberté du commerce ni à l'intérêt public dans la convention entre le fabricant d'un produit et la détailleur, que celui-ci vendra l'article à un prix déterminé, lorsque le

fabricant a un intérêt à faire cette convention;

Condemnation was nevertheless expressed for the arrangements outlined above.

> Je conclus de ces documents, et de la nature même de la convention, que ce sont les marchands détailleurs associés ou combinés qui ont dans leur intérêt fixé le prix de vente à $1 pour une merchandise qui leur coûte 46 à 58 centins, formant un profit de 45 centins, profit évidemment exagéré et <u>combine</u> contrarire à l'intérêt public.[26]

The contract was not enforced to prevent Lyons from selling below the agreed price and obtaining a mere 10 cent profit. The same stand was taken in a later case[27] where the defendant was buying at 50 cents and selling at 79 cents, instead of $1.00. That such an agreement is banned by the Criminal Code was seen by the court because of its effect. "It means that competition is not only unduly prevented or lessened in the purchase, barter, and sale of this article but is absolutely destroyed."[28]

Subsequent to a civil case[29] in which the Brantford Coal Importers' Association, formed in 1899, was declared illegal, the government initiated the first criminal case[30] since the 1900 amendment, by charging the Association president. The course of attacking the fraudulent tenders indulged in by the group was not pursued. It was noted that the case depended entirely upon the statute, which set the Canadian scene apart from the English where there were only the prohibitions of the common law, reduced in some instances by legislation, stood in the way of monopolistic practices. The court's comment on the legislative history of section 520 is of interest:

> Now it is quite plain that Parliament intended by the enactment to further control the right to hamper and monopolise trade, though, until the second amendment of the Act, it seems to have failed strangely to effect such purpose, indeed to have produced quite futile enactments until the word "unlawfully" was eliminated.[31]

The defendant was found guilty and fined the maximum $4,000. In the appeal judgment sustaining the conviction Justice Osler held that there was a Canadian "right to competition."[32]

A similar scheme of a more elaborate character involved an agreement, copied from like arrangements in the United States, that the Master Plumbers and Steam Fitters Co-operative Association had entered into with the Central Supply Association, whereby the jobbing and supply houses undertook not to sell directly to the general public and to sell to non-members of the plumbing trade at 20 per cent above the Association price. Quotations of 25 per cent higher might be given to members of the general public. The suppliers agreed to pay a 7 1/2 per cent commission -- a rebate -- to the plumbers on all sales to members, and 5 per cent on sales to outsiders. The court commented on the plan for submitting tenders:

> A number of hitherto reputable firms, meeting around a table, and under the pretence of sending in invited tenders, deliberately adopt a method by which, apparently without the slightest compunction, they took from the public, that portion of the public who happened to be interested, money to which they had no possible claim, no more claim than any person has when meeting another in the street he by force robs him of his money. Indeed, I think of the two offences the robbery is the less offensive.[33]

The practice of adding to the estimated cost of material and labour 26 1/2 per cent plus sometimes what was called a rake-off

or bonus to cover the time and trouble of assembling elicited the epithet, "plunder," from the court. The associations were fined $5,000 each. The Central Supply Association's appeal was dismissed in a close decision of 3 to 2. In spite of it having been shown that there was in a single case a difference of nearly $6,000 between the conspiratorial tender and an outside legitimate tender, one of the dissenting justices in the Court of Appeal spoke of "the imposition of an enormous fine."[34] One would hesitate to infer that the learned judge believed the punishment to exceed the prize for such masterful combination. Later in the year the manager of the Dominion Radiator Company, doing business as dealers in radiators and boilers was convicted of violating what was now section 498 of the Criminal Code[35] and fined $250. He had arranged to bring his company into the agreement.[36]

An Alberta case[37] toward the end of 1907 saw the prime mover in a series of lumber combinations covering western Canada convicted and fined $500. Upheld on appeal, the conviction reaffirmed the fact that such monopolistic schemes were banned. The view expressed in Rex v. Elliott was supported formally. One of the participants in the litigation might perhaps qualify the case as an historical anecdote. Counsel for the accused lumber dealer was a Calgary lawyer, R. B. Bennett, K. C.

As recounted by Mackenzie King, then Minister of Labour and later to become Prime Minister, 1909 was a merger year, with amalgamations occurring in asbestos, cement, railway equipment, brewing, electric power, electrical equipment, and textiles. In

response to the concern about dangers inherent in mergers and to alarm about rising prices, the government introduced new legislation, ". . . not aimed against combines or mergers as such, but rather against the exercise on the part of combines, mergers or monopolies, in an unfair manner, of the powers which they may get from that form of organization. . . . A highly organized industry should, from the facilities it has of improving production, lead to greater efficiency and economies of one kind and another, which should, on the whole, benefit the consuming public. But, we know that in other countries, and possibly also in this country, organisations have not always used their corporate powers to the advantage of the consumers, but have taken, in some cases, possibly, an unfair advantage to themselves. This measure seeks to afford the means of conserving to the public some of the benefits which arise from large organizations of capital for the purpose of business and commerce."[38] It was stated, that, since society permits the consolidations, people have a right to expect no curtailment of their rights and liberties. Control of the actions, not the formation, of combinations was sought. In arguing that there were possible advantages of trusts, the Minister of Labour used the example of the creation of the Canada Cement Company eliminating cross hauling.[39]

The resulting Combines Investigation Act, 1910,[40] brought the merger concept expressly into Canadian law and provided for the creation of ad hoc 3-man boards of investigation upon a judge's order after a hearing. Six citizens could initiate

such action. The Minister of Labour was to administer the Act with the aid of a Registrar. A board's report was to be published without delay. There was to be a $1,000 per day penalty for continuing the violation after the deadline set by the board. An important feature was that the government would now bear most of the expenses of carrying on a case. One observer heralded the enactment as novel and progressive.[41] The results, however, were extremely modest.

The lone investigation under that Act dealt with the United Shoe Machinery Company of Canada. It had been started by the Liberal Administration before the Conservatives took office in 1911. Litigation preceded and accompanied the investigation. Before 1909 some Quebec shoe manufacturers had violated the tying clause in the typical United Shoe lease. The company began an action seeking an injunction to restrain the shoe makers from continuing the violation. Two Quebec courts dismissed the suit, declaring the leases with such tying clauses to be void. The Privy Council reversed the lower courts, making the temporary injunction perpetual and awarding nominal damages of $1 as no actual damages were sustained by the company. Their Lordships spoke to the question of the alleged detriment in the restrictive leases:

> If the monopoly established by the appellants and their mode of carrying on their business be as oppressive as is alleged (upon which their Lordships express no opinion), then the evil, if it exists, may be capable of cure by legislation or by competition, but in their view not by litigation. It is not for them to suggest what form the legislation should take, or by

> what methods the necessary competition should be established. These matters may, they think, be safely left to the ingenuity and enterprise of the Canadian people.[42]

The 1910 Act was the legislation and the ad hoc board the instrument for moving toward competition.

A group of residents of the City of Quebec, directly across the St. Lawrence River from the site of the only independent shoe machinery manufacturer in Canada, the Canadian General and Shoe Machinery Manufacturing Company of Levis, applied in 1910 for a court order to set up a board. The board found that United Shoe was a combine and allowed 6 months before the $1,000 per day maximum penalty would commence.[43] United Shoe sought a writ to prohibit the board from proceeding, primarily on the basis that the original complainants were chiefly consumers. The appeal court quashed the writ on two grounds. First, the judge's order for an investigation is analogous to a grand jury returning an indictment, meaning the proceedings shall continue. There is no appeal from that decision to continue. Secondly, "consumers must be able to complain against a combine as well as competitors otherwise a perfectly successful combine would be totally safe from complaint, which requires six or more persons."[44]

In January of 1914 the Minister of Labour reported to the House of Commons that the United Shoe Machinery Company had altered its leases before the end of the 6 months' period granted by the investigating board. With 138 out of 145 Canadian manufacturers using United Shoe machines, there had been only one

complaint. The Minister stated that, otherwise, "They are very much pleased with them, they are much pleased with the manner in which they are permitted to use them; they think it encourages the manufacture of boots and shoes." If purchase were required instead of leasing, considerable capital would be needed to enter the industry. In replying to the contention of Sir Wilfrid Laurier, Leader of the Opposition, that the complaint claimed the new leases were worse than the old, the Minister of Labour pointed out that that could be studied only with the appointment of a new board.[45] The previous Liberal administration had failed in 1910 to create a continuing operation of combines investigation; the current Conservative government failed to prompt any investigations under the 1910 law.

One further 1910 matter displayed the divergence between Parliamentary condemnation and judicial approval. The report of the 1888 Select Committee had focussed a good deal of attention on the activities of the Grocers' guild, concluding that the combination was "obnoxious to the public interest." There had apparently been concern for the interests of consumers as well as of competitors.[46] In 1910 the Dominion Wholesale Grocers' Guild and the Ontario Wholesale Grocers' Guild and others were charged with violating section 498. The Chief Justice of Ontario, trying the case[47] without a jury, distinguished the methods of the grocers from those, which had been condemned, of coal dealers, plumbers and lumber dealers. The distinction turned upon the fact that being a wholesaler made one a guild member by his simply choosing to

join. That the purpose of the guilds was laudable appeared to be accepted by the Chief Justice by reason of them being an attempt to correct very unsatisfactory conditions in the trade.

> The wholesale grocers were making a very small profit altogether, and not even a living profit on staples. Price-cutting was prevalent. The defendants assert that it was owing to the unfortunate and unsatisfactory conditions that existed that some steps had to be taken to preserve their existence in trade.[48]

The English common law, which the courts had noted in Rex v. Elliott had been in part superseded with the 1900 amendment, seemed surprisingly vigorous in the mind of the Chief Justice. After stating, "This prosecution is under the statute, but it is instructive to consider the common law on the subject . . .," he cited at length such cases as Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co., Ontario Salt Co. v. Merchants Salt Co., and Mogul Steamship Co. v. McGregor, Gow and Co. A recent Canadian case, The King v. Gage,[49] supported a dismissal. There it had been determined lawful for members of the Winnipeg Grain and Produce Exchange to join together to establish rules, albeit in some instances restrictive, for the successful operation of the market created by the Exchange. The charges against the grocers were dismissed with a warning against coercing wholesalers into joining. It was held,

> It is of the essence of the innocence of the defendants that the privileges which they seek to enjoy should be extended to all persons and corporations who are strictly wholesaler, whether they choose to join the Guild or not.[50]

Of several civil suits, in one[51] of which support for the decision was found in the American case, Dr. Miles Medical Co.

v. John D. Park and Sons Co., and in each of which the restrictive contracts were void for violating section 498, one is important for the Supreme Court of Canada confirming the judgment in Rex v. Elliott. The case[52] concerned a contract between two Winnipeg junk dealers, handling 90 to 95 per cent of the business between the Great Lakes and the Rocky Mountains, by which they agreed to fix buying prices and to share profits. The plaintiff (respondent) was suing for his alleged share of the 1906 profits. The trial judge dismissed the action because of holding the contract void, which had been the defence of Weidman and Company.[53] In spite of section 498 the Manitoba Court of Appeal took its cue from the common law and held the agreement valid, reversing the trial judgment.[54]

That the Supreme Court appreciated the importance of its first direct contact with section 498 may be seen in the concluding remarks of one of the justices:

> It may be that to give effect to the defendants' plea of illegality will enable them dishonestly to escape from the consequences of a bargain which they made fully understanding and appreciating its effect. But that the purpose of Parliament in enacting section 498 of the Criminal Code should be carried out and that the influence of its provisions for the protection of the public interests should not be weakened or impaired is much more important than that in a particular case a party to an illegal agreement should be prevented from dishonestly evading his private obligation.[55]

Firm in the opinion that the statute made illegal certain acts which would be lawful at common law,[56] the Court examined in detail the scope of the legislative ban.

> Parliament has not sought to regulate the prices of commodities to the consumer, but it is the policy

of the law to encourage trade and commerce and Parliament had declared illegal all agreements and combinations entered into for the purpose of limiting the activities of individuals for the promotion of trade; and preventing or lessening unduly that competition which is the life of trade and the only effective regulator of prices is prohibited.[57]

. . .

Corporate creations are necessary for the promoting of manufacturing and commercial life. Yet the facilities and capacities given them also tend in many ways to produce and do produce much of the evil I conceive to be aimed at by the statute.[58]

. . .

The development of modern industrial and commercial life, however, has certainly, when some of the later results are looked at, justified men in re-examining the profound belief heretofore held in unfettered contract and such competition as may exist therewith. And when they produce as the result of such examination, a statute like this and throw upon the courts the duty of drawing the line at the right place, we must, in order to discriminate properly, examine all such similar suggestions as the several foregoing, and all else within the whole range of legislation bearing on the problem so far as we can, and determine the principles upon which to proceed.

The state assuredly has the right to withdraw its aid from him who plots with another to deprive his fellow-men of the reasonable expectations each of them is entitled to cherish if the ordinary results of competition are allowed that free scope upon which so much of the prosperity and happiness of the dwellers in a free country hang.

It is at this point the crux of the whole question lies. We must assume Parliament realized that the unlimited power of competition begotten of combination, and the unlimited right of contract cannot any longer exist together with a full enjoyment of the ordinary results of competition to which I have just referred, and hence a new statutory crime had to be created.[59]

Referring to the law laid down in the Mogul Steamship Co. v. McGregor, Gow and Co., which permitted several monopolistic practices, Justice Idington stated,

The right in this country to drive others out of trade by such means and for such selfish purposes, so plainly recognized by the quotation above, as legitimate in England and formerly here, is taken away by

this statute.[60]

The Court recognised that the ultimate effectiveness of the legislation rested with the judiciary.

> We must assume that an Act such as this is not placed on the statute book for an idle purpose. Its operation must not be minimized simply because of difficulties in the way of enforcing it. Its purpose is to crush out of existence an evil. Its success, if any, must depend on its administration. Its great risk of failure lies in the fact that the requisite knowledge of the social and commercial forces shaping the social structure does not lie in the daily path of the lawyer's life, and that it cannot be well supplied by expert evidence.[61]

It would hardly be difficult to infer from those comments the desirability of establishing workable enforcement machinery outside the courts. The attempt of 1910 would be followed by others. The Court found the agreement came under the ban of the enactment, reversed the judgment of the Court of Appeal for Manitoba and restored the trial judgment, expressing in so doing its concurrence with the decision in Rex v. Elliott, that it does not follow that, because an agreement is not unlawful at common law, it may not constitute an offence against section 498. There had elapsed almost a quarter of a century since the time of the Select Committee of 1888.

In 1916 a civil suit raised the question of monopoly. Setting aside certain complicated shareholder-company relations which are not pertinent to this study, the case involved an agreement between the Canadian Anthracite Coal Company and its subsidiary, the Canmore Company, to purchase the assets of the Georgetown Collieries, which had begun in 1913 the only

competition for the custom of the Canadian Pacific Railway on its Crow's Nest division. Price cutting had followed the appearance of the Georgetown Collieries. It was frankly admitted that the object of the intended purchase was the reduction of competition for the railway business, which was their sole interest. The trial judge was of the opinion that the removal of the lone rival from so profitable a field was against the public interest, and that there was little likelihood of the public or the Canadian Pacific Railway benefitting from lower costs, which it was argued would arise with increased production at the Canmore Company's property. Finding the agreement under the ban of section 498, the judge ruled that the Canmore Company must be repaid by its directors any sums paid under that agreement by the company, but refused the plaintiff an injunction to prevent Canadian Anthracite from completing the purchase itself.[62]

The Appellate Division of the Supreme Court of Alberta acknowledged that the statute went further than the common law but nevertheless held that the trial judgment extended it further than the real meaning of its words, which clearly intended it to apply to arrangements among persons remaining in business.

> We have here not an agreement between persons remaining in the trade to fix prices or otherwise limit competition among themselves but an arrangement between two persons jointly interested in a coal mine to buy out a competing mine altogether. An examination of all the cases decided under sec. 498 will shew that this is apparently the first time that the section has been so extended. . . .
>
> . . .
>
> If we go beyond the question of criminality and look into the cases in which contracts in restraint of

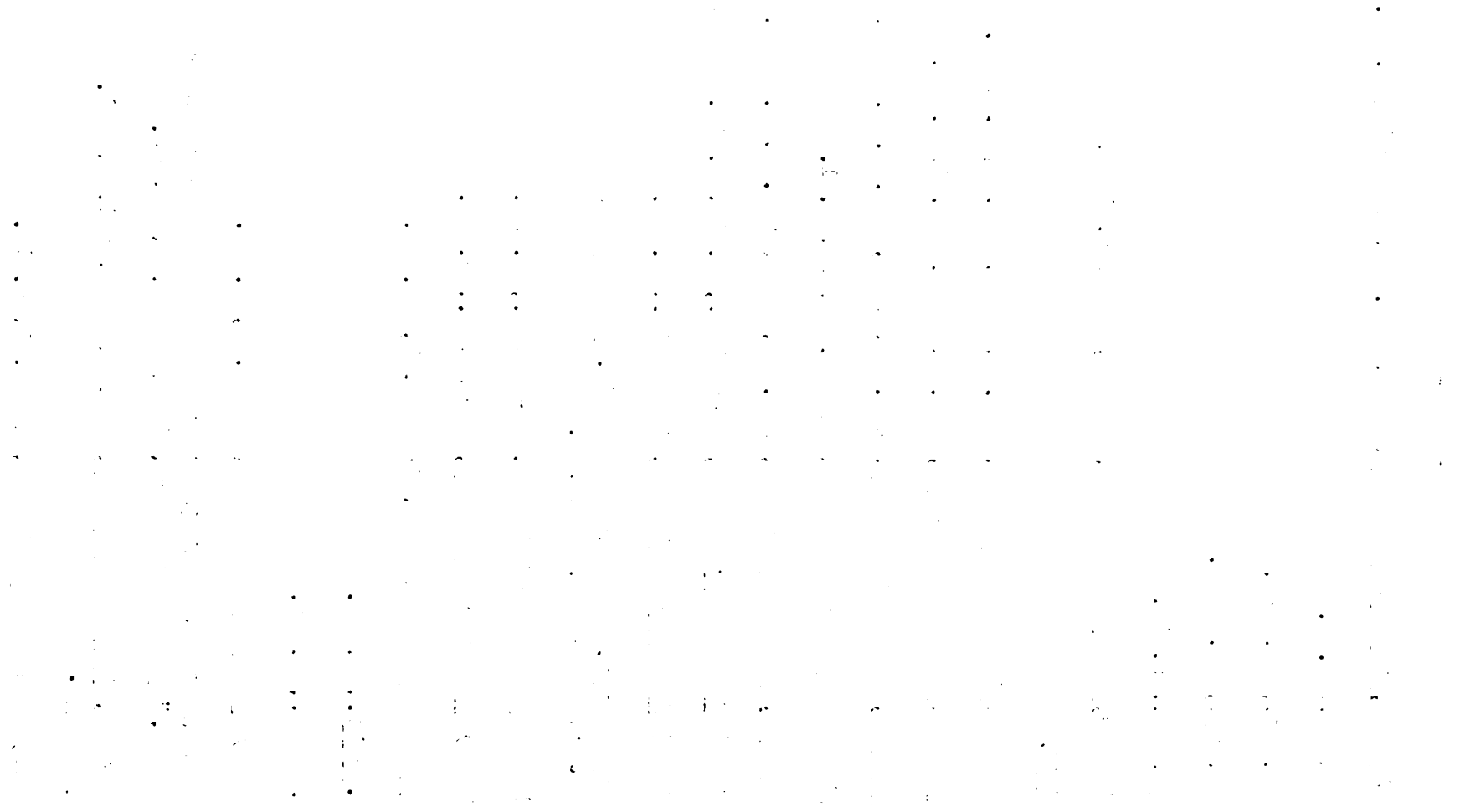
> trade have been held illegal we shall find the great majority of them dealing with covenants not to carry on a certain kind of business contained in an agreement for the sale of a business.
>
> In neither of the two English cases which were much canvassed by the Supreme Court of Canada in Weidman v. Shragge, ubi supra, viz: Maxim Nordenfelt Guns and Ammunition Co. v. Nordenfelt, (1894) A.C. 535, and Mogul Steamship Co. v. McGregor Gow and Co., (1892) A.C. 25, was there any question of an arrangement merely to buy out a competitor completely.[63]

There being no contravention of section 498, the Anthracite-Canmore agreement was valid and the payments thereunder lawful. The Supreme Court of Canada confirmed the decision of the appeal court.[64] The legislative ban did not encompass monopoly by merger. The Georgian Collieries were closed down, dismantled and abandoned.

Even the bare possibility of action under the Combines Investigation Act, 1910, was removed in 1919 with its repeal and replacement by the Combines and Fair Prices Act, 1919,[65] and the Board of Commerce Act.[66] It was the year following the end of World War I; the chief concern was the increase in the price level. Provision was made for "cease and desist" orders, which could be varied or rescinded by the Governor in Council, on its own initiative or on petition to it. Appeal was to the Supreme Court of Canada in regard to questions of jurisdiction or law. The "fair prices" part provided for specific regulation. A question of constitutionality was raised after the Board had issued an order with the effect of setting certain clothing prices in Ottawa. The Supreme Court of Canada arrived at a 3 to 3 no decision. The Privy Council, speaking to the powers of specific regulation, rejected the arguments of the Attorney-General for Canada that the acts were supported by section 91 of the British

North America Act because they concerned: Peace, Order, and good Government of Canada; the Regulation of Trade and Commerce (head 2); the Criminal Law (head 27), and determined the regulatory aspects ultra vires the Dominion Parliament, as interfering with Property and Civil Rights in the Province (head 13 of section 92).[67] That judicial emasculation of Parliament's power to regulate trade and commerce belongs in the capricious realm of constitutional law. In 1921, the year in which the Liberals ended a decade out of office, only the Criminal Code provisions stood in the path of monopoly growth.

1. Journals, House of Commons, 1888, vol. 22, Appendix(No. 3).
2. op. cit., p. 5.
3. op. cit., pp. 6-7.
4. op. cit., pp. 3-10.
5. op. cit., p. 10.
6. Debates, House of Commons, May 18, 1888, p. 1545.
7. Ibid.
8. Debates, House of Commons, Apr. 8, 1889, vol. 2, p. 1113.
9. Debates, House of Commons, Feb. 6, 1889, vol. 1, p. 19.
10. Debates, House of Commons, Apr. 22, 1889, vol. 2, p. 1440.
11. (1889) Statutes of Canada, 52 Vic., c. 41, s. 1.
12. Debates, House of Commons, Apr. 21, 1890, vol. 2, p. 3704.
13. (1897) Statutes of Canada, 60-61 Vic., c. 16, s. 18.
14. (1892) Statutes of Canada, 55-56 Vic., c. 29.
15. The Queen v. American Tobacco Co. of Canada (1897) 3 Revue de Jurisprudence 453 at 460.
16. (1899) Statutes of Canada, 62-63 Vic., c. 46.
17. (1900) Statutes of Canada, 63-64 Vic., c. 46.
18. Sessional Papers, 1902, 1-2 Edw. 7, No. 53.
19. op. cit., p. 17.
20. op. cit., p. 15.
21. (1903) Statutes of Canada, 3 Edw. 7, c. 46.
22. "Report of the Royal Commission on the Tobacco Trade of Canada," Sessional Papers, 1903, 3 Edw. 7, No. 62.
23. Debates, House of Commons, Aug. 4, 1904, vol. 5, col. 8394 et passim.
24. (1904) Statutes of Canada, 4 Edw. 7, c. 17.



25. V. W. Bladen, An Introduction to Political Economy, University of Toronto Press, Toronto, 1951, p. 215.

26. Wampole et al. v. Lyons (1904) 25 Que. S.C. 390 at 391 and 393.

27. Wampole and Co. v. F. E. Karn Co. (1906) 11 O.L.R. 619.

28. op. cit., 627.

29. Hately v. Elliott (1905) 9 O.L.R. 185.

30. Rex v. Elliott (1905) 9 O.L.R. 648

31. op. cit., 653-54.

32. Rex v. Elliott (1905) 9 O.L.R. 656 at 661.
supra, Introduction, p. 2.

33. Rex v. Master Plumbers and Steam Fitters Co-operative Association (1905) 14 O.L.R. 295 at 304.

34. Rex v. Master Plumbers and Steam Fitters Co-operative Association (1907) 14 O.L.R. 307 at 309.

35. (1906) Revised Statutes of Canada, 5-6 Edw. 7, c. 146.

36. The King v. McMichael (1907) 18 C.C.C. 185.

37. Rex v. Clarke (1907) 14 C.C.C. 46.
Rex v. Clarke (1907) 14 C.C.C. 57.

38. (1909-10) Debates, House of Commons, vol. 2, Jan. 18, 1910, col. 2057.

39. (1909-10) Debates, House of Commons, vol. 4, Apr. 12, 1910, cols. 6823 and 6837.

40. Statutes of Canada, 9-10 Edw. 7, c.9.

41. W. W. Swanson, "Curbing the Combines by Boards of Investigation," Queen's Quarterly, April, May, June, 1910, p. 351.

42. United Shoe Machinery Co. of Canada v. Brunet et al. (1909) A.C. 330 at 344.

43. Labour Gazette, Nov. 1912, pp. 464-72.

44. United Shoe Machinery Co. of Canada v. Laurendeau and Drouin (1912) 2 D.L.R. 77 at 83.
Laurendeau was chairman of the board of investigation and Drouin was one of the Quebec City complainants.

45. Debates, House of Commons, Jan. 28, 1914, vol. 1, pp. 278-79.

46. supra, ch. 7, pp. 166-167.

47. Rex v. Beckett et al. (1910) 20 O.L.R. 401.

48. op. cit., 419.

49. The King v. Gage (1907) 13 C.C.C. 415.
The King v. Gage (1908) 13 C.C.C. 428.

50. Rex v. Beckett et al. (1910) 20 O.L.R. 401 at 432.

51. Stearns v. Avery (1915) 33 O.L.R. 251.

52. Weidman v. Shragge (1912) 46 S.C.R. 1.

53. Shragge v. Weidman (1910) 20 Man.R. 178.

54. Shragge v. Weidman (1910) 20 Man.R. 188.

55. Weidman v. Shragge (1912) 46 S.C.R. 1 at 44.

56. supra, Introduction, p. 2.

57. (1912) 46 S.C.R. 1 at 4.

58. op. cit., 21.

59. op. cit., 22-23.

60. op. cit., 25.

61. op. cit., 26-27.

62. Stewart v. Thorpe (1916) 27 C.C.C. 409.

63. Stewart v. Thorpe (1917) 36 D.L.R. 752 at 757-58.

64. Stewart v. Thorp [sic] (1918) 49 D.L.R. 694.

65. (1919) Statutes of Canada, 9-10 Geo. 5, c. 45.

66. (1919) Statutes of Canada, 9-10 Geo. 5, c. 37.

67. In re the Board of Commerce Act, 1919, and the Combines and Fair Prices Act, 1919 (1922) 1 A.C. 191.

## Chapter 8

To apprehend that more than three decades of Canadian anti-combines policy had foundered required little more than a reading of the 1921 opinion of the Judicial Committee of the House of Lords which had hobbled the most recent development of that policy. To compare the narrow legal construction of the E. C. Knight case in the face of the plain language of the Sherman Act with the amazing constitutional construction of the Board of Commerce case is to make the American judgment seem minor. It has been observed[1] that years of erroneous judicial process have quite altered the meaning and intent of the British North America Act, 1867,[2] which created the Confederation of the Dominion of Canada. The striking down of the regulatory powers of the Board of Commerce was trifling beside the accompanying emasculation of the federal power to regulate trade and commerce.

A warning of the approaching storm over the anti-combines question was sounded in the House of Commons before the decision of the Privy Council had come down. In May of 1921,

Mackenzie King accused the government of insincerity, claiming that any decision would little affect the government's lack of concern in the matter, and citing as evidence the extensive network of interlocking directorates that had been created between two government concerns -- Canadian National Railways and Canadian Government Merchant Marine -- and many private companies deeply interested in transportation.[3] The intensity of the railing against trusts and combines grew during the first session under the new Liberal government, which included as Minister of Labour James Murdock, who had been the second to resign from the Board of Commerce before the Privy Council affair.

Thomas L. Church, member for Toronto North, vigorously put the case for action against combines, raising again the tobacco issue, and suggested that the Minister's actions were not matching his earlier bold denunciations.[4] Remarks of Sir Henry L. Drayton, former Conservative Minister of Finance, must have stirred ghosts of 1888. He contrasted Murdock's condemnation of combines with the vast mergers that had occurred before 1911 (omitting, of course, the greater number which had followed during a Conservative regime), noting in particular the British Empire Steel Company, which the Minister of Labour himself had claimed involved no less than $230,000,000 in good will or water.[5] He represented York West, the old riding of N. Clarke Wallace. It would actually be difficult, if not impossible, to establish a political significance to the 374 consolidations between 1900 and 1933. They were concentrated essentially during boom periods.[6]

The effect of resale price maintenance being enforced by manufacturers refusing supplies to those not abiding by such a policy, was described to the House in words similar to those to be heard in later years in the United States Supreme Court. ". . . The manufacturer is endeavouring to make of free merchants men who have to be, to a certain extent, his serfs, to do what he tells them. . . . an example of the new feudalism, and the sooner we get away from that the better."[7]

During the 1923 presentation by the Prime Minister of new anti-combines legislation, the discussion was lively, at times acrimonious. It was his opinion that previous legislation had "all been by way of experiment with a very difficult subject."[8] This latest proposal was proceeding on the theory that,

> large combinations of capital, organizations of business in a large way, are an absolute essential if the business of our country is to hold its own in competition with business of other countries. But just because it is recognized that it is necessary to have these large organizations of business, so the government recognizes that some restraint must be placed on the possible abuse of great power which may come into their hands. The legislation does not seek in any way to restrict just combinations or agreements between business and industrial houses and firms, but it does seek to protect the public against the possible ill effects of these combinations.[9]

A clear distinction between good and bad combines was being made. Emphasis was placed upon the effectiveness of publicity as a remedy, which may have been somewhat naive in the face of the expenditures which indicted companies would sometimes be willing to make in order to present <u>their</u> side to the public.

Later incidents dictate noting the contention of the

Conservative member for Vancouver Centre, H. H. Stevens, that the bill would duplicate other laws, confuse and increase expenses. "All that is sought for in this bill is much better provided for in the Criminal Code, the Inquiries Act, the Patent Act and the Customs Act. These acts with slight amendments constitute the proper medium of treatment and provide all the needed machinery, . . ."[10] That position was even more firmly stated by the Leader of the Opposition and various members of his party.

One member, however, called all the legislation, not an "experiment," but the "greatest political joke ever played on the people." His remarks also recalled many historic allegations that connected tariffs with trusts. Speaking of the 1880's, he said,

> It was plain to both parties that these combines were brought into being by the protective tariff, so to offset the agitation against trade restriction an act was passed by the Macdonald government for the suppression of combinations in restraint of trade. Obviously the politicians responsible for that act in 1889 never intended it to be anything more than a mere make-believe for there could be no conceivable reason for the manufacturers dickering with the politicians for a high protective tariff when an effective measure on the statute books would have prevented them taking full advantage of such a tariff.[11]

He illustrated his viewpoint further by reference to the anti-dumping provisions of the customs law. The fact that the successful combines prosecutions could then be counted on the fingers of one hand gave a strong air of credulity to his charges, thereby implicitly supporting the proposed revamping of the law.

An alternative approach was presented, appropriately enough, by J. S. Woodsworth, member for Winnipeg Centre. He

expressed the view that, once it is admitted that, "this is essentially the age of combination, and in so far as we still have competition it is indicative of incomplete development," the separation of unjust from just does not take society very far because the central problem is the threat to public welfare posed by the power inherent in combination. He stated his party's view clearly by holding that,

> It is impossible for us effectively to break up these combines. The only possible thing for us to do if we want really effective action is to take hold of them and carry them one step further until we have such a complete combine that the public through its various organizations co-operative, municipal, provincial and federal, will be able to use it for its own purposes.[12]

That position possessed ineffectual voting strength but its expression might well be taken as a warning of a likely course open in the event of a failure to do more about combines than had been achieved in the preceding 34 years.

In asking what was taken to be a rhetorical question about the existence of a newspaper combination, which would add an ironic footnote to the earlier inquiry[13] on behalf of newspapers, another member leveled a flat criticism at the proposed punishments. Insisting that the $25,000 fine maximum for corporations was inadequate, he favoured imprisonment for company officers on the grounds that if the law were necessary, it should require a real punishment for the guilty.[14] A milder view of stressing the protective rather than the punitive aspects of the bill was stated by the Minister of Labour in these words: "The public, unorganized as the sands by the sea, requires a protection against the

superorganization of modern business." He repeated the government distinction between good and bad combinations.[15] The member for York South recommended a vigorous attack in his suggestion that the House of Commons send a short telegram to the sugar combine in Montreal, declaring, "If you do not by Friday afford relief to the housekeepers and every citizen of this country who uses sugar, by a reduction of the price, there will be a reduction in the duty on sugar."[16]

The member for Brome, who had warned a year earlier of the feudalistic aspects of the corporate system, questioned the validity of the government's desire to avoid the American policy of a general ban. "There may be that rara avis in our economic life, the beneficent combine, the gathering together of manufacturers or middlemen for the purpose of reducing costs of production or of distribution and of giving the benefit of that reduction to the consumer. . . . But I am afraid . . . that as a rule combines are not made for the purpose of reducing prices but of maintaining or raising them."[17]

In support of his contention at the previous session that only effective results proved that an avowed purpose of curbing monopolistic practices was being followed without equivocation, the member for Toronto North explained a case of direct action.

> In the city of Toronto restaurants, for example, cannot operate except under license from the police commissioners. So Colonel Denison and his colleagues, including Judge Winchester and myself, summoned the managers of these American restaurants /Childs' and Bowles'/ before the police board and threatened to cancel their licenses unless the rates they were

> charging were cut in two within one week. Action in the desired direction promptly followed. Before the expiration of the allotted time the prices charged for coffee, toast, vegetables, eggs, and other articles had been reduced by 33 1/3 per cent. This shows that you can get action if you only go the right way about it.[18]

A similar bold recommendation had been included in the bill introduced in 1888, which would have provided for the forfeiture of a company's charter.[19] It remains a suggestion unlikely to come to fruition in legislation.

The next day the member for Toronto initiated a keen discussion by his inquiry, ". . . were the Merchant Marine a part of an Atlantic combine in any way for an increase in freight rates?" The Minister of Railways gave a fascinating reply: "The management of the Canadian Government Merchant Marine, Limited, maintain that they were never parties to any combines though their representative has sat in at the weekly sessions of what is known as the 'North Atlantic Conference' for the stabilization of freight rates and the ensuring of equality to all shippers." It was reported that on regular steamship lines operating from Canadian ports rates were determined, neither by the law of supply and demand nor by cost plus a reasonable profit but by a combine with headquarters at 8-10 Bridge Street, New York, and with a subsidiary association, the Canadian Liner Committee, in Montreal meeting every Tuesday afternoon in various companies' offices.[20]

The Prime Minister's concluding remarks stressed the aspects of investigation to obtain information and of publicity. He expressed his viewpoint by saying, "Prevent the light of day

from penetrating the secret recesses of various business devices, and very soon industry, instead of being the great servant of humanity which it should be, comes to be an instrument to be used against the well-being of the people themselves." The second reading of the bill passed 138 to 21, indicating a broad measure of support.[21]

Section 2 of the Act[22] retained the "merger or monopoly" concept of the 1910 legislation. Sub-section (1) stated,

> combines which have operated or are likely to operate to the detriment or against the interest of the public, whether consumers, producers or others, and which
> (a) are mergers, trusts or monopolies, so called; or
> (b) result from the purchase, lease, or other acquisition by any person of any control over or interest in the whole or part of the business of any other person; or
> (c) result from any actual or tacit contract, agreement, arrangement, or combination which has or is designed to have the effect of
>  (i) limiting facilities for transporting, producing, manufacturing, supplying, storing or dealing, or
>  (ii) preventing, limiting or lessening manufacture or production, or
>  (iii) fixing a common price or a resale price, or a common rental, or a common cost of storage or transportation, or
>  (iv) enhancing the price, rental or cost of article, rental, storage or transportation, or
>  (v) preventing or lessening competition in, or substantially controlling within any particular area or district or generally, production, manufacture, purchase, barter, sale, storage, transportation, insurance or supply, or
>  (vi) otherwise restraining or injuring trade or commerce,
> are described by the word "combine" . . .

The penalties were greater than those provided for in section 498 of the Criminal Code.

32. Every one is guilty of an indictable offence

> and liable to a penalty not exceeding ten thousand dollars or to two years imprisonment, or if a corporation to a penalty not exceeding twenty-five thousand dollars, who is a party or privy to or knowingly assists in the formation or operation of a combine within the meaning of this Act.

The creation of a permanent official, the Registrar, was a marked improvement in the means of administering the Act. An application to him by any 6 citizens might instigate an investigation into an alleged combine. The Registrar was endowed with suitable powers for conducting an inquiry; similar powers were provided for commissioners who might be appointed to carry out specific investigations. It was required that a report of every investigation by either the Registrar or a commissioner be submitted to the Minister. The Minister's action was set forth in section 28.

> Any report of a commissioner,* other than an interim report, shall within fifteen days after its receipt by the Minister be made public, unless the commissioner is of the opinion that the public interest would be better served by withholding publication and so states in the report itself, in which case the Minister may exercise his discretion as to the publicity to be given to the report in whole or in part.

If the Minister considered an offence to have been committed, he might submit any relevant returns, evidence or information to the appropriate provincial attorney-general for action at the decision of the latter. Failing action by any such attorney-general deemed required by the Governor in Council, the Solicitor-General might permit an action. That did not prove to be a source of useful activity. The special remedies with respect to customs and

* underlining supplied.

patents were continued. The two acts of 1919 were repealed. The inadmissibility of evidence produced during an investigation at any subsequent criminal proceeding was a defect of the law.

A year prior to the passage of the Combines Investigation Act the Attorney-General for Ontario had brought "an action[23] of a very novel kind," against the Canadian Wholesale Grocers Association, seeking a declaration that the defendants had entered into a combine, in violation of section 498 of the Criminal Code and of the common law, the dissolution of the combine and an injunction to restrain the defendants from acting to continue the combine or to continue unlawful price agreements. A testimony to the durability of the causes for the agitation in the 1880's came from the fact that charged with entering into understandings with the wholesale grocers were the only two Canadian manufacturers of starch.[24] The court ruled that none of the alleged restrictive arrangements were actionable at common law and went further to strike down the plaintiff's plea for an injunction, on the grounds that no public or private right existing independently of the provisions of the Criminal Code was invaded or threatened -- that is, even granting the acts were crimes under section 498, every crime is not necessarily also a tort.[25] In dismissing the civil action, the court stated that it would be improper to make a finding in regard to the possible criminality of the acts charged. That was to settle the matter of injunction for some years.

Under the first Registrar, Harry Hereford, three investigations examined conditions in regard to fruits and

vegetables in Western Canada, coal in Winnipeg, and potatoes in New Brunswick. There was a finding of no combine with respect to coal, a detrimental combine in the fruit and vegetable business, and an aggressive market development for potatoes by one Guy B. Porter, which was working against the interests of the growers. After receiving a submission from the Minister of Labour the Attorney-General for New Brunswick took no action; neither was there action by the Dominion government.

Upon receiving submissions from the Minister regarding the fruit and vegetable situation in Western Canada, the western Attorneys-General requested a Dominion prosecution which was successfully undertaken, bringing a conviction of 4 officials and 4 companies of the Nash organisation from Minneapolis. The machinery of the new combines legislation had worked effectively. The jobber-broker relationship was closely scrutinised and found detrimental. The original complaint had been by 6 residents of British Columbia. The convictions, however, rested upon fraud and secret commissions, not upon section 498 or the Combines Act. Each company was fined $25,000 and each individual $25,000 and 1 day's imprisonment. British Columbia and Saskatchewan passed legislation governing sales on consignment, and the Nash organisation was reportedly operating solely as a jobbing concern.[26]

A former personal secretary to Prime Minister W. L. Mackenzie King became the new Registrar in the autumn of 1925. F. A. McGregor's first report made a finding of no combine in the sale of bread in Montreal. A second 1926 investigation into the

marketing of fruits and vegetables in Ontario was conducted by a commissioner, Lewis Duncan, who had done a similar work in Western Canada. Although he found no contravention of the Combines Act, he reported that certain marketing conditions and practices were prejudicial to the interests of producers and consumers. The remedy was provided by the Ontario Fruit and Vegetables Consignment Act of 1927.[27] There was sufficient flexibility to effect some remedies without litigation.

An investigation begun by the Registrar in 1926 into the activities of the Proprietary Articles Trade Association (PATA), a group of manufacturing and retail druggists, led to certain important constitutional questions. Although the Minister of Labour supported the Registrar, to avoid possible criticism after PATA complaints about fairness he appointed in 1927 L. V. O'Connor, whose report as commissioner was made public in October. Both the Registrar and the commissioner reported a combine. Prices had been raised and were likely to be raised again. PATA, the Attorney-General for Quebec, the Attorney-General for Ontario, the Amalgamated Builders' Council and the Amalgamated Clothing Industries Council challenged the constitutional validity of the anti-combines laws. To clarify the situation more speedily the Governor in Council referred the question to the Supreme Court of Canada. The unanimous ruling was that both the Combines Investigation Act and section 498 of the Criminal Code were <u>intra vires</u> the Parliament of Canada under the reservation thereto of "The Criminal Law, except the Constitution of Courts of Criminal

Jurisdiction, but including the Procedure in Criminal Matters."[28]

The first three named of the challengers in the Supreme Court reference carried the matter to the Judicial Committee of the Privy Council. The Board of Commerce case was distinguished in that the finding of invalidity had arisen from the provisions of the 1919 acts relating to fair prices, not to combines. The Privy Council affirmed the decision of the Supreme Court, finding that section 498 and most of the Combines Investigation Act were supported under section 91 of the British North America Act, head 27, "The Criminal Law," and that the remedies regarding customs duties and patents were supported under heads 3 and 22, "The raising of Money by any Mode or System of Taxation" and "Patents of Invention and Discovery." The Committee spoke to the issue of the regulation of trade and commerce:

> The view that their Lordships have expressed makes it unnecessary to discuss the further ground upon which the legislation has been supported by reference to the power to legislate under s. 91(2) for "The Regulation of Trade and Commerce." Their Lordships merely propose to dissociate themselves from the construction suggested in argument of a passage in the judgment in the Board of Commerce case under which it was contended that the power to regulate trade and commerce could be invoked only in furtherance of a general power which Parliament possessed independently of it. No such restriction is properly to be inferred from that judgment. The words of the statute must receive their proper construction where they stand as giving an independent authority to Parliament over the particular subject matter. But following the second principle noticed in the beginning of this judgment their Lordships in the present case forbear from defining the extent of that authority. They desire, however, to guard themselves from being supposed to lay down that the present legislation could not be supported on that ground.[29]

It is unfortunate that their Lordships did not face the issue

directly by basing their judgment at least in part on that power.

PATA, comprising about 160 manufacturers, 28 wholesale druggists and 2700 retail druggists, was using resale price maintenance as its principal weapon, apparently little impeded by the earlier court rulings[30] that the restrictive contracts involved were unenforceable. More than 600 articles had been covered in the first price list of PATA. The severe conclusions of the Registrar may be summarised. The effect of the PATA was worse than price enhancement. It restrained the drug business, stereotyping distribution, militating against lower prices, confirming in some cases excessive costs of distribution and selling, penalising the passing of reductions in operating costs on to the consumers, and consequently should be restrained from continuing such conduct. Although the courts had removed any doubt about the validity of the laws, no action was taken regarding PATA on the basis that it was reported the harmful activities had ceased.[31]

Criminal prosecution and conviction did not always have an enduring effect, possibly because of the lack of the relatively easy route back to court provided by injunction. Slightly more than 20 years after the conviction under section 498 of 2 associations in the plumbing business,[32] the professional skills of Louis M. Singer, K.C., were applied to reinvigorating a more or less dormant association of plumbing and heating concerns for an organisation fee of $7,500. After the formation of the Canadian Plumbing and Heating Guild, in 1928 a second association, the Amalgamated Builders' Council, was registered under the Trade

Unions Act. For directing 3 organisations Mr. Singer received "approximately $40,000 by way of salary, in addition to his expenses." Regarding the Amalgamated Builders' Council, the trial judge held that, "from its operations it is clearly evident that the purpose of those responsible for its creation and operation was to avail themselves of any immunity provided by this Act [Trade Unions Act], and, if possible, evade the provisions of the Combines Investigation Act and the Criminal Code."[33] The final outcome of several cases[34] was the imposition of a total of $45,200 in fines, the placing of 11 individuals each under a year's suspended sentence, and the judicial finding that proceedings under the Combines Investigation Act are "incompletely privileged." The registrations under the Trade Unions Act were cancelled at the end of 1929. The conducting of the successful prosecutions by the Dominion government had been at the request of the Attorney-General for Ontario.[35]

Of the remaining reports begun during the Liberal administration, one found no combine in bread-baking, one culminated in a prosecution and conviction and one in a prosecution and acquittal. Sixteen electrical contractors in Toronto, seven operating as companies and nine as individuals, associated together in the Electrical Estimators Association, and seven of their representatives were charged under both section 498 and the Combines Act concerning restraint of trade, enhancing prices, and preventing or lessening competition.[36] Their chief device was submitting "average tenders," based on the prime cost estimates of

the members, with an addition of about 17 per cent for overhead and 10 per cent for profits. Such a bid was necessarily always higher than would have obtained with open competition. The element of fraud did not enter the case, although there seemed to be an analogy with Rex v. Simington.[37] Although he found the parties guilty on several counts, the trial judge held that they actually constituted a single offence. Choosing to impose the penalties under section 32 of the Combines Act (where the limits are greater) and stating, "The penalties ought not to be vindictive, but they should be substantial, and under all the circumstances, particularly in view of the prosecution of the Master Plumbers in 1905, and the result of that prosecution, they ought to be exemplary," the judge nevertheless imposed no single fine greater than $2,500 -- a weak example, a mild punishment. The fines totaled $26,500.

The case dealing with the motion picture industry[38] was the first instance of a difference between the reporting of a combine by the Registrar or a commissioner and the subsequent court decision. The charges were of the customary conspiratorial nature. The parties concerned were exhibitors or distributors and their joint association. As the largest individual customer of the distributors, Famous Players Canadian Corporation was seen to possess a special measure of economic power; that was not, however, particularly relevant to the question of conspiracy. The judge was not satisfied that Famous Players was receiving such a degree of "first run protection" as to work to the

detriment of the independents. His remark that, "While Famous Players was enjoying a first run and protection afterwards with one film of a certain picture there was nothing to prevent some independent exhibitor having the same privilege with another film of the same picture in some other district," did not evince complete understanding of the economic implications of such schemes. A case was not made to support the alleged conspiracy; all parties were acquitted.

The Conservatives returned to office under the leadership of R. B. Bennett, K.C., in 1930. The preparation of 6 reports by the Registrar during the 5-year Conservative government showed a sharp movement away from publicity as an instrument in combatting combines. Four of the reports were never published. The Attorney-General for Ontario secured the conviction of 15 persons, each of whom was fined $100, connected with a combine in the manufacture of baskets and wood veneer containers for fruits, vegetables and meats. The prices of radio tubes throughout Canada were greatly reduced after an investigation; the Attorney-General for Ontario took no action on the advice of counsel. Nothing came of the studies of gasoline distribution in Ontario and of rubber footwear. A report on leaf tobacco, finding no violation of the law but setting forth evidence that the growers were at a serious disadvantage in their relations to the buyers.[39]

Although submitted to the Minister on April 21, 1933, the Registrar's report on anthracite coal was not published until 1936, after the Liberals had returned to office. Before the

report's appearance, two successful prosecutions, involving a total of 10 companies, had been completed. To continue an historical anecdote, begun in Edmonton in 1907,[40] one counsel for the Crown was Louis S. St. Laurent, K.C. That there was some cause for scrutiny of the coal importing business had been urged in the usually tranquil Senate in 1932. Senator Rodolphe Lemieux had stated information reported by a high government official. Coal was $5.30 a ton landed in Montreal; after screening and delivering, the public was paying $16 or $17. His suggestion that the increase was extreme may have been especially interesting to one of his colleagues.[41] Senator Lorne C. Webster, "reported to have had an income of more than a million dollars a year in the late 1920's,"[42] was an active moving force in the corralling of British coal imports into Canada. The Minister of Labour defended the policy of withholding publication on three grounds: the technical point that it was not mandatory because the inquiry had been by the Registrar not a commissioner, there might be some injustice if the courts subsequently found no offence, and in the event of an offence publication might give aid to the offender. Prime Minister Bennett displayed the true nature of these arguments a year later by declining to publish the report <u>after</u> the companies concerned had been convicted.[43]

The significance of the two coal cases[44] involving Senator Webster lay in the fact that one of the charges against the 11 companies (one of which was found not guilty) came under the Combines Act, section 2, sub-section (1)(b), which dealt with

acquisitions operating or likely to operate against the interest of the public. For the Ontario and Quebec market no domestic anthracite was available and supplies were imported from the United States and, at somewhat lower prices, from the British Isles from Welsh and Scottish fields. Until the government embargo of February 28, 1931, Russian imports were also available. That the companies, with the exception of the Webster-owned St. Lawrence Stevedoring Company which was acquitted, had acted in concert "to unduly limit the facilities for transporting, supplying, storing and dealing," and "to have the effect of preventing and lessening competition in the purchase, barter, sale and supply of coal and coke," in contravention of section 498, and, further, in contravention of the Combines Act, because of the detrimental preventing and lessening of competition, was firmly established in both suits. Five companies of the Webster group were fined a total of $30,000; the other five were fined a total of $16,500. Evidence in court showed clearly that Senator Webster had played a most active part in the many negotiations entered into for the establishment and maintenance of control of the market.

At the same time, however, the court rejected the argument that the acquisitions operated or were likely to operate to the detriment of the public. Common ownership of several companies was ruled not to come under the legislative ban of section 2, subsection (1)(b). The acquisition of the various coal retail firms was not brought under the ban of the Combines Act for two reasons. First, some had been acquired to protect accounts

receivable. Second, the acquisition of a few of more than 400 retailers in Montreal could have but small effect on the trade. The purchase of a Toronto concern through an intermediary whose connection with Senator Webster was unknown to the seller destroyed the element of conspiracy. There seemed still to be few difficulties in the path of enlarging one's control of a market by purchase.

Two cases[45] relating to the provincial regulation came to decisions analogous with that of Nebbia v. New York. A province may impose thorough-going regulations on an industry, including price-fixing by a public board, licensing, and the punishment by fines of violators of the regulations. A suit to determine points of law in regard to specific damages, in addition to damage simply as a member of the public, allegedly suffered by a firm because of the actions of an alleged combine, brought out the court opinion that, ". . . the Combines Investigation Act does not in any way contemplate, nor was it the intention of Parliament, to confer any private right of action."

. . .

> When it is remembered that we have a dual legislative system, the Parliament of Canada possessing exclusive jurisdiction over criminal law and the Provincial Legislature exercising sole jurisdiction over property and civil rights, I think it is plain that the Parliament of Canada in passing this Act [Combines] intended it to be an exercise by it of the power to legislate with respect to crime and criminal law and that it did not intend to interfere with the provincial jurisdiction over property and civil rights.[46]

In 1934 Hon. H. H. Stevens, Minister of Trade and

Commerce, was appointed chairman of a Royal Commission on Price Spreads, which had begun five months earlier in February as a Special Select Committee of the House of Commons. In 5 of the 6 by-elections during the year Liberals were elected. Wm. Walker Kennedy succeeded to the chairmanship of the Royal Commission upon the resignation of Hon. H. H. Stevens in October from the Commission and from the Cabinet. Affairs were in a turmoil for several months.

The Report noted that the most intense periods of consolidation had been times of prosperity; the most active periods were 1910-12 and 1924-30. In commenting, "The facts support the view that the real motive of many consolidations was financial gain to the professional promoter and investment dealer," the Commission opined that, ". . . the 'promoter' of a refinancing scheme is not entitled to the reward of an entrepreneur, but merely to the modest brokerage customarily payable to a broker who acts as intermediary in the sale of a property from one party to another."[47]

In summary, the Commission observed that the severity of unfair practices was increased by depression, the strong enlarged their dominance in depression, the presence of monopoly and oligopoly was leading to price-fixing with production adjusted to whatever sales were then possible and was creating an aversion to price competition, the disappearance of many small independent units and the ending of a free entry and exit in regard to the market was destroying smooth adjustment in the economy. All these

problems were worsening the difficulties arising from the existence in Canada of one-resource areas, severe seasonal variations in output, and the high cost of a vast area sparsely settled. The growing separation of control from ownership in large companies was noted. Increasing concentration was cited in tobacco, asbestos, petroleum, nickel, cement, meat packing, agricultural implements, and cotton textiles. Rayon was a 2-firm industry. Powerful associations in the rubber industry fixed prices of footwear and tires. The basing point system of pricing used by such firms as Canadian Industries Limited was condemned as a monopolistic practice. The Commission contended that competition driving out the inefficient was needed to correct the 20-year long excess capacity in flour milling. It went further in stating, after an examination of the fact that milling firms controlled a majority of the baking concerns, that the local bakery was the most efficient because it avoided high costs of delivery and selling.

The recommendations of the Royal Commission were many. A Securities Board should be created to effect greater disclosure, to protect capital by prohibiting dividends being paid out of capital, and to prevent stock watering. To replace the legal fiction that ownership means control it was stated, "we feel that the whole trend of law should be toward putting the managers and directors in a trustee capacity, with respect to all security holders." The B. N. A. Act should be amended to give the Dominion exclusive jurisdiction over companies or, as a second

best, Dominion-Provincial co-operation should establish uniform company law across the country. Pointing to the sufficient warning in the N. R. A. experience, the Commission warned against proposals for industry self-government. In some situations monopoly might require complete regulation or government ownership, in others state action might be able to restore competition. For the vast jungle of imperfect competition in between these two, there was a need of price control or profit restriction. Because of the possibility of some far-reaching social changes being irreversible, a warning was sounded for government intervention to move with caution. The anti-combines law should be made more certainly applicable to monopoly. Where the restoration of competition is unlikely or undesirable, there should be a commission to regulate the monopoly, supervise government authorised price agreements (in spite of the warning about the N. R. A.), and conduct economic inquiries. In Annex 8 the Canadian Manufacturers' Association urged the outright repeal of the Combines Investigation Act or, failing that, the weakening of its provisions. Hon. H. H. Stevens held that the combines legislation was clearly ineffective against mergers, and wanted tax penalties to counter the maldistribution of wealth. He put the matter plainly in the House of Commons, "Constitutionally, politically, and nominally, Canada is a democracy, but actually Canada is ruled by a plutocratic autocracy."[48]

The 1935 legislation that followed agreed with the spirit of the depressed times rather than with the spirit of the

report. It stressed those elements noted by the Royal Commission which focussed upon "unfair practices." The requirement that reports be published was repealed altogether. Criminal proceedings must be confined to the Criminal Code or the Combines Act in a particular situation. The office of registrar was eliminated. Responsibility for the Act passed from the Minister of Labour to the Prime Minister. The responsibilities and functions of the registrar were placed in the hands of the newly constituted Dominion Trade and Industry Commission, composed of the 3 members of the Tariff Board. New activities included the supervision of commodity standards, the conducting of economic studies, and both instigating prosecutions in cases of "unfair" competition and holding fair trade conferences. After a full investigation in regard to the latter, the Governor in Council might approve industrial agreements designed to combat "wasteful" competition, and the Trade and Industry Commission was charged with the continuing supervision of such agreements.[49] Slightly more than 3 weeks before the passage of these acts, J. L. Ilsley, a member of the Royal Commission, had brought the attention of the House of Commons to the failure of N. R. A. in the United States, and had warned the members that the provision for the approval of restrictive industry agreements would weaken Combines administration.[50]

Price discrimination was brought under the ban of the Criminal Code by the addition of section 498A, which read as follows:

> Every person engaged in trade or commerce or industry is guilty of an indictable offence and liable to a penalty not exceeding one thousand dollars or to one month's imprisonment, or, if a corporation, to a penalty not exceeding five thousand dollars, who
>
> (a) is a party to, or associates in, any transaction of sale which discriminates, to his knowledge, against competitors of the purchaser in that any discount, rebate or allowance is granted to the purchaser over and above any discount, rebate or allowance available at the time of such transaction to the aforesaid competitors in respect of a sale of goods of like quantity and quality;
> . . .
>
> (b) engages in a policy of selling goods in any area of Canada at prices lower than those exacted by such seller elsewhere in Canada, for the purpose of destroying competition or eliminating a competitor in such part of Canada;
>
> (c) engages in a policy of selling goods at prices unreasonably low for the purpose of destroying competition or eliminating a competitor.[51]

The constitutionality of all the 1935 legislation was being tested in the courts in less than a year. The Supreme Court sustained section 498A, sections (b) and (c) unanimously and section (a) in a 4 to 2 decision, the dissenters noting the silence of that section in regard to competition, under the power of Parliament over the criminal law.[52] That opinion was affirmed by the Privy Council.[53] The Supreme Court declared ultra vires 3 different sections of the Dominion Trade and Industry Commission Act. That permitting restrictive agreements to be approved by the Governor in Council was not supported by the criminal law power or by the power to regulate trade and commerce. That decision[54] stood because it was not appealed. The other 2 sections, dealing with the establishment and administration of a national

trade mark for commodities under the name "Canada Standard," were struck down as an attempt to create a novel civil right. Upon appeal the Privy Council reversed that judgment. Their Lordships held that the novel civil right, most similar to a trade mark, found obvious support under Parliament's power to regulate trade and commerce.[55] Some things were possible under head 2 of section 91 of the B. N. A. Act. Thus had the judiciary destroyed the only substantial change from pre-1935 ways. In less than 3 months the new Liberal administration put through the repeal of the combines amendments but left in force the new section 498A. The combines work returned to the Minister of Labour with its administrative head raised to the status of commissioner. The restored 15-day publication requirement would now apply to all reports of combines investigations. In addition to the enhancement of the position of the head of combines investigation, the work was further strengthened by making evidence obtained during an investigation admissible in criminal proceeding under either the Combines Investigation Act or section 498 and 498A of the Criminal Code.[56] The former private secretary of the Prime Minister, F. A. McGregor, who had been the Registrar, was appointed the first Commissioner.

Between the inactive period arising from the judicial testing of constitutional issues during 1936 and 1937 and that engendered by wartime controls, 3 industries were investigated -- tobacco products in Alberta and elsewhere, paperboard shipping containers and related products, and Western Canadian fruits and

vegetables. Two successful prosecutions followed the shipping containers report. Two individuals and 23 companies were fined a total of $176,000.

Eight individuals and 28 companies in the tobacco business were fined a total of $221,500. On appeal by all but one company which had been fined $15,000, the convictions were quashed on technical grounds, partly matters of procedure. The affair was to be aired several years later in the House of Commons during a discussion of means of improving the combines legislation. A. L. Smith, K.C., who had been one of the Crown prosecutors when charges were laid under section 498 of Criminal Code and who had been taken off the tobacco case before its conclusion, described the part played by J. C. McRuer, later appointed Chief Justice of Ontario, who was paid by the federal government to continue the prosecution. ". . . He was thrown out of court on a much simpler problem than arose in the dental case." A stay had been entered in the case and, "following that, this new charge [under the Combines Investigation Act] was laid by this great man; but the appeal told him what every law student knows, that a stay is not the end of a prosecution, and you cannot prosecute a man twice for the same thing and at the same time. So the tobacco case was lost."[57]

The case[58] dealing with the business of fruits and vegetables in Western Canada was under the "monopoly" provision of the Combines Act. By it a "merger, trust or monopoly" means "one or more persons who has or have purchased, leased or otherwise acquired control over or interest in the whole or a part of the

business of another. . ." Two companies, Dominion Fruit, a wholesale and jobbing subsidiary of Western Grocers, and Lander Company, packers and shippers, had dealings which the Crown attempted to show brought Dominion Fruit Limited under the indictment of the Act. The ownership of the shares of Lander Company was:

| | | |
|---|---|---|
| R. B. Staples (director of Lander Co.) . . . | 4,593 | |
| A. D. Lander (director of Lander Co.) . . . | 4,593 | 9,186 |
| A. McCallum (director of Dominion Fruit) . . | 186 | |
| R. B. Staples (in trust for Dominion Fruit). | 9,000 | 9,186 |

Speaking to that, the judge said, "The ownership of one-half the shares in a company, does not give control of the company, and, in my opinion, does not give any control of the company's business which is an asset or property of the company."[59] He held further that a shareholder has no legal interest in the business or property of a company in which he holds stock. Several English cases were cited in support of that view. There were no charges against the companies in regard to a combine by "actual or tacit contract, agreement or arrangement." All the accused were found not guilty.

World War II placed the Combines Commissioner in the anomolous office of Enforcement Administrator of the Wartime Prices and Trade Board which, in the paramount interest of more easily managing wartime controls, encouraged concerted industry action -- a phenomenon not peculiar to the Canadian scene in time of war. Anti-combines activity had come to a standstill with the termination in February of 1942 of the shipping containers and tobacco cases.[60] The experience of almost 2 decades was examined in an

economic study, which noted the lack of a consistent policy toward competition, greater effort, both public and private, exerted to curb competition than to prevent combination, and the Canadian tendency to assume consolidation to be beneficial and, consequently, to concentrate on attacking conspiracy. The future possibilities of action were suggested.

> The limited effectiveness of the Combines Act is not due to inherent weakness. The machinery of the Act is well conceived, it has been fully sustained in the courts, it has been sympathetically and ably administered. The difficulty is that both Liberal and Conservative governments, for political reasons, have not favored too vigorous enforcement of the Act, and have not given the administrators either the definite encouragement or the larger staff necessary for effective action. If these requisites were provided, the Combines Investigation machinery could perform important work in that sector of the economy within which competition is still possible.[61]

The next chapter will describe in part the more bountiful times experienced by Combines Investigation in the postwar world.

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12. ---- , May 7, 1923, vol. 3, p. 2552.

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19. supra, ch. 7, p. 168.

20. Debates, House of Commons, May 9, 1923, vol. 3, pp. 2613, 2627 et passim.

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23. Attorney-General for Ontario v. Canadian Wholesale Grocers Association (1922) 52 O.L.R. 536.

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27. Canada Year Book, 1927-28, p. 769.

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32. supra, ch. 7, pp. 176-177.

33. Rex. v. Singer et al. (1931) O.R. 202 at 211.

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44. Rex v. Canadian Import Co. et al. (1933) 61 C.C.C. 144.
Rex v. Canadian Import Co. et al. (1935) 3 D.L.R. 330.
British Coal Corp. et al. v. The King (1935) 3 D.L.R. 401.
The King v. Hartt and Adair Coal Co. (1935) unreported.
Hartt & Adair Coal Co. v. The King (1935) unreported.

45. Rex v. Simoneau (1935) 65 C.C.C. 19.
Cherry v. The King ex rel. Wood (1937) 69 C.C.C. 219.

46. Transport Oil Co. v. Imperial Oil Ltd. et al. (1935) 63 C.C.C. 108.

47. Report of the Royal Commission on Price Spreads, King's Printer, Ottawa, 1935, pp. 31 and 33.

48. op. cit., pp. 261-63.
Canadian Annual Review, 1934, pp. 38-41, 54-56 and 468.
Debates, House of Commons, June 11, 1935, vol. 4, pp. 3515 and 3517.

49. Combines Investigation Act Amendment Act, 1935, 25-26 Geo. 5, c. 54.
The Dominion Trade and Industry Commission Act, 1935, 25-26 Geo. 5, c. 59.

50. Debates, House of Commons, June 11, 1935, vol. 4, pp. 3525-28.

51. (1935) Statutes of Canada, 25-26 Geo. 5, c.56.

52. In the Matter of a Reference as to the Constitutionality of section 498A of the Criminal Code (1936) S.C.R. 363.

53. Attorney-General for British Columbia v. Attorney-General for Canada (1937) A.C. 368.

54. In a Matter of a Reference as to the Constitutionality of the Dominion Trade and Industry Commission Act (1936) S.C.R. 379.

55. Attorney-General for Ontario v. Attorney-General for Canada (1937) A.C. 405.

56. Combines Investigation Act Amendment Act, 1937, 1 Geo. 6, c. 23.

57. Debates, House of Commons, Nov. 14, 1949, vol. 2, pp. 1762-63.

58. Rex v. Staples et al. (1940) 4 D.L.R. 699.

59. op cit., 703.

60. Container Materials Ltd. et al. v. The King (1942) 1 D.L.R. 529.
Rex v. Imperial Tobacco Co. et al. (1942) 1 D.L.R. 540.

61. Lloyd G. Reynolds, The Control of Competition in Canada, Harvard University Press, Cambridge, 1940, p. 171.

# Chapter 9

About a year before the end of the war a competent observer outlined some of the prospects of combines investigation.[1] Of special interest were two points -- one concerning the problem of full employment and one regarding merger or amalgamation. On the first he said,

> I submit, however, that there is a strong probability that restrictive practices such as are becoming more and more rife in the modern economy are probably more serious deterrents to the achievement of "full employment" than has been generally recognized, and that the Combines Commission has a part to play in the post-war "full employment" policy of the Canadian government.

There seems to have been little made of this, if only to rally public support to the work of the Commission. There was something of the outlook of Janus toward bigness -- efficiency and concentration of economic power. But looking more sternly at the prospect of private power becoming greater than that of the state, the author spoke of the possibility of requiring Parliamentary approval, by means of a private bill, of an acquisition of stock or assets of a competitor, wherever the

resulting control would exceed some specified percentage of the industry. The problems of equity in dissolving mergers dictated prevention as far as possible. His recommendation of a quarter of a million dollar budget for effective operation of the Commission would not be met for 8 years.

Near the conclusion of the war the Combines Commissioner stated that a vital part of the job of changing from war to peace would be the reconversion of men's minds, from dependence on government to self-reliance. "Producers, distributors, and consumers will have to be weaned away from a war-time attitude of dependence upon government for protection from all kinds of economic gales and storms and even high winds. Government itself, including civil servants, will have to help in the process of decentralizing and depaternalising."[2] Some of his remarks have since taken on particular import in the light of later events connected with flour milling. He warned,

> Surely it is obvious that the problem of monopoly in the years ahead of us is not going to be made any easier by reason of the particular kind of recognition and impetus that has been given to trade organizations in the war years. My own apprehensions are allayed to some extent when I think of the hundreds of trade associations that have operated for years in Canada with great credit to themselves, helpfulness to their members, and advantage to the Canadian public. But a great deal has happened in this field since 1939, and even since 1941. We may well be concerned lest the restrictionist philosophy which is inherent in these emergency controls should motivate such strongly organized groups to certain types of action that are not at all appropriate to a system of free enterprise. Monopoly and monopolistic practices could be off to a new start; and every element in the country, government, business, labour, the farmer, and the man on the street should be alive to the possibilities and the dangers of it in the post-war years. It is a more

serious problem than it was even pre-war."[3]

Four and a half years later Mr. McGregor was to make a special contribution to increasing the public awareness of the problem of monopolistic practices.

The Commission's first postwar report, Canada and International Cartels,[4] surveyed 3 classes of cartels -- those affecting Canadian imports, those confining Canadian manufacturers to the domestic market, and those involving participation by Canadian exporters. The report spoke against any attempts to sort out cartels according to any immediate advantages or disadvantages to Canada and urged adoption of policies of reviving and expanding world trade. Although there was no specific intent of following the study with prosecution, as there often is in single industry studies, of the many fields covered there were subsequent investigations and convictions in flat glass, matches, fine papers, and coarse papers (not newsprint). The total of fines in the 4 cases was $429,000.

In 1946 combines work was transferred to the Minister of Justice and the tenuous but lingering connection with the Dominion Trade and Industry Commission was severed. Provision was made to prevent the Combines Investigation Act from depriving any person of "any civil right of action." The Commissioner was, from time to time, to make studies of monopolistic practices in Canada and report to the Minister;[5] that seemed to cover such matters as the recent examination of cartels.

In 1949 the Ontario Court of Appeal dismissed an appeal

by the Crown from a directed verdict of acquittal, after trial by judge and jury, of 18 companies in the dental supply business, 7 as manufacturers and 11 as dealers.[6] The case had turned upon the admissibility of evidence. The court found that the Crown had offered too little direct evidence and had relied too heavily upon inferences that might be drawn from what evidence was directly proved. The Court of Appeal spoke to this question at some length:

> No witness was called to prove any by-laws, resolution, minute or other corporate act of any of the accused having any relation to the making or carrying out of or acting upon any agreement such as is charged against them as a conspiracy. No witness was called to prove what persons occupied official positions in any of the accused companies, or to prove that any person had been appointed to act for, or to represent any of the accused in respect of any of the matters charged against them. No witness was called to prove the handwriting of any person upon any letter or document that purported to be signed by such person, nor to prove that any such person had authority to sign such letter or document on behalf of any of the accused.[7]

There were many more examples cited. The trial judge had noted further that there had been no actual proof of corporate existence throughout the period in question -- 1930 to 1947.

The critical impact of that judgment on the enforcement of combines legislation was well stated in the Canadian Bar Review.[8] The effect of the judgment was that,

> The signature on the document of the president or general manager or other officers is not in itself proof of the position or of the authority of these officers without further proof. . . . there must be further proof that the writing of the letter was authorized by the company or that someone having authority to bind the company had knowledge of the sending of the letter or of its receipt or of its content.
>
> . . .

> Conspiracy, . . ., can rarely be established by direct evidence and agreements in restraint of trade even more rarely. Such agreements are made in secret. To the extent that they are reduced to writing, they would certainly not be recorded in the minute-book of a company. Nor would a company by by-law or resolution authorize an officer or employee to enter into such agreements. Direct evidence would require the testimony of co-conspirators and officers of the accused companies who may themselves be co-conspirators.
>
> The law must take cognizance of the fact that, although there may be little or no difficulty in applying the existing rules to small local companies in which the ownership, management and direction of the business are vested in one or two persons, it may be impossible to apply these rules effectively in the case of the modern large corporation which must of necessity act through many persons with authority in different branches of the business and in different geographic areas.

In spite of an adverse report,[9] the evidentiary difficulties presented by the outcome of the Dental Goods case decided against a prosecution of firms in the optical goods industry. Patent actions in the Exchequer Court of Canada, started in 1943 before a 1946 amendment to the Combines Act had provided for that court preventing the use of a patent or trade mark to further a combine or conspiracy in restraint of trade, resulted in findings that they were valid. The court rejected the Crown's argument that they suffered from lack of novelty or subject matter. It was officially reported that licensing restrictions were withdrawn after the publication of the report on optical goods.[10]

From the Report of the Royal Commission on Prices[11] some significant points may be noted. After observing that there were both competitive and oligopolistic industries in Canada, the Commission considered that there remained a legacy from the

concerted efforts of wartime -- a tendency to less enterprise. It was evident that some business groups had moved from a world of maximum price regulations to one of privately fixed minimum profit margins. The Commission expressed its concern over "the growing tendency toward monopolistic competition through brand names and special advertising, price leadership by a few large firms in an industry and resale price maintenance whereby the manufacturer sets the retail price for his product." It placed itself in opposition to resale price maintenance, partly on the basis that it had been found detrimental to the public interest in combines investigations in regard to proprietary articles, tobacco, dental supplies, optical goods, and bread. That there was growing concentration in bread-baking, with many examples of control by milling companies was soon to be of special concern.

Less than 5 months after the general election of June 27, 1949 had returned the Liberals to power, the Combines Commissioner, F. A. McGregor made a signal contribution to publicity in combines work, which had been so often praised by his late chief, W. L. Mackenzie King. He resigned. His memorandum with the resignation attacked proposals that would weaken the effectiveness of anti-combines activity -- removal of commissioner initiative in launching inquiries, limiting the requirement of publication, and any provision for exempting certain restrictive agreements after prior approval. Such were unlikely to enter the House of Commons in the white light of publicity engendered by his resignation.[13]

That the combines question was entering many homes

across the land may be exemplified by the Saturday Night, which dealt with the affair in 5 successive issues, extending over a period of 6 weeks. A week after the Hon. Stuart S. Garson, K.C., Minister of Justice, had tabled the flour milling report of Mr. McGregor in the House of Commons following the resignation, its editorial contended "that McGregor was registering the boldest protest he could against the frustrating circumstances in which he has been placed for many years, notably, I think, in 1930-35 and in 1945-49. In other words, I imagine the flour milling rebuff was just the last straw, not necessarily any bigger than some of the earlier straws."[14] A fiercer mood was expressed on the point that the report, dated December 29, 1948, had been withheld, the legal requirement of publication notwithstanding, until after the election in June. In that act, "this Government has been guilty of deliberate defiance of the law, by the very men sworn to administer it. This is an offence that ought not to be forgiven."[15] Only Parliament could bring a Minister to task; that Parliament made no such move.

The Parliamentary storm was unleashed by the Minister of Justice tabling the report on November 7th. He had announced 4 days earlier that the Commissioner and a Deputy Commissioner, Ian MacKeigan, had resigned. The Rt. Hon. C. D. Howe, a member of the Cabinet from 1935, said that he had objected to the report dealing only with the period of wartime price control and the subsequent decontrol period, and, "Therefore I called the attention of the Minister of Justice to the situation and urged him not to table

the report without further investigation."[16] It soon was revealed that the whole Cabinet had supported the violation of the Combines Investigation Act by the Minister of Justice. No attempt will be made to interpret a politician's use of "whole Cabinet." Mr. Howe went on to explain that there had been some representations to the milling companies by the head of the wartime prices and trade board. Mr. Garson used a different line of argument, suggesting difficulties in trying to prosecute.

M. J. Coldwell described the situation confronting a small co-operative of western farmers during the first year or two of the war. Until members of the British Parliament were made aware of the matter the small co-operative could obtain no overseas orders. He continued by saying, "In 1934 and 1935 these practices of combinations and price fixing were prevalent in this country among the milling interests, and I have no doubt that the same practices are continuing at the present time."[17] A member from the next province west added further illumination by discussing a 1938 encounter with Mr. McGregor. At that time, Solon Low was a member of the Alberta Cabinet and had discussed the alleged tobacco combine with the Combines Commissioner, at which time "Mr. McGregor told him how difficult it was to get any encouragement from high places to institute these prosecutions, even where inquiry showed that there was a combine."[18]

More ominous notes raised the opinion that the government had adopted this course of action to obtain the resignation. It was also raised that the delay carried the entire affair beyond

the 2-year limit of the Criminal Code. There was no prosecution.

J. M. Macdonell, before turning to a direct denunciation of the Minister of Trade and Commerce, Rt. Hon. C. D. Howe, attacked the Minister of Justice by recounting a bit of history.

> . . . what has been done, with one leap of the mind, carried us back to the Stuarts, particularly to the one Stuart who lost his head for suspending the law without parliament. It carries us back also to the declaration of the Bill of Rights, which, we should remind ourselves, is part of the law of this country.
>
> I suppose it is true to say that what this government has done has no precedent since the Stuarts. I have not been able to verify that, but I believe there is little if any precedent in the centuries which have elapsed for what the government has done. It is wise for us to remember the words already used in this chamber by a former Liberal leader, that it does not matter to a free people whether their liberties are invaded by a king or a cabinet.[19]

Once more there had been much sound and fury. Before examining the legislative action of that stormy session, there should be some additions in regard to the wartime administration of the flour milling industry, which affords a striking comparison with that found in the British match industry and referred to earlier in this study.[20] C. H. G. Short, the wartime flour administrator, was the president and managing director of the Lake of the Woods Milling Company and, for many years, president of the flour millers' association.[21]

The option of a jury trial for corporations was abolished by a 1949 amendment. The weakness in the Combines Act disclosed by the Dental Goods case was corrected by the addition of a new section to the Act. It made an action by any agent of one accused of participating in a combine prima facie evidence of the

act having been done with the authority of the alleged participant. Documents written or received by an agent of an alleged participant became prima facie evidence of having been written or received with the authority of the participant. Documents proved to have been in the possession of or on the premises of a participant, or in the possession of his agent were prima facie evidence of the accused having knowledge of the documents and their contents and of anything therein being under the authority of the participant.[22]

Five days before his resignation became effective, F. A. McGregor submitted, on December 27, 1949, his last report -- Matches -- which led to a rare event in Canada, a "monopoly" case. Later events would be part of the changing environment in which monopolistic elements find themselves in Canada, but would not bear directly upon the case of Rex v. Eddy Match Co. et al.

The reverberations from the flour milling controversy were still to be heard early in the 1950 session of Parliament. Two points were brought out concerning the allegation by the Minister of Justice that the requirement to make a report public in 15 days caused difficulties. That tabling a report in the House of Commons was indeed making it public was simple, incontrovertible. That the subsequent record of the Minister's action refuted his contention, or at least showed the requirement to be feasible, was shown by the publication in 14 days of the Flat Glass report and in 13 days of the Matches report.[23] It must be noted, however, that a great deal of the Parliamentary discussion centred on the responsibility of the government to uphold the rule

of law, rather than on the desirability of comprehensive enforcement of the combines legislation. The disturbance was nevertheless sufficiently widespread to strengthen the position of Combines Investigation in the Canadian economy.

During the early summer of 1950 the Minister of Justice announced the appointment of a Committee, popularly entitled the MacQuarrie Committee from the name of its chairman, J. H. MacQuarrie, "to study, in the light of present day conditions, the purposes and methods of the Combines Investigation Act and related Canadian statutes, and the legislation and procedures of other countries, in so far as the latter appear likely to afford assistance, and to recommend what amendments, if any, should be made to our Canadian legislation in order to make it a more effective instrument for the encouraging and safeguarding of our free economy." The Committee submitted on October 1, 1951, an interim report covering resale price maintenance. It recommended that,

> it should be made an offence for a manufacturer or other supplier:
>
> 1. To recommend or prescribe minimum resale prices for his products;
> 2. To refuse to sell, to withdraw a franchise or to take any other form of action as a means of enforcing minimum resale prices.[24]

The Interim Report was tabled in the House of Commons on October 12 and in the Senate on November 6. There was quickly appointed a Joint Committee of the Senate and the House of Commons on Combines Legislation, which held its first meeting on November 13. Despatch seemed to be the order of the day. Briefs were submitted to and witnesses called by the Committee. The final

meeting of the Joint Committee was held on December 7, 1951. A number of organisations, representing such groups as labour, consumers, and some retailers indicated their firm opposition to resale price maintenance. More presentations to the Joint Committee expressed support for resale price maintenance, often coupling it with professed alarm about "loss leaders" which they claimed to be avoidable only through resale price maintenance.

It will suffice to outline a few of the remarks before the Joint Committee. The appearance of an official of the Canadian Pharmaceutical Association recalled the exit of the Proprietary Articles Trade Association in 1927 after investigation by Mr. McGregor's staff. The present group was a retail structure; the defunct PATA had included manufacturers, wholesalers and retailers in the drug field. The essence of that historic change was that, by his own testimony, resale price maintenance had been spreading in the druggists' world since 1927.[25] Their representative urged its continuance. The Canadian Congress of Labour, vigorous proponents of public price control to check the rising cost of living, wanted a ban on resale price maintenance as a minimal course of action. Its representative went on to say that the "combines" approach to influence prices reminded him of Dr. Johnson's statement, "It is setting a farthing candle at Dover to give light at Calais."[26] The implications of one line of argument in a brief from the Canadian Electrical Manufacturers Association were not explored. The point raised was that the enjoyment of "planned mass production" required control of the

selling price of the output -- therefore resale price maintenance.[27] It is likely that although the Canadian Congress of Labour would be most happy with the line of reasoning, although it would reach a different conclusion. F. A. McGregor occupied an entire afternoon session and was recalled for a further meeting. As he had begun his combines work in 1925 on the business of druggists, so he opened his remarks by stating that the same results were now being obtained by new methods in proprietary items. He argued the very purpose of resale price maintenance is to prevent prices falling below some privately established minimum and that any result at all from such endeavour must keep prices higher than they would otherwise be. Citing the only sound comparison to be between a price-maintained area and a non-price-maintained area with other distributive conditions similar, he claimed that such comparisons in the United States had shown lower prices in the absence of resale price maintenance. He spoke to the contention of the "orderly marketers" that there were many other forms of competition with the flat statement that price competition is the vital part of a competitive system; the other forms are cost increasing and hence raise prices.[28]

The Joint Committee's final report was made on December 7. It held that loss leaders could be effectively dealt with by vigorous enforcement of section 498A of the Criminal Code, which bans price discrimination to injure competitors. Its recommendation to prohibit resale price maintenance[29] became law before the end of the year.[30]

The final report of the MacQuarrie Committee was submitted to the Minister of Justice on March 8, 1952. The chief recommendations were: the separation of investigation and research from appraisal and report, the empowering of the appraisal board to require firms to submit reports to enable the board to assess their operations in regard to monopolistic elements, the redrawing of section 498A of the Criminal Code to make clear that it is directed against a practice and not against a single transaction, the abolition of the statutory limit on fines, the early consideration of whether there are any obstacles in the way of the use of a judicial restraining order, a provision that a convicted offender file any periodic reports the court may require until further order, and the creation of effective liaison with other governmental departments whose activities may affect monopolistic conditions and practices. In opposing any list of permissible practices, the Committee members took the stand that, "There is a good deal of complaint of uncertainty as to permitted practices and exposure to inquiry on the part of business firms, but it is not unfair that certain disadvantages and responsibilities should go with the possession of monopoly power and that freedom from inquiry should belong to those in highly competitive industries who have avoided restrictive agreements or any semblance of them."[31] The proposals were substantively translated into law on July 4, 1952.[32] The publication requirement was extended to 30 days from 15. Convicted offenders could be required to submit reports or information on court order only for a period of 3 years after sentence. The constitutionality of judicial restraining orders,

as provided by section 31 of the Combines Investigation Act, as amended in 1952, was upheld by the Supreme Court of Canada under head 27, Criminal Law, of section 91 of the British North America Act.[33]

It is evident that much was accomplished by Parliament in the year and a half following the McGregor resignation. The funds available have doubled in half a dozen years. The Act has been greatly strengthened in recent years. The tempo of investigation and prosecution has risen. A genuinely competitive economy has not been established. It is well to keep in mind also the altered political environment. The Conservatives returned to power in 1957. Neither party has yet unleashed an enduring attack on monopoly, in contrast to conspiracy. That the propaganda for the repeal of the ban on resale price maintenance continues its unremitting course is illustrated in the report of the general manager of the Canadian Manufacturers' Association in 1958 with the use of the "yes, but" technique. After stating, ". . . the Association has made it clear that it recognizes that some form of anti-combines legislation is necessary. The whole point is that it should be legislation that is wise and of the right kind," the report urges, a few paragraphs later, the repeal of the ban on resale price maintenance.[34] Perhaps it has become vital to bring Mackenzie King's publicity to aid winning wider public support for the legislation as its best defence against the continuous attempts to weaken it.

1. V. W. Bladen, "The Combines Investigation Commission and Post-War Reconstruction," Canadian Journal of Economics and Political Science, Aug., 1944, p. 343.

2. F. A. McGregor, "Control of Prices in War and Peace -- Some Contrasts," University of Toronto Commerce Journal, May, 1945, p. 1.

3. op. cit., p. 7.

4. King's Printer, Ottawa, 1945.

5. An Act to Amend the Combines Investigation Act, (1946) Statutes of Canada, 10 Geo. 6, c.44.

6. Rex v. Ash-Temple Co. et al. (1949) 93 C.C.C. 267.

7. op. cit., 274.

8. April, 1949, p. 461, especially pp. 463-64.

9. Investigation into an Alleged Combine in the Manufacture and Sale of Optical Goods in Canada, Department of Justice, King's Printer, Ottawa, 1948.

10. Canada Year Book, 1947, p. 764.
---- , 1950, p. 885.
The King v. Uhlemann Optical Co. (1950) Ex.C.R. 142.
The King v. American Optical Co. et al. (1950) Ex.C.R. 344.
The King v. Uhlemann Optical Co. (1952) S.C.R. 143.
(1946) Statutes of Canada, 10 Geo. 6, c. 44, s.9.

11. (C. A. Curtis, chairman), King's Printer, Ottawa, 1949, especially vol. 1, p. 27 and vol. 2, pp. 257-260.

12. Report of the Royal Commission on Prices, King's Printer, Ottawa, 1949, vol. 3, pp. 19-21 and 37.

13. Debates, House of Commons, 1949 (2nd Sess.), Nov. 7, 1949, vol. 2, p. 1516.

14. Wilfrid Eggleston, "A Resignation of Protest," Saturday Night, Nov. 15, 1949, p. 5. Also in "Ottawa View" by Michael Barkway, Nov. 15, 1949, p. 4; Nov. 22, 1949, p. 4; Nov. 29, 1949, p. 4; Dec. 6, 1949, p. 4; and Dec. 13, 1949, p. 14.

15. Maclean's, Dec. 15, 1949, p. 2.

16. Debates, House of Commons, 1949 (2nd Sess.), Nov. 7, 1949, vol. 2, p. 1500.

17. Debates, House of Commons, 1949 (2nd Sess.), Nov. 7, 1949, vol. 2, p. 1509.

18. op. cit., p. 1514.

19. Debates, House of Commons, 1949 (2nd Sess.), Nov. 22, 1949, vol. 2, p. 2064.

20. supra, ch. 4, p. 89.

21. Debates, House of Commons, 1949 (2nd Sess.), Nov. 14, 1949, vol. 2, p. 1748.
op. cit., Nov. 22, 1949, vol. 2, p. 2074.

22. (1949) (2nd Sess.) Statutes of Canada, 13 Geo. 6, c. 12, ss. 2, 3.

23. Debates, House of Commons, 1949 (2nd Sess.), Dec. 9, 1949, vol. 3, pp. 2982, 2989.
Debates, House of Commons, Feb. 21, 1950, vol. 1, p. 42.

24. Report of the Committee to Study Combines Legislation and Interim Report on Resale Price Maintenance, Queen's Printer, Ottawa, 1952, p. 71 (cited as Report of the MacQuarrie Committee.)

25. Joint Committee of the Senate and the House of Commons on Combines Legislation, House of Commons, 1951 (2nd Sess.), Minutes of Proceedings and Evidence, No. 4, Nov. 22, 1951, p. 134.

26. op. cit., No. 2, Nov. 20, 1951, p. 73.

27. op. cit., No. 6, Nov. 26, 1951, p. 341.

28. op. cit., No. 8, Nov. 28, 1951, pp. 389-401.

29. op. cit., No. 15, Dec. 7, 1951, pp. 821-24.

30. (1951) (2nd Sess.) Statutes of Canada, 15-16 Geo. 6, c. 30, s. 1.

31. Report of the MacQuarrie Committee, pp. 47-49.

32. (1952) Statutes of Canada, 1 Eliz. 2, c. 39.

33. The Goodyear Tire and Rubber Co. of Canada et al. v. The Queen (1956) S.C.R. 303.

34. Canadian Manufacturers' Association: Eighty-Seventh Annual General Meeting: Report of the General Manager, Canadian Manufacturers' Association, Toronto, 1958, pp. 35-36.

# Chapter 10

In 1851 in Hull, Quebec, the Canadian manufacture of wooden matches was begun by Ezra Butler Eddy. They were sulphur matches, called "Telegraph", which were "sawed, split and dipped by hand, while the boxes were turned out by women using shavings or veneer." The first match machines apparently utilised an invention of one of the firm's millwrights. The E. B. Eddy Co. had grown into a substantial enterprise. Parliamentary debates relating to the abandoning of phosphorus matches disclosed useful data concerning the Canadian industry. The number of establishments and the total value of product was given by the Minister of Labour for certain years:

| Year | Number | Value |
|---|---|---|
| 1871 | 24 | $ 229,137 |
| 1881 | 22 | 511,250 |
| 1891 | 12 | 434,953 |
| 1901 | 5 | 312,655 |
| 1906 | 3 | 226,743 |
| 1911 | 5 | 1,072,527 |

Of the 4 manufacturers recorded by the Dominion Bureau of Statistics in 1920, only 2 were operating in 1921 -- the match plant of

the E. B. Eddy Company, which was also an important paper manufacturer, and the Dominion Match Company of Deseronto, Ontario. After the subsequent acquisition by E. B. Eddy of Dominion Match the Deseronto production ceased. Rockefeller interests, through a subsidiary of the American Splint Corporation, had begun the production of match splints at Berthierville, Quebec, about 1920.[1]

Under a new name The Match Company, the Rockefeller concern began the production of matches themselves in 1922. In that year match production was begun at Pembroke, Ontario, by the Canadian Match Company, initially with the chief shareholders, Diamond Match, Maguire, Paterson and Palmer, and Bryant and May, each having about the same interest. Control of Maguire, Paterson and Palmer was shortly acquired by Bryant and May, making it the majority stockholder in Canadian Match. The following year Ivar Kreuger acquired The Match Company, the name being changed to the World Match Corporation. In addition to the Canadian concern, the world match triad were now represented by active participation in Canadian match production. The rivalry was severe and the losses extensive.[2] The newly formed oligopoly was not yet stabilised. The outcome was not simply agreement, express or tacit, but a permanent corporate consolidation.

Evidence of the formation of the new firm began to be noticed in the press by December of 1927 in an atmosphere of rumour and mystery. Hon. R. B. Bennett, the majority stockholder in E. B. Eddy Company, had become the leader of the Conservative party and had announced his desire to dispose of many of his

business interests to free his time for his new work. The evidence available does not permit an assessment of the degree to which the possibly inflated values, which often accompany a merger of monopoly proportions, attracted the man controlling the most significant match-making facilities in the country. In any event Hon. R. B. Bennett's actions during 1927 were at least no impediment to the plans of the world's match triad and were at best highly catalytic in bringing about the complete achievement of their design on the Canadian scene. It was a year for bringing greater stability and harmony into the market relationships of the American, British and Swedish concerns. That there existed at least some vague awareness of the international entanglements of the match industry was seen in newspaper reports before the announcement of the new company that control was going to the International Match Corporation.[3]

The official statement that the new merger, Eddy Match Company, was to be headed by George W. Paton, president of Bryant and May, elicited 2 interesting comments in a Toronto newspaper. Although perhaps not entirely accurate in detail, the first hit the mark rather well. "There must have been a good deal of friendly bargaining between the great corporations which divide the world's match business among them in order to arrive at such a result. The Diamond Match Company, for instance, controlled the Canadian Match Company at Pembroke, and the World Match Corporation was controlled by the Swedish Match Corporation [sic]." The editorial approval of Bennett "enlisting British capital" for

the Canadian economy did not tell the complete story. Bryant and May invested $2,425,000 to obtain complete control of World Match from the Swedish interests represented by International Match and Vulcan Match. At the time of the trial of Eddy Match in 1951, the president of E. B. Eddy touched indirectly on trade war problems of the oligopolists before the merger by stating that keen foreign competition in the 1920's had "made it impossible to carry on the match-making end of the firm."[4]

Apparently the original negotiations were conducted by R. B. Bennett, acting for E. B. Eddy, and Ivar Kreuger, acting for World Match and Canadian Match. The resulting "Draft Agreement" of October 4, 1927, was an important element in the ultimate settlement. Bennett's accompanying letter revealed something of the background of E. B. Eddy Company and showed his active part in the negotiations. In writing to Kreuger, he said in part,

> The fact is that it is not improbable that the preference shares will be divided between the International Paper Company, that is Mr. Drury and his associates and myself. The International desire to sell their shares for cash. . . .
>
> . . .
>
> If you will execute one of the agreements and send it back to me, I will arrange my plans so as to permit of my going to England and completing all details in connection with the organization of the new Company - in fact I could go into the whole matter with the British Match Trust's solicitors . . .

For all its match business assets, including goodwill, E. B. Eddy received $28,000 in cash, the entire 30,000 Eddy Match 6% preferred shares, and 9,600 of the 120,000 common shares. Circuitously and eventually the preferred shares were held,

20,750 by Diamond Match, 5,000 by Bryant and May, and 4,250 by British Match. An outside interest, the Gatineau Power Company of Ottawa, came ultimately into possession of 4,700 of the common shares; Bryant and May acquired 3,430 and Diamond 1,470. Acting as exclusive sales agents during the first year of operations of Eddy Match was the last active part played by the paper company.[5]

An important amendment to the Bennett-Kreuger arrangements was effected by a firm protest from the president of Diamond that World Match had been assigned by the negotiators too important a position in the Canadian industry. He argued strongly, that, "as a power in the Match business of Canada, no fair-minded analyst could rate the World Match Co. at more than one-fourth, or, at the most, one-third of the Canadian Match Co., and considering all the factors involved of good-will, facilities, trade connections, dominance in the trade, volume of business, manufacturing ability and facilities, such as are included in the contemplated merger, we would rate the three Companies about as follows: Eddy 50, Canadian Match 38 to 40, World Match 10 to 12." That indicated clearly that it was essential to acquire the match business from the outside interests of E. B. Eddy Company. Mr. Fairburn's letter of December 9 to the chairman of Bryant and May, urging a greater interest in the new company for Canadian Match, shed further light on the part played by R. B. Bennett. "The whole proposition, dictated by Mr. Bennett, is permeated with gross humiliation for the victor and the ultimate survivor - if the trade war continued - and, as far as the Match business of Canada

is concerned, the Canadian Match Co., due primarily to our efforts, has positively gained the upper hand, and our position would have become increasingly dominant during the next year or two." Such was the Diamond reaction to a letter of November 17, 1927, from the head of Bryant and May to B. Chandler Snead, a New York lawyer, counsel for Diamond and a kind of liaison officer for the American and British match interests. The remaining common shares of Eddy Match had been assigned, giving effect to the Bennett-Kreuger Draft Agreement, 63,000 to World Match and 47,400 to Canadian Match, in which Diamond had a minority interest.[6]

Of four alternative proposals offered by W. A. Fairburn, the first recommended that Diamond obtain a 25 per cent interest in the new Eddy Match Company. That this was agreed to by Bryant and May was shown by entries in the Eddy Match share register for September 22, 1928. The original assignment of stock in February of that year had followed the outline of George W. Paton's letter of the previous November, providing Diamond with a holding of 15,118 shares. In September the transfer by nominees of British Match and Bryant and May to nominees of Diamond Match of another 14,882 common shares of Eddy Match raised the Diamond holding to 25 per cent of the total.[7] Subsequent events showed that Diamond had undertaken the active management of Eddy Match, following another suggestion of W. A. Fairburn. The former match companies were dissolved.

A memorandum with Paton's November letter, outlining the proposed stock distribution, summarised the financial commitments

in Eddy Match at its formation:

| | |
|---|---|
| 30,000 preference shares given in part consideration for The E. B. Eddy Company assets | $ 3,000,000.00 |
| Cash to The E. B. Eddy Company | 28,000.00 |
| 9,600 ordinary shares to the E. B. Eddy Company at $41.67, value assigned thereto on books of new company | 400,000.00 |
| Cost of World Match Corporation assets to Bryant and May | 2,425,564.18 |
| Cost of Canadian Match company to stockholders | 1,796,606.95 |
| Total | $ 7,648,171.13 |

The memorandum, attached to the letter which must have been written at least 10 years earlier, went on to show that "the judgment of the officers of the two companies [Bryant and May and Diamond] who formulated the plan and participated in its execution, was validated by subsequent happenings. The previous large losses of the old companies were immediately converted into substantial profits. . . . More than $2,500,000 and in excess of one-third - was assigned by the directors of the new enterprise to a non-depreciable asset, good will; leaving about two-thirds allocable to current and depreciable fixed assets."[8]

The inflated values of certain assets acquired by Eddy Match, in the assembling of facilities with a daily capacity of 120,000,000 matches,[9] became, in 1937, the object of scrutiny by the Department of National Revenue. To assist Mr. Snead in handling the matter, the assistant secretary of Eddy Match prepared an analysis of certain assets values and depreciation

reserves, as they appeared on the books of the predecessor companies on December 31, 1927, and on the books of Eddy Match on January 1, 1928. The total "write up" amounted to $313,205.25; the depreciation not carried over to the Eddy Match books aggregated $854,461.04. Within that total of $1,667,666.29 there was mute evidence of the consummate skill of R. B. Bennett -- $1,075,285.03 was attributed to land, buildings and equipment of E. B. Eddy. In commenting later on the adjustment, which would not in any event cover a small $22,296.26 "write up" of Deseronto land, required by the government, the Eddy Match assistant secretary, H. Hart, stated the situation plainly:

> In short it is our opinion that a careful and thorough investigation might well have raised the present adjustment of $840,000.00, much closer to the original requested adjustment of $1,645,000.00.
>
> . . . It is a well known and obvious fact that these assets were overvalued - or water - as of January 1, 1928, and all that has happened is that the Department has placed these assets on a reliable and sound footing backed by tangible values which should in fact have been done for taxation purposes in 1928.

Two months later, on July 7, 1938, a by-law was enacted reducing the paid-up capital of the company by $842,100.17, from $5,000,000 to $4,157,899.83.[10]

That action left undisturbed goodwill of $2,600,000.00 patents, rights, trade marks and formulae of $401,447.50. Their status was clearly outlined by W. A. Fairburn in early 1944.

> Again, the item of Patents, Rights, Trade Marks, Formulae and Good Will, aggregating over three million dollars, is nothing but plain "water", and is not worthy of even being called an intangible asset, for it represents merely the difference between high values placed on certain tangible assets and the total sum of money paid to acquire the property.

In the same letter Mr. Fairburn turned his attention to the Berthierville property, which had not been "written up" from the values given by World Match.

> The Plant Account is outrageously high considering manufacturing facilities and the cost in normal times of duplicating the manufacturing capacity. As far as their utilization is concerned, the Berthierville buildings, showing at around $968,000 after depreciation, stand out like a sore thumb, for in the ultimate this plant is more of a liability than an asset and I would like to see three-quarters of a million dollars taken off this one capital asset.[11]

In December of 1943 Mr. Fairburn had reacted vigorously to the president of Bryant and May raising the possibility of an extra dividend on the common stock. There was reference to the company's market position and the effect thereon of highly inflated asset values, and the record of substantial earnings and dividend payments. A statement covering the first 19 years of Eddy Match operations showed total net earnings for the period of $11,824,604.66. Dividend payments amounted to $10,020,000.00 -- $3,420,000.00 on the preferred stock and $6,600,000.00 on the common.[12] After referring to the $3,000,000 of "water," Mr. Fairburn said,

> . . . The value of the Eddy properties and all tangible assets is probably not in excess of $5,000,000, although I believe the books show a value of about $8,400,000.
>
> If it had not been for the financial setup arranged by Sir George and others and my positive desire to make no criticism of it and if I had not known that you wanted to obtain all the dividends possible from your investment in Eddy, I should have urged many long years ago that the sum of $300,000 a year be taken from Surplus and Earnings and utilized to make the Balance Sheet a healthy one by the squeezing out of the "water" that is so conspicuously evident.
>
> The Eddy Company is in a position today where it

> could not possibly meet severe, competent and intelligently handled competition; it has been protected in its operations and has shown good earnings and paid big dividends, but I have always felt that the setup should at sometime or other be handled with courage and the company put in shape so that all of its assets would be real and based on appraised values, . . .[13]

The combined net earnings for the next 9 years, ending December 31, 1955, totaled $7,578,423. The unbroken dividend record was maintained at the same level; the majority of the preferred shares were redeemed. By October 31, 1956, goodwill had been reduced by $1,845,018. Earned surplus amounted to $2,004,971, which marked a considerable increase from the $835,144.89 on December 31, 1946.[14] The record supports the Crown's allegation that, "notwithstanding the excessive price paid to acquire the monopoly position, and inflated expenditures made to retain it by acquisition of independent competitors, Eddy Match, in addition to paying substantial dividends, had reduced the amount by which goodwill was carried on its books by a substantial amount and accumulated a substantial surplus."[15]

Before examining the company's conduct in regard to independent producers which appeared from time to time, there should be some recounting of the power of Eddy Match at its inception to control prices. The oligopolistic trade war in the Canadian match industry prior to the Bennett-Kreuger agreement of October 4, 1927, had brought about significant price reductions, with concomitant operating losses for the companies -- especially World Match. That the eventual exit of one or more producers would likely bring about higher prices in no way detracts from

the conclusion that the actual price increases which quickly followed the October agreement showed the power over the market of a mere common purpose, even before it was translated into a common, consolidated corporate unit. A comparison of prices on three different dates illustrates the changes in price as the unifying of action in the industry proceeded. The prices are for eastern Canada, as far as the head of Lake Superior, on a case basis.[16]

| July 7, 1927<br>CANADIAN MATCH | Matches, Sales Tax | Excise Tax | Jobbers Net Cash Cost | Resale |
|---|---|---|---|---|
| Maple Leaf 4's | $3.68 | $4.32 | $8.00 | $9.45 |
| Blue Ribbon 4's (144 boxes) | 3.68 | 4.32 | 8.00 | 9.45 |
| Maple Leaf Pocket (720 boxes) | 3.85 | 2.70 | 6.55 | 8.00 |
| Royal Safety (720 boxes) | 3.85 | 2.70 | 6.55 | 8.00 |
| October 22, 1927<br>CANADIAN MATCH | | | | |
| Maple Leaf 4's | 4.93 | 4.32 | 9.25 | n.a. |
| Blue Ribbon 4's | 4.93 | 4.32 | 9.25 | n.a. |
| Maple Leaf Pocket | 4.72 | 2.70 | 7.42 | n.a. |
| Royal Safety | 4.72 | 2.70 | 7.42 | n.a. |
| E. B. EDDY | | | | |
| Buffalo | -- | -- | 9.25 | -- |
| Dominion 4's | -- | -- | 9.25 | -- |
| Owl 3's (100 boxes) | 4.15 | 2.25 | 6.40 | -- |
| Eddy Safety | 5.66 | 2.70 | 8.36 | -- |
| January 3, 1928 | | | | |
| Maple Leaf 4's | 6.00 | 4.32 | 10.32 | 11.91 |
| Buffalo | 6.00 | 4.32 | 10.32 | 11.91 |
| Maple Leaf Pocket | 5.10 | 2.70 | 7.80 | 9.00 |
| Owl 3's | 4.32 | 2.25 | 6.57 | 7.71 |
| Royal Safety | 5.66 | 2.70 | 8.36 | 9.65 |
| Eddy Safety | 5.66 | 2.70 | 8.36 | 9.65 |

On the common "kitchen" matches the jobbers' net cash cost had been increased in two stages by $2.32 per case, which was the largest advance. It may be noted that the fame of "Eddy Safety" had seemingly permitted those matches to sell at a premium, which was eliminated by the amalgamation by increasing other safety match prices.

That the October price lists were the outcome of co-operation between the "independent" companies, E. B. Eddy and Canadian Match, was made evident by a letter of October 25, 1927, from E. B. Eddy which discussed some differences which remained, and raised the question of resale prices. The letter was for the attention of E. P. Miller of Canadian Match, who was to become the sales manager of Eddy Match.

> We duly received your letter of 24th. instant, with enlosures [sic] as stated and wish to say that we found your lists very completely made out which facilitated our task of checking them and made the job comparatively easy.
>
> . . .
>
> In B.C. we note you will not show on your list the price of "Maple Leaf 4's 144s.As [sic] explained we allow the Trade in B.C. a trade discount of 12 1/2% from the face of the invoice and 3% quarterly loyalty discount and we shall continue on this basis until we go into the matter of re-sale prices in a general way.
>
> We have O.K'd and return herewith your lists and it is to be hoped that we will get our printed lists off to our Branch Managers and Agents by Thursday evening the 27th.instant, . . .
>
> We should like to say how much we appreciated your co-operation in this entire matter and your readiness to lend assistance in lining up the new prices. . . .[17]

The separate elements of the Canadian match industry were beginning to work together to procure some measure of monopoly gain, even before the merger was completed.

Eddy Match circulars of February 1, 1928, announced a change, with no price changes involved, in the method of quoting prices to enable the same list to provide both the jobbers' cost and resale prices. After explaining the way to calculate net cash cost from the invoice or resale price, E. P. Miller, sales manager for Eddy Match, urged support for the scheme from the jobbers:

> For the past few years there has been a demoralized market on matches, and many jobbers have sold matches at very small profits. In naming the resale prices on the enclosed list we have done so with the idea of providing a satisfactory profit for jobber handling our brands of matches.
>
> We realize there are various brands of matches, purchased at old prices, in the hands of jobbers who may be inclined to sell these at prices below the resale prices named by us for brands of the same size, style and pack. We would point out to such jobbers, however, that they should immediately place on such brands, prices in accordance with the resale prices named in our February 1st price list, in order to prevent a demoralized market after February 1st.

An unissued memorandum, apparently setting down some of the thinking of the officials on the problem, bearing the same date, indicated that Eddy Match, while recognising the possible weakness in not providing for control of retail selling prices as well, was not then prepared to carry the scheme that far.[18]

The final details of the match consolidation, such as the numerous stock transfers required, had not been completed before Eddy Match turned its attention to the elimination of an insignificant competitor, whose output never accounted for more than 00.35 per cent of Canadian production. The process of elimination was neither long nor difficult. Although the general manager of

Eddy Match had indicated to the vice president of Diamond in February of 1927 that he was little concerned with the possible competition of the Aurora Match Corporation, the company followed a different policy. The purchase of all its assets by Eddy Match was completed on May 12, 1928, for a total expenditure of $27,500, including a commission of $3,000 and legal fees of $1,500.[19] No particular tactics were required in this situation.

1. Kenneth Lunny, "Matchmaking Past and Present," Canadian Chemical Processing, June 20, 1952, p. 54.
C. J. S. Warrington and R. V. V. Nicholls, A History of Chemistry in Canada, Pitman, Toronto, 1949, p. 351.
White Phosphorus Matches Act, (1914) 4-5 Geo. 5, c. 12.
Debates, House of Commons, Mar. 17, 1914, vol. 2, p. 1756.
Canadian Match Report, pp. 9, 15.
supra, ch. 2, p. 28.

2. Canadian Match Report, pp. 14-15.
supra, ch. 4, pp. 72-73.

3. Globe, Dec. 22, 1927, p. 1.
Financial Post, Dec. 16, 1927, p. 6.

4. Globe, Dec. 22, 1927, p. 8; Dec. 23, 1927, p. 4.
Eddy Match Case Transcript, vol. 5, p. 751.
Pulp and Paper Magazine of Canada, April, 1951, p. 72.

5. Eddy Match Case Transcript, vol. 5, pp. 724-31; vol. 12, pp. 2891-2902, 2906, 2952, 2959, 2961, 2965, 2968.
Canadian Match Report, pp. 16, 18.

6. Eddy Match Case Transcript, vol. 5, pp. 756-64.

7. op. cit., vol. 5, pp. 826-27; vol. 12, pp. 2936-39.

8. op. cit., vol. 5, pp. 751-53.

9. Globe, Dec. 22, 1927, p. 2.

10. Eddy Match Case Transcript, vol. 7, pp. 1460-61, 1663; vol. 12, p. 3038.

11. op. cit., vol. 7, p. 1652; vol. 9, p. 2172.

12. op. cit., vol. 10, p. 2602.

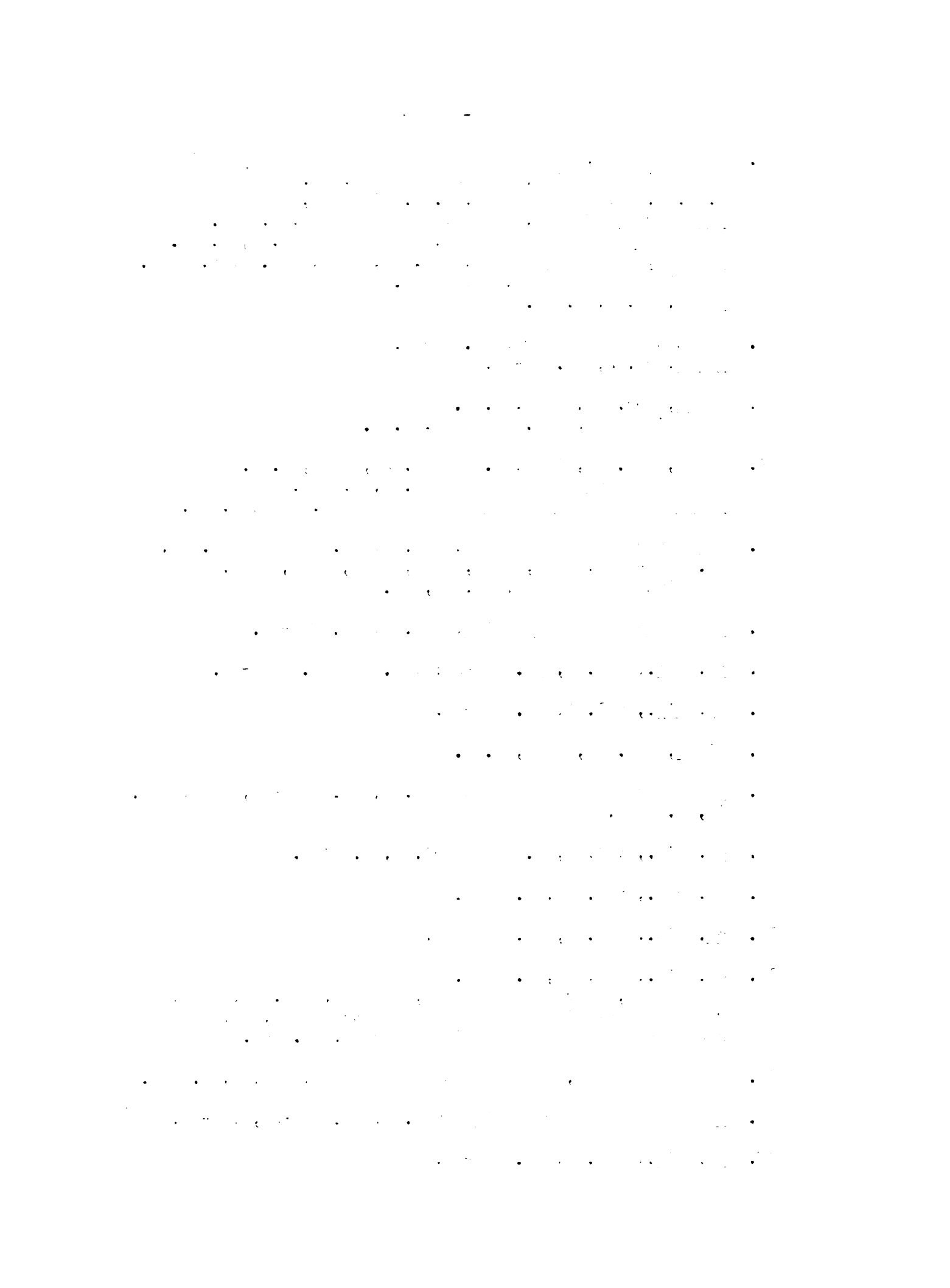
13. op. cit., vol. 9, pp. 2165-66.

14. op. cit., vol. 10, p. 2602.
Prospectus, Eddy Match Company, Limited, Dec. 19, 1956, regarding the disposal by Diamond Match of 66,938, common shares (after the subdividing 2 for 1), pp. 3-4.

15. Eddy Match Case, Factum of the Respondent, vol. 3, p. 541.

16. Eddy Match Case Transcript, vol. 5, pp. 718-22, 785-90.

17. op. cit., vol. 5, pp. 732-33.



18. op. cit., vol. 5, pp. 791-96.

19. op. cit., vol. 5, pp. 809-22; vol. 8, p. 1939.

## Chapter 11

The second potential competitor was much more substantial and brought forth the use by Eddy Match of several techniques to impede the new company's growth. Although incorporated on July 30, 1928, the Columbia Match Company of Canada did not enter into production until 1929. During its short career of less than 4 years, the output of Columbia Match rose from 7.36 per cent to 14.35 per cent of the total domestic production.[1] Its appearance was clearly of much greater significance to Eddy Match than Aurora Match had been, prior to its outright purchase by Eddy Match. Characteristic of the similarity between the conditions of a duopoly and those of military warfare, of major importance in the struggle is information about the rival or enemy.

On occasion the distinction between commercial intelligence and commercial espionage may be a fine one. One device employed by Eddy Match argues that the managing group felt their methods had strong elements of spying, not usual in ordinary business dealings. They were certainly not confining themselves

to "comparison shopping." Five shares of Columbia common and five shares of Columbia preferred were purchased following an Eddy Match directors' meeting in the spring of 1929. Shareholders have available a good deal of information with respect to their company. The details of this arrangement were handled by the general manager of Eddy Match and B. Chandler Snead, who, in addition to his responsibilities with the British and American members of the world match triad, was the deputy chairman of Eddy Match. The "secret service" nature of the stockholdings in Columbia Match was made apparent in one of Mr. Snead's letters.

> In regard to the five shares of Preferred and Common stock of the Columbia Match Company purchased by us or in our behalf some time ago, would say that I had not been advised that this purchase had been actually made although the advisability of doing so was discussed by Messrs. Drury, Woodruff [former general manager of Eddy] and myself at our Directors Meeting last spring.
>
> It was agreed that it would be well for the Company to purchase this stock and Mr. Drury offered to arrange the purchase for us in the name of a dummy - such ownership to give us the privilege of examining the list of stockholders and other corporate records of the company as well as entitling us to receive all statements and reports, etc. . . .

A few weeks later Mr. Snead received a report on the matter from the assistant secretary of Eddy Match. Upon the request of the general manager, the assistant secretary wrote to Mr. Drury asking about the Columbia Match certificates. She wrote to Mr. Snead, "we have now received one Certificate covering five shares of Preferred Stock of Columbia Match Company, and one Certificate covering five shares of Common Stock.

These have been endorsed by Mr. E. Langueduc, to whom

they were issued, and we have now placed them in our vault." It must have been encouraging to the management of Eddy Match to find that they could rely for a catalytic performance upon a member of the minority group in E. B. Eddy, as they had once been able to rely upon the majority shareholder, Hon. R. B. Bennett. There was a touch of irony in the fact that the establishment of this "secret" source of information was directed against the sales efforts of the vice president of Columbia Match, P. A. Conway, who had formerly been the sales manager of World Match.[2] This device, however, played a minor part in the campaign.

The chief weapon was selective price cutting -- confined to a region or to a brand as the situation demanded. National in scope, Eddy Match could proceed from a position of great strength to take losses, if need be, in whatever direction the new company was making headway. Attempting to become established in the face of consumer acceptance of well known brands was likely to necessitate Columbia offering lower prices to induce the trade to handle the matches at all. Although there did not later appear to have been any use made of them, the surviving stocks at Berthierville of matches of the World Match Corporation were considered by E. P. Miller, the sales manager of Eddy Match.[3]

It was decided to use Blue Ribbon matches as a "fighting brand" to meet Columbia wherever necessary. The Eddy Match sales supervisor for western Canada described to E. P. Miller some difficulties in maintaining the Eddy Match price structure.

> All of the jobbers to whom we offered Blue Ribbon were very pleased and assured us that they would not worry

> over Columbia Matches. While we placed before them very strongly the fact that these Blue Ribbon Matches were only to be used where they found competition from a cheap match, nevertheless it will be a hard thing keeping them from selling them wherever it is possible.
> . . .
> As you will notice in Mr. Persse's letter, Vancouver and Fort William are not at the present time to get the Blue Ribbon deal and I sincerely trust that it will never get into British Columbia. As you are aware, Blue Ribbon are getting altogether too much sale at the present time.[4]

Mr. Persse was the president of Tees and Persse Limited, the Eddy Match representative for western Canada. The problem of a fighting brand being a two-edged sword was evidently a serious problem at that time. Most of the advantage of geographic price discrimination is lost by too great a widening of the territory. A confidential circular from Tees and Persse to its managers stressed the importance of confining the use of Blue Ribbon to meet Columbia competition and of preventing the area of their use from spreading.[5] To close the regular channels of distribution to Columbia Match was the purpose. Mr. Miller acknowledged that this did not require prices as low as Columbia's because the greater volume would compensate the jobber.[6]

Although he expressed the belief that the trade in Saskatoon would co-operate on the above arrangement, the western sales supervisor went on to say,

> . . . the more I talk this with the Trade the more I feel that the loyalty discount if [sic] the only solution to our problem for all the jobber express the desire to get 10% and they would be perfectly satisfied. On top of that the loyalty discount would mean that they could not purchase opposition goods and that in itself would stop opposition goods from securing any business on the territories. There is

> no doubt that the whole Trade feel that they do not want to handle anything but Eddy's Goods and any solution to this problem that would show them the 10% would have the desired effect.[7]

There was throughout this period an effort by Eddy Match to obtain the co-operation of the jobbers in setting minimum prices, rather than simply a policy by Eddy Match of naming minimum resale prices. The company's procedure in combatting Columbia was a blending, involving an element of self-contradiction forced upon Eddy by any successes of its rival, of working toward the establishment of minimum resale prices and of using regional price cutting or "fighing brands" at the same time, and of promoting exclusive dealers, by means of "loyalty" discounts, to close important channels of distribution to Columbia. The pattern was followed anywhere in the country that conditions indicated the long run profitability of its use.

That Eddy Match was able to exert considerable control over prices, in spite of price cutting to curb the growth of Columbia and regardless of the depressed economic conditions in the early thirties, may be seen in a 1932 letter from Eddy Match to one of its Maritime representatives.

> In reply to your letter of April 12th., our price list of April 8th does not include BLUE RIBBON brand of matches. We have never listed this brand, and as you know, we are using it to meet competitive prices.
>
> The price of Blue Ribbon is the same as that of all number four sizes, $12.91 less the usual discounts, and the 50¢ special allowance will apply.[8]

In the light of the worsened economic conditions, a $1.00 higher list or resale price in 1932 compared with the $11.91 price of 1929 was an impressive advance. In addition to the "fighting

brand" allowance of 50 cents a case, Eddy Match on occasion gave an advertising allowance per case, especially to larger handlers. These flexible elements of pricing had apparently enabled the company to carry out its campaign against Columbia Match without causing its general price structure to crumble. With its general price level higher than in 1928, Eddy Match was nevertheless able to provide a lower net cash cost to jobbers whenever it deemed conditions warranted such action.[9]

News of the bankruptcy of Columbia Match reached the Montreal office of Eddy Match on February 6, 1932. Eddy Match began quickly to cancel special discounts and to withdraw any unusual allowances, thereby raising their own receipts. The continuing of Columbia operations for a few months in receivership meant a repetition of price reduction from time to time under the pressure in different areas from the liquidation of stocks of Columbia matches.[10]

The best interests of the creditors of Columbia dictated an effort to dispose of the business intact. In a letter to the creditors, found in possession of Canada Match and during the investigation delivered by arrangement to the Crown by E. P. Miller, the trustee explained that,

> . . . negotiations have been carried on with a certain syndicate for the acquisition of the business which, if successful, should result very favourably to the creditors. . . .
> . . . Therefore the dividend to the unsecured creditors is dependent on the success of the negotiations being carried on for the sale of the business as a going concern.[11]

The syndicate had the appearance of being an independent group.

In a letter to the western Canadian sales supervisor on May 18, 1932, Mr. Miller told of the sale of Columbia's assets and hinted strongly at a new device to discourage competitors from entering the match business in Canada.

> For your information and use conservatively, the sale of the assets of the bankrupt Columbia Match Company was ratified to-day by the courts to the Falkirk Company.
>
> . . .
>
> The point in connection with the matter is that, we understand, the stockholders of the bankrupt Columbia Match Company got nothing and that the investors in this company have practically lost all of their money.
>
> I do not think it would do any harm to impress this on any prospectors in a Match business in Canada, as certainly, the experience of the investors in the Columbia Match Company would show that they made a very poor investment, and if anyone tries to float a further stock-selling scheme for shares in a Match company, the more they know the unfortunate result of the investors in the Columbia Match Company, the less opportunity anyone will have to raise funds in the future.
>
> You will understand that I would not want you to make any Radio speech about this and I am depending on you to use your best judgment in speaking of this, but the only reason I am asking to do this is that we do not wish to have anyone in our organization deliberately spread propaganda about the misfortune of others, even though the statements are absolutely true.[12]

The matchmaking facilities at St. Johns, Quebec, which had been purchased by Falkirk, obviously represented the possibility of renewed competition. If, however, the Falkirk Company were not independent, the situation would assume a different complexion.

The background of that ostensibly independent company was revealed by the sale, on December 31, 1932, of all of the assets at St. Johns to the newly formed Commonwealth Match Company for the sum of $424,000. One of the 6 nominees designated by Falkirk to be allotted Commonwealth stock in part payment for the Columbia facilities was the Gore Company. Its allotment was 70 per cent of

the preferred shares and 70 per cent of the common. The $300,000 of 6 per cent Commonwealth bonds were to be delivered to the order of the vice-president of Falkirk.[13] One of the other nominees was Philip B. Keyes, treasurer of Eddy Match and then vice-president, treasurer and manager of Commonwealth Match.

Two letters received by him from B. Chandler Snead during the summer of 1933 made the affair fairly clear. They both concerned semi-annual interest payments on the Commonwealth bonds.

> I have now received from Bryant and May and enclose herewith the following coupons in the total sum of $6,300., due July 1st, of the Commonwealth Match Co., Limited, . . .
>
> It will be in order for you to remit in this amount to Bryant and May in care of Mr. Joseph H. G. Reed, purchasing a draft on London in Pounds equivalent to six thousand three hundred Canadian dollars ($6,300.00) at the present rate of exchange.[14]

The second letter dealt with the remaining 30 per cent of the Commonwealth bonds.

> With respect to the interest owing by Commonwealth on $90,000.00 of its 6% bonds, first, please have the Company make this semi annual interest payment to you as owner of the bonds and, secondly, send me a New York draft payable to the order of The Diamond Match Company for the American equivalent of this interest payment.[15]

If Mr. Keyes were not the nominal holder and Diamond Match the beneficial owner, that transaction would be in the realmof pure fantasy. Bryant and May and Diamond Match were now, and seemingly had been from the time of the original sale of Columbia assets to Falkirk, assured that the matchmaking facilities in St. Johns would not be a means to the entry of rivals in the match business in Canada.

The Bryant and May-Diamond control of Commonwealth, with

Diamond exercising the active management, was uninterrupted. The movement of Diamond's 30 per cent through the procession of companies, outwardly independent, Ledburn, Hilton, Pan-American Match, Universal Match, up to the acquisition of Commonwealth by Valcourt Company, was described in Chapter 3. All the ownership changes were merely nominal. For example, a meeting of the directors of Commonwealth Match in 1947 at the time of its acquisition by Valcourt, a wholly-owned subsidiary of Eddy Match, made evident that the Gore Company had been an instrumentality of Bryant and May. The evidence was brought forth by a resolution of the Commonwealth directors,

> THAT the transfer on the books of the Company of 700 Preferred Shares from the Gore Company to Valcourt Company, Ltd., and 7,000 Common Shares from the Gore Company to Valcourt Company, Ltd., be and the same is hereby authorized and approved and the Secretary of the Company be and hereby is authorized to so transfer said shares.[16]

That Bryant and May were throughout the beneficial owners was well supported by documentary evidence, including the sending of dividend payments from Commonwealth to Bryant and May through an intermediary, Provincial Wood Products of Saint John, New Brunswick.[17] The attorneys for the companies in appeal described the persistent efforts to conceal the true ownership as "elaborate and often admittedly ridiculous."[18] These elaborate attempts at concealment would hardly seem ridiculous to the active manager of the efforts, Diamond Match, because that company lived in the shadow of the ban of the Sherman Act.

Contending in appeal that such a situation was not

illegal, the attorneys for the appellant companies freely admitted that Eddy Match and Commonwealth "were from the outset owned and controlled by the same outside interests." It was a pervasive, extending to the establishment by Diamond, apparently in its rôle of active manager in behalf of Bryant and May and itself, of production quotas for Commonwealth. Although there was considerable variation from year to year, at least as great as from 55,000 cases in 1936 to 40,500 in 1940, the annual output from St. Johns under Commonwealth was kept consistently below the average output from the St. Johns facilities when under the control of Columbia Match. The average for 3 years of independent operation had been slightly more than 2,900,000,000 matches; the maximum, in the final year of independence, had been 3,750,000,000. During the first seven years of Commonwealth operation, the annual average output at St. Johns was about 1,900,000,000 matches; the peak output was nearly 2,350,000,000.[19] The American and British interests were maintaining important excess capacity in the Canadian market, which would always be at least potentially a significant weapon.

With commercial espionage in a minor rôle, Eddy Match had used fighting brands and special discounts, allowances and rebates, which were often of a confidential nature for the presumable purpose of bringing the least disturbance to the generally maintained price structure, successfully to eliminate its competitor, Columbia Match Company. Recognising that the financial elimination of a competitor does not cope entirely with competitive threat of the physical existence of matchmaking

facilities, the American and British owners of Eddy Match acquired "secretly" those facilities from the receiver in bankruptcy. The acquisition removed any competitive threat. The secrecy involved questions of the law for one of the participants. There may also have been some value assigned to having an ostensibly independent company in the industry to blunt somewhat charges of monopoly. The monopolist may also have found useful his command of excess capacity in the industry.

1. Eddy Match Case Transcript, vol. 8, p. 1939.

2. op. cit., vol. 5, pp. 855-58.
Canadian Match Report, p. 22.

3. Eddy Match Case Transcript, vol. 5, p. 838.

4. op. cit., vol. 5, pp. 843-44.

5. op. cit., vol. 5, pp. 845-46.

6. op. cit., vol. 5, pp. 851-52.

7. op. cit., vol. 5, pp. 853-54.

8. op. cit., vol. 5, p. 907.

9. op. cit., vol. 5, pp. 875, 883, 885-86.

10. op. cit., vol. 5, pp. 887, 894-95, 898-99, 916-17, 896.

11. op. cit., vol. 5, p. 900.

12. op. cit., vol, 5, p. 915.

13. op. cit., vol. 11, pp. 2857-58, 2861-62, 2866.

14. op. cit., vol. 5, p. 1023.

15. op. cit., vol. 5, p. 1024.

16. op. cit., vol. 11, p. 2835.

17. op. cit., vol. 8, p. 1796.

18. Eddy Match Case, Appellants' Factum, p. 57.

19. Ibid.
Eddy Match Case Transcript, vol. 6, p. 1311; vol, 9, pp. 2069-70; vol. 8, p. 1939.

## Chapter 12

A third rival, Canada Match Company of Hull, Quebec, had been formed before the second had ended in bankruptcy. A match-making machine had been secured from the Bell Machine Co. of Oshkosh, Wisconsin.[1] Canada Match output accounted for 3.48 per cent of domestic production at the time that Columbia was going into bankruptcy.[2] This was one of various efforts to restore match manufacture to the city of Hull after the closing of the E. B. Eddy factory in 1928. Eddy Match soon turned its attention to the activities of this new rival. Although the basic pattern of market behaviour continued, there was an important shift in emphasis which produced interesting variations.

Working toward the general reinstatement of its April price list on "kitchen" matches of $12.91 list and $10.54 net cash cost to jobbers, Eddy Match was withdrawing, during the summer of 1932, some of its temporarily reduced prices, which were sometimes as low as $8.35 to the jobbers. However, within a few weeks small jobbers who had been handling Canada matches were raising a

problem. A new fighting brand North Star was made available by Eddy Match at $8.75 per case to the jobbers. The sales manager exerted a continuing influence to confine North Star sales to combatting Canada Match and to limit, as far as possible, the effect on other Eddy brands. His policy was outlined in a letter of September 15, 1932, to a Toronto customer.

> We do not quite agree with the statement in the first part of your letter that there is a lot of competition by North Stars against Eddy's other brands. There is no possible way that North Star brand can compete against our regular brands of matches, first, because it is not the same grade of match, and secondly, because we are not going to manufacture a sufficient quantity of them so that they could greatly affect business on regular brands, . . .[3]

North Star was to be used to deal with limited competition from outside brands. As the rivalry was intensified both Blue Ribbon and Maple Leaf were made available at a special 50 cent allowance, $10.04 to jobbers. That the difficulty of maintaining the general price structure was thereby increasing was evident. A letter received by Mr. Miller in October put the matter in these terms: "We understand our French friends are not meeting North Star prices in all cases, and believe to-day the competition against Eddy's other brands by North Star is becoming more pronounced and will be impossible to control before long." By December Eddy Match had introduced a new fighting brand, Bull Dog, and offered a price of $8.25 per case on both of the recent fighting brands. Canada Match reported to a firm in London, Ontario, that month, "we can quote you Canada matches at $9.15 net per case. We understand Eddy Match are selling Bull Dog at $8.25 net per case, but it is

impossible to us to meet this price. We have been told that they are selling this brand only by small quantity at the time."[4]

Rather than price reductions simply to meet competition, a position constantly referred to in Eddy Match correspondence, that seemed to be a clear example of lowering prices to eliminate a competitor. Whether it was an intentional though occasional weapon or a tactical error because of limited commercial intelligence, such price cutting did not form the core of Eddy's attack on Canada Match. Every effort was made to confine lower Eddy prices to restricted areas and to fighting brands. The concentrated effort was on 2 other monopolistic weapons, exclusive dealing and resale price maintenance, which were closely interwoven. Comments addressed to Mr. Miller in 1932 by a Maritime wholesaler in regard to sharp departures from maintained prices illustrated a widely held view:

> There seems to be always somebody taking the joy out of life. If it isn't one thing, its [sic] another, and some people seem to be anxious to work for nothing, or are able to sell merchandise cheaper than other firms. We hope this condition will correct itself sooner or later and they will wake up to the fact that they are working for nothing. There is no fun in that for anyone, either manufacturer, jobber, or retailer; and nine times out of ten, the retailer who buys merchandise today at special prices, is passing it on again at special prices to the consumer--sometimes foolishly, and he gets very little thanks from all those who participate, and the final result is that nobody has made any money except possibly the consumer, who has saved a few cents. If all hands would lighten up a little - both the manufacturer and the jobber, and the retailer would spend more time on merchandising rather than on buying, things would improve with a jump and become much healthier----"[5]

There was a denial of the desirability of price competition, the

social advantage of economising in distribution, and the purpose of production being consumption. That the end of the depression did not mark the end of the idea of agreeing to maintain prices is evident from the recent history of resale price maintenance and its unqualified support in certain influential quarters, exemplified by the current stand of the Canadian Manufacturers' Association.[6]

On June 30, 1932, instructions from Mr. Miller to the western sales supervisor made clear that Eddy was already trying to induce distributors to handle its products exclusively. He said, "you may continue the 25¢ special allowance on CWL matches to David Spencer Ltd., in view of the fact that this chain store is giving us their exclusive Match business, and in order to be in a position to hold this, I think it better that we continue this special allowance for the time being."[7] A wider profit margin was available to those handling only Eddy matches. By November, Mr. Miller was advising a Halifax firm,

> In order to show our willingness to work with you one hundred percent and also our appreciation of the increased business you have given us, . . ., we will give you the fifty cents per case rebate on what BLUE RIBBON matches you include in the car. We would ask, however, that you keep this matter strictly confidential between the writer and yourself, and would ask also that you do not allow this fifty cent rebate to reflect in your re-sale price, but take this as an extra profit, which we feel sure you will be willing to do.[8]

Although forced by competition from time to time to accept lower resale prices, it was evidently Eddy Match's purpose to widen the profit margins of distributors so as to induce them to concentrate their efforts on the company's products.

In many instances this relationship between the jobber's profits and their purchases of Eddy matches only was stated very plainly in the face of direct competition from Canada matches. Every dealer that Eddy could convince by means of the extra profit to refuse to handle rival matches represented a narrowing of the distribution channels open to Canada Match. In a detailed account of his meeting with one of the large Winnipeg jobbers, the western sales supervisor for Eddy Match provided useful illumination in regard to prevailing conditions.

> The representative of the Canada Match Co., . . ., is now in the city and has offered Macdonalds [the Winnipeg firm] a price of $7.75 delivered at any Manitoba point on Canada 3's. Mr. Crawford opened the box and said they were good matches, and I must admit that they were, in fact I would almost swear that they had our Blue Ribbon splints in the box. The wood is beautiful wood and the match is the same size and colour as our Blue Ribbon. . . .

The Canada Match price was quite low and, at the same time, the quality of the product was obviously much better than Eddy Match persistently implied in their contacts with various dealers. After stating emphatically that his complete knowledge of the match block purchases of Canada Match gave him an accurate idea of that company's output, and quoting an Eddy Match price of $8.44 net on their competing Owl brand, the western sales supervisor said to Macdonalds' official,

> Of course Mr. Crawford, you realize that there is more enters into this than the $8.44 price, and that you are getting a deal that only is allowed providing you handle exclusively Eddy's Matches.[9]

The firm was convinced to continue its exclusive handling of Eddy's matches in spite of the substantially lower price on Canada

matches. To assure the jobbers a profit attractive enough to exclude other matches Eddy Match needed to be operating under an umbrella of maintained prices. A comprehensive resale price maintenance programme would be difficult in the face of substantial quantities of like quality matches being available to retailers at much lower prices. That could be solved by choking off the competitor's access to the normal channels of distribution. Thus were wed exclusive handling arrangements and a firm resale price maintenance policy.

A 1932 contract letter brought the two aspects of Eddy's problem together in a 3-year agreement.

> In return for your entire Match business from date to October 31st, 1935, the Eddy Match Co. Limited agree to sell you their various brands of matches at their list prices in effect at point of purchase from time to time, less their regular discounts in effect from time to time.
>
> . . .
>
> Providing you signify your acceptance of this Contract by placing your signature hereon, the Eddy Match Co. Limited will allow you, during the life of this Contract, a special confidential discount of 5% (five percent) on all Red and White brands supplied, and a special confidential discount of 2% (two percent) on all Eddy Brands supplied.[10]

That was explicitly an exclusive contract. To permit jobbers a profit that would induce them to observe the contract there had to be a stable resale price or Eddy faced a crumbling price structure thereby reducing its own profits. To sustain prices and volume of sales, equally important to the company, there had to be at least a shortage of low-priced matches. Effective resale price maintenance was implicitly an essential element in making the exclusive contracts profitable for manufacturer,

wholesalers, and retailers. Once enough distributors agreed to the policy, Canada Match would no longer be able to obtain substantial business by means of offering lower prices; in addition to price discrimination, more damaging to Canada than to Eddy, Canada Match would be encircled by unreceptive dealers, once the latter had been persuaded by Eddy that they could enjoy the enhanced profits on a long term basis.

Express recognition was given to resale price maintenance in 1934 by Eddy Match and its pseudo competitor, Commonwealth. They adopted a uniform policy of offering a 35¢ per case special discount to any jobber maintaining a minimum selling price on <u>all</u> sales. Eddy Match described the policy as,

> . . . an effort to eliminate the varying prices . . . of matches from jobber to retailer, and . . . to help and protect our distributors from the necessity of sacrificing profit, . . .

and explained the resale price of $9.50 in terms that might still serve as a warning to be wary for those entrusted with the enforcement of a ban on the practice. (underlining supplied)

> Please understand that this $9.50 price is the <u>suggested minimum</u>, and is named in an effort to eliminate lower unprofitable prices which have been existing in some territories, and if adhered to, will result in improved profitable prices for distributors; however, <u>it does not prohibit the sale of these brands below the $9.50 price</u>, but we feel certain that all distributors will be vitally interested in this or a higher price in order that they may obtain the thirty-five cents per case rebate offered for this co-operation.[11]

A "suggested" price might well be, in some instances, the perfect device for keeping the letter of the law, while denying its substance. The 1934 producer-jobber arrangements were improved in

1935. The resale price was raised to $9.75 per case and the jobber discount for maintaining that was increased to 4 per cent on a list price of $9.43, which was equivalent to 37.72¢, compared with the 35 cents of the previous year.[12]

That the enhanced profit margins resulting from the resale price maintenance were proving effective for the purpose of Eddy Match was certain. The policy was being continued and there were examples, reaching the attention of the company's sales manager, Mr. Miller, of distributors declining to handle Canada matches, offered with a price advantage to the buyer of 56 cents per case. His comments on such an occurrence to the Maritime representative of the Eddy Match were informative of his outlook.

> As I understand it, the Canada Match Company has not named resale prices in the Maritime Provinces; therefore, in consideration of our naming resale prices and co-operating with the jobbers in the territory, none of the jobbers should consider the sale of Canada matches, and if they do they will break down the profitable prices that are now existing in the territory, and I understand that this is the position that Jones, Schofield, Hathaway are taking with reference to this quotation, and they are absolutely right.[13]

Another possible weakness that might develop in a ban on resale price maintenance was illustrated by the position of the T. Eaton Company in 1935. Mr. Miller was advised that,

> The T. Eaton Co. Limited state they are not permitted to sign any declaration re price maintenance, etc.
> . . .
> They are quite willing to observe any consumer resales which may be named - in fact just recently Mr. Holmes instructed Lethbridge and Medicine Hat stores that resales of which we advised them must be respected on family size matches of any make.[14]

Mr. Miller's suggestion that the head office sign for all branches

brought out the matter even more clearly.

> . . . the trouble is that it is Eaton's Head Office who refuse to sign, and state that it is a very strict policy of the firm that they will not sign any agreement regarding maintenance of price. They will give their word to observe a minimum, and will observe it, their attitude being that if their word is not good enough there is no point in their putting their signature on a document.[15]

It was decided that under those circumstances they were entitled to the rebate; the discount was for price maintenance in reality not for signing a pledge. If that method of an unwritten promise were widespread, the banning of resale price maintenance would face serious obstacles in the courts.

Without using the ultimate weapon, the boycotting of a dealer who did not live up to the price maintenance requirements, Eddy Match had gradually built up a fairly firm price structure, higher than necessary to continue a profitable operation. In response to the idea of an imposition of some penalty on the recalcitrant, Mr. Miller had stated the position of the company.

> . . . if we could only make a penalty that would apply against any jobber that did not keep to the arrangement, everything would be O.K., but of course we cannot do this, although our friend Ossie Marrin could tell us how it could be done with his little black book, but you know that we cannot possibly consider such drastic action as this and can only hope that the jobbers will sincerely co-operate . . .[16]

Although it was not stated in that case that the deterrent to more drastic action was a question of the law, that aspect was expressly considered two years later in 1934. A British Columbia jobbers' association had requested a resale price agreement. Mr. Miller explained to the association that "any attempts to control

prices on all brands of matches, to be successful, would result in an agreement that we are advised would be illegal. . . . It is very readily recognized that any price policy, other than one that will absolutely bind all manufacturers and all wholesale distributors, is of little value in protecting the jobbers' profit, and as to draw up such an agreement is difficult against existing law, it is very questionable whether any such agreement should be entertained."[17]

At the same time Mr. Miller put the matter even more plainly to his western sales supervisor, stating that, "owing to the Combines Act in Canada, it would be illegal for us to combine with the jobbers and other manufacturers of matches to fix a resale price or prices."[18] In response to receiving a copy of that second statement of the problem, the vice-president and sales manager of Diamond Match said,

> I have noted copy of your letter to Mr. Nickerson [Eddy Match western sales supervisor] of October 31st, referring to the demand made upon you to make an effort to fix resale prices on matches in British Columbia. I think the stand that you have taken is logical and proper and I hope that you will be able to sidestep making any such attempt.
>
> Of course you have no objections to jobbers making this effort thru the Candy Association of [sic] they care to do so, but it is certainly advisable for you to keep out of such arrangements.[19]

Eddy Match, in pursuing its monopolistic practices, was clearly endeavouring to keep within the law -- prima facie a commendable procedure. Against the background of Eddy Match, it was also illustrative of a sharp awareness on the part of the company that there were many points of conflict between its monopolistic

purposes and the competitive purposes of the law. Rather than ending price fixing efforts, however, the influence of the Combines Act was to Eddy Match to proceed circumspectly.

In spite of his words of caution in October and November of 1934 and his statement of January 5, 1935, to Mr. Nickerson repeating the opinion that the Combines Act made unlawful a price maintenance policy, Mr. Miller continued to work indirectly to achieve such an end. A January circular from the firm representing Eddy Match in western Canada set out "Jobbers Resale Prices." Eddy Match was resorting to a veiled suggestion implying that "no jobber should buy matches from a competitor who does not provide them with a resale printed price list and a policy that will protect their profit." Writing to the western sales supervisor in March of 1935 about the problem of resale price maintenance, Mr. Miller said,

> I think that you and our brokers in Western Canada will be able to point out this to the trade so forcibly that the customers in Western Canada will not buy matches from any other match manufacturer who does not provide a policy equal to ours for the protection of their profit, and will go as far as to refuse to handle matches from any other match manufacturer who does not provide such a policy.

Having rejected the use of a boycott against jobbers who failed to maintain prices, Eddy Match's persistent efforts had brought about a situation where the distributors were prepared to boycott a producer who did not assist in the maintenance of prices.[20] The only significant difference of the two methods seems to be that the second takes longer to accomplish. Although there was thought to be some legal distinction, it was apparently only one of detection.

There may actually have been little difference in the long-run economic effects. The first means would have meant an earlier monopoly control and probably an earlier appearance in court. The second method meant a later establishment of monopoly control and, probably, a longer time before appearance in court. To whatever extent legal penalties do not remove monopoly gains, the deterrent of the Combines Act had a useful economic effect in bringing Eddy Match to the second method of maintaining prices. The profits may have been still too large, but they were at least not for so long.

An important contrast with the Columbia Match situation was that, during its years of independent operation, Canada Match enjoyed a net profit, except for the first 9 months. That the struggle with Eddy Match had curtailed those profits was seen in a comparison with the results obtained after the company's acquisition by Eddy Match in 1936.[21] Canada Match was not driven to bankruptcy by the intensive efforts of Eddy Match. Toward the end of 1934 efforts were made to purchase a majority of the shares in Canada Match.

The negotiations were handled by the sales manager of Commonwealth Match on behalf of Eddy Match and with the knowledge and agreement of Diamond Match. The 313 shares acquired at approximately $160 per share would have given Eddy Match control of the company with its 620 shares outstanding, except that at the time of the negotiations additional shares had been issued to other individuals. The 313 shares were held by nominees of Eddy Match

and the Commonwealth sales manager, who had conducted the purchase, was kept out of the picture. He was instructed the following year to turn over the shares to B. Chandler Snead. The vice-president of Diamond Match sent out the instructions concerning the Canada Match shares. Apparently under some financial scheme with Diamond, the president of Canada Match, J. W. Charette, resigned.[22]

With Eddy Match holding a substantial minority interest in Canada Match, E. P. Miller, sales manager of Eddy, took an active part in attempting to obtain the balance of the shares in Canada Match and saw arrangements completed in January of 1936 for the purchase at $225 per share of the 726 shares not already held by nominees of Eddy Match. The new president of Canada Match had explained to Mr. Miller that the shareholders had entered a pooling agreement, which had been signed at the suggestion of Senator Côté. There was also involved an undertaking by them not to have anything to do with the match business in Canada for a period of 20 years. The total cost of acquiring the 1,039 shares of Canada Match, which included the extra shares issued during the earlier negotiations, was $213,715.31.[23] The interest of the Diamond Match Company was indicated by its auditor advising the Canadian accountants for Eddy Match of the desirability of treating the necessary financial entries as inconspicuously as possible.[24]

Again hiding from view the complete affiliation of another former rival, Eddy Match began the active management of Canada Match in January of 1936 by raising the company's prices.

Its price lists were now prepared by the office of E. P. Miller. On his instructions Canada Match introduced a price maintenance policy in May of 1936. Canada Match now paid 25 cents per case on sales to Eddy Match, which had assumed the position of sales office for that company. Production and sales quotas for Canada Match were established by Eddy Match with little variation from year to year, until they were increased at the time production ceased at the St. Johns plant in 1949, when the property was sold for $165,000. Canada Match was then producing some of the brands that had formerly been manufactured by Commonwealth.[25]

The growth of another rival had been deliberately curbed by the market behaviour of Eddy Match by devices similar to those which had driven Columbia Match into bankruptcy. As Canada Match was able to continue to earn small profits, Eddy Match then eliminated the concern as a competitor by acquiring all the stock of the company. Eddy Match emerged again as the sole match producer in Canada, with that fact concealed by its operation of both Commonwealth and Canada as ostensible competitors. There was no variation in the result for the consumer -- there were increased prices.

1. Canadian Match Report, p. 38.

2. Eddy Match Case Transcript, vol. 8, p. 1939.

3. op. cit., vol. 5, pp. 901, 929, 932, 934.

4. op. cit., vol. 5, pp. 936, 942-44, 1017.
Canadian Match Report, p. 45.

5. Eddy Match Case Transcript, vol. 5, pp. 947-48.

6. supra, ch. 9, p. 239.

7. Eddy Match Case Transcript, vol. 5, p. 923.

8. op. cit., vol. 5, p. 952.

9. op. cit., vol. 5, p. 965.

10. op. cit., vol. 5, p. 951.

11. op. cit., vol. 5, pp. 1033-34.

12. op. cit., vol. 5, pp. 1089, 1092.

13. op. cit., vol. 6, p. 1094.

14. op. cit., vol. 6, p. 1190.

15. op. cit., vol. 6, p. 1193.

16. op. cit., vol. 5, p. 993.

17. op. cit., vol. 5, p. 1050.

18. op. cit., vol. 5, p. 1052.

19. op. cit., vol. 5, p. 1053.

20. op. cit., vol. 6, pp. 1060-64, 1095-96.

21. Canadian Match Report, p. 122, table 16.

22. Eddy Match Case Transcript, vol. 3, p. 471; vol. 6, pp. 1068, 1113, 1272; vol. 7, pp. 1637-38; vol. 12, p. 3118.
Eddy Match Case, Factum of the Respondent, vol. 2, pp. 218-19.
supra, ch. 3, pp. 51-52.

23. Eddy Match Case Transcript, vol. 6, pp. 1111, 1269-71; vol. 7, pp. 1615, 1642.

24. op. cit., vol. 6, p. 1273.

25. op. cit., vol. 3, pp. 473-75, 482, 484; vol. 4, p. 583; vol. 6, pp. 1278-79, 1281, 1286, 1288, 1293-1302, 1305-06; vol. 9, pp. 2108-2109, 2253; vol. 10, 2438-44; vol. 11, p. 2850. Eddy Match Case, Factum of the Respondent, p. 250.

# Chapter 13

A minority of the Canada Match stockholders had not entered into a restrictive covenant with respect to engaging in the match business in Canada. In the spring of 1936 a new Hull match company was formed by J. W. Charette, the original president of Canada Match, and several others, including some shareholders of Canada Match, presumably some of those not bound by the restrictive covenant. The new company faced the co-ordinated competition of Eddy, Commonwealth and Canada, rather than the problems of entering a 3-firm industry. The Federal Match Company was to have an independent existence for less than 4 years.

The location of Federal in the same city as one of the Eddy group greatly facilitated commercial spying. From Canada Match "intelligence" reports reached Mr. Miller in Montreal with great frequency; there were times when the reports were daily.[1] They dealt with such matters in regard to Federal as rate of production, the quality of the product, and the destination of the shipments from the factory. There were more improper sources

of information than the employees of Canada Match. Some one from Hinde and Dauche, for example, provided information regarding the use by Federal of the cases supplied by that company.[2] Canada, from a lumber company employee who had talked with somebody in the foundry where Federal's match machine had been made, learned of that company's investment in order to commence operations and of its trade policy to sell 25 cents per case under Canada Match.[3] Plans of Federal to alter its policy were quickly communicated to Mr. Miller. For instance, he learned that Federal was considering a box of 150 matches.[4]

Whenever the sales manager of Eddy Match was informed of the destination of a Federal shipment of matches, he promptly warned his representative in that area, thereby laying the basis for effectively combating the competition of new supplies from Federal.[5] Although remarks deprecating Federal matches continued to be circulated among the jobbers, Eddy Match had been made aware, through its spy network, that Federal matches were of excellent quality, superior to the product of Commonwealth.[6] That this espionage was found valuable to Eddy Match was indicated by its extension to western Canada, where there was no physical proximity to assist such an operation.

The western sales supervisor played an important part in collecting information and forwarding it to Mr. Miller in Montreal. Employees of shipping companies, both steamship and railway, proved particularly useful sources of what surely must be deemed confidential information. An illustration of the procedure was given by

a letter to the western sales supervisor from the Winnipeg brokerage firm which represented Eddy Match in western Canada.

> Following up our check on Federal activities, we were advised by the C.N.R. that since Federal started shipping West, Tyson's Storage have had about 600 cases come along in pool cars, part of which were sent to MacKenzie Storage in Winnipeg, some went to Calgary, and approximately 150 to Saskatoon.
>
> We questioned the Saskatoon shipment, but the railway company asked us to leave it with them for a day or two as it is somewhat difficult for them to secure definite information since these goods had been enclosed in a pool car from the East, which was consigned to the Tyson Storage Co.
>
> We had the Canada Steamship Lines go through their boat manifests and they tell us the only shipment they handled was 50 cases Bluebirds weighing 1400 lbs. which were shipped by the Federal Match Co. Hull, loaded on a Canada Steamship Line boat in Montreal June 19th, and consigned to H. J. Lockwood, Winnipeg. . . .[7]

That is sufficient comment on the commercial morality of the parties concerned.

That the wide travels of the western sales supervisor had enabled him to establish direct sources of confidential information may be seen in a letter from him to the sales manager of Eddy Match.

> Just as we were closing my railway friend phoned me and gave me the following contents of the Fox car:
>
> 250 c/s Federal 3s
> 250 c/s Perfection 3s
> 200 c/s Federal Pocket 30's
> 200 c/s Coronation " 30's
> 100 c/s Bluebird 3s L.S.
>
> This, as you will note, amounts to 1,000 c/s and not 1,100 c/s as reported and the car was consigned to Slade, Freight Collect. I was very careful to find this out and also the matches are billed by Fox and not National Brokerage Company and these were put in

Slade's storage warehouse, . . .[8]

"Fox" was the code word for the Federal Match Company.[9] The amount of detail found in that letter was not unusual for the reports that were constantly being received by Mr. Miller.

Approximately 2 months before the acquisition of Federal by Eddy Match a letter to the Western sales supervisor from Mr. Miller showed both his anxiety at a failure in spying and the fierceness of the rivalry against Federal right up to the end of its independent existence.

> What is worrying me is that these shipments going out in this way, seems to indicate that these people are able to sell some of the matches which they have shipped to Winnipeg, and it is unfortunate that we have lost our check on these matches and are therefore in the position that we do not know how many of them are being sold.
>
> You know pretty well the position we are in with reference to this concern, and while they are undoubtedly in a very precarious position, if they can sell matches in Western Canada (at which point they can get higher prices than they can at any other point in the Dominion[x]), they might be able to carry on their business for some time on Western sales alone if they are able to dispose of any such quantity as has been shipped into the territory in the last two or three months. It is therefore quite important that we see to it that they cannot sell these matches.
>
> . . .
>
> . . . Furthermore, if they could sell this large quantity of matches or if there is any possibility of them doing so, considering that they are trying to keep their plant running apparently from Western sales, we may have to throw discretion to the winds and supply all the Swan [a new fighting brand introduced in 1939][107] matches that the jobbers will buy on the basis of $8.00 per case, or maybe lower, and I am making this statement because it is extremely important that these

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x It was quite the general rule with all the match companies that sales in Western Canada yielded a higher factory net for the producer. The jobbers' cost in the West usually exceeded that in the rest of the country by more than the transportation differential.

> people do not put over their proposition by going to Western Canada and selling matches in volume, which is indicated by the large shipments they have made in January and February, and also another car of 1,100 cases which is now being loaded.
>
> The important thing at the present time is to prevent the liquidation of these stocks into the Western Canada market, . . .[11]

The final struggle against Federal Match came in western Canada because vigorous price cutting in other areas had curtailed severely sales of Federal matches. The situation in the Maritimes had resulted in the withdrawal by Eddy of a comprehensive programme of resale price maintenance, in its offering all brands of matches at lower prices to combat the inroads being made by Federal, and, in some instances, in Eddy Match adopting the practice of making direct sales to some retailers.[12]

During this period of competition with Federal Match, the 3 Eddy companies, Commonwealth being an affiliate with the same owners as Eddy Match and Canada being a subsidiary by reason of it being owned by the Valcourt Company, which was formed in 1937 as a wholly owned subsidiary of Eddy Match for the purpose of acquiring the stock of Canada Match at the written down value of $103,900,[13] co-operated on fighting brands against Federal Match. They continued their efforts to keep the use of fighting brands confined as much as was permitted by the outside pressure from Federal. A means to that end was a narrower profit margin for the jobbers because the 4 per cent resale price maintenance discount was not allowed on the fighting brands.[14]

With special emphasis in western Canada, but by no

means confined to that area, extra allowances were given to certain large retailers such as, for example, the department store chain, Woodward's, and the grocery chains, Safeway and Loblaw Groceterias.[15] It was stated by the Eddy Match western sales supervisor that the brands handled under that arrangement were often sold as "Loss Specials."[16] Eddy Match, stressing the policy in western Canada, set retail prices from time to time. A good example of that occurred with respect to Commonwealth matches. They were offered at a lower net cost to jobbers on the basis that they would be sold to the ultimate consumer at the same price as the higher cost Eddy brands.[17]

A 1937 marketing innovation by the Federal Match Company, when it brought out a box of 30 matches selling for 1 cent, engaged the direct attention of W. A. Fairburn, president of Diamond Match and Managing Director of Eddy Match. Writing to the company's general manager in Pembroke, Ontario, he said,

> Will you please obtain from E. P. Miller, samples of Federal Match Company CORONATION brand, which I understand are selling for one cent per box; the box being a rather large size but carrying only a 30 count?
>
> As soon as you receive all the information which you desire in regard to this Federal brand, will you please make a very careful estimate of cost, giving the information to no one except me personally, and comparing the cost of reproducing the CORONATION brand at an Eddy factory with our regular No. 0 Pocket size?
>
> . . .
>
> I understand the Federal CORONATION brand is selling to the jobbing trade at prices from $8.00 to $8.55 per case, which it would seem, after deducting Sales and Excise Taxes, gives the Federal a revenue of from $4.71 to $5.22 for 10 gross of boxes. Miller maintains that this 30 count box is not profitable and he says "We bank on Federal not being able to make a profit at the prices on which they are selling them;

in fact we believe they are taking a loss."

For your information, will say that I am advised that Federal sold 670 cases of CORONATION brand during May and T.J.R. /vice-president and sales manager of the Diamond Match Company/ advises that "E.P.M. /sales manager of Eddy Match/ has estimated that Federal must be losing $1.00 per case."

I would like to check up E.P.M's. and T.J.R's. statements in regard to Federal losses on their sales of one cent 30 count matches. Hence call upon you for help in checking costs comparative with our standard No. 0 size.

. . .[18]

The careful checking was being carried out by the man who had provided a financial incentive to promote the elimination of Federal by advising Mr. Miller at the end of 1936 that Mr. Miller would be paid an additional bonus beyond his $10,000 "total compensation from all companies, . . . if the Federal Match Company disappeared as a competitor during the year 1937."[19]

The reply W. A. Fairburn received showed the large difference in efficiency of operations between the Eddy Match facilities at Pembroke acquired from the Canadian Match Company and those at Berthierville acquired from the World Match Corporation, and also indicated that the Federal Match Company was not necessarily producing and selling their 1 cent matches at a loss.

. . ., we have gone very carefully into the cost of the "Coronation" brand. We find that if this brand was made in an Eddy factory on the same basis as I understand Federal are using, i.e. making boxes, caddies, etc. by hand, the cost would be as follows:

| | | | |
|---|---|---|---|
| Pembroke | - | $4.84 | |
| Berthierville | - | 5.60 | |
| Consolidated | - | 5.22 | all per case of 1,440 boxes. |

These costs include of course overhead of Eddy factories as at present in effect.

Costs of 10 gross (1,440) No. 0 Pocket size for

the six months ending June 30th, 1937, are as follows:

| | | |
|---|---|---|
| Pembroke | - | $3.57 |
| Berthierville | - | 5.04 |
| Consolidated | - | 4.16[20] |

Further information in response to W. A. Fairburn asking what would be the cost at Pembroke, calculating Federal overhead, which he suggested could be estimated from Canada Match figures, and using the facilities there which were producing the pocket size, suggested strongly that Federal was earning a profit on its 1 cent matches. The Pembroke cost was estimated at between $3.15 and $3.38 per case, depending upon the type of packaging.[21] Eddy Match attempted to meet that competition with its pocket matches at 5 cents for 2 boxes to avoid a changeover; in the course of the struggle in the Maritimes the Eddy matches were eventually offered at 1 cent a box.[22]

In spite of the combative efforts of the 3 Eddy companies against it, the Federal Match operated at a profit and had built up a surplus of just over $42,000 in a period of 4 years.[23] That this could be accomplished during a time of prolonged price cutting was evidence of the exceptionally high level of profits that could be and were maintained whenever the Bryant and May-Diamond companies were able to restore their monopoly control. It may be further noted that the output of Federal was relatively small, never accounting for more than 10 per cent of Canadian output.[24]

In May of 1940 all the Federal shareholders formally offered to sell out to Valcourt, the wholly owned subsidiary of Eddy Match Company. They undertook, as a condition of acceptance,

not to engage, directly or indirectly, in the manufacture of matches in Canada for a period of 20 years. Valcourt accepted and acquired all the stock of Federal Match for the sum of $136,500, which was $300 per share.[25] As the value of the issued capital and surplus at the time of purchase was $87,823.08, the Eddy Match interests were apparently prepared to pay a high price, which involved more than $48,000 described by one Eddy official as "good will or nuisance value" investment, to eliminate its only domestic competitor. The excessive charge was written off at the end of 1943, as had been done with earlier acquisitions containing "water."[26] It is of interest to note that shortly after the "nuisance value" or goodwill had been capitalised in 1940, the assistant secretary of Eddy Match, in his justification of the transaction, said, "It is a fact that goodwill did and does exist in Federal. This can be demonstrated by the Company's earnings prior to purchase and mathematically proven to be true."[27]

Upon its acquisition by Valcourt, the Federal Match Company came under the active direction of E. P. Miller, sales manager of Eddy Match. It had already been his task to deploy the market forces in each new struggle against another entrant. He was now actively directing Eddy Match, Commonwealth Match, Canada Match and Federal Match, with considerable assistance and sometimes directives from Diamond Match officials, including the president, W. A. Fairburn. A Diamond subsidiary, Industrial Management Engineers, and its subsidiary, Management Engineers of Canada, were actively engaged in liaison work between Diamond and the Eddy

group of match producers, and in putting into effect certain policies emanating from Diamond in its rôle of managing the Canadian firms on behalf of the principal stockholder, Bryant and May. Efforts to conceal the actual relationship persisted.

That was clearly demonstrated in correspondence between the chairman of Bryant and May and the president of Diamond. The British request for detailed information concerning the Canadian companies was introduced with an explanation to Mr. Fairburn:

> As you no doubt are aware, a report on Company Law Amendment was recently submitted to Parliament by the Cohen Committee.
>
> It is not anticipated that their recommendations will become law until late in 1948, but when such is the case there will be many ways in which this Company will be affected.
>
> Principally, we shall be concerned with the presentation of accounts, which, broadly speaking, will involve the publication of much more information than has been considered advisable hitherto and we shall also have to publish a consolidated Balance Sheet and Profit and Loss Account.
>
> It is our intention, therefore, to avail ourselves of the present interim period to prepare annually, but not for the time being to publish, Consolidated Accounts, which will be drawn up in accordance with the principles recommended by the Cohen Committee in their Report.[28]

Arthur Hacking of Bryant and May, in outlining the required information, placed the Canadian companies, including the Canadian Splint and Lumber Corporation which it had acquired at the time of gaining control of Maguire, Paterson and Palmer prior to the 1927 agreements and the formation of British Match,[29] in three groups -- Eddy Match Company Limited, Federal and Canada Match Companies, and Canadian Splint and Lumber Corporation Ltd. and Commonwealth Match Company.

Stating that the assistant secretary of Eddy Match would handle the details, Mr. Fairburn, in reply to the British request, described a means of collecting the information clandestinely.

> Mr. Hart, at Pembroke, will handle all details in correspondence with duly deputized Bryant and May officials, and W. A. F. Jr., [son of W. A. Fairburn] with the co-operation of others intimately connected with Canada, Federal, and Commonwealth operations, will forward to Mr. Hart at the Pembroke office all the material he needs. I have used Mr. Miller, whose office is at Montreal, together with Mr. Duffey of Industrial Management Engineers, Inc., and Management Engineers of Canada, on several matters and W.A.F. Jr. will act as liaison officer in bringing the material in proper shape, through the various auditing firms, to Mr. Hart for incorporation in the final consolidated reports.
>
> You probably know that Canada and Federal have no dealings or correspondence whatsoever with the management of Eddy Match, and Commonwealth has no direct dealings or contact with anyone connected with Eddy, Canada, or Federal. The situation in regard to Canadian Splint and Lumber is simple, as that is a direct wholly-owned subsidiary of Bryant and May, and Mr. Hart has the records of that company in all its phases, as he has of Eddy Match, except, of course, that Canada and Federal are considered as being owned by a subsidiary company of Eddy (i.e., Valcourt), and no reports of the operations of these two companies go directly to Eddy; as a matter of fact, I do not think that Mr. Hart has ever seen a Balance Sheet or Statement of Earnings of these two little Hull companies. Absolutely nothing in regard to the operation of Commonwealth Match has ever reached the office of Eddy Match at Pembroke.
>
> . . .[30]

That position, in the face of the continuing co-ordination of the policies of the different companies, seemingly relied upon the fine distinction between communications on plain white paper and those using company letterheads.

In explaining to Mr. Fairburn the details of the procedure that was going to be followed, Mr. Hart, assistant secretary of Eddy Match, indicated that he was accustomed to the

policy of concealment.

> The above organization has been built up on the basis of getting complete information to B. & M. now and in the future as speedily as possible and at the same time preserving our present position of decentralization of records so far as is possible and total avoidance of direct contact.
>
> In this connection it occurs to me that it might be much more preferrable for me to have some letter heads printed with my own name, using the Pembroke post office box as an address, rather than use the company letterheads for letters which must mention other companies even when such companies are not specifically designated. . . .[31]

Federal Match had clearly become a member of the Eddy group, which was carrying on its policy of concealing the true relationship between the various components. The monopoly position that had been again restored by the acquisition of Federal was to be enjoyed until after the conclusion of World War II.

The acquisition of Federal Match in 1940 by the Eddy interests reestablished monopoly in the Canadian manufacture of wooden matches. It would appear that the shareholders of Federal had been induced to sell out, partly by the "stick" of severe market competition by the Eddy companies and partly by the "carrot" of an excessive price paid for their holdings. The effects followed the usual pattern. Fighting brands were withdrawn and prices were raised; for example, the case cost to jobbers rose from $7.00 to $8.85. One Federal letter, 7 days after the end of its independent existence, gave a disarming explanation that the price increase was "due to the sudden change in price on raw materials which enter into the manufacture of matches." Its production of one cent boxes was halted and its general output was

curtailed. Federal began payment of a 25 cents per case sales commission to Eddy Match, as Canada had done upon its acquisition.[32]

Some comments by the sales manager of Eddy Match with respect to the one cent box affair, which had been a most intensive struggle in the Maritimes, illustrated a monopolistic viewpoint at least to some degree, against the background of the production costs worked out for W. A. Fairburn and the fact that both Federal and Eddy Match and its associates operated profitably every year. In reply to an inquiry arising from discovering some of the one cent remnants of the price war, Mr. Miller said,

> we have not manufactured any of them for the last four months and do not intend to do so. You will undoubtedly appreciate how foolish it would be for us to put out a box of matches and sell at a loss so that the jobber and retailer could make a large profit, especially so when the Coronation match is off the market and there is no box of matches at the present time anywhere in Canada that is being sold at this ridiculously low price of one cent for a large box.
>
> We certainly are going to make an endeavour to confine our sales to our regular brands of matches, both in the household size and the pocket sizes, and especially so in the Maritime Provinces where we have sold both the Little Comet box and the North Star matches at a substantial loss to ourselves, and if the truth is known, we, as the manufacturer, have been the only people that have not been making some money on matches in the last year or so, and we certainly hope we shall be able to change this situation so that we can at least make a reasonable profit.[33]

That was apparently an exaggerated statement of the fact that the struggle with Federal had brought a sharp reduction in the profits earned by Eddy Match and by Canada Match.

1. Eddy Match Case Transcript, vol. 6, pp. 1323, 1325-29, 1331-33, 1336-37, 1341-43, 1368-77.

2. op. cit., vol. 6, pp. 1332-33.

3. op. cit., vol. 6, pp. 1341-43.

4. op. cit., vol. 7, p. 1716.

5. op. cit., vol. 6, pp. 1351-53.

6. op. cit., vol. 7, p. 1645.

7. op. cit., vol. 7, p. 1539.

8. op. cit., vol. 9, p. 1972.

9. op. cit., vol. 3, pp. 429-31.

10. op. cit., vol. 8, p. 1841.

11. op. cit., vol. 9, pp. 1969-70.

12. op. cit., vol. 8, pp. 1868-69, 1877-78, 1887.

13. op. cit., vol. 12, pp. 3052-55.

14. op. cit., vol. 6, p. 1366; vol. 7, pp. 1433, 1466-67, 1490, 1519, 1551-52, 1694.

15. op. cit., vol. 8, pp. 1883, 1885, 1898; vol. 9, pp. 2216, 2251, 2434, 2533.

16. op. cit., vol. 9, 1986.

17. op. cit., vol. 9, pp. 1987, 2013, 2019-20, 2135-37.

18. op. cit., vol. 7, 1491-92.

19. op. cit., vol. 7, p. 1576.

20. op. cit., vol. 7, p. 1497.

21. op. cit., vol. 7, p. 1515.

22. op. cit., vol. 7, pp. 1542-45, 1548.

23. op. cit., vol. 9, p. 1980.
Canadian Match Report, p. 132, Appendix III.

24. Eddy Match Case Transcript, vol. 8, p. 1939.

25. op. cit., vol. 12, pp. 3059-62.

26. op. cit., vol. 9, pp. 1991-92; vol. 11, pp. 2824-28.

27. op. cit., vol. 9, p. 2045.

28. op. cit., vol. 10, pp. 2534-37.

29. supra, ch. 10, p. 243; ch. 4, 72.
Canadian Match Report, p. 14.

30. op. cit., vol. 10, p. 2538.

31. op. cit., vol. 10, p. 2557.

32. op. cit., vol. 4, pp. 582, 584; vol. 9, pp. 1978, 1983-84, 1995-96, 2145-46; vol. 10, pp. 2432-33.

33. op. cit., vol. 9, p. 2050.

# Chapter 14

Net profits before taxes were greatly enhanced during wartime for all members of the Eddy group, which continued to hold a monopoly in the Canadian manufacture of wooden matches, although only the physical output of Eddy Match itself showed any significant increase.[1] The next challenge to that monopoly position appeared early in 1945 with the incorporation of the Western Match Company on Vancouver Island.

That some consideration of the question of locating a factory in western Canada had arisen early in the history of Eddy Match was shown by a 1929 letter from the first general manager of that company to W. A. Fairburn, the company's managing director.

> Regarding the erection of a Western factory, I had understood all along that this was settled fact, and had discussed same with Mr. Paton, [Bryant and May] and with Mr. Bennett, and on several occasions with yourself as being one of the activities which was to be started in the early Spring of 1929.
>
> With reference to the funds for same, I wish to advise you that at the present time there are ample funds available, due to the fact that Eddy Match Company, Limited, have on hand at the present time $350,000.00 in cash, most of which has been worked

> out of inventory, and there is no reason why this amount should not be increased from inventory, due to the fact that for the past six months, in order to take care of the moving period from Hull to Berthierville, we have built up a larger supply of finished matches than it is our intention to carry as regular stock.
>
> Mr. Keyes and Mr. Larson are leaving for the West to complete any investigating that I felt had not been thoroughly done when I was out there, in order to better place myself in a position to determine the location.
>
> I think I had expressed to you at an earlier date that my preference from the investigation so far would be Red Deer rather than Calgary.
>
> I would appreciate hearing from you, after the investigation is made by Mr. Keyes and Mr. Larson, whether or not I shall proceed to determine the location, or whether you wish the reports placed before you and same discussed with me before any definite step is made.
>
> Wish to say that my opinion regarding the policy of building in the West has not changed up to the present time.[2]

The only action that apparently resulted from these investigations was the purchase of some land. That the matter was examined again was seen in correspondence between the vice-president of Diamond and Mr. Miller. The discussion seemingly arose at the instigation of Diamond. Mr. Reynolds outlined the problem.

> I think we should be forehanded and figure out what would be necessary in the way of a factory located in British Columbia, probably Vancouver, in case of necessity. Naturally we do not want to build a factory out there unless forced to do so, but I think if Snyder seriously considers building a factory in Vancouver we should beat him to it. I do not believe we ought to consider the Red Deer location, and I understand you agree on that point.
>
> Will you kindly do a little figuring as to what territory would be supplied from a factory located

> in Vancouver or elsewhere in British Columbia and let me know the quantity in gross that could be profitably made and distributed from such a factory? Please understand there is no definite idea of going into such a plan, and don't say anything about it or give it any publicity.[3]

Comparing the freight savings for a plant at Vancouver or Red Deer, Mr. Miller replied,

> . . .
>
> The territories that could be supplied from Vancouver, would be British Columbia, Province of Alberta and Province of Saskatchewan, except the towns of Weyburn and Yorkton. This would take care of all of Western Canada except the Province of Manitoba and the towns of Weyburn and Yorkton, which could be supplied from Pembroke factory at a lower freight cost than from Vancouver.
>
> The total freight saving which could be supplied from Vancouver is $29,257. which would mean a per case freight saving of 35¢ per case.
>
> . . .
>
> We would also have to consider the reduction of the production at Pembroke factory, which would probably mean a higher cost at Pembroke, and it is probably very questionable whether or not any saving would be made, as possibly the cost to manufacture would be increased more than the saving in freight.
>
> In the case of the Red Deer location, where we now own land, a larger volume of business could be supplied from this point at a lower freight cost than could be supplied from Vancouver or British Columbia point. The saving by supplying the territory that could economically be supplied from Red Deer as far as freight cost is concerned on finished product, would amount to $33,003.66. The saving, however, per case, is less then [sic] in the case of British Columbia, Red Deer's saving being 28¢ per case.[4]

There the matter rested in 1935, when the factory net Eddy Match realised on sales in British Columbia exceeded by $0.668 on the average the factory net realised on sales in Ontario. The

average factory net per case from sales in the Prairie Provinces exceeded the Ontario return by $0.181 per case.[5] Jobber prices in western Canada exceeded those in eastern Canada by more than the difference in direct selling expenses and freight charges. The Combines Commissioner reported that, "From that time [1935] until 1948, when the Eddy plant at Mission, B.C., came into operation, the differentials between Eastern and Western prices remained relatively unchanged."[6]

The incorporation of the Western Match Company was announced in a Victoria newspaper in January of 1945. It was reported in August of 1945 that a building permit had been issued for a $90,000 match factory in Esquimalt. Actual production of matches commenced in September of 1946.[7] The very long warning had given Eddy Match the opportunity to make use of two new tactical weapons -- overloading the western market and constructing a western match plant.

The "Western Operation Plan" of filling the distribution channels in that part of the country was begun in March of 1945. The degree of success it was meeting by the end of June was indicated in a letter to the western sales supervisor from Mr. Miller, now vice-president of Eddy Match, who had inaugurated the plan.

> From what you report it seems that our plan is working in Western Canada, and the fact that Codville Company [wholesale grocers] and Western Grocers both frankly admitted to you that their Match business was slowing off certainly seems to indicate that our plan of giving them more matches has resulted in loading at least part of the market. As we discussed, if this volume kept up it would certainly saturate the market, and while I anticipated three months would do this,

> apparently it is going to take a bit longer, probably entirely due to the fact that sales are still so easy to make. I am afraid, however, that our Western business will suffer some time in the future, but, of course, we have got to keep the market loaded in order to prevent an open market for the sale of "Western" matches when and if they are in a position to deliver.[8]

Having been forewarned by the early announcement of Western Match, Eddy Match was ensuring that it was forearmed. The impact of the company's policy was outlined by Mr. Miller in his analysis of sales during the first six months of 1945 for the company's western representative, Tees and Persse Limited.

> Because of our policy, started in March, to increase deliveries to the trade in Western Canada, sales in Winnipeg territory show a 30% increase over the first six months of 1944.
>
> In making a comparison against pre-war sales in the Winnipeg territory against the sales for the first six months of 1945, the sales show an increase this year of 75% over pre-war. When considering that the year 1944 showed an increase over pre-war years of 43% and for the year 1954 55%, it seems quite certain that with this tremendous increase in deliveries to our customers, the trade is now getting overloaded with matches, and we do not think there is a manufacturer that can show such a tremendous increase in deliveries as is shown by these figures which we have given you of increases for the last two and a half years.
>
> . . .[9]

Eddy Match was clearly making considerable progress in blocking the match market in western Canada in anticipation of the entry of Western Match.

A memorandum from W. A. Fairburn in October of 1945 to Mr. Miller dealt with some of the implications of the decision at long last to build a western factory in the face of a potential western competitor.

> In regard to the brands to be sold in the western provinces, it was not my idea to put on special labels saying that the goods were made in the West, but what you may do later in regard to brands will be determined to a large degree by what competition forces you to do to maintain both trade distribution and profits. We should, of course, use our old established brands as long as possible, but you may be required to resort to fighting brands, and I think that you should give this matter some thought ahead of time so that there is no occasion for you to act precipitously in the matter but have your plans well developed and hold back new brands until you may be forced to use them. If such special brands are put out, they should not be put out as being manufactured in Western Canada, and probably it would be just as well not to have any distinguishing mark on the label that would enable competition to identify the goods as being made in Ontario or Quebec on the one hand and British Columbia on the other. However, all advertising and propaganda work should specialize in The West and British Columbia (or Western Canada) factory. The matches shipped from the East should go into storage at the western plant, and they should be so made and shipped from the western plant that the trade and competition will have no means of knowing (without access to the plant) whether the matches were made in British Columbia or not. I think your thought of broadcasting in the West that Eddy Matches are being made from British Columbia lumber is a good one, for under no condition would I want to see the relatively small quantity of matches that will be made in the western plant bear a distinguishing label that would definitely identify the product with any special plant.[10]

There was seemingly to be some "threat" mixed in with the fact of Eddy building a western plant. Ontario and Quebec matches stored in and reshipped from a western factory would hardly be taking advantage of lower freight charges to the western market. But its very existence undermined the geographic superiority that would otherwise have been possessed by Western Match. The excavation at the new Eddy site in Mission, British Columbia, had been started by April of 1946, and the "loading" of the western market

had continued at almost the same level in spite of the plan causing shortages in eastern Canada. Mr. Miller claimed the company's inventory position was worse than at any time during the war.[11] The extent of the emphasis on the western market was such that of a 51,000 case increase Eddy Match had sent 41,000 into western Canada.[12]

During this period the Eddy Match group continued such routine policies as special allowances to large buyers, exclusive dealing contracts, and resale price maintenance.[13] An example of the durability of the last mentioned was found in a declaration form required to obtain the 4 per cent discount for maintaining prices. (underlining supplied)

> We hereby certify that during the period of the quarter ending Sept. 30-46 we have maintained the minimum resale price named in your Jobber's Resale Price List and that no sales of your matches have been made for less than these prices except for the allowance not to exceed 1% for cash. We are, therefore, entitled to the 4% discount in accordance with your letter of April 1st, 1935.[14]

Eddy Match had been diligent indeed in buttressing its monopoly position by a variety of techniques. The reliably monopolistic device of resale price maintenance had been relatively effectively sustained over the years. The Eddy group was continuing the flood of matches into western Canada as the time approached for the entry into the market of its new competitor.[15] It was Mr. Miller's declared opinion that the substantial increases would be "of great help against any competitive matches offered in a market so well supplied."[16] Eddy Match was finding it increasingly difficult to keep up the increased shipments to western Canada. The company

nevertheless achieved a higher level of western shipments in 1946 than in 1945.

Shortly after Western Match had begun selling matches, the western sales supervisor for Eddy Match issued a circular concerning the new company, which outlined the situation for the jobbers in an effort to persuade them to stay with Eddy matches. His appeal was to the handsome profits they were enjoying by reason of the resale price maintenance policy of Eddy Match. He said, in part,

> In the first place, our Jobbers are against taking in another match of unknown Brand and quality and they are not unmindful of the fact that while Eddy's have consumers' demand, the Eddy's policy has always insured them a profit without price-cutting and they have no desire to duplicate stock.
>
> From a profit point of view, Eddy's Matches gives the jobber a larger profit without any sales effort. Selling Western Matches means a smaller profit and the difficulties of attempting to sell a new and unknown line.[17]

At the end of the circular, a comparison of the percentage profit showed it to be consistently about one half of one per cent on Eddy Match brands.

Rather intensive commercial spying[18] brought a good deal of information to the western sales supervisor, who used the material in his reports to Mr. Miller. In response to reports that Western Match was selling only in small quantities, Mr. Miller, in December of 1946, suggested problems which might arise as Western Match continued its efforts to break into the "loaded" market.

> I note that you are quite optimistic that they are not selling a particularly large volume of matches even on a first coverage. There is one point, however, that we must consider, and that is that they have a factory in operation in which they have two match machines /each with a capacity of 1,125,000 matches an hour/, and if these machines are operating eight hours a day regularly they should produce between seven and eight thousand cases of matches per month.
>
> From reports, I would judge that they have not been able to sell this volume for the first month they have been in operation. Also, they probably have not produced this volume during their first month's production, when they would possibly have all kinds of difficulty in breaking in new machinery and new help, and it would be a very good showing for them to produce any such volume during their first month's operation. They, however, should have technical knowledge supplied by their affiliates, the Pacific Match Company of Tacoma, Washington, U.S.A. to correct any manufacturing difficulties, and we can expect that they can produce a much larger volume in the months to come, which will mean that they will branch out and make every attempt to sell a volume of matches. We can therefore expect some real competition from these people when they are in production to the capacity of their machines, and if their production runs over their sales they will certainly have to look for business outside of British Columbia, because probably the entire volume of match business in this Province would be necessary for them to take care of their production, and we, having enjoyed this market over a period of a great many years, can not afford to lose any such volume of business.[19]

Western Match was able for a time to enter the export market; but exchange difficulties limited the opportunities. The company shipped 19,000 cases of matches to New Zealand during the latter part of 1945.[20] That the company's efforts across the Dominion did not meet with great success was suggested by the fact that in 1948 the Eddy companies were able to increase prices to the jobbers without any significant impairment of their profit margins.[21]

On March 6, 1949, a Victoria newspaper carried an announcement of the sale of Western Match Company to Eddy Match.

The president of Western Match had announced that the price was $210,000. The purchase was dealt with at a special meeting of the Board of Directors of Eddy Match held on June 21st, 1949, at which time it was unanimously -

> RESOLVED that the purchase by the Company of 2,750 Preferred Shares and 3,000 Common Shares of the Western Match Company, Limited, Victoria, B.C., constituting the entire issued and outstanding Preferred and Common stock of said Company, for the sum of Two Hundred Nine Thousand Two Hundred Fifty Dollars ($209,250.00), be and the same hereby is ratified and confirmed.[22]

That this was, as had become customary in acquisitions eliminating competitors, an inflated price was demonstrated by the fact that the Eddy Match statement of earned surplus for the year ended December 31, 1949, showed that $84,250.00 had been written off the investment in Western Match.[23]

Approval of share transfers is required in the case of a private company, which was then the status of Eddy Match. The approval of two transfers at the June meeting which had ratified the purchase of Western Match was of special significance. It demonstrated beyond question that the major stockholders of Eddy Match, Bryant and May and Diamond Match, were actively interested in the Canadian company's monopoly being retained. The directors' meeting had approved the transfer of 666 common shares from Bryant and May, Limited, to R. W. Mayhew, the father of the president of Western Match at the time of the sale. Also approved was the transfer of 334 shares of common stock in Eddy Match to F. Edward Winslow, manager of the Victoria office of the Royal Trust Company. The Bryant and May transfer was effected on July 7, 1949;

The 334 shares were transferred from Diamond Match on September 1, 1949.[24] The elimination of the sole independent producer of wooden matches in Canada had been carried to completion under the auspices of the British and American members of the world match triad. Western Canadian match production continued only at the Mission plant of Eddy Match, the Victoria facilities being closed down and the property sold.

1. Canadian Match Report, p. 114, table 11; p. 119, table 15; p. 122, table 16; p. 123, table 17.

2. Eddy Match Case Transcript, vol. 5, pp. 834-35.

3. op. cit., vol. 6, p. 1256.

4. op. cit., vol. 6, pp. 1260-61.

5. Canadian Match Report, p. 107, table 8.

6. op. cit., p. 109.

7. Times (Victoria, B.C.), Jan. 18, 1945; Aug. 18, 1945; Sept. 30, 1946. (no pagination -- information from a clipping file).
"British Columbia's First Match Plant," Western Business and Industry, Nov., 1946, p. 51.

8. Eddy Match Case Transcript, vol. 9, p. 2232.

9. op. cit., vol. 9, p. 2233.

10. op. cit., vol. 9, p. 2238.

11. op. cit., vol. 10, pp. 2424, 2467; vol. 9, 2244.

12. op. cit., vol. 10, p. 2427.

13. op. cit., vol. 9, p. 2237; vol. 10, pp. 2430-31, 2452, 2518.

14. op. cit., vol. 10, p. 2323.

15. Eddy Match Case, Factum of the Respondent, p. 510.

16. Eddy Match Case Transcript, vol. 10, pp. 2471, 2473, 2475, 2477, 2479, 2481.

17. op. cit., vol. 10, pp. 2568-69.

18. op. cit., vol. 10, pp. 2554-55, 2570, 2574, 2576-77, 2583-86.

19. op. cit., vol. 10, 2596-97.

20. Canadian Match Report, p. 79.

21. Eddy Match Case Transcript, vol. 10, pp. 2608-14 (Commonwealth Match); pp. 2615-22 (Eddy Match); p. 2623 (Federal Match); p. 2624 (Canada Match) -- all dated Feb. 2, 1948.

22. Daily Colonist (Victoria, B.C.), Mar. 6, 1949, p. 1.
Eddy Match Case Transcript, vol. 12, p. 3049.

23. op. cit., vol. 11, p. 2690.

24. op. cit., vol. 12, pp. 2994, 3000, 3050.

# Chapter 15

During the period of the independent existence of Western Match, alterations were made in the corporate relationships between the different members of the Eddy group, controlled from the time of the original merger by Bryant and May and Diamond Match. Eddy Match had controlled directly, by means of its wholly-owned subsidiary holding company, Valcourt, both Canada Match and Federal Match, once it had eliminated them as independent competitors. Commonwealth Match had been operated as an affiliate with the same principal stockholders as Eddy Match. That Commonwealth policy was directed by and co-ordinated with that of Eddy Match arose from the agreement between Diamond and Bryant and May, whereby Diamond assumed the active management of the Canadian concerns. The American firm gave effect to its policies by three major methods -- direct action by several important Diamond officials, including W. A. Fairburn, its president, daily and detailed orders from officials of the Diamond subsidiary, Industrial Management Engineers and its Canadian subsidiary, Management Engineers of Canada, and marketing strategy by E. P. Miller of

the Eddy Match Company. The effective relationship of Eddy Match was thus as close with its affiliate as with its subsidiaries. The corporate relationship of Commonwealth was placed on the same basis in 1947 with the acquisition by Valcourt of the Bryant and May and Diamond holdings in the St. Johns company.[1]

That same year the Commonwealth plant ceased operations. The manufacture of some Commonwealth brands was assumed by Canada Match. It is likely that the decision was based upon the experience of a less efficient operation. That matter had concerned J. E. Duffey of Management Engineers of Canada for some years. A 1938 confidential memorandum to the head of Commonwealth had stated the problem plainly.

> Attached herewith is an analysis of the Manufacturing Costs of the Hull plant [Canada Match] versus yours of St. Johns.
>
> I would call your particular attention to the sheet showing the cost on the #30 size [a per case differential of from $1.12 to $1.50]. You will note that your material used cost is tremendously out of line especially when we consider that you had some aid in your materials used on blocks. You will note that you have no chance whatever of competing with Canada Match on this size case under present cost conditions and I would appreciate hearing from you as to what steps will be taken to correct this situation.[2]

In 1949 for $165,000 the St. Johns property was sold by Eddy Match, which had purchased it from Commonwealth, effective December 31st, 1943. A few months later the land and buildings of Federal Match were acquired through expropriation by His Majesty the King in right of the Dominion of Canada for the sum of $132,127; its equipment and inventory were sold to Canada Match for the price of $17,839.71.[3] Eddy interests were then confined

to functioning match plants at Pembroke, Ontario, Berthierville, Quebec, and Mission, British Columbia, and Hull, Quebec.

A purpose of the 1927 agreements between the American, British and Swedish match producers had been the allocation of world markets. It was apparently the intention to seal off the Canadian market as the sole operating area for Eddy Match, the Canadian instrument of the match triad. The American and British had agreed upon a sharing of the Canadian match business and Swedish Match had accepted a withdrawal. Inquiries from foreign countries in regard to purchasing matches from either Canada Match or Federal Match were left unanswered or declined. Correspondence in 1940 with respect to matches for the Venezuelan government illustrated the restriction on the Canadian industry. The inquiry had been addressed to the Federal Match Company, apparently as a result of wartime conditions creating difficulties with respect to the usual Swedish supply.

> As these matches are usually comming [sic] from Sweden, but under present conditions shipment is very unsecure and hard to make, the Government is ready to buy from a securer country.
>
> Their orders are from 50,000 up to 300,000 gross at the time and very likely we could secure you some orders. Payment is cash against documents on arrival of goods, and this Government is very prompt in their payments.
>
> We would like you to send us a few boxes as samples.

To this request, involving minimum orders greatly in excess of its annual output, the Federal Match Company replied, "We do not manufacture matches for export outside of Canada, and so of

course we are not interested in the sale of matches in Venezuela."[4] There were other requests, from such places as British West Africa, Holland, and England, which received a similar response.[5] There was to be no disturbance of the production quotas established for Eddy's associate companies or of the world market allocation set by the world's match triad.

At the creation of the Eddy Match monopoly and its re-establishment from time to time by the deliberate elimination of various Canadian competitors, there remained the possibility of competition from outside the country. That source of course would be limited to those concerns that were independent of the match trio. Imports of matches into Canada came chiefly from the United States, Japan and Russia in widely fluctuating quantities, and from Sweden in two special periods of time -- five years in the 1920's and again in the 1950's. Although Diamond was clearly interested in certain Russian negotiations in 1929, it was understood by the general manager of Eddy Match at that time, who was taking some part in the arrangements, that Diamond and its officials were to take no part in the negotiations, and he took care that their names would not be connected with such activities in any way.[6]

The concentration of imports from the United States in western Canada increased their significance to Eddy Match. Its policy, in attempting to curb importing, was to "load" the Canadian distribution channels as was done later in combatting Western Match. In discussing imports from Pacific Match in

Tacoma, Mr. Miller thought that the duty and other complications would serve to limit that threat. At the same time he described dramatically the position of Eddy Match after the elimination of Federal. "As far as Canadian-made matches at low prices is [sic] concerned, if we do not supply them they cannot be obtained."[7] The western sales supervisor suggested the importance of sales by Eddy's "ostensible competitors," Canada and Federal, as a restraining influence on the level of imports from the United States. In writing to Mr. Miller he said,

> With reference to future Canada Brand Sales in Western Canada, I can plainly see by your letter that you are anxious that we continue to dispose of Canada Brand matches in B.C. You will remember that up until the time it became necessary for us to find an unknown brand which could be used on Specials in the larger stores there were no Canada Brand Matches sold in Western Canada, and I was under the impression that we could carry on after the liquidation of our Fox [Federal] troubles with competition by Winter [Commonwealth] and their brands, but certainly, from the figures that you have given me, it will be necessary for us to continue to sell Canada as before, for, as you say, no matter what we would like to have, as far as the Eddy business goes we must always take the longer view regarding envious eyes by someone else. It would be much safer for us to have a situation where our competition is more friendly than otherwise, and undoubtedly there are certain interests south of the border who would feel it worthwhile to attempt a foothold if the business were in one Company's hands.[8]

It was evident that Mr. Miller considered the continuation of sales in western Canada by Canada Match to be especially important in keeping some of the larger buyers from going to Pacific Match in the United States.[9]

In regard to sources of supply the Canadian companies followed the settled policy of buying whenever possible through

the Uniform Chemical Company, a subsidiary of the Diamond Match Company. That was stated flatly by the president of Industrial Management Engineers to the manager of Commonwealth Match, when he wrote to him in 1936 that,

> As far as buying cases direct instead of from Uniform this is not desirable as it is a part of the policy to purchase all possible materials through the Uniform Chemical Company.[10]

There was a warning with that letter to keep a file of such items at home, leaving "the plant files clear." The manager of Commonwealth raised the question again because of cost considerations. He inquired of Fred Reynolds at Uniform Chemical as follows:

> We have just received a letter from Shipman Boxboards Limited, Hamilton, Ontario, which reads in part as follows:- We are prepared to quote you a price of $79.00 per 1000 on a minimum carload of 10,000 number 3 cases, or a price of $77.50 per 1000 on two minimum cars of 10,000 each for delivery this month. These prices are F.O.B. Montreal and the only additional charge to the price quoted above would be a printing charge of $3.75 per 1000.
>
> I would like to know if you know anything about these people, as their prices are so much lower than anybody else, that it is very attractive, and would save us considerable money. I suppose we will have to continue buying from dear old Uniform Chemical, but perhaps you could contact them yourself.[11]

In the case of Canadian supplies obtained through Uniform Chemical by the Eddy group of companies, that company's markup, ranging from 16 per cent to 40 per cent, averaged almost 25 per cent for four years, 1939, 1940, 1944 and 1946, analysed by the Combines Commissioner. The gross profit to Uniform for those four years amounted to almost $180,000. Shipments were custom-

arily made direct from the Canadian supplier. The billing came from the New York subsidiary of Diamond Match.[12] This practice increased production costs to the Canadian companies in all cases where the Canadian supplier would have dealt directly with its ultimate customers. Any increasing of costs was particularly significant because the Eddy group had the power to control match prices on the Canadian market. The Canadian consumer could be made to bear the extra cost, which was largely an additional profit to Diamond Match.

The extent of the extra burden forced upon the Canadian consumers by the Diamond policy of Uniform Chemical supplying the Canadian companies was seen in sharp outline in further correspondence between Commonwealth and Uniform Chemical.

> Your invoice of May 12th covering 9,064 No. 3 size, corrugated cases, shows a price of $108.62 per hundred less a quantity discount. Will you please advise if this price is correct as it seems to me that the present price of cases should be around $80.00.

The reply from Fred Reynolds indicated that the quoted price was correct and represented a reduction from the beginning of 1939, when the Uniform Chemical price had been $121.95. The acknowledgement by Commonwealth confirmed the existence of a considerable cost increase arising from dealing with the American concern.

> Thanks for your letter of June 5th, advising that your price on No. 3 corrugated cases was correct. The reason why I wrote you, regarding the price, was that the regular price on No. 3 cartons buying direct, is slightly under $80.00 and I thought you were charging a little too much commission. I can see how that getting lower prices from you is a tough proposition.[13]

That the outside interests controlling the Canadian

match industry intended their influence should pervade all aspects of the business was illustrated by a 1939 letter to the manager of Commonwealth Match. It had been sent by J. E. Duffey, president of Industrial Management Engineers, from the Chico, California, offices of the Diamond Match Company, outlining briefly the attitude toward a potential entrant in the manufacture of match blocks.

> I would like to again caution you in regard to the Inter Provincial Lumber Company, who are trying to get a block plant started in Canada, that we do not wish our executives to have any contact with this outfit. If they show up at any time, your attitude will be one of disinterest, but after they have left, please drop me a line and also notify Mr. E. P. Miller.[14]

A 1935 incident illustrated that strengthening the Canadian law against resale price maintenance does not necessarily mean more effective enforcement of such a ban, even with adequate funds and personnel forthcoming. The incident pointed up the serious problem of proving price fixing arrangements, which are conducted with sufficient subtlety. By 1935 Eddy Match had been admittedly attempting to control the price of matches. In February of 1935 the company made use of a device that would bode ill for successful government attack on price fixing. It was described to the Maritime representative of Eddy Match by Mr. Miller, in connection with a higher resale price of $9.75 per case which had been established at the request of jobbers themselves.

> As you know, there was a Convention held in Montreal last week at which jobbers from all territories were represented. The writer had a meeting with the representatives of the Maritime Provinces, all the territories being represented, and all being in agreement with the policy which is outlined in the

> enclosed circular. They agreed to this one hundred per-cent, and it is at their request that this policy is being put into force.
>
> The $9.75 resale price provides a reasonable profit, and from the expressions of the gentlemen who attended the meeting, we do not believe there is any doubt but what the price will be maintained. If it is not, and the jobber does not sign the enclosed letter quarterly, he will, of course, lose the 4% discount which is offered for his co-operation on the $9.75 resale price.[15]

There need not have been a recording of the meeting or of its consequences. The programme would still have involved a conspiring by the distributors with the manufacturer to fix prices. It was less overt than a "Gary dinner" because the individuals had assembled in Montreal for other purposes than the fixing of the price of matches. It was but an example of the magic of verbal agreements in that their proof is much more difficult. Such schemes would not necessarily erode the effectiveness of enforcement; they would at least increase the costs of enforcement.

Although Eddy Match has consistently been able to re-establish its monopoly of wooden match manufacture in Canada, the longest period in which the company enjoyed that same position in regard to book matches was from the bankruptcy of the Columbia Match Company of Canada in 1932 until 1938. There then appeared two independent producers of book matches -- Book Match Manufacturers Limited, Toronto, and Strike-Rite Matches Limited, London. Another, apparently connected with Strike-Rite, began during 1946. That was Premier Matches Limited, Montreal. More recently a fourth book match manufacturer, D. D. Bean (Canada) Limited, commenced business in St. Cesaire, Quebec. It would

appear to be connected with D. D. Bean and Sons of Jaffrey, New Hampshire, producers of book and safety matches. Book matches have been becoming more important in the total match output in Canada, now accounting for something more than 40 per cent. The Combines Commissioner reported that while "Eddy Match has endeavoured to push the sale of wooden matches, in which it had a monopoly, in preference to the sale of book matches, it is also evident that Eddy Match had been determined to maintain or improve its position in the book match field. The fact that Eddy Match is the only manufacturer able to supply both wooden and book matches gives it a position of advantage in making sales to the distributive trades."[16] The strong contrast to the Cellophane case seen in the Eddy Match case makes less significant the production of book matches.

1. supra, ch. 11, p. 266.
2. Eddy Match Case Transcript, vol. 7, pp. 1689-92.
3. op. cit., vol. 11, pp. 2846-50; vol. 12, pp. 3093-96.
4. op. cit., vol. 9, pp. 2067-68.
5. op. cit., vol. 9, pp. 2261; vol. 12, p. 3117.
6. op. cit., vol. 5, p. 834.
7. op. cit., vol. 9, pp. 2022-23, 2203, 2210-11.
8. op. cit., vol. 9, p. 2034.
9. op. cit., vol. 9, p. 2038.
10. op. cit., vol. 6, p. 1321.
11. op. cit., vol. 7, p. 1720.
12. Canadian Match Report, pp. 102-104.
13. op. cit., vol. 8, pp. 1837, 1838, 1840.
14. op. cit., vol. 8, p. 1860.
15. op. cit., vol. 5, p. 997; vol. 6, pp. 1086-87.
16. Canadian Match Report, pp. 99-101.

# Chapter 16

Just at the time that a monopolistic situation was created in the Canadian wooden match industry by the acquisition of Dominion Match of Deseronto, Ontario, by the E. B. Eddy Company in 1922, the world match triad entered the Canadian industry, Bryant and May and Diamond Match as partners in the Pembroke enterprise and Swedish Match by itself at the Berthierville site. By the subsequent formation of the Eddy Match Company in 1927, the British and American interests, clearly with the agreement of the Swedish interests, obtained monopoly power by intention. That they vigorously exercised such monopoly power continuously was demonstrated by the ensuing history of Eddy Match. In economics, monopoly power and its exertion were in the hands of the Eddy Match Company.

At law, in 1951, Eddy Match and its subsidiaries, Commonwealth Match, Canada Match, Federal Match and Valcourt Company, were charged with having been

> parties or privies to or knowingly assisted in the formation or operation of a combine within the meaning

> of the Combines Investigation Act, to wit: a merger, trust or monopoly which, during the said period, substantially or completely controlled throughout Canada, excluding Newfoundland, the class or species of business in which they were engaged, to wit: the business of producing, manufacturing, supplying or dealing in wooden matches, a commodity which may be and then was the subject of trade or commerce, which merger, trust or monopoly has operated or was likely to operate during the said period to the detriment or against the interest of the public, whether consumers, producers or others.[1]

The Crown provided the following details in setting out particulars of the charge:

1. The actual corporate relationships existing between Eddy Match and the other indicted companies in spite of any outward appearance to the contrary.

2. The numerous techniques used by the accused companies to further their monopolistic purposes, including:

(1) Close surveillance of competitors of the Accused by directors, officers, employees, servants or agents of the Accused and by officers, employees, servants or agents of storage and transportation companies on behalf of the Accused in order to secure information in regard to such matters as financial status and operations, rate of production, quality of product, brand and type of product, selling prices, names of customers, and destination of shipments of such competitor with the object of making sales by such competitor difficult or impossible.

(2) Use of special discounts, rebates and allowances on wooden matches manufactured by the Accused, particularly to large wholesale distributors, in order that such distributors would purchase and sell wooden matches manufactured and supplied only by the Accused thereby restricting sales of wooden matches manufactured or supplied by others.

(3) Use of confidential prices below the advertised list prices of wooden matches manufactured and supplied by the Accused, particularly to large wholesale distributors, in order that such

distributors would purchase and sell wooden matches manufactured and supplied only by the Accused thereby restricting sales of wooden matches manufactured or supplied by others.

(4) The methods described in the foregoing sub-paragraphs (2) and (3) were generally used selectively, that is, only in areas where wooden matches manufactured or supplied by others were being sold or offered for sale.

(5) Exclusive dealing contracts with large wholesale distributors whereby such distributors in return for financial inducements agreed to purchase and sell wooden matches manufactured and supplied only by the Accused thereby restricting sales of wooden matches manufactured or supplied by others by closing off large sections of the market to such others.

(6) Substantially increasing the manufacture, supply and sale of wooden matches manufactured by the Accused in a particular area where wooden matches to be manufactured or supplied by another manufacturer were expected to be sold or offered for sale but before such matches could be sold or offered for sale in order to restrict sales of such matches by such other manufacturer.

(7) Construction and operation of a factory to manufacture, produce and supply wooden matches in the same Province as a factory which was being constructed or operated by another manufacturer to manufacture, produce and supply wooden matches in order to restrict the sale of wooden matches of such other manufacturer.

(8) Use of special brands of wooden matches, described as fighting brands or price matches, manufactured and supplied by the Accused at prices lower than the advertised list prices of other wooden matches manufacturered and supplied by the Accused to restrict the sale of wooden matches manufactured or supplied by others. Efforts were always made to control and direct the supply and distribution of such special brands for the particular purpose for which they were introduced, that is, such special brands were used generally in areas where wooden matches manufactured by others were being sold or offered for sale and as far as possible quantities of such special brands were manufactured

or supplied only in an amount deemed sufficient by the Accused to prevent or seriously restrict sales of wooden matches manufactured or supplied by such others. . . .

(9) Use of certain regular advertised brands of wooden matches manufactured and supplied by the Accused at reduced prices in the same manner and for the same purpose as special brands hereinbefore described.

(10) Active promotion of agreements among large wholesalers on wholesale selling prices of wooden matches manufactured by the Accused.

(11) Throughout large areas of Canada establishing and enforcing a policy of resale price maintenance at the wholesale level of trade. This included the establishment of minimum selling prices at which wholesalers were to resell wooden matches manufactured by the Accused in return for which such wholesalers would receive a specified rebate on wooden matches purchased from the Accused providing they certified in writing at certain periods that they had resold such matches at prices not lower than the minimum prices named by the Accused. By this method the Accused have sought to induce such wholesalers to refrain from purchasing or reselling wooden matches manufactured or supplied by others than the Accused on the ground that preferred distribution should be given to wooden matches manufactured by the Accused who were endeavouring to protect the profit of such wholesalers. Efforts were made through such wholesalers to have resale prices on wooden matches manufactured or supplied by others than the Accused established at or near resale prices established by the Accused with the object, which was realized, of restricting the sale of wooden matches manufactured or supplied by others than the Accused.

(12) Throughout large areas of Canada establishing and enforcing a policy of resale price maintenance at the retail level of trade. . . .

(13) Outward operation of Commonwealth Match Co. Ltd. as an independent manufacturer or supplier of wooden matches through involved efforts to conceal its interrelationship with the remaining Accused as hereinbefore described in order to conceal the substantial or complete control of the business

of producing, manufacturing, supplying or dealing in wooden matches by the Accused.

(14) Within the period mentioned in the formal Charge [between the 14th day of December, 1927, and the 8th day of September, 1950] all persons (all of whom are companies) who have engaged in the business of producing, manufacturing, supplying or dealing in wooden matches and who have been in existence at any time during the said period either have been acquired by Eddy Match Company Limited either directly or indirectly or through Valcourt Company Ltd. either by purchase of the assets or of the assets relating to such business or of the outstanding issued capital stock of such companies or have ceased to engage in such business through bankruptcy or otherwise.

(15) At or about the time of certain such acquisitions either the companies concerned entered into agreements with Eddy Match Company Limited whereby they agreed not to manufacture or sell matches in Canada thereafter or for a specified period thereafter or the shareholders thereof undertook to enter individually into a formal agreement with Valcourt Company Ltd. not to engage either directly or indirectly in the manufacture of matches in Canada for a specified period thereafter.[2]

There was no objection made to these details nor was any request filed for their rejection. That such events had transpired was thus accepted at the trial.

The law applicable at the time of the alleged offence imposed a limit of $25,000 on any fine that might be levied against a convicted corporation. There was no provision for a court order requiring convicted parties to provide information for a period of three years after the sentence. There was provision neither for an injunction to prevent the continuation or repetition of an offence nor for the dissolution of the merger, trust or monopoly. Those were some of the ways in which the combines legislation was strengthened in 1952.

From the enhancement of prices that quickly followed the creation of the Eddy Match monopoly the Court noted the chief events in the Canadian wooden match industry during the quarter of a century involved. That record embraced the absorption of Aurora Match, a company of "très faible proportions,"[3] the driving into bankruptcy of Columbia Match and the secret acquisition of its assets at St. Johns, Quebec, in order to operate under the name of Commonwealth as an apparent competitor, the protracted market struggle against Canada Match, Federal Match and Western Match, in turn, and the subsequent acquisition of each at inflated prices, the continuing active management by Diamond and its agents, in accordance with its understanding with Bryant and May, and the use of Valcourt to carry out financial transactions.

Judge Bienvenue stressed the uncommon business practice between so-called rivals, Eddy Match and Commonwealth, of making reports available. Eddy had had access to any information concerning Commonwealth that was desired. On the matter of the secrecy surrounding the interrelationship, he said,

> If the relations of the said companies between themselves had a legal character, one may rightfully ask what motive impelled the interested parties to take so many precautions to conceal the communications they had between themselves.
>
> A reading and a thorough examination of the documents filed leads to but one conclusion: these companies realized that their operations and business practices constituted a violation of the law and their efforts were aimed at not letting anything leak out.[4]

On the question of commercial spying and secret and confidential reports on rival companies being forwarded to Mr.

Miller of Eddy Match, the Court expressed the view that

> All this certainly goes beyond the bounds of normal competition and can imply nothing else but a firm decision to eliminate the competitor absolutely. . . . A whole secret police system was set in motion. It is certain that if such business methods could be regarded as legal, commercial operations would become untenable.[5]

Attention was directed to the handsome earnings of Eddy Match and to the fact that "it always paid lush dividends during both good and bad years since its incorporation."[6] Judge Bienvenue described the effect of resale price maintenance, a policy pursued by Eddy Match in the exercise of its substantial control of the production of wooden matches, in these words:

> Defendant Eddy, by means of cleverly conceived work, got into contact with groups of distributors who agreed with it to maintain resale prices. These agreements had the effect of closing the market almost hermetically for products except its own. By the free play of competition, the price of matches would have had a tendency to drop. By means of a resale price policy set in motion by defendant Eddy through agreements with the distributors (jobbers), the prices were maintained at a higher level than they would normally have been, and this precisely because of the maintenance of resale price enforced by defendant Eddy.
>
> Matters were so arranged that the distributors on occasion had to be content with smaller profits, leaving larger margins of profit to the retailers, always on the condition that only Eddy products were to be sold. The ramifications of defendant Eddy extended to all areas of the country, with the exception of Newfoundland, so that all serious competition became impossible, leaving defendant Eddy in almost absolute control of the production and distribution of wooden matches.
>
> A fact revealed by the exhibits and which is a matter of astonishment is the following one: Commonwealth Match, even before being absorbed by defendant Eddy, always concurred directly or indirectly in the business policies and methods advocated by the

management of defendant Eddy. The competition it seemed to practise was just "bogus" competition.[7]

The oral evidence, given entirely by officers of the various defendant companies, corroborated and in no way contradicted the voluminous documentary evidence. Of special interest in revealing some of the connections with the world's match triad, that is with the British and American members, were the remarks of the Court concerning the testimony of the former manager of Commonwealth Match.

> Witness P. B. Keyes, manager of Canada Match since March 1, 1949, had previously been manager of defendant Commonwealth Match since January, 1933. He was hired in that capacity by Mr. B. C. Snead, legal adviser and director of defendant Eddy Match. The latter lived in New York.
>
> Witness said he did not know under what authority he had been hired by a complete stranger to his company, namely a New York lawyer, as manager of a Canadian company, defendant Commonwealth Match. The evidence shows that Mr. Snead was a legal adviser and the personal representative or "contact man" of defendant Eddy and a sizeable group of English and American shareholders.
>
> Witness Keyes received instructions from persons strangers to the Commonwealth company, and among others from W. W. Howe, for a time treasurer of the Diamond Match Co. of New York. Though in the employ of defendant Commonwealth Match, the same Mr. Keyes also received instructions from John C. Sebright, a New York lawyer and for a time secretary of defendant Eddy Match. Witness said he was unaware, which the Court does not believe, by virtue of what authority such instructions were given him by persons strangers to his company, and this fact, added to all the remainder of the evidence, reveals up to what point the officers of the subsidiary companies of defendant Eddy Match were kept under control.[8]

On the question of participation as a principal, which was surely the part played by Eddy Match, or merely as an

"assistant," the Court stated the position of the law in these terms:

> The legislator has established no distinction between the principals and the accessories or collaborators when the matter has to do with an illegal combine, and he has put them on the same footing. Now, where the legislator has made no distinction, the courts cannot make any. Moreover, it is easily understood that in order to succeed in the prosecution of an illegal end such as that set out in the matter, it is necessary normally that there should be a concurrence and an agreement of different persons to bring about and maintain a merger, trust or monopoly within the meaning of the law. It often happens that willing competitors apply themselves, for a consideration, to serve the ends sought by the author of the merger or trust.
>
> Moreover, in the examination and appreciation of the evidence relative to a charge of this nature, the matter to be considered is the end sought by the offender without regard to the actual and attained. Section 2, subsection (1) of the Act states expressly that every agreement, merger, trust or monopoly is illegal when it has operated or is likely to operate to the detriment or against the interest of the public. Hence, it is immaterial in judging such an agreement that it did operate or that it did not operate to the detriment of the public. The criterion to be applied is that of the very nature of the plan contemplated without regard to its result.
>
> The combine is illegal when the free play of competition is paralyzed or likely to be. So will the legislator by an Act that does not lend itself to ambiguity, and so the courts have ruled on many occasions in a jurisprudence reported at the end of this judgment.
>
> In the established order of things, with our economic system, this same Act that governs us has determined that a sound, normal and free competition should operate without the intervention of undue obstacles or impediments.
>
> The legislator also had in mind that no person, corporation or individual should be able to participate or help with impunity in the formation or operation of an illegal combine, regardless of the motives that could have determined the formation of this combine, or regardless of the results obtained.[9]

Following that plain statement of the law, the Court examined and struck down several arguments presented by the defence. One concerned whether or not wooden matches constituted a class of business. The defence argued that they were rather a part of the wider business of producing light or fire. The Court struck down that position in a few words to the effect that the production and sale of wooden matches was a class of trade or species of business "in which defendant Eddy Match was principally engaged like most of the other defendants."[10] The Court held that resale price maintenance was banned by the provision against "fixing a common price or resale price," which had been part of the law since 1923.

Speaking to the defence argument that there had been no detriment to the public, the Judge said,

> The defence, . . ., submitted that the combine, if it existed, did not operate to the detriment of the public. . . . It is sufficient, once again, that the agreement, monopoly or merger was likely to operate to the detriment or against the interest of the public.
>
> In this connection, whether the prices were increased or remained the same, which is not the case, such a consideration is immaterial in law.[11]

Confronting the defence argument that the corporations were not responsible for much that had occurred on the ground that the minute books of the said corporations did not contain the tenor of much that was disclosed in the correspondence filed as exhibits, Judge Bienvenue stated,

> It must be kept in mind that in a number of cases the signers of the letters took care to invite their correspondents to destroy the documents in

question after having read them, which does not seem to have been done.

There is no cause for surprise that one does not find in the minute books the text of the agreements or arrangements which could have been made by defendants. In the case of such offences, one seldom finds, if ever, concrete, clear-cut evidence of agreements the purpose of which is to create a monopoly or to operate it.

It cannot be expected, especially, that such evidence will be found in the minute books of a company. Neither can one be expected to be in a position to establish that the officers of commercial corporations met and agreed in an explicit manner to organize a combine, a trust or a monopoly with a view to brush aside all competition.

It is sufficient, as for any other criminal matter, to be in a position to draw from the whole of the evidence that an agreement, even tacit, was in fact concluded, that a common plan was conceived and set in operation to violate the Act, regardless of the results obtained.

Does the extensive evidence adduced by the Crown make it possible to come to the conclusion that this was the case? I must unhesitatingly answer in the affirmative. It does seem, in fact, that since its incorporation or shortly afterwards, the Eddy Match Company prepared a plan to cause the disappearance of rival industries, to absorb them if necessary, and in any case, to eliminate competition, in a word, that it took the necessary steps to remain alone or almost so in the wooden match trade and commerce, and this by using methods that the Act does not authorize.[12]

In a brief review of the Canadian jurisprudence in the matter, Judge Bienvenue cited Rex v. Master Plumbers and Steam Fitters Co-operative Association (1905) 14 O.L.R. 295, Rex v. Elliott (1905) 9 O.L.R. 656, Weidman v. Shragge (1912) 46 S.C.R. 1, Dominion Supply Co. v. T. L. Robertson Manufacturing Co. Ltd. (1917) 39 O.L.R. 495, Stinson-Reeb Builders Supply Co. et al. v. The King (1929) S.C.R. 276, Rex v. Singer et al. (1931) 56 C.C.C. 68,

Rex v. Alexander et al. (1932) 57 C.C.C. 346, Rex. v. Canadian Import Co. et al. (1933) 61 C.C.C. 114 and in appeal (1934) 62 C.C.C. 342, and Container Materials Ltd. et al. v. The King (1942) 1 D.L.R. 529. These cases stressed that Parliament had established a right to competition and that serious impairment of the public interest in free competition came under the ban of the combines legislation.

Judge Bienvenue referred also to a few American anti-trust decisions on the premise that,

> Without binding our Courts in an absolute manner, there is no reason why United States decisions should not guide us to a degree, especially when they confirm the essential principles contained in our laws. Geographical frontiers cannot dissociate similar laws enacted for identical purposes and to counteract similar ills.[13]

Of the passages he cited from Nash v. U.S. (1913) 229 U.S. 373 at 376, American Column and Lumber Co. et al. v. U.S. (1921) 257 U.S. 377 at 400, U.S. v. Corn Products Refining Co. (1916) 234 Fed. 964 at 1013, U.S. v. Great Lakes Towing Co. (1913) 208 Fed. 733 at 744, U.S. v. Griffith et al. (1948) 334 U.S. 100, Richardson v. Buhl (1889) 43 N.W. 1102, U.S. v. Aluminum Co. of America (1945) 148 Fed. 2nd 416 at 428, 431-32, and U.S. v. National Lead Co. (1945) 63 Fed. Supp. 513 at 525, that from U.S. v. Griffith et al. is perhaps most pertinent in regard to the actions of Eddy Match since its inception.

> The anti-trust laws are as much violated by the prevention of competition as by its destruction. . . . It a fortiori that the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful.[14]

The relevance of the Aluminum case decision of Judge Learned Hand is obvious.

The Court concluded its survey with two long quotations from a Harvard Law Review article[15] by Professor R. L. Raymond, commenting on the decision in Standard Oil v. U.S. (1911) 221 U.S. 1. Two excerpts are particularly applicable in the Eddy Match case. The first recounted some of the monopolistic devices employed.

> The combination continued to receive rebates and discriminations from railroads, made contracts with competitors in restraint of trade, indulged in local price-cutting, spying on competitors, and the operation of bogus independent companies. Of course it arranged matters so that there was no competition between its own subsidiary companies.[16]

The second dealt with the distinction between proper and improper methods of a corporation increasing its business.

> A corporation, whether it represents a combination of not, may increase its business to any extent, even up to the point of acquiring the whole of a given trade, if it does so not by interfering with the right of others to compete, but by means of proper methods. Proper methods can be completely defined only after some decision which shall hold a combination legal. The following are obviously proper methods: excellence of product, lowness of selling price, efficiency of management, skill in marketing of product, and ability to attract the custom of the public by reason of the above methods and by advertising. To meet increased trade by proper methods, a corporation, whether it represents a combination or not, may increase its capital to any amount, extend its plant to any size, and may purchase the plants of any persons or corporations who are genuinely willing to sell.
>
> A corporation, whether it represents a combination or not, may not attempt to acquire monopoly control. It may not increase its trade by interfering with the right of others to trade, that is, by killing off or preventing the competition of outsiders by means of unfair methods. Unfair methods are many,

> and no general description can cover them all. Broadly speaking, they consist principally in acts which, standing alone, are not for the benefit of the corporation but for the purpose of injuring others. For example, to give three specific instances, to sell goods at less than cost, to pay a large sum for the plant of a competitor and then abandon the plant, to expend money in acquiring sources of supply to an extent very much greater than is needed or can be reasonably needed in the future - are acts which, standing alone, do not benefit a corporation but injure it. Conceivably each of these acts might be proper to meet some special exigency. Probably, however, they are done respectively to kill off, to buy off, and to keep off competition. All clearly represent a purpose to acquire monopoly control. Other acts suggested by these cases which tend in varying degrees to show an improper purpose are: securing rebates from railways, spying on competitors, selling low in one place to meet local competition, uniformly or generally making contracts with persons whose business is bought that such persons shall not compete for long periods in the future, and the operation of bogus independent companies. In the same class fall naturally discriminations, such as refusing to deal with competitors, or persons who deal with competitors.[17]

Much of that analysis could have been an apt description of the conduct of Eddy Match and its associates and subsidiaries. Such was apparently the view of the Court.

In conclusion Judge Bienvenue said that,

> From the very beginning of this long period of time, defendant made provision for the necessary steps to eliminate from the sphere of activity of its trade and commerce every competitor already there or coming in to do business. To this end, defendant resorted to two different techniques producing the same results:
>
> 1. Waging unfair, illegal and unjust competition to remove competitors;
>
> 2. Purchasing and absorbing the business of competitors.
>
> The fact that defendant, The Eddy Match Company, Limited, remained alone at the end in the wooden match

> industry is not an accidental occurrence, . . ., but on the contrary that was exactly the end that the defendant had in mind when it took the necessary steps to attain it.
>
> . . .
>
> By acquiring all the competing industries and placing them under its control, defendant Eddy Match Company, Limited thus formed a combine, a trust or monopoly as defined in the above-mentioned Act [Combines Investigation Act]. This defendant acted in such a way, with the control it exercised in fact in every part of Canada, with the exception of Newfoundland, that it would have been practically impossible for a new firm to establish itself in this trade. It has been established that those who were engaged in this trade were dislodged from same, defendant Eddy enjoying all the privileges attached to a monopoly.
>
> . . ., I come to the conclusion that the Crown produced the necessary evidence in support of the said charge and of the facts alleged in the particulars, and that the five defendant corporations . . . in the fact of the evidence produced, have committed the offence mentioned in Section 32, paragraph (1) of the Combines Investigation Act, that is Chapter 26 of the Revised Statutes of Canada, 1927, as amended.
>
> Consequently, I declare the said defendant corporations and each of them guilty of the said offence.[18]

Eddy Match and Valcourt were each sentenced to the maximum fine of $25,000; Commonwealth to a fine of $15,000; Canada Match and Federal Match each to a fine of $10,000. Costs were to be paid by the guilty parties in proportion to their respective fines. The total fines imposed on the Eddy Match group amounted to $85,000, a mere $550 greater than the $84,500 written off the Eddy investment in Western Match in the same year that the last independent wooden match manufacturer had been bought out by Eddy at what was apparently an inflated price. Eddy's own appraisal of the excess expenditure ironically matched the fines imposed by the

Court.

The companies entered appeals both from the conviction and from the sentences. Of the fourteen or more chief points argued by the appellants, only those bearing particularly on economic considerations will attract the attention of this study. That will result in a selection from the decision in appeal which will concentrate the Court's view on matters of economic implication..

In addressing itself to the argument that, by being charged with having been parties etc. . . . in the "formation or operation" of a combine, the companies were in fact charged with two separate offences, the Court set forth its judicial view of what Parliament meant to prohibit. Judge Casey, delivering the judgment of the Court, said that (underlining supplied)

> . . . the controlling element is detriment to the public, and unless it exists or is likely to exist, there is no combine, and the combination or the merger, trust or monopoly is inoffensive.
>
> It seems then, that what Parliament seeks to prevent is the causing or the creating of the likelihood, of detriment to the public through the use of means which in themselves are not objectionable. But the moment one has brought into existence the situations envisaged by section 2 then, if the element of detriment, either actual or likely, is present, the offence has been committed and it is a matter of indifference whether that detriment results from the formation or operation. It seems then that section 32 prohibits combine activity in any or all of its phases and that the words "formation or operation" are used to express in a comprehensive manner just this and not to create two separate offences.[19]

Thus was the Court of Appeal accepting the trial judge's tenet that the unfolding of a common plan was the essential element to

bring a situation under the ban of the legislation.[20]

Were American courts to look to Canadian decisions for guidance, there might well have been a different outcome in the Cellophane case. On the question of what is to be included in a market the Court of Appeal said,

> It is contended by Appellants that the manufacture of wooden matches is not a class or species of business. They say that the wooden match is device for producing light or fire and as such it is in competition with every other device designed to achieve the same end; viz., the paper match and the mechanical lighter. They argue that to limit the charge to wooden matches is to remove the case from the operation of the Statute, and they add that "evidence discloses that the manufacture, distribution and sale of wooden matches is not a class or species of business."
>
> It is true that the manufacture of lighting devices whatever be the type or kind, can be regarded as a general class of business which would include wooden matches. But it seems strange to suggest that within the general class there can not be as many type of businesses as there are species of devices.
>
> It is undisputed that Eddy Match and its three operating subsidiaries made wooden matches and with the exception of a minor paper match operation on the part of Eddy Match and Federal, that they made nothing else. Certainly the making of wooden matches was their business, and since this commodity can be distinguished from the other devices, such as mechanical lighters and the like, it must be said that the manufacture of wooden matches is a class of species of business within the meaning of section 2(4)(b).[21]

That outlook represented a quite close confining of the meaning of a class of business to the technical, physical or manufacturing aspects of the situation. There was no discussion of the subtleties of cross elasticities of demand, as a guide to defining the market. The Canadian law had approached that problem from the point of view of the production situation rather than of the

sales situation.

On the crucial matter of "control" of the wooden match industry, the Court made several observations:

> At this point it may be remarked that the momentary appearance of Western did not disturb Appellant's control to any appreciable extent. It is true that the appearance of this competition destroyed the complete control which had existed and which was later re-established. But that interruption was apparent rather than real and in any event it did no more than reduce the control from one which was "complete" to one which was "substantial."
>
> . . .
>
> Finally, it may be remarked that during the period imported matches were available in negligible quantities. These I disregard since so far as can be judged from the record, the importation of matches had no real influence on the wooden match industry in Canada.
>
> The evidence discloses that throughout the period, Eddy Match and its subsidiaries as they came into existence, - were under the control, in all phases of their operations, of the same interests. It is true that they did not receive direct instructions in their daily operations, but one need only regard the roles played; - by W. A. Fairburn, President of Diamond Match and Managing Director of Eddy Match; J. E. Duffey, President of Management Engineers and Management Engineers of Canada; and of E. P. Miller, General Sales Manager of Eddy Match, - to realize that all five Appellants acted as a closely knit team; that they were under common direction and that their plans and operations were fully coordinated. It is impossible to say that Appellants did not work as a unit or to say that their position in the industry did not give them control of the industry or that they did not join together in the exercise of that control.
>
> . . .
>
> When a group of companies engaged in the same business are alone in the field; when they work together as a unit; when they are free to supply the market or to withhold their product; when there is no restriction on the prices which they charge, save their own self-interest; when their freedom to exclude

> individuals as customers is restricted only by their interpretation of existing penal laws, then, by all normal standards, those companies are in control of the business in which they are engaged.[22]

Economics and the law were of one accord in regard to the wooden match industry of Canada, and its monopolistic structure.

The appellants argued that with respect to public detriment the law required the Crown to prove either actual detriment in the past or the likelihood of detriment to the public interest in the future. That position was not fully accepted by the Court, especially concerning the appellants' plea that the "likelihood" must relate to the future. The judicial view was expressed in these words:

> By this Act Parliament seeks to prevent an evil which may result from certain practices. It does so by defining these practices and then by making them illegal if their adoption has resulted in an actual prejudice which may be demonstrated ("has operated"), or if by adopting them, a situation has been created which will probably result in prejudice ("likely to operate").
>
> . . .
>
> The Crown then may make its case by showing one or the other. If it has established actual prejudice - and here I think that it has, - there is no difficulty. If, on the other hand it did not show actual prejudice in the past, it was free to show - and again I think that it did - that the merger, trust or monopoly operated by Appellants, as it existed at least during the period 1940 to 1946, was at that time and irrespective of what may have happened subsequently, likely to operate to the detriment of the public. The moment that this likelihood was established then there was proof that there existed, in the past, the combine prohibited by the Act, and with this proof the Crown's burden was discharged.
>
> . . . there can be no combine and in consequence, no offence, unless their control was acquired or

> exercised with resultant detriment, either actual or likely.[23]

Rejecting the appellants' argument that there had been no detriment, Judge Casey enunciated with approval the fundamental principle "that everyone is entitled to the benefits that flow from free competition." That was a close following of the precedent of Rex v. Elliott, first sustained by the Supreme Court of Canada in Weidman v. Shragge.[24] Anything which limits or restricts freedom of competition is thus an encroachment on that public right.

> At the same time however, it [Parliament] has refused to label as an evil to be avoided, all encroachments on the public right. Only those which cause or are likely to cause detriment are forbidden. But Parliament has not enacted as a condition sine qua non that actual detriment be demonstrated. If it had intended to do so, it would not have added the words "or is likely to." These words broaden the field of forbidden encroachments by bringing within that class those whose very nature creates a presumption that they will probably prejudice the public right.
>
> What we have here is the activity envisaged by section 2(4)(b), - the control of a class of business; a control that, as revealed by the evidence, excluded for all practical purposes, the possibility of any competition. Such a condition creates a presumption that the public is being deprived of all the benefits of free competition and this deprivation, being the negation of the public right, is necessarily to the detriment or against the interest of the public.
>
> This presumption however may be rebutted and it does not seem unreasonable to suggest that some "controls" might in exceptional circumstances be more advantageous to the public than if the business had been left free. But when faced with facts which disclose the systematic elimination of competition, the presumption of detriment becomes violent. In these circumstances, the burden of showing absence of detriment must surely rest on the shoulders of those against whom the presumption plays. Appellants made no defence and there is nothing in the record which comes to their aid.
>
> But in this case there is more than the simple

> fact that Appellants had complete control of the class of business in which they were engaged. There is uncontradicted evidence that the leading actor - Eddy Match - deliberately set out to eliminate competition as it arose; that because of its strength and resources it was able to do so; that each new subsidiary was given its role and played its part in the general plan and finally, that the five Appellants, all competition eliminated, were able to give to the public the products that they chose to make available, at the price they chose to fix and through the channels they chose to use. . . .
>
> Whether these acts [the practices used to further the monopolistic end] are "prohibited with penal consequences" does not concern me. In fact, since the existence of this particular combine is not dependent on the criminality of the practices employed, I am prepared to concede that each of these practices, from this point of view, is indifferent.
>
> The importance of these practices lies in the fact that they testify with great eloquence as to the power which Appellants could and did exercise, as to their determination to be alone in the field, as to the helpless position of the public and, in short, as to the inevitability of the very evil which the Act seeks to prevent.[25]

Thus, although Canadian law had not banned all impairments of competition, many were brought within the scope of the legislative prohibition by means of the wide judicial interpretation given the "likelihood" of public detriment. Judge Casey added immediately to the discussion of detriment that the Crown had proved actual detriment. Of the practices from which the Court held detriment must be inferred, a few may be cited.

> The policy dictated to at least Commonwealth and Canada was that they buy certain supplies from Uniform Chemical Products of New York and this despite the fact that the same supplies could be bought more advantageously in Canada. In the absence of an explanation it must be assumed that this needless extravagance was reflected in the price of the finished products and that it was borne by the consumer. Furthermore when one

> views this incident against the background of the group's corporate structure and ramifications it must be assumed that there were other instances where an extra profit was made by one company rather than by another and that the consumer made unnecessary contributions to the financial welfare of companies other than those whose products were being bought.[26]

In examining the problem of fighting brands, the Court spoke to the appellants' contention that they had introduced them only to meet competition after the provocation by competitors who under-sold at "low uneconomic prices," Judge Casey said, "And yet there is evidence, that at least one of these companies, - Federal - against whom 'fighting brands' were used, operated at a profit. It must be assumed then that Appellants could have done likewise and that they would have had they been obliged to meet competition. Having eliminated competition they effectively deprived the public of this benefit."[27]

The Court concluded further detriment from the case of "Northern Confectioners" being charged the full resale price after that small Winnipeg outlet had sold below the resale price. It had been Mr. Miller's way of handling a request from the western sales supervisor that the concern be refused matches. The price increase was simply a less drastic way of achieving the same result. The Court commented,

> Whether or not this customer depended on the sales of matches for a living seems unimportant. What counts is that Eddy Match could and would deprive him of his source of supply and refuse him the right to do business as a jobber. With the record as it stands we are entitled to assume that this incident was repeated and that on each occasion it caused detriment to the individual and to those he was hoping to serve.[28]

The Court of Appeal dismissed the appellants' appeal

from the conviction, and on the question of the sentences which the appellants submitted were excessive and illegal, found "nothing to warrant any interference with the amounts fixed by the learned trial Judge."[29] The argument that condemning the appellants to pay the costs of the prosecution went against certain provisions of the Criminal Code was held to be unfounded by the Court of Appeal, which cited its own ruling in Rex v. Canadian Import Co. et al. (1935) 3 D.L.R. 330, in which five coal companies were condemned to pay a total fine of $30,000 and costs. Leave to appeal to the Supreme Court of Canada was denied on December 22, 1953. The legal fact of there being a merger, trust or monopoly was thus one with the economic fact of there being a monopoly in the Canadian wooden match industry. That result has been typical of Canadian combines cases since World War II. The impact of such legal achievements comprises the next topic of this study.

1. Rex v. Eddy Match Company Limited et al. ((1953) 104 C.C.C. 39) (1951-52) 13 C.R. 217 at 218.
2. op. cit., 225-28.
3. op. cit., 232.
4. op. cit., 276.
5. op. cit., 279.
6. op. cit., 283.
7. op. cit., 283-84.
8. op. cit., 285-86.
9. op. cit., 287-88.
10. op. cit., 288.
11. op. cit., 289.
12. op. cit., 290.
13. op. cit., 297.
14. op. cit., 263.
15. Robert L. Raymond, "The Standard Oil and Tobacco Cases," Harvard Law Review, vol. 25, Nov., 1911, p. 31.
16. Rex v. Eddy Match Company Limited et al. (1951-52)13 C.R. 217 at 264.
17. op. cit., 265-66.
18. op. cit., 297-99.
19. Eddy Match Company Limited et al. v. The Queen (1954) 109 C.C.C. 1 at 11-12.
20. supra, ch. 16, p. 335.
21. Eddy Match Company Limited et al. v. The Queen (1954) 109 C.C.C. 1 at 14.
22. op. cit., 16-18.
23. op. cit., 19-20.
24. supra, Introduction, p. 2.

25. Eddy Match Company Limited, et al. v. The Queen (1954) 109 C.C.C. 1 at 20-22.

26. op. cit., 23.

27. op. cit., 23-24.

28. op. cit., 24.

29. op. cit., 25.

## Chapter 17

The Eddy Match decision sustained the Canadian right to competition, first stated unequivocally in 1905 by Mr. Justice Osler in Rex v. Elliott.[1] That this meant the price competition of the economist had been enunciated by the Chief Justice of Ontario in Rex v. Container Materials Ltd. et al. in the following terms:

> Competition from which everything that makes for success is eliminated except salesmanship is not the free competition that s. 498 is mainly designed to protect. It brings to the customer no opportunity to buy at a lower price or on better terms, or to buy better or more attractive goods for the same money, and this is one of the principal benefits to be had from free competition. The chief factor in increasing sales under conditions such as prevailed under this arrangement is mere salesmanship. Competition of this restricted kind resembles the competition one reads of among the agents of one insurance company as to who shall write the most insurance in the year, all competition in benefits granted the persons insured being prevented by law.[2]

A 1957 decision of the Supreme Court of Canada reiterated that this right to competition may not easily be abridged within the law by stressing that,

> The public is entitled to the benefit of free competition, and the prohibitions of the act [s. 498,

> now s. 411 of the Criminal Code 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 organised in order to achieve the stabilization of prices and production.[3]

Why the elimination of competition is intended is immaterial, its elimination is the offence. The trial judge, however, in that same case acknowledged a much earlier Supreme Court decision, which had introduced a possible qualification to a finding that competition had been unduly injured. It could, in some instances, have considerable importance because of the part played in the Canadian economy by international trade. The judge noted that,

> As was pointed out in MacEwan v. Toronto General Trusts Corp. (1917) 54 S.C.R. 381, it would be impossible to have a monopoly if those who manufactured in Canada alone combined and the Canadian user was supplied not only by them but by goods imported into the Dominion.[4]

That matter will be examined further in dealing directly with the Eddy Match situation. A judicial rejection of an administered price as a reliable criterion of a reasonable price demonstrated another aspect of a firm adherence to the principle of competition.[5]

The comprehensive condemnation leads naturally to the expectation of strong deterrents. It was not realised prior to the 1952 removal of the $10,000 and $25,000 ceilings on fines,

which had been imposed respectively by the Criminal Code and the Combines Investigation Act. A peculiarity of prosecutions subsequent to the amount of the fine having been placed at the discretion of the court has left the matter in the realm of conjecture. That is one facet of another topic. As has been noted above the $85,000 fine imposed on the Eddy group of five companies ironically matched the excess price the controlling company was quite willing to pay in a single transaction in its long history of eradicating competitors. It must be regarded at most as a modest "poaching licence," that is, a fee to carry out an unlawful act. The prize of monopoly profit has continued to far outweigh the possible penalty.

What might well be termed diffidence in prosecution appears to have some importance in the weakness of the judicial deterrents to the crime of seriously impairing free competition. One aspect of that diffidence has been disclosed unambiguously in at least those prosecutions covering fine papers, coarse papers, electrical wire and cable, and wire fencing. Although the court proceedings followed the expiration of the ceiling on fines, which occurred on October 31st, 1952, the charges preferred by the Crown stopped at that date, thereby leaving the limits in effect. The Wire Fencing report was dated two whole years after fines were at the discretion of the courts. Another provision of the revised Criminal Code has removed the court's power to impose the payment of costs. The penalties may thus be lighter than was possible under previous arrangements, until such time as a prosecution

comprehends a later period of time and a judge avails himself of the new discretionary power.

That there cannot be a strong expectation of rising penalties necessarily resulting from the unlimited range of fines may be illustrated by a recent decision concerning twenty-six service station operators who had agreed to raise the price of gasoline at the expiration of wartime controls in British Columbia. Adjudged guilty, they were fined $1 each -- a mild penalty in the face of an increase of between 1.3¢ and 1.6¢ per gallon.[6] There is, however, a strong likelihood in many jurisdictions of more realistic fines on the basis of numerous past judicial pronouncements about the inadequacy of the penalty.

An extended judicial statement in a case of the most flagrant nature and a brief parliamentary view will serve to introduce a further aspect of the prosecuting diffidence. They both speak to the question of imprisonment, which the law provides in combines cases under the Act or the Criminal Code. Judge J. Boyd McBride of the Supreme Court of Alberta pointed out that,

> during the months of this trial it behooved me to confine my attentions, as I did, to the evidence adduced me as to the accused corporations, but incidentally I learned much of the actions of their officers. Commercial corporations are well nigh indispensable in our economic system and it is elementary that they do no thinking themselves. As artifical legal entities created by and permitted to function under the authority of parliament or the provincial legislatures, each one acts through human agency, officers, directors and others, men who decide the corporation's course of conduct and see that it is carried into effect. Certainly there is a clear obligation that these men fulfil their offices so that the rights and powers conferred on corporations are not to be abused or used by having the corporations offend against the criminal law.

> Putting to one side any question of legal liability, the presidents, managing directors and certain other head office officials of the accused corporations and of the controlling corporations whom I have already mentioned had a moral responsibility in controlling and directing the actions of these accused corporations. Warnings against combines had been given and disregarded. In the result, the accused corporations charged a course of conduct contrary to the criminal law of this country and quite deliberately continued on that course without deviating. In only two of all the Canadian cases against combines can I find the officers of the corporations expressly relieved of moral responsibility or, as it is called in these cases, moral turpitude, for the reasons I have stated.
>
> I am satisfied that as a result of the criminal conduct of the accused corporations here the public was mulcted of very substantial sums of money, both during the years of hard times and war times, for bread, a vital foodstuff. . . .
>
> Parliament has established an economic imperative in sec. 498 of the Criminal Code buttressed by the sanctions there stated. The officers of the accused and other corporations I have mentioned and any others like-minded who may be operating in a similar manner, corporations dealing in foodstuffs or other articles or commodities of trade, need a blunt and stern warning. The operation of sec. 498 of the Code is not confined to corporations; under it individuals may be and have been charged and convicted in the past. These men will do well to mend their ways. They need not feel comfortably secure behind their corporations. The arm of the law is long enough to reach out to them. If there be a conviction of any individual the punishment is not necessarily a fine; each convicted individual stands in the shadow of a jail sentence. Therefore, if for no other reason, let them pay regard hereafter to the rules laid down by parliament for the regulation of their corporations.[7]

His viewpoint was not carried into action because there were no individuals on charge before him, which has been the customary procedure with respect to corporations. Individuals accused have usually been doing business in their own name.

Expressing as stern an outlook, the remarks in the

House of Commons were made soon after the trial judgment was delivered in the Eddy Match case.

> It has been said that immediately after being fined the match people raised their prices, as did the glass people; that the raises were uniform and identical, and the consumers of Canada are paying the fine without the loss of a dime to those companies. I believe the penalties under this act are not adequate. There are all too many striped-pants directors who ought to be provided with striped coats and a number in addition at government expense. In that way the act could be enforced.[8]

There was at that time, of course, no provision for issuing an injunction nor for a court to require continuing information to be submitted to it subsequent to a conviction. Both have since become part of the legislation, although the latter requirement is seriously restricted to a three-year period.

The behaviour of match prices from the end of 1951 is an answer to the parliamentary comments. Although the wholesale price of matches since the Eddy Match conviction has not been at all times higher than it was before the trial, that condition has persistently prevailed in regard to the net realised by the manufacturer.[9] Eddy Match has actually been continuously enjoying the situation implied by the comments in the House of Commons. It is not a matter that came under judicial review.

To return more specifically to this facet of what has been called diffident prosecution, the judge in the recent Winnipeg Coal case[10] imposed on the relatively small concerns and individuals convicted the fines suggested by the Crown. He also turned his attention to the possibility of imprisonment and noted that,

> While the Code provides that a term of imprisonment may be imposed on individual accused the Crown has never, as I understand it, asked for the imposition of imprisonment.[11]

In most of the combines cases the human agencies by whose direction the convicted corporations have proceeded along their unlawful routes have been clearly culpable. The foregoing illustrations indicate that the difference of opinion lies in whether the parliamentary sanction of imprisonment should be used. Failing that the corporation official is touched not at all; the individual businessman is touched by the fine. That will mean in some instances an important discrepancy in the extent of the deterrent wrought by judicial conviction. The danger lies in the fact that the deterrent is likely to be less relatively in the case of the large company, where the economic power to impair free competition is the greater.

Granting that the day is at least approaching when the fines imposed will match rather closely the estimated monopoly gain, and barring any vengeful excess unfavourable to the convicted, a complaint of financial duress may well be turned aside by the accustomed judicial handling of parties coming to court "with unclean hands." Fines imposed with the design and effect of recovering the monopoly gain derived from the illegal elimination of competition by "combination, merger, trust or monopoly" will reach the actively guilty parties in situations similar to the Eddy Match case, provided that the convicted are surely prevented from a later recouping by means of additional administered price increases. If the industry structure and the attendant behaviour

are not significantly altered, then there must continue some effective review of conditions in that industry. If there cannot be competition there cannot validly be a resignation to private licence with neither the restraints imposed by competition nor the responsible check afforded by public authority. It would be possible with the Eddy group to affect the level of dividend payments to foreign owners, formerly Bryant and May and Diamond and now Bryant and May, who have also controlled the Canadian policy, including the persistent violation of Canadian law. A similar situation has prevailed in other combines cases.

There are probably even more situations, however, where the owners, thousands of small stockholders, exercise no important measure of control over the policies pursued by their companies. A genuinely punitive fine might again, as in the previous example, affect adversely the companies' dividend payments. But the punishment would not then be borne by those parties actually guilty of directing the corporations on a course of conduct prohibited by the criminal law of the country. The management in such cases has the control and hence the guilt; if the law is to sensibly deter further violations, the guilty must receive the punishment. The legal fiction that the shareholders can change the management whenever they disapprove of their operation of the company does not answer this point. The usual stockholder's grip on the details of his company's activities is weak, possibly little more than his hold on the economic subtleties of combination and competition. His financial means rarely equip him to wage a successful proxy

fight. Under these circumstances the levying of a punitive fine on the company accused and convicted, borne by way of the dividend mechanism by shareholders having the most tenuous connection with the illegal conduct of their company, would clearly miss the mark. To deter the law must reach those who actively offend.

In addition to the considerable impunity enjoyed by corporate officials because they are seldom indicted and, in any event, imprisonment is not asked of the court, and the tardy approach to the recent scheme of discretionary fines, a final aspect of diffidence in prosecution is displayed in the almost studied avoidance of a number of major Canadian industries, even in the realm of investigating to the stage of a formal report, quite aside from prosecuting, where there exists at least strong superficial indication of the possibility of combination or monopoly. An absence of free competition might be disclosed by a study of such industries as pulp and paper, aluminum, nickel, asbestos, gypsum, and a number of manufacturing industries. The first named appears to be a predominantly Canadian controlled industry. The dominant element in aluminum was originally the creature of the Aluminum Company of America, designed as a cartel instrument by its creator. A United States judicial decision was involved in the financial breaking apart of the two concerns. External influence is significant in the remaining three industries cited, as it is in several manufacturing fields. It is beyond the scope of this study to examine the implications in the fact that most of the output of the Canadian pulp and paper industry is

shipped to foreign markets, chiefly the United States.

The rationale for whatever diffidence does exist may in part lie in there being substance to the allegation that the Canadian government has discouraged rather than encouraged combines prosecutions.[12] Beyond the allegedly reluctant support of the government throughout the history of the legislation, it has been suggested that a major onslaught in fields where free competition is absent would engender ferocious opposition on the part of industrial leaders. It has been further held that the considerable public support for combines work vital to withstand serious attack on the legislation is by no means assured. These assumptions would dictate caution. It is nevertheless unacceptable. The very existence of the combines legislation and its enforcement agency carries the strong implication to the public that there is a continual coping with the monopolistic elements in the Canadian economy.

The extensive storm in and out of the House of Commons brewed by the Minister of Justice improperly withholding the Flour Milling report, until the 1949 resignation of the Combines Commissioner forced its publication, represented substantial public support for the work of combines investigation and prosecution. Additional evidence of support has been revealed since World War II in the prompt response of Parliament both to recommendations of committees and to the disclosure in court proceedings of defects in the law. Parliament has greatly strengthened the law and has steadily increased the appropriation.

Substantial increases notwithstanding, it remains inadequate to an extent of great magnitude, because of the expenses of two major requirements for a genuinely comprehensive restoration and maintenance of free competition -- a very great expansion of the number of able personnel available for the investigation and prosecution of combinations and monopolies and the introduction of a thorough campaign of publicity. From the time of the introduction in the House of Commons of the 1910 legislation there has been much idle talk of the importance of publicity as an effective deterrent against impairing the public's right to competition. It has been idle in part because there has actually been so little publicity. The news reporting of a combines case has been customarily a mere outline of the judgment -- providing little detail as to what named companies have been engaging in what kind of unlawful market behaviour. Expert advice might determine that the ideal medium for reaching the public in order to bring a new awareness of the extent of the problem and to arouse wider interest and support would be advertising. That might well prove to be the most efficacious counterbalance to the steady flood of advertising pouring forth from convicted combiners and swiftly washing away any doubt aroused in the public mind in regard to the company's purposes and their relation to the public welfare. Such a campaign, together with the stiffer penalties now possible would do much to destroy the advantage of reduced publicity arising in cases of the accused pleading guilty. An example may serve to clarify the possible impact on the public and indirectly on the

industry of an effective advertising programme emanating, most likely, from the Restrictive Trade Practices Commission.

In the Western Bread case[13] the chain bakers operating in that region of the country were convicted under section 498 of the Criminal Code and fined the quite inadequate, almost meaningless maximum of $10,000. From the maze of evidence and argument in the lengthy trial, two deviations from law and morality stand out. They would surely constitute a story of malevolence that would arouse public interest. The supplying of bread to hospitals and other institutions and to the armed services was handled by the bakeries so that the contract was rotated. These contracts were let by tender. Having agreed upon which bakery was to have the contract for the next period, the remainder submitted fictitious tenders to ensure that their "chosen one" received the business. Judge McBride described the scheme as being

> almost identical with that of the plumbers' association so bitingly excoriated by Clute, J. in Rex v. Master Plumbers, etc. Assn. (1907) 14 OLR 295, at 304 and 305. In his language, which has my full approval in its application here, it was a system of misrepresentation and fraud, a system of plunder comparable to meeting a man on the street and forcibly robbing him of his money. Clute, J. thought that, of the two offences, the robbery was the least offensive. I agree. Practices of this kind perpetrated by so-called reputable companies must be scathingly denounced by this court and I do denounce them. This system of dishonest trickery as carried out by the accused corporations here and others, in my opinion, standing alone constituted an undue preventing or lessening of competition and would require and support a conviction of the accused as charged.[14]

The second outstanding deviation arose at the ending of wartime price controls. There was a "price increase of 3 cents per loaf

effected in combination and by eliminating competition, in September, 1947, while there were still on hand substantial stocks of cheap flour obtained under government subsidy at about half the price which prevailed for flour on the withdrawal of the subsidy, a neat and quite profitable transaction at public expense."[15] The people of Canada, by will of their government, had paid the bakers by means of the subsidy, and had subsequently, by will of the bakers, paid again by means of an unlawfully administered price increase. That true story of modern brigandage brought into every Canadian home through modern communication methods might easily divert important consumer buying to the independent bakers. Such a structural change in the industry demand schedule would be a more meaningful remedy than penal consequences. Thus allowing only the competitive to win any prizes for competition would simply be an instance of the disadvantages accompanying the possession of monopoly power.[16]

On the premise that Parliament has so far decreed that competition is to be the regulating force in the Canadian economy, except in wartime circumstances, some part of the effort in the direction of wider knowledge of the market could be devoted to recalling attention to the recurring theme of "compete or be nationalised."[17] Should a sufficiently large segment of industry and of the public ignore that choice, the continued refusal of many concerns to obey Parliament's "economic imperative" that free competition be maintained will strengthen those elements advocating public, not competitive, regulation of prices and output.

The so-called "rugged individualist is a strong, though unwilling and unwanted, ally of the socialist." Stressing these alternatives could reduce the number of violations of combines law.

The Canadian wooden match industry, comprising only the convicted Eddy companies was not directly charged by the successful prosecution, except for the financial penalty reducing the rate of accumulation of reserves. Just at the time of the entry into the Canadian market of the world's match triad -- Swedish Match, Diamond Match and British Match -- the industry had become a single-firm industry in the hands of E. B. Eddy. That condition was restored by the formation of the Eddy Match Company. The important difference was that control had been shifted from Canadian hands to British and American ones, which are in many respects beyond the reach of Canadian law. The Diamond consent decree finally resulted in that company selling on the open market its stockholdings in Eddy Match. The Canadian monopoly in the manufacture of wooden matches has thus become the province of only the British member of the world's match trio. The question of imports may assume more significance with only one foreign match producer having a direct financial interest in the Canadian company.

Canadian judicial decision has indicated that imports can account for a sufficient part of the supply available to Canadian users of the product so as to frustrate an attempt to convict a Canadian manufacturing combination or monopoly. Of the three chief possible sources of imports of wooden matches into Canada, only one would establish economic validity to the proposition that

substantial importing meant that there was not a monopoly. Matches from truly independent producers in other countries could create meaningful competition although distinctly different in character from domestic competition with respect to at least balance of payments problems and national income and employment considerations. Matches from "state-trading" nations, where a number of former Swedish Match factories are located, are of a different order because of the likelihood in the present international environment that the shipments would be sporadic. Matches from Swedish Match-British Match-Diamond Match sources might well represent some new effort at killing off or keeping off competition in the Canadian market. A sufficiently enduring disagreement between the members of the match triad could bring in elements of a bilateral monopoly struggle. It is an unlikely source of truly competitive matches.

The customs duty was lowered in 1952. Imports of wooden matches have risen greatly in terms of percentage, though still accounting for less than five per cent of the Canadian total. Although there is no record of the import sources by companies, the matches are arriving principally from the United States, the United Kingdom and Italy. Independent companies exist in those nations and could be the source of this part of the Canadian supply. It should be noted that 1956 was the first time in eight years that Sweden has not been either first or second among countries exporting matches to Canada. It could not be considered a beneficial effect of the 1951 conviction of Eddy Match

so far as Canadian industrial activity is concerned to have imports of wooden matches from the match triad displace those produced in Canada. For example, Bryant and May selling directly in Canada rather than through Eddy Match would be in much the same position financially; some Canadian employees would be worse off. There would be nothing competitive in such a shift of production. Care to bring into prosecutions in circumstances similar to those outlined in section 2(4)(b) might ensure that judicial attention would concentrate on the Canadian scene. That provision of the Combines Investigation Act states that, '"Merger, trust or monopoly' means one or more persons who either substantially or completely control, throughout any particular area or district in Canada or throughout Canada the class or species of business in which he is or they are engaged; and extends and applies only to the business of manufacturing, producing, transporting, purchasing, supplying, storing or dealing in commodities which may be the subject of trade or commerce."

There is a technological consideration of some importance in regard to the Canadian production of matches under competitive conditions. Six $100,000 machines operating sixteen hours a day, five days a week and fifty weeks a year are capable of producing the Canadian output of matches which, without exporting as is currently the situation in Canada, to all intents and purposes meets the Canadian consumption. Three such machines operating continuously throughout the year would achieve the same output. It would hence appear that the Canadian industry is likely to have

excess capacity and strong monopolistic elements, even if the purpose to eliminate competition were absent.

The steadily growing importance of book matches in Canada will continue to affect the position of Eddy Match, the sole producer of wooden matches and one of five producers of book matches. The four independent manufacturers of book matches confine themselves to that field, whereas Eddy Match produces both. Being the only source of both kinds of matches provides Eddy Match with extra market power over the more specialised book match firms. The evidence produced in the lawsuit demonstrated that Eddy Match exerted considerable influence with distributors. Unless the company is prepared, in spite of its past conviction, to remove the competition in book matches, that industry is likely to continue to have competitive elements. Other sources of Eddy Match's special economic power, compared with the book match manufacturers, are its financial connection with Bryant and May and British Match, its increasing diversification into fields other than matches, and the continuation of its strong trade connections, which were in large measure established and maintained by unlawful means with illegal purpose. Legislation that permitted more than a three-year surveillance of a convicted company would allow the early detection of any serious attempts to eliminate competition in the book match field. Even the three-year provision was not applicable at law at the time of the Eddy trial. The most likely effect of the three-year stipulation is simply that an intending offender will wait.

Some guidance as to the Eddy Match policy that may be expected may be found in statements of the British Match viewpoint. At the time of the British Match Report the corporation held that the industry was competitive, regardless of the findings of the Monopolies Commission. The type of competition referred to was revealed in a recent annual report which spoke to the problem of lower priced imports entering the United Kingdom.

> Competition, of course, affects only the prices quoted to the distributing trade, as the retail price of this type of box [2d box] to the public is the same in all cases, and we rely therefore on good quality backed by the natural preference of the British public for British goods to maintain the sales of our well-known Brymay and other brands.

The report went on to describe the dividends from Canada as "particularly helpful and greatly in the national interest," which is a particularly interesting analysis of monopoly gain. A private levy has been regularly imposed on the Canadian consumer resulting in more substantial British dividend receipts and capital accumulations, for which British Match is to be praised -- if a British shareholder is concerned. At a time when the company is embarking on a programme of diversification and modernisation, the report said of an £200,000 outlay for the latter, "the large reserves built up in the past are more than adequate to finance this outlay."[18]

A final point of importance is raised by the fact that Eddy Match is a small part of a world picture of cartel ramifications and domestic monopolies, government or private, leaving only small sectors under competitive conditions. Most of the

monopolistic elements that have influenced the Canadian industry are beyond the reach of Canadian law. There is little remedy in the fact that the Canadian government can affect imports, because that remedy is as restrictive as the world market allocation itself. At the direction of the Minister of Labour toward the end of World War II the Combines Commissioner examined cartels as they affected Canada. He stated the problem and suggested the remedy in these words:

> Business firms, in the absence of international law on the subject, have been able to develop and administer their own private systems of international law and regulations. This development has aided in carrying the results of industrial integration and combination far beyond the boundaries of individual states and makes it difficult for any one country, particularly one largely dependent upon trade with others, to devise effective measures to deal with them. Difficult or not, it is essential that effective measures be taken in Canada to the full extent of national jurisdiction and by collaboration with other countries to prevent the abuse of monopoly power, whether such abuse is effected by national or international combinations of business enterprise or by individual dominant concerns.[19]

The report accepted that it is essential to prevent widespread depression, national or international, as a vital element in any programme to further competitive forces in the economy.

Some effort toward international action against monopoly power was begun in September, 1951, with the establishment at the United Nations by the Economic and Social Council of an ad hoc committee "to study the question of restrictive business practices and propose to the Council, by March 1953, methods to be adopted by international agreement for preventing business practices

which have an adverse effect on international trade."[20] The 1953 report of the committee, comprising members from Belgium, Canada, France, India, Mexico, Pakistan, Sweden, the United Kingdom, the United States, and Uruguay, included a draft agreement which provided for consultation and investigation. After consideration at the 16th Session of the Economic and Social Council that year, most members supported the draft agreement, but it was resolved that more information be gathered and consideration be resumed at the 19th Session in 1955. There was a decision then not to act, expressed by the statement that "the time was not ripe for the adoption of the draft agreement."[21] The Economic and Social Council reaffirmed its continuing concern in regard to the problem and directed the Secretary-General to continue to collect and summarise information on the subject. Thus there seems to be little immediate prospect for the kind of international action that would afford the only remedy in many cases.[22] Detriment had been plainly set forth to the Council in the Report on Restrictive Business Practices in International Trade.[23]

In summary, the Eddy Match case resulted in a reaffirming of the Canadian right to competition, which, at law, is not to be denied even on grounds of apparently commendable motives. It is the economist's competition of price; the administered price has been rejected as a sound criterion of a reasonable price. Although the Supreme Court decision concerning the Dominion Salt Agency in MacEwan v. Toronto General Trusts Corp.[24] at least implies that substantial importing of a commodity, produced in Canada under

monopolistic conditions, might absolve the domestic combination or monopoly of a combines indictment, the usual vigor of stare decisis in Supreme Court judgments may be mitigated by one or more of these considerations, pertaining to the Salt case: (1) section 2(4)(b) of the Combines Investigation Act condemns substantial or complete control in part or all of Canada of a particular class of business; (2) duty free imports exceeded Canadian production, 90 per cent of which was controlled by the combination; (3) relevant in a civil suit, the plaintiff had dealt with an intermediary and had been unaware of the existence of any combination; (4) no price enhancement was proved, which fact has often been declared immaterial in combines cases.

Economic conditions frequently rule out importation as a valid economic means of restoring competition in a national market in the face of a domestic combination or monopoly. Similar circumstance may and often do obtain in markets outside a particular country. Further, foreign monopoly may be and often is directly related to the domestic situation. In that event the imports would represent only a shift in sales from one monopolistic unit to another. Structural change in the domestic industry could introduce competitive elements and would avoid certain adverse income and employment effects that might attend a sudden increasing of imports. The bringing together of new competitive influences in the domestic industry and of any competitive imports that may be available could validly claim active public support. In industries, such as the Canadian wooden match industry, where the output of the

minimum technological unit of production bulks large compared with the national market, world competition, permitting and indeed facilitating free international trade in the relevant commodities, is the sine qua non of domestic competition. Importation as a remedy for local conditions of monopoly requires an effective international attack on cartels and other restrictive arrangements, wherever competitive conditions do not prevail. World prosperity is an underlying requisite in sustaining open markets. Outside the range of national law, the obvious route to such a goal is the renewal in the United States of efforts to obtain acceptance of international principles to cope with international restrictive business practices.

For reasons good or bad, Canadian combines prosecutions have omitted asking for the penalty of imprisonment and have refrained from exploring the new world of discretionary fines, where that penalty could be meaningful in terms of the monopoly profit enjoyed in the past. There is therefore no determination of how the courts will exercise that new discretion, although some judges have intimated strongly that they would have used such power had they possessed it. Though comparatively heavier than in many other combines cases, the penalty imposed on the Eddy Match group was relatively light in view of the decades of monopoly earnings. In the numerous situations unlike the Eddy Match condition of controlling shareholders, where corporate ownership and control are sharply distinct, there is little assurance that the incidence of a fine will actually rest on the guilty. There may be a shifting

of a fine imposed on corporate officials and a new incidence on the corporation, that is, on the stockholders, who wield no real control. There would be no such shifting of the penalty of imprisonment. In spite of an early success[25] where heavy fines were imposed because of fraud, subsequent prosecutions have notably avoided that line of indictment, even in those circumstances where fraudulent tenders were so flagrant a part of the monopolistic scheme as to elicit judicial castigation.[26] A too doctrinaire devotion to obtaining a "combines conviction" may have prevented the imposition of a sterner deterrent.

The conviction and sentence of the Eddy Match group left unaltered the monopolistic structure of the Canadian wooden match industry. No other result could then be achieved under Canadian law. Control of the industry remains with the major operating unit of British Match, which was itself created at the same time as its Canadian counterpart, Eddy Match, by the dominant world match producers for the same monopolistic purpose. The concern of the British Monopolies Commission that any fundamental change in the structure of the British industry would weaken it vis-à-vis Swedish Match[27] adds force to the view that international action to curb monopolistic practices is the way to preserve and expand competition. There is a strong chain reaction from one restrictive scheme to another. Canadian law now permits the dissolution of a merger, trust or monopoly upon, or within three years of, conviction. There is yet no evidence that such remedy will be requested or that the appropriate court will comply with such request if made.

There have been court injunctions restraining convicted parties from the continuation or repetition of an offence. Dissolution enters more deeply the realm of property rights. Although restraining orders strengthen anti-combines law enforcement, therein lies a danger unless there is court surveillance, for more than three years, to ensure the early detection of any departure from full compliance with the order. That is a minimum. Complete compliance with the order does not guarantee more than that monopolistic conditions are not being reestablished by those devices proscribed in the order. As new means of eliminating competition may be devised and put into effect, there is perhaps also a need for continuing surveillance of convicted groups by Combines or Restrictive Trade Practices personnel.

The procedure and results typified by the Eddy Match case stop far short of the requirements for the long run accomplishment of Parliament's economic imperative of free competition. There must be a greatly enlarged expenditure to increase the level of investigation, reporting, prosecution and conviction. The expansion of anti-combines work must proceed against a background of ever more effective communication with the Canadian public. All the remedies provided by law must be given full effect. Some have too long been honoured more in the breach than in the observance. Finally, a nation so dependent on international trade must impel great effort on the international level to cope with the restrictive and monopolistic conditions and practices which are quite beyond the reach of the domestic law of individual nations.

1. supra, Introduction, p. 2.

2. (1941) 3 D.L.R. 145 at 167-88.

3. Howard Smith Paper Mills, Ltd. et al. v. The Queen (1957) 8 D.L.R. (2d) 449 at 452-53.

4. Regina v. Howard Smith Paper Mills, Limited et al. (1954) O.R. 543 at 575.

5. Péloquin v. Latraverse (1919) 54 D.L.R. 181.

6. Regina v. Morrey et al. (1956) 19 W.W.R. 299.

7. Rex v. MacGavin Bakeries Limited et al. (No. 6) 1951) 3 W.W.R. (N.S.) 289 at 319-20.

8. Debates, House of Commons, 1951, 2nd Sess., Dec. 31, 1951, vol. 3, pp. 2403-04.

9. See Appendix D, table 3.

10. Regina v. D. E.Adams Coal Limited et al. (1957-58) 23 W.W.R. 419.

11. op. cit., 428

12. supra, ch. 9, p. 232.

13. Rex v. McGavin Bakeries Limited et al.

14. Rex v. McGavin Bakeries Limited et al. (1951) 3 W.W.R. (N.S.) 289 at 315.

15. Ibid.

16. supra, ch. 9, p. 238 (view of the MacQuarrie Committee).

17. supra, ch. 6, p. 155; ch. 8, p. 196; ch. 9, pp. 236-37.

18. Economist, Oct. 1, 1955, p. 76; Sept. 1, 1956, p. 757.

19. Canada and International Cartels, Report of Commissioner, Combines Investigation Act, Ottawa, 1945, p. 65.

20. Yearbook of the United Nations, 1951, p. 53.

21. Yearbook of the United Nations, 1955, p. 124.

22. E.g., supra, ch. 6, pp. 149-53; ch. 7, p. 173; ch. 8, pp. 194, 198.

23. Economic and Social Council, Official Records; Nineteenth Session, Supplement No. 3A; E/2675, United Nations, New York, 1955.

24. supra, ch. 17, p. 351.

25. supra, ch. 8, p. 202.

26. E.g., master plumbers, ch. 8, pp. 11-12; western bread, ch. 18, p. 12.

27. British Match Report, pars. 193-214.

## Chapter 18

The Canadian match industry comprises the Eddy Match Company, the sole producer of wooden matches and the major producer of book matches, and a growing number of independent book match manufacturers, of which there were four in 1957. The Eddy name has been associated with the Canadian match industry since 1851, when E. B. Eddy inaugurated match manufacturing in the country. After the rapid appearance of two dozen plants within twenty years there set in a steady decline in the number of match firms. By 1922 only the pioneer E. B. Eddy Company was still operating. It was then that the world match triad entered the Canadian market.

Bryant and May and the Diamond Match Company entered jointly with the formation of the Canadian Match Company. The Swedish Match interests made entry by the acquisition from Rockefeller interests of a factory at Berthierville, Quebec. Thus had a Canadian monopoly of wooden match manufacture existed only momentarily. The Swedish controlled company had an accumulated

loss of more than $3,500,000 by the time the merger of Canadian match manufacturing facilities created the Eddy Match Company. The active oligopolistic market struggle preceding the merger witnessed a substantial decline in the position of E. B. Eddy and a rapid increase in the outputs of the two new firms. At the time of the 1928 merger the percentage shares of the Canadian market held by E. B. Eddy, Canadian Match and World Match were respectively about forty, forty and twenty. Swedish Match accepted extravagant payment for its facilities and withdrew from the Canadian scene. British Match acquired majority ownership in the new Eddy Match Company which owned all the Canadian match producing assets. Diamond Match became the largest minority stockholder in Eddy Match and assumed the active management of the company. Three plants at Hull, Pembroke and Berthierville were in operation. The well-known Eddy name had been transferred from the short-lived Canadian match monopoly to one controlled by the British and American members of the world match triad.

Match purchases in Canada have recently amounted to less than one-twentieth of one per cent of Canadian consumer spending. This may be compared with United States cigarette purchases amounting to almost two per cent of American consumer spending. In 1952, with Canadian consumer spending running at a level of $14,366,000,000 annually, $4,777,000 were spent during the year on matches. Match purchases are an inconsequential item in the household budget. The general demand for matches is highly inelastic. The various means of producing light or fire are

Figure 1

A COMPARISON OF
THE VALUE OF CANADIAN MATCH PRODUCTION
AND
CANADIAN PERSONAL CONSUMPTION EXPENDITURE
(current dollars)

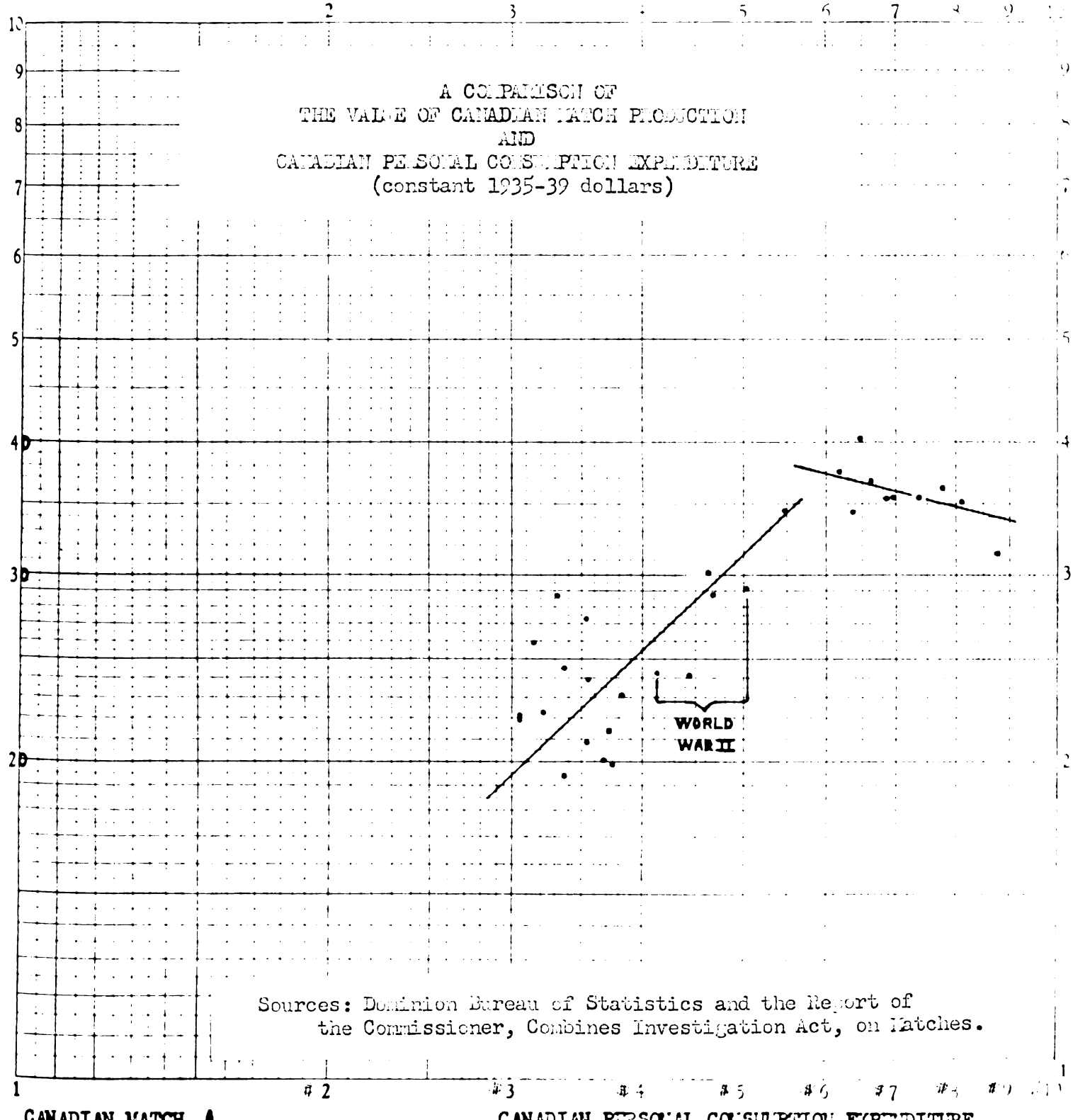



Sources: Dominion Bureau of Statistics and the Report of the Commissioner, Combines Investigation Act, on Matches.

CANADIAN MATCH PRODUCTION (millions of dollars)

CANADIAN PERSONAL CONSUMPTION EXPENDITURE
(billions of current dollars divided by 2)

Figure 2

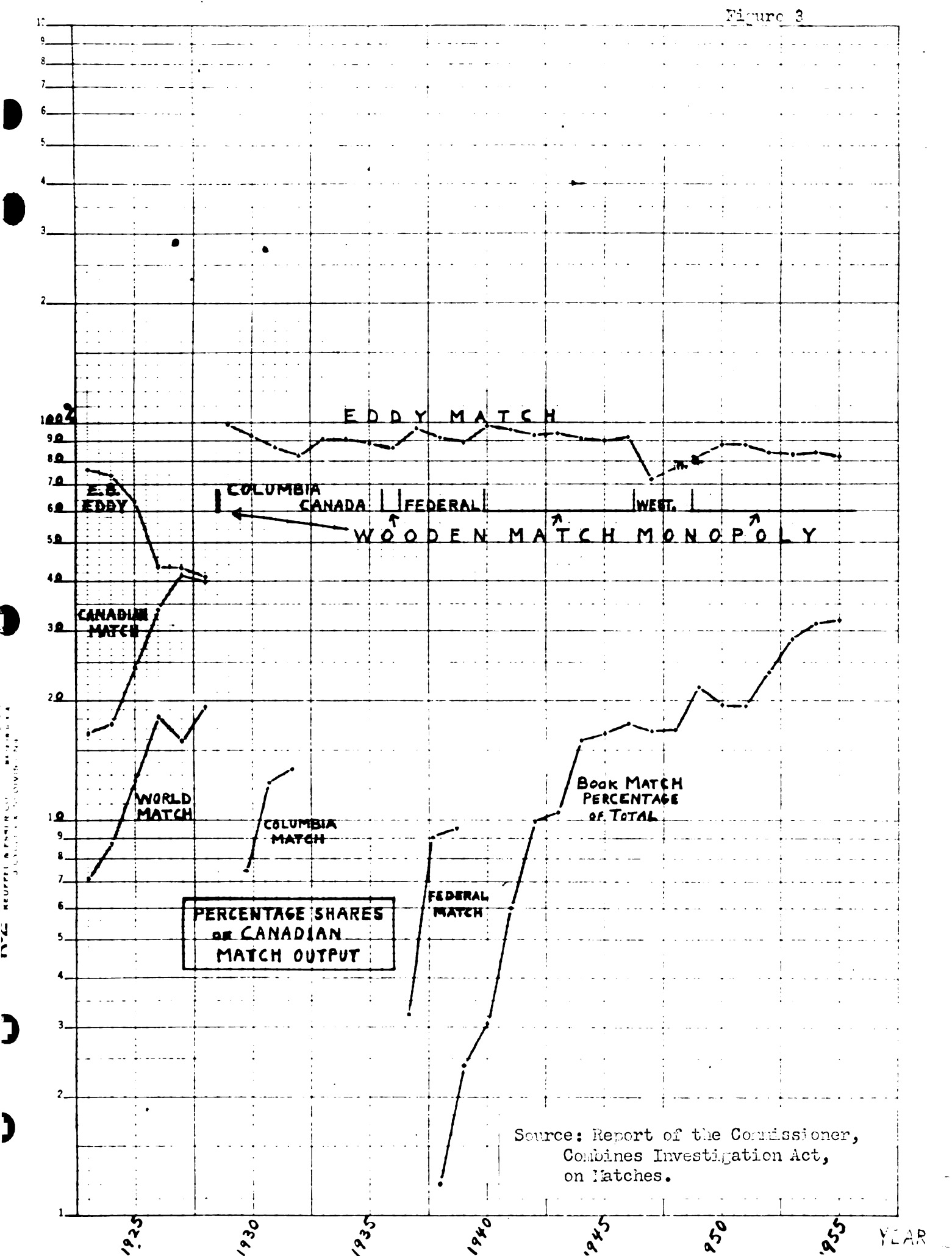

A COMPARISON OF
THE VALUE OF CANADIAN MATCH PRODUCTION
AND
CANADIAN PERSONAL CONSUMPTION EXPENDITURE
(constant 1935-39 dollars)
WORLD
WAR II
Sources: Dominion Bureau of Statistics and the Report of
the Commissioner, Combines Investigation Act, on Matches.
CANADIAN MATCH
OUTPUT
(billions
of matches)
CANADIAN PERSONAL CONSUMPTION EXPENDITURE
(billions of constant 1935-39 dollars)

rather imperfect substitutes. The Canadian per person consumption of matches has followed an erratic decline, varying between 1800 and 3000 per year. Continuing economic development making more widespread the use of electricity, oil and gas will tend to reduce further the per person use of matches. The Canadian annual output of matches, fluctuating between nineteen and forty billions, has expanded less rapidly than the population. There appears to be little relationship between total match consumption and personal consumption expenditure, in monetary or real terms. (See figures 1 and 2.)

Book matches were first produced in Canada by World Match. Columbia Match had also engaged in that field. Eddy Match undertook book match production with reluctance, having little or no interest so long as the profitability of making wooden matches remained as high or higher. After the bankruptcy of Columbia Match, Eddy Match was the sole producer of book matches until 1938. Independent producers quickly captured more than half the book match market. The swiftly increasing demand for matches during World War II and, in its early years, the rising prices of wooden matches witnessed a great expansion in the use of book matches. They were occupying a larger and larger share of the total match output, although the rate of growth has declined since the end of the war. (See figure 3.)

That development presented to some extent a curbing of the monopoly power of Eddy Match. Its strongly entrenched hold, clearly achieved by design rather than by chance, on the normal

Figure 3




Source: Report of the Commissioner, Combines Investigation Act, on Matches.

channels of distribution was not, however, seriously impaired. It remained the only concern offering a full line of "kitchen" matches, safety matches and book matches. Jobbers, faced with the necessity of handling some Eddy products, might well be induced to handle all Eddy products.

The growing importance of book matches seems to have arisen more from their increasing acceptance by Canadians than from a significant substitution away from wooden matches. No change in wooden match prices occurred during the years of most rapid expansion in the use of book matches. In the presence of wide acceptance of the book match, however, there is more likelihood of a higher cross-elasticity of demand between the two kinds of matches. In any event price competition has not yet appeared as an important factor in the book match field. Eddy is a dominant force in being the major producer of book matches. Evidence suggests that it occupies the position of price leader. A less aggressive policy has been followed with respect to rival book match manufacturers than has been the case with competing wooden match producers.

Although there may have been unrecorded examples of predatory destruction of Canadian match firms during the latter part of the nineteenth century and the early years of the twentieth, the principal factor contributing to the decline in the number of firms was certainly the technological advance of the continuous automatic match-making machine. That greatly increased the economic plant size relative to the market. It is

not strange to find that the first firm maintained its initial lead. The restoration of monopoly in the industry at the conclusion of the oligopolistic market struggle in the 1920's was quickly followed by the exercise of that power by Eddy Match. Resale price maintenance was instituted at once. Care was taken, however, not to give strict statement of such policy. It was hoped that jobbers would adhere to the resale price maintenance by being persuaded that their long-term profits would be thereby enhanced in contrast with the poorer results that would be obtained by handling lower-priced matches. Awareness of the illegality of price-fixing agreements restrained Eddy Match from a strict enforcement of resale price maintenance.

Nevertheless the sales manager urged that the advantage be pointed out so forcibly to jobbers that they would not handle matches distributed without resale price maintenance. It was, in other words, his hope that the jobbers themselves would boycott the matches of rival companies. Avoiding an outright boycott to enforce its programme, Eddy Match was prepared in some instances to charge its full resale price to an outlet that had been selling at less than the prescribed level. That proved quite as effective as an actual withholding of supplies. The Eddy Match sales manager considered it especially important to close the distributive channels in western Canada to Federal Match. That market was traditionally more profitable than eastern Canada because prices were customarily higher by more than the additional cost of delivering in the western market. Table 1 shows the extra

profitability of western sales.

Table 1. "Phantom freight" on western sales -- 1939.

| | Direct Sales Expense and Freight per case | Actual cost difference, Ontario and points in west. Canada | Extra cost to western jobbers (freight prepaid) | "Phantom freight" to Eddy |
|---|---|---|---|---|
| Ontario | 27.7¢ | -- | -- | -- |
| Winnipeg | 60.3¢ | 32.3¢ | 38¢ | 5.7¢ |
| Regina | 55.2¢ | 27.5¢ | 57¢ | 29.5¢ |
| Edmonton | 70.1¢ | 42.4¢ | 77¢ | 34.6¢ |
| Vancouver | 72.0¢ | 44.3¢ | 92¢ | 47.7¢ |

Source: compiled from data in the Canadian Match Report.

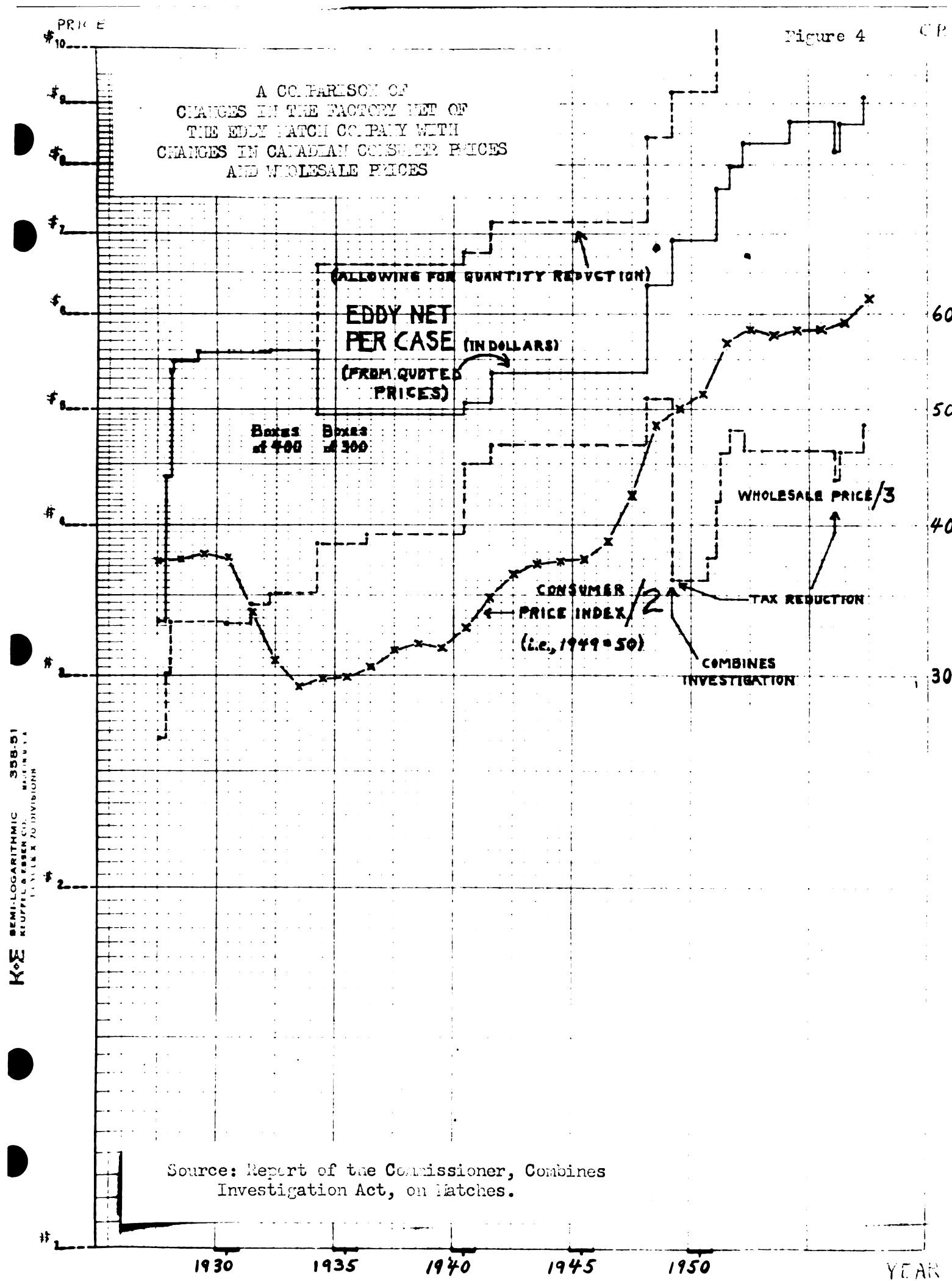
In contrast with general match demand, the demand for individual brands is elastic. The introduction in 1937 by Federal Match of a one cent box of 30 matches realised an expansion of sales sufficient to bring in Eddy with "fighting" brands at reduced prices. Eddy had been selling two boxes of 50 matches each for five cents. Consumers were quickly substituting the cheaper Federal matches. Eddy Match estimated that the factory net to Federal lay between $4.71 and $5.22 per case of 1440 boxes. Eddy's cost, including overhead costs, would have been $3.57 at the Pembroke plant. Excluding the overhead costs of Eddy, the Pembroke cost would have been from $3.15 to $3.38, depending upon the type of packaging. The lower-priced match of Federal was a profitable endeavour.

Match prices were increased upon the formation of the Eddy Match monopoly and continued to rise during the depression of the 1930's. The nadir in 1932 of consumer spending in constant dollars was 82.8 per cent of the 1929 peak. The physical volume of Eddy sales declined by 1934 to 73 per cent of the 1929

maximum. After a sharp reduction on the creation of Eddy Match, Canadian match production rose annually thereafter until 1932 to reach a level 111.5 per cent of the 1929 total. The Eddy Match share of the market was declining during this period. Consumers were responding to the availability of alternative brands at more attractive prices. The profits of the monopoly, however, were less seriously eroded by the combination of depressed economic conditions, vigorous market rivalry with Canada Match, and its own high price policy. Its 1932 profits before taxes were 94 per cent of the 1929 figure; its profits after taxes were 91 per cent.

With the exception of a one per cent decrease in 1930, which was in effect for a year, Eddy Match followed the policy of increasing the wholesale price of matches until 1949. At that time there was a change from a specific tax to an ad valorum tax and a substantial tax reduction to 25 per cent of the previous level. The combines investigation was then in progress. A substantial cut in the wholesale price that year nevertheless meant a further increase in the factory net to Eddy. With a single exception the factory net had increased with each change from the formation of the wooden match monopoly to 1957. The exception covered the first four months of 1956, when a 5.6 per cent decline was realised because the lowering of the wholesale price had more than offset a tax reduction. That deviation from the accustomed policy of Eddy Match was removed in May of 1956. The next change restored the traditional pattern of wholesale price increases more than compensating for tax increases. (See figure 4.)

Figure 4

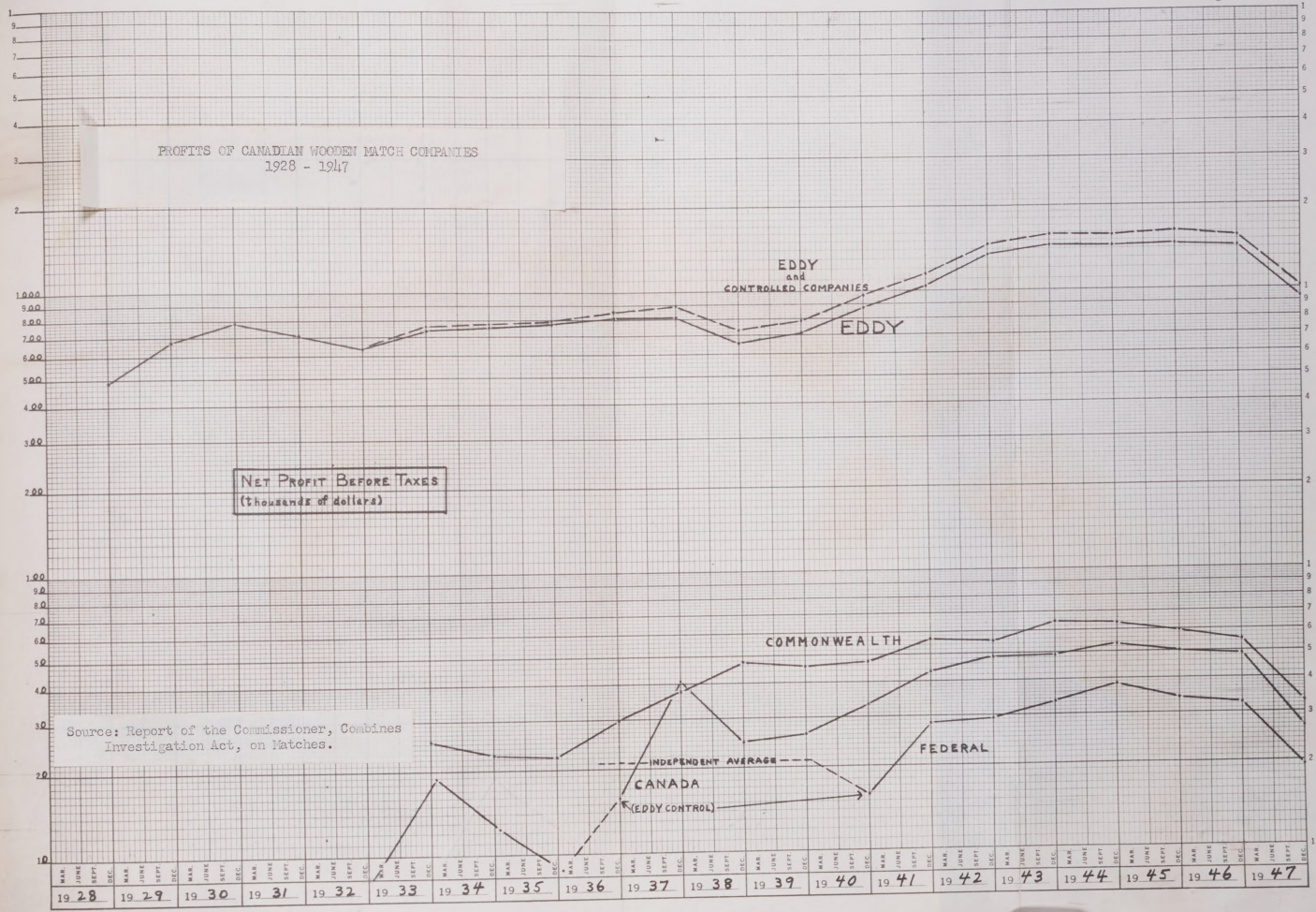



Source: Report of the Commissioner, Combines Investigation Act, on Matches.

The Eddy Match price to jobbers has increased less rapidly than general Canadian consumer or wholesale price indexes. Taken in conjunction with tax changes, however, the company's price policy is not evidence of a monopolist dedicated to a life of comfort and ease. The basic rapacity of the price policy is revealed by the fact that the factory net has risen more rapidly over the years than the wholesale price of matches or the general Canadian price indexes. That Eddy Match kept its price increases to a more modest pace than that of the general price indexes may be a modest tribute to the ever-present likelihood of new entrants. At least the cases of unprofitable Columbia Match and of profitable Federal Match demonstrate that rivals have contributed to an absolute decline in the net profit of Eddy itself and of the Eddy group of companies. (See figure 5.)

Toward the conclusion of the Columbia-Canada rivalry, Eddy accomplished a substantial increase in its factory net at the time of changing from a four-hundred match box to a three-hundred match box. Its price cut by no means matched the reduction in quantity. The next enhancement in the factory net followed quickly the acquisition by Eddy Match of Federal Match which reëstablished the Canadian wooden match monopoly. (See figure 4.) That monopoly power remained sufficiently strong so that Eddy effected some price increases in the face of most of its wooden match rivals, thereby permitting the steadily rising factory net.

At the beginning of World War II book matches accounted for less than three per cent of Canadian match sales. Prior to


PROFITS OF CANADIAN WOODEN MATCH COMPANIES
1928 - 1947
EDDY
and
CONTROLLED COMPANIES
EDDY
NET PROFIT BEFORE TAXES
(thousands of dollars)
COMMONWEALTH
FEDERAL
INDEPENDENT AVERAGE
CANADA
(EDDY CONTROL)
Source: Report of the Commissioner, Combines Investigation Act, on Matches.
1928
1929
1930
1931
1932
1933
1934
1935
1936
1937
1938
1939
1940
1941
1942
1943
1944
1945
1946
1947

the advent of price control at the end of 1941, rising wartime demand for matches permitted price increases and considerable gains in the consumption of both wooden and book matches. This new threat to its entrenched position was met by Eddy Match expanding its output of book matches, thereby limiting the decline in the Eddy share of Canadian match production to relatively small proportions. In 1939 the last year of the independent operation of Federal Match the Eddy share was just over 89 per cent. The elimination of Federal Match as an independent company raised it to 98 per cent. The wartime book match growth reduced the Eddy share to 90 per cent by 1945. (See figure 3.) A further eight per cent of the market was lost by Eddy in the first decade following the war.

The profit experience of Eddy Match highlights the strength of its monopoly power. During the great depression the profits before taxes of Canadian manufacturing companies fell from their 1929 peak of 259 million dollars to a 1932 loss of six million dollars. The Eddy Match peak in 1930 of 783 thousand dollars, which was an increase of more than one hundred thousand dollars over the 1929 profit before taxes, was followed by a decline to 637 thousand dollars in 1932. That was more than 80 per cent of the 1930 peak profit figure and 94 per cent of the 1929 level. The exertion of monopoly power did not go unrewarded.

A rough criterion by which to judge the extent of the monopoly return of Eddy Match may be found in the profit experience of the three major successors to the American Tobacco Trust. The

match and cigarette industries are both characterised by a more elastic demand for particular brands than for the industry output as a whole. In both instances the monopoly return suggests more a problem of income distribution than of economic efficiency. The structure alternatives in the Canadian wooden match industry seem to be monopoly or oligopoly. There appears in the American cigarette industry the third possibility of monopolostic competition. Not present in the Canadian wooden match industry during the period of comparison were two restraints on monopoly return affecting the American cigarette industry -- heavy advertising outlays and whatever caution was engendered by the United States monopoly conviction in 1941. In spite of those restraints and the threat of new entrants and sporadic outbreaks of rivalry, the latter two experienced in Canada as well, the profit level in the American cigarette industry continued greatly in excess of that enjoyed by manufacturing in general. Eddy Match's greater element of monopoly power, at times complete, brought to it a monopoly return consistently equal to or greater than the level enjoyed by the American cigarette producers. The profit comparison in Table 2 demonstrates the high degree of monopoly profit realised by Eddy Match.

Table 2. Certain Canadian match and United States tobacco profit ratios.

| | Eddy Match Company inflated assets | Eddy Match Company deflated assets | Tobacco Trust successor companies |
|---|---|---|---|
| Net profit after taxes as a percentage of net tangible assets: | | | |
| 1912-1941 | | | 14.7-20.0 |
| 1928-1939 | 10.9 | 15.3 | |
| 1940-1947 | 10.9 | 15.2 | |
| 1942-1947 | | | 8.9-12.0 |
| Net profit before taxes as a percentage of net tangible assets: | | | |
| 1928-1939 | 12.5 | 17.1 | |
| 1931-1941 | | | 17.3-23.8 |
| 1940-1947 | 21.0 | 29.2 | |
| 1942-1947 | | | 15.8-20.1 |

Source: compiled from the Canadian Match Report, the Eddy Match Case Transcript and R. B. Tennant, "The Cigarette Industry," in Walter Adams (ed.), The Structure of American Industry, rev. ed., Macmillan, New York, 1954.

As investment income each year was not available as a separate item, it was included in the Eddy Match net profit figures. In those years when it could be distinguished, the ratios differed by two to four per cent. Compared with the 14.7 to 20.0 per cent realised by the major successors to the American Tobacco Trust over a more extended time period, during the first twelve years Eddy Match realised a return after taxes of 10.9 per cent on its net tangible assets, which were highly inflated. Removal of the "water" claimed by the Department of National Revenue presents a return for 1928-1939 of 15.3 per cent, which is remarkably close to the experience of two of the three American companies. Although the

next period shows a significant decline for the American companies, Eddy Match maintained the same rate of return in the face of higher wartime taxes. It must be noted that during the first period Eddy Match was engaged in market struggles pursuant to the elimination of Columbia Match, Canada Match and Federal Match. The company enjoyed a wooden match monopoly during World War II.

The ratios involving net profit before taxes reveal more clearly the extent of Eddy's monopoly power. On the basis of the inflated asset values the company's return rose from 12.5 per cent to 21.0 per cent of net tangible assets, whereas the American companies experienced a decline. The 29.2 per cent wartime return for Eddy Match was significantly higher than the American experience.

That the market strategy of Eddy Match, effective as it was in eliminating rivals, did not seriously erode its profit margins is shown by Table 3, which examines ratios of net profit before taxes to net sales excluding excise taxes. Compared with the American tobacco companies averaging from 21.2 to 27.0 per cent during the period 1931-1941, Eddy Match averaged 36.3 per cent during the depression period 1930-1934. That was also a time when Eddy was in combat with Columbia Match and Canada Match. High wartime demand and a complete monopoly of Canadian wooden match output raised the Eddy margin to 43.1 per cent for the years 1942-1946 in contrast with the decline experienced by the American companies.

Table 3. A comparison of ratios of profits to sales for Eddy Match and American tobacco companies.

| | Eddy Match Company | Tobacco Trust successor companies |
|---|---|---|
| Net profit before taxes as a percentage of sales: | | |
| 1930 | 32.1 | |
| 1931 | 29.7 | |
| 1932 | 36.8 | |
| 1933 | 39.4 | |
| 1934 | 43.5 | |
| 1930-1934 | 36.3 | |
| 1931-1941 | | 21.2-27.0 |
| 1942 | 45.0 | |
| 1943 | 45.9 | |
| 1944 | 44.9 | |
| 1945 | 41.5 | |
| 1946 | 38.0 | |
| 1942-1946 | 43.1 | |
| 1942-1947 | | 17.9-18.5 |
| Net profit after taxes as a percentage of sales: | | |
| 1930-1934 | 32.2 | |
| 1942-1946 | 21.0 | |
| Net profit after taxes, excluding investment income, as a percentage of sales: | | |
| 1942-1946 | 18.4 | |

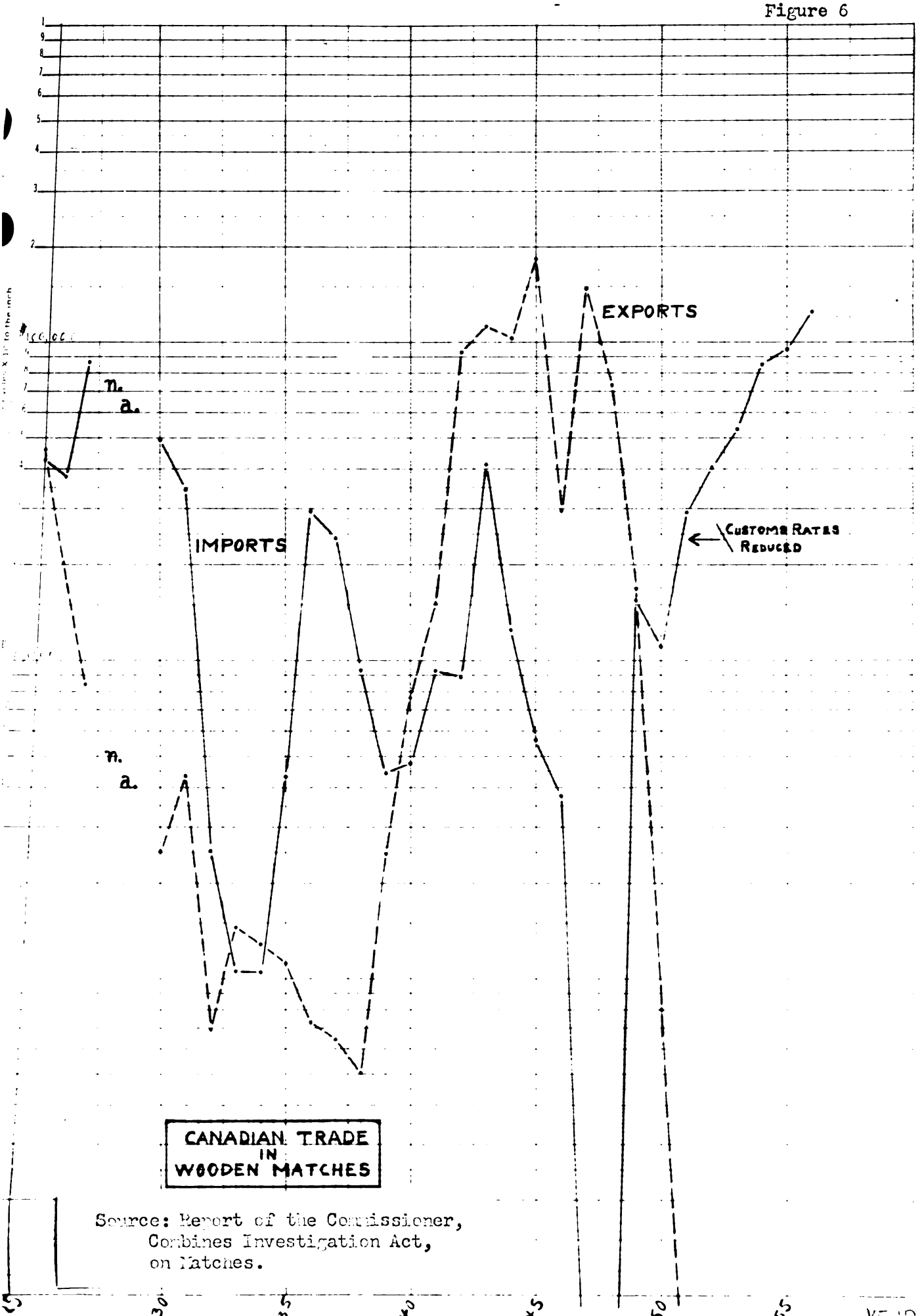
Source: see Table 2. Except where noted the Canadian figures of profit include investment income, which is excluded from the American profit figures.

An addendum to the details already examined of the unrelenting aggression of the Eddy Match Company against entrants into the Canadian wooden match industry concerns advertising. It appears as a minor weapon. Eddy Match has devoted its rather considerable efforts and talents to sealing off the channels of

distribution from rival brands by the enticement of excessively handsome jobber profits as a reward for exclusive dealing. The company apparently estimated it was futile to attempt to build up strong brand loyalty to induce consumers to buy major Eddy brands at "regular" prices instead of lower-priced rival brands. Rather than choosing extensive advertising as a means of diverting consumer buying away from the cheaper brands, Eddy used its market power to curtail the actual availability of such matches. Removing the lower-priced alternative was apparently considered more effective. Advertising allowances to "loyal" distributors have been a relatively minor element in company strategy. An example from the campaign to eliminate Western Match will illustrate the place of advertising. In 1948, for two Eddy-controlled companies, Canada Match and Federal Match, labour and materials accounted for 80 to 85 per cent of the cost of sales. Selling expenses amounted to nine or ten per cent with more than 60 per cent going to commissions for direct selling efforts. The advertising expenditure for Canada Match in that year was fifty-seven dollars. That is trivial for a net sales total of $139,106.

The minor part played by foreign trade in the Canadian match business is not immutable. The wide fluctuations in the past with respect to both imports and exports (see figure 6) may be in part explained by the strategy of the various members of the world match triad. Since the tariff reduction following the combines conviction of Eddy Match and its associated companies, imports have increased steadily. Although many of the imported

Figure 6




Source: Report of the Commissioner, Combines Investigation Act, on Matches.

matches are "luxury" types and total imports remain a small part of the total Canadian consumption, they do nevertheless represent a growing element of competitiveness. Increases in Canadian match exports would offset any unfavourable impact on employment in the industry arising from the expansion of imports. The 1946 United States consent decree signed by Diamond Match and others enjoined Diamond from voting its Eddy Match shares. The American company has since sold its interest in Eddy Match by a public offering of the stock. That may mean that the United States market is a more likely goal for Canadian match exports. Aside from international tax differences and any continuing agreement regarding market allocation, British Match is likely to be interested in any sales expansion of Eddy that is not directly competitive with sales of the British company and its other subsidiaries. Such expansion of output would use up some of the excess capacity in the Canadian industry. A recent sharp decline in exports indicates the difficulty of even maintaining foreign sales of Canadian output.

Three plants operated by Eddy Match produced the Canadian wooden match output. Until there has been a considerable expansion of the domestic market and/or a significant increase in exports, three firms would appear to represent thefeasible economic maximum for the industry, if not in fact more than the maximum in the light of existing excess capacity. Such an oligopoly could not be relied upon to bring about lower prices of a lasting character. Except perhaps for sporadic price-cutting, which might well lead to a reduction in the number of firms, intelligent behaviour without

collusion on the part of oligopolists will accomplish a monopoly price and output level. There would be in addition the likelihood of large advertising expenditures, which have so far not plagued the industry. That is a wasteful means of limiting profits. Upon the basis of the judicial condemnation of most of the methods used by Eddy Match to gain and retain business, members of an oligopoly in the match industry would be impelled to engage in large-scale advertising because of legal considerations, if not also economic.

Relative ease of entry has been characteristic of the match industry. That and excessive profits within the industry have led to a procession of entrants. The rather quick elimination of each new entrant has left the excessive profits only slightly disturbed. If the combines conviction and penalty have made Eddy Match more diffident about eliminating future rivals, it might seem reasonable to expect an increase in the number of wooden match manufacturers in the country. It is not, however, clear that past entrants were induced simply by the expectation of large annual profits. Except for Columbia Match, those who so far have completed the cycle of entry and exist have realised an annual net profit and a capitalised share of expected future profits. The latter has taken the form of excessive payments for their match-making properties. Eddy Match may be deterred by its conviction from continuing that policy in the future. If the expected annual monopoly profit alone were insufficient to induce entry, new wooden match firms would not be probable. The dissolution of Eddy Match would seem the most feasible way to change the industry from monopoly to

oligopoly. It is not a recommended line of action. The possible gain in progressive stimulus from the rivalry of several firms in an oligopoly is not sufficiently compelling to justify the change, which would involve the risk of a more wasteful allocation of resources in expanded advertising expenditures.

Five plants and five firms create the Canadian book match output. Eddy Match is dominant by reason of its share of the book match market and of it offering the only complete line of wooden and book matches. Evidence indicates that its price leadership has been accepted by the other book match manufacturers. Eddy Match has apparently withheld from this field the aggressive tactics it has employed against every rival in the wooden match field. Although only a further offence would open the legal avenue to divestiture, the divestment of the Eddy Match book match facilities at Berthierville would introduce important change in the competitive structure of that field with no significant cost changes. There would be a curtailment of the monopoly power enjoyed by Eddy Match in its dealing with the distributive trades. A dominant firm would no longer set wooden match prices and dominate book match pricing. Further expansion of the book match share of Canadian match sales would place additional restraint on the exercise of monopoly power in the field of wooden matches. The present legal barrier to such a development being forced upon Eddy Match is a difficulty. In addition to lessening the monopoly power of Eddy Match without incurring other economic disadvantages, the removal of Eddy Match from the book match field would separate to some extent the pricing

policies concerning the two kinds of matches. Not introducing more brands would avoid adding to the inventory problems in distribution.

There remains to be considered a matter of income distribution. Appropriations of monopoly revenue by the original creators of Eddy Match cannot now be recalled. Similar appropriations by those eliminated from the wooden match industry by Eddy have also been incorporated in the present investment commitment of Eddy. It continues to realise unusually high profits. As there is diffused ownership of only a small part of the stock of Eddy Match, the company's monopoly gain furthers income concentration. The bulk of the dividend payments of Eddy accrues to British Match, an outside monopoly owner. That vested interest in monopoly profit is more readily attacked than would be a similar interest vested in many small domestic shareholders. To limit future profits and not to distort match production, a suitable device would be a fixed tax on the company to divert to public use some measure of the excessive monopoly earnings. It would amount to a special government levy on match consumers. It is more tenable to have them assume an extra share of their own government's activities than to have them contribute unduly to the income of the British creator of the Canadian monopoly.

The operation of the wooden match field by a crown corporation as a government monopoly would permit passing on the elimination of monopoly revenue to the consumers of matches in the form of lower prices. The special levy on match consumers, which

would remain if a private monopoly continued with its profit lowered by a lump sum tax, would be avoided. The economic soundness of such a programme adds little to the slight probability of political acceptance. That monopoly profits have been too large for too long has not proven to be a vote-catching proposition.

Assuming a surmounting of the present legal barriers to the Berthierville plant divestiture and to the discriminatory taxing of a monopoly after a combines conviction, the economic performance of the Canadian match industry might well be improved by the separation of wooden match and book match production and by a fiscal reduction in the monopoly profit of the wooden match industry. Any future introduction of wide-scale advertising, with its misallocation of resources, would call for additional measures to prevent a deterioration in the economic performance of the match industry.

Appendix A

## World Match Data
(millions of matches)

Annual consumption: 1955 -- 5,000,000
1927 -- 3,228,425

Swedish Match Company (about 100 factories in more than 30 nations)
1938 Output: in Sweden -- 90,000
elsewhere --360,000
1931 Control of 75 per cent of the world's match trade.
1932 Output had declined to 50 per cent of 1929 output.

Sweden:

| Year | Value of Output (million kronor) | Quantity Exported |
|---|---|---|
| 1956 | -- | 80,000 |
| 1955 | 44 | 70,000 |
| 1954 | 45 | 64,800 |
| 1953 | 46 | 69,400 |
| 1952 | 56 | 75,500 |
| 1951 | 56 | 82,800 |
| 1950 | 39 | 78,800 |
| 1947 | 24 | -- |
| 1942 | 7 | -- |
| 1937 | 16 | -- |
| 1932 | 21 | -- |
| 1929 | 41 | -- |
| 1927 | 37 | -- |

Leading exporting nations: (1950 quantities)

| | |
|---|---|
| Sweden -- 78,800 | U.K. and Overseas, Indonesia, France Overseas. |
| Belgium -- 27,900 | U.K., Venezuela, Belgian Congo |
| Austria -- 20,750 | Pakistan, Peru, France Overseas. |
| Finland -- 10,750 | France and Overseas, U.S., Saudi Arabia, U.K. |
| Italy -- 8,800 | Venezuela, U.K., Pakistan, France. |

Japanese exports: 1923 -- 290,000; 1922 -- 240,000.
(80 per cent controlled by Swedish Match)

Potential exporters: Czechoslovakia and Russia, and the eastern European nations where Swedish Match once controlled match factories -- Bulgaria, Rumania, Jugoslavia, Hungary, Poland, Lithuania, Latvia, and Estonia.

Netherlands exporting potential -- 4,325.

## Appendix B

### The United States
(millions of matches)

Annual consumption:

| | |
|---|---|
| 1955 | -- 500,000 |
| 1935 | -- 404,000 |
| 1927 | -- 365,000 |

Annual production:

| Year | Total | Percentage in Book matches |
|---|---|---|
| 1954 | 433,160 | 65.8 |
| 1950 | 454,596 | 52.7 |
| 1947 | 496,438 | 47.1 |
| 1939 | 419,707 | -- |
| 1933 | 371,119 | 16.5 |
| 1932 | 306,724 | 18.8 |
| 1930 | 249,631 | 20.6 |
| 1929 | 310,653 | 15.6 |
| 1927 | 300,000 | -- |

Annual imports of safety matches:

| | | Percentage from: | | | Percentage of |
|---|---|---|---|---|---|
| Year | Total | Sweden | Japan | Russia | U.S. Output |
| 1935 | 13,840 | -- | -- | 44 | -- |
| 1933 | 22,712 | 15 | 70 | 13 | 6.1 |
| 1932 | 18,484 | 53 | 8 | 19 | 6.0 |
| 1931 | 23,011 | -- | -- | -- | 7.4 |
| 1930 | 29,239 | -- | -- | -- | 11.7 |
| 1929 | 76,151x | -- | -- | -- | 24.5 |

x in anticipation of a tariff increase.

Average annual value of imports:

| | |
|---|---|
| 1936-40 | -- $270,000. |
| 1931-35 | -- 860,000. |

Number of establishments:

| | |
|---|---|
| 1954 | -- 20 |
| 1931 | -- 19 |
| 1929 | -- 21 |
| 1927 | -- 25 |

Diamond Match Company: 1954 sales of $21,200,000 amounted to 35 per cent of the United States match business. Five plants with total floor space of 1,660,000 square feet, made up of areas in separate plants of 600,000 sq. ft., 330,000 sq. ft., 320,000 sq. ft., 235,000 sq. ft. and 175,000 sq. ft.

In 1935 it was reported that the company's "plants alone are said to be fully capable of supplying all domestic needs."

Appendix C

The United Kingdom
(millions of matches)

Table 1

Annual consumption:

| Year | Grand Total | Percentage of Grand Total: HOME PRODUCED Total | By British Match Group | IMPORTED Total | By Swedish Match Group |
|---|---|---|---|---|---|
| 1955 | 126,000 | 66.8 | -- | 33.2 | -- |
| 1954 | 126,100 | 68.0 | -- | 32.0 | -- |
| 1953 | 126,290 | 72.6 | -- | 27.4 | -- |
| 1952 | 123,500 | 78.0 | -- | 22.0 | -- |
| 1951 | 137,500 | 65.7 | 63.2 | 34.3 | 28.5 |
| 1950 | 131,300 | 67.2 | 64.8 | 32.8 | 29.2 |
| 1949 | 138,700 | 69.7 | 66.1 | 30.3 | 25.6 |
| 1948 | 124,000 | 72.7 | 68.9 | 27.3 | 26.9 |
| 1947 | 118,000 | 75.3 | 71.7 | 24.7 | 22.3 |
| 1946 | 102,300 | 93.6 | 90.4 | 6.4 | 6.4 |
| 1945 | 84,800 | 94.7 | 91.4 | 5.3 | 5.3 |
| 1944 | 85,200 | 98.5 | 95.1 | 1.5 | 1.5 |
| 1943 | 84,940 | 98.0 | 94.2 | 2.0 | 2.0 |
| 1942 | 91,200 | 92.9 | 89.2 | 7.1 | 7.1 |
| 1941 | 97,300 | 86.8 | 83.6 | 13.2 | 13.2 |
| 1940 | 126,900 | 70.1 | 67.3 | 29.9 | 25.4 |
| 1939 | 160,400 | 56.1 | 53.4 | 43.9 | 38.0 |
| 1938 | 140,300 | 55.9 | 53.6 | 44.1 | 33.5 |
| 1937 | 142,800 | 54.0 | 49.9 | 46.0 | 36.3 |
| 1936 | 142,800 | 54.6 | 51.4 | 45.4 | 35.7 |
| 1935 | 139,200 | 56.1 | 53.1 | 43.9 | 33.1 |
| 1934 | 135,600 | 57.3 | 54.2 | 42.7 | 30.0 |
| 1933 | 132,900 | 57.6 | 55.0 | 42.4 | 31.0 |
| 1932 | 130,300 | 60.0 | 56.8 | 40.0 | 31.6 |
| 1931 | 142,100 | 53.9 | 51.9 | 46.1 | 37.5 |
| 1930 | 141,600 | 53.4 | 52.7 | 46.6 | 38.2 |
| 1929 | 140,100 | 52.6 | 51.7 | 47.4 | 37.4 |
| 1928 | 135,900 | 51.1 | 50.5 | 48.9 | 43.0 |
| 1927 | 141,500 | 42.0 | -- | 58.0 | -- |
| 1926 | --- | 50.0 | -- | 50.0 | -- |
| 1925 | --- | 54.0 | -- | 46.0 | -- |
| 1924 | --- | 58.0 | -- | 42.0 | -- |
| 1923 | --- | 61.0 | -- | 39.0 | -- |
| 1922 | --- | 67.0 | -- | 33.0 | -- |
| 1921 | --- | 72.0 | -- | 28.0 | -- |
| 1920 | --- | 29.0 | -- | 31.0 | -- |
| 1919 | --- | 88.0 | -- | 12.0 | -- |
| 1918* | --- | 99.0 | -- | 1.0 | -- |
| 1917* | --- | 65.0 | -- | 35.0 | -- |

* United Kingdom production increased 86.5 per cent from 1917 to 1918.

Table 2

Origin of match imports

| Country | 1951 | 1913 |
|---|---|---|
| Sweden | 17,900 | 38,900 |
| Belgium | 15,400 | 20,200 |
| Norway | 4,500 | 5,000 |
| Italy | 1,800 | -- |
| Finland | 500 | -- |
| Netherlands | 250 | 3,600 |
| Austria | 150 | -- |
| (Austria-Hungary) | -- | 1,800 |
| Denmark | -- | 400 |
| Latvia | -- | 2,800 |
| Czechoslovakia | 3,100 | -- |
| Russia | 2,200 | -- |
| Poland | 1,400 | -- |
| Total | 47,200 | 72,700 |

\- - - - -

Number of establishments in 1952

| | |
|---|---|
| British Match group | 9x |
| North of England Match Company | 1 |
| Anglia Match Company | 1 |
| Magnet Match Works | 1 |

x one closed in 1955 because of growing foreign competition.

The annual Eddy Match dividend has accounted for 10 to 15 per cent of the annual income of British Match.

Prior to World War II, which ended Russian imports, matches imported from Russia amounted to from 3.3 to 11.5 per cent of the United Kingdom market.

Since World War II:

| Year | Iron Curtain Countries | Russia only |
|---|---|---|
| 1955 | 7,000 | -- |
| 1954 | 6,500 | -- |
| 1953 | 5,700 | -- |
| 1951 | -- | 2,200 |
| 1950 | -- | 2,800 |
| 1947 | -- | 100 |

Appendix D

Canada

Table 1

| Year | No. of Plants | Match Production Sales Value at Factory $ | Wooden Match Imports $ | Chief Sources | Wooden Match Exports $ | Chief Markets |
|---|---|---|---|---|---|---|
| 1957 | 8 | --- | --- | --- | 0 | --- |
| 1956 | 7 | --- | 125,115 | US UK It | 13 | US only |
| 1955 | 7 | 4,285,000 | 95,406 | US Sw It | 0 | --- |
| 1954 | 7 | 4,767,115 | 85,705 | US Sw UK | 0 | --- |
| 1953 | 7 | 4,795,051 | 53,651 | Sw US No | 0 | --- |
| 1952 | 7 | 4,776,896 | 40,073 | Sw US No | 0 | --- |
| 1951 | 7 | 4,231,000 | 29,236 | Sw only | 0 | --- |
| 1950 | 7 | 3,655,875 | 11,093 | Sw US It | 800 | PM only |
| 1949 | 7 | 4,078,662 | 15,472 | Sw It US | 16,981 | Ne NZ PM |
| 1948 | 10 | 4,160,395 | 0 | --- | 73,729 | Ne NZ PM |
| 1947 | 10 | 4,027,846 | 54 | US only | 148,769 | Ne NZ BM |
| 1946 | 10 | 3,440,665 | 3,750 | US UK | 29,788 | Ne It PM |
| 1945 | 7 | 3,050,771 | 5,629 | US only | 183,873 | Ne Eg Ce |
| 1944 | 7 | 2,619,234 | 12,533 | US only | 100,342 | Ne It Ce |
| 1943 | 7 | 2,420,973 | 41,444 | --- | 112,180 | --- |
| 1942 | 7 | 2,478,318 | 8,846 | --- | 93,875 | --- |
| 1941 | 7 | 2,168,859 | 9,322 | --- | 15,026 | --- |
| 1940 | 7 | 1,842,194 | 4,769 | --- | 7,683 | --- |
| 1939 | 7 | 1,894,768 | 4,440 | US HK Ru | 2,491 | PM Ba Ne |
| 1938 | 6 | 1,688,229 | 9,378 | US Ja Ru | 508 | PM Ba UK |
| 1937 | 5 | 1,949,369 | 24,074 | Ja US HK | 644 | PM Ba Jm |
| 1936 | 5 | 1,491,935 | 29,491 | US Ja HK | 733 | PM US Ba |
| 1935 | 4 | 1,516,898 | 4,312 | US HK Ne | 1,121 | PM Ba Ne |
| 1934 | 4 | 1,605,204 | 1,053 | HK US UK | 1,296 | Ba PM Ne |
| 1933 | 4 | 1,613,367 | 1,066 | US HK Ne | 1,460 | PM Ba |
| 1932 | 4 | 1,212,019 | 2,559 | US Ja Ge | 692 | PM Ba Ne |
| 1931 | 4 | 2,073,726 | 34,407 | US UK Ja | 4,365 | UK PM Ba |
| 1930 | 3 | 1,645,545 | 49,661 | US UK Ja | 2,529 | PM BG Ba |
| 1927 | 3 | 1,874,707 | 86,463 | Sw Ja Be | 8,410 | US PM Ne |
| 1926 | 3 | 1,943,795 | 37,861 | Sw US Ja | 20,254 | US Ne BG |
| 1925 | 3 | 2,054,640 | 42,847 | Sw US Ja | 46,024 | US BG Ne |
| 1922 | 3 | 2,923,998 | --- | --- | --- | --- |
| 1921 | 2 | --- | --- | --- | --- | --- |
| 1901 | 5 | 312,655 | --- | --- | --- | --- |
| 1891 | 12 | 434,953 | --- | --- | --- | --- |
| 1881 | 22 | 511,250 | --- | --- | --- | --- |
| 1871 | 24 | 229,137 | --- | --- | --- | --- |

Abbreviations: Ba-Barbados, Be-Belgium, BG-Brit. Guiana, BM-Brit. Malaya, Ce-Ceylon, Eg-Egypt, Ge-Germany, HK-Hong Kong, It-Italy, Ja-Japan, Jm-Jamaica, Ne-Newfoundland, No-Norway, NZ-New Zealand, PM-St. Pierre and Miquelon; Ru-Russia, Sw-Sweden, UK-United Kingdom, US-United States.

Table 2
(millions of matches)

| Year Fiscal Mar.31 1923-39 Calendar 1940-55 | Total Canadian Output | Percentage Share of Total Output: E.B. Eddy | Canadian Match | Match Co. World Match | Names of Independents |
|---|---|---|---|---|---|
| 1923 | 26,768 | 76.31 | 16.43 | 7.10 | |
| 1924 | 26,021 | 73.89 | 17.32 | 8.76 | |
| 1925 | 24,039 | 63.21 | 24.13 | 12.66 | |
| 1926 | 21,920 | 43.87 | 37.95 | 18.18 | |
| 1927 | 28,747 | 43.52 | 41.44 | 15.03 | Aurora |
| 1928 | 27,318 | 40.94 | 39.81 | 19.25 | " |
| | | Eddy Match Company (Subsidiaries and Associates) | | | |
| 1929 | 20,032 | | 99.65 | | " shut |
| 1930 | 23,927 | | 92.54 | | Columbia |
| 1931 | 24,510 | | 86.64 | | " |
| 1932 | 25,993 | | 82.17 | | " Canada |
| 1933 | 22,132 | | 90.73 | | " |
| 1934 | 22,299 | | 90.71 | | " |
| 1935 | 19,428 | | 88.93 | | " |
| 1936 | 20,892 | | 86.46 | | " |
| 1937 | 19,949 | | 96.58 | | Federal |
| 1938 | 21,461 | | 91.97 | | " Book Match |
| 1939 | 23,042 | | 89.22 | | " Strike-Rite |
| 1940 | 24,250 | (approx.) | 98.00 | (approx.) | Book M. " |
| 1941 | 24,070 | " | 96.00 | " | " " |
| 1942 | 30,010 | " | 93.00 | " | B M S-R |
| 1943 | 28,740 | " | 94.00 | " | " " |
| 1944 | 29,030 | " | 91.00 | " | " " |
| 1945 | 34,600 | " | 90.00 | " | " " |
| 1946 | 37,560 | " | 92.00 | " | " " (Western |
| | | | | | (Premier |
| 1947 | 40,260 | " | 72.00 | " | " " Pr West. |
| 1948 | 34,270 | " | n. a. | | " " " " |
| 1949 | 36,800 | " | n. a. | | |
| 1950 | 35,370 | " | 88.00 | (approx.) | " " " |
| 1951 | 35,530 | " | 88.00 | " | " " " |
| 1952 | 35,590 | " | 84.00 | " | " " " |
| 1953 | 36,140 | " | 83.00 | " | " " " |
| 1954 | 35,100 | " | 84.00 | " | " " " |
| 1955 | 31,590 | " | 82.00 | " | " " " |
| 1956 | n. a. | | n. a. | | " " " |
| 1957 | n. a. | | n. a. | | " " " Bean |

In the production of wooden matches the Eddy Match group had an absolute monopoly from the acquisition of Federal Match in 1940 until 1946, when Western Match began operations. Since the closing down of Western in 1949 the Eddy Match group has had an absolute monopoly of wooden match manufacture in Canada. Four firms compete with Eddy in producing book matches.

Table 3

Price Per Case* of Household Matches

| Date | Wholesale | Excise and Sales Taxes | Manufacturer's Net |
|---|---|---|---|
| | $ | $ | $ |
| July 1927 | 8.00 | 4.63 | 3.37 |
| Oct. 1927 | 9.06 | 4.67 | 4.39 |
| Jan. 1928 | 10.11 | 4.72 | 5.39 |
| Feb. 1928 | 10.11 | 4.62 | 5.49 |
| Mar. 1929 | 10.11 | 4.52 | 5.59 |
| May 1930 | 10.01 | 4.42 | 5.59 |
| June 1931 | 10.32 | 4.73 | 5.59 |
| Apr. 1932 | 10.54 | 4.94 | 5.60 |
| Apr. 1934 | 8.68 | 3.73 | 4.95 |
| May 1936 | 8.87 | 3.92 | 4.95 |
| June 1940 | 10.17 | 5.10 | 5.07 |
| July 1941 | 10.50 | 5.13 | 5.37 |
| Feb. 1948 | 11.50 | 5.17 | 6.33 |
| Apr. 1949 | 8.16 | 1.25 | 6.91 |
| July 1950 | 8.17 | 1.25 | 6.92 |
| Sep. 1950 | 8.52 | 1.60 | 6.92 |
| Jan. 1951 | 9.40 | 1.86 | 7.64 |
| Apr. 1951 | 10.32 | 2.68 | 7.64 |
| Aug. 1951 | 10.78 | 2.79 | 7.99 |
| Apr. 1952 | 10.42 | 2.08 | 8.34 |
| Apr. 1954 | 10.42 | 1.73 | 8.69 |
| Jan. 1956 | 9.84 | 1.64 | 8.20 |
| May 1956 | 10.36 | 1.73 | 8.63 |
| May 1957 | 10.92 | 1.82 | 9.10 |

* From 1922 until 1934 household matches were generally sold in boxes containing 400 matches. A box containing 300 matches has been used from 1934 until the present time. Both sizes have been packed 144 boxes to the case.

| | Customs Rates (%) | | |
|---|---|---|---|
| | British Preferential | Most Favoured Nation | General |
| 1951: | | | |
| paperboard, paper matches | 17 1/2 | 22 1/2 | 35 |
| wooden matches | 17 1/2 | 20 | 25 |
| 1952: | | | |
| paperboard for matches | 10 | 15 | 35 |
| paper matches | 7 1/2 | 15 | 35 |
| wooden matches | 7 1/2 | 10 | 25 |

Table 4

Net Profits before Taxes, 1928-1947
(thousands of dollars)

| Year Ended Dec. 31* | Eddy Match | Canada Match* | Commonwealth Match | Federal Match |
|---|---|---|---|---|
| 1928 | 485.9 | | | |
| 1929 | 677.2 | | | |
| 1930 | 782.6 | | | |
| 1931 | 709.5 | | | |
| 1932 | 636.9 | (1.9) Loss | | |
| 1933 | 736.8 | 8.3 | 25.4 | |
| 1934 | 756.7 | 19.0 | 22.8 | |
| 1935 | 768.7 | 12.3 | 22.1 | |
| 1936 | --- | 8.7 | -- | |
| 1936 | 816.0 | 15.9 | 29.9 | |
| 1937 | 817.0 | 40.4 | 37.5 | |
| 1938 | 656.3 | 24.5 | 47.8 | |
| 1939 | 709.3 | 26.1 | 45.9 | |
| 1940 | 867.2 | 33.0 | 47.7 | 16.0 |
| 1941 | 1,034.2 | 41.8 | 56.2 | 28.3 |
| 1942 | 1,322.8 | 48.5 | 55.4 | 29.2 |
| 1943 | 1,440.3 | 48.9 | 64.2 | 33.4 |
| 1944 | 1,421.1 | 53.6 | 63.7 | 38.3 |
| 1945 | 1,463.1 | 50.0 | 59.4 | 34.0 |
| 1946 | 1,412.3 | 48.9 | 54.7 | 32.5 |
| 1947 | 928.7 | 26.7 | 34.3 | 19.2 |

* Before Eddy Match acquired complete control of Canada Match in 1936, the latter company's fiscal year ended January 31.

Table 5

Net Sales of Eddy Match Company,
Excluding Excise Taxes

| Year | Sales |
|---|---|
| 1930 | $2,440,140 |
| 1931 | 2,389,730 |
| 1932 | 1,729,626 |
| 1933 | 1,869,184 |
| 1934 | 1,740,101 |
| 1942 | 2,938,313 |
| 1943 | 3,139,150 |
| 1944 | 3,167,153 |
| 1945 | 3,519,669 |
| 1946 | 3,708,059 |

## Appendix E

The Combines Investigation Act as in force in 1950 at the end of the period covered by the charge in the Eddy Match case contained the following provisions applicable in that case:

Section 32.

(1) Every one is guilty of an indictable offence and liable to a penalty not exceeding ten thousand dollars or to two years imprisonment, or if a corporation to a penalty not exceeding twenty-five thousand dollars, who is a party or privy to or knowingly assists in the formation or operation of a combine within the meaning of this Act.

Section 2.

In this Act, unless the context otherwise requires,

(1) "Combine" means a combination having relation to any commodity which may be the subject of trade or commerce, of two or more persons by way of actual or tacit contract, agreement or arrangement having or designed to have the effect of

(a) limiting facilities for transporting, producing, manufacturing, supplying, storing or dealing, or
(b) preventing, limiting or lessening manufacture or production, or
(c) fixing a common price or a resale price, or a common rental, or a common cost of storage or transportation, or
(d) enhancing the price, rental or cost of article, rental, storage or transportation, or
(e) preventing or lessening competition in, or substantially controlling within any particular area or district or generally, production, manufacture, purchase, barter, sale, storage, transportation, insurance or supply, or
(f) otherwise restraining or injuring trade or commerce;

or a merger, trust or monopoly, which combination, merger, trust or monopoly has operated or is likely to operate to the detriment or against the interest of the public, whether consumers, producers or others.

(4) "Merger, trust or monopoly" means one or more persons

(b) who either substantially or completely control, throughout any particular area or district in Canada or throughout Canada the class or species of business in which he is or they are engaged;

and extends and applies only to the business of manufacturing, producing, transporting, purchasing, supplying, storing or dealing in commodities which may be the subject of trade or commerce;

Section 39A.

(1) In this section

(a) "agent of a participant" means a person who by a document admitted in evidence under this section appears to be or is otherwise proven to be an officer, agent, servant, employee or representative of a participant,
(b) "document" includes any document appearing to be a carbon, photographic or other copy of a document, and
(c) "participant" means any accused and any person who, although not accused, is alleged in the charge or indictment to have been a co-conspirator or otherwise party or privy to the offence charged.

(2) In a prosecution under section thirty-two of this Act or under section four hundred and ninety-eight or section four hundred and ninety-eight A of the Criminal Code:

(a) anything done, said or agreed upon by an agent of a participant shall prima facie be deemed to have been done, said or agreed upon, as the case may be, with the authority of that participant;
(b) a document written or received by an agent of a participant shall prima facie be deemed to have been written or received, as the case may be, with the authority of that participant; and
(c) a document proved to have been in the possession of a participant or on the premises used or occupied by a participant or in the possession of an agent of a participant shall be admitted in evidence without further proof thereof and shall be prima facie evidence:
  (i) that the participant had knowledge of the document and its contents;
  (ii) that anything recorded in or by the document as having been done, said or agreed upon by any participant or by an agent of a participant was done, said or agreed upon as recorded and, where anything is recorded in or by the document as having been done, said or agreed upon by an agent of a participant, that it was done, said or agreed upon with the authority of that participant;
  (iii) that the document, where it appears to have been written by any participant or by an agent of a participant, was so written and, where it appears to have been written by an agent of a participant, that it was written with the authority of that participant.

(Note: The trial judge ruled, and was upheld by the Court of Appeal, that section 39A, enacted in 1949 to overcome certain difficulties raised by the decision in the Dental Goods case, Rex v. Ash-Temple Co. et al. (1949) 93 C.C.C. 267, was procedural and therefore retroactive.)

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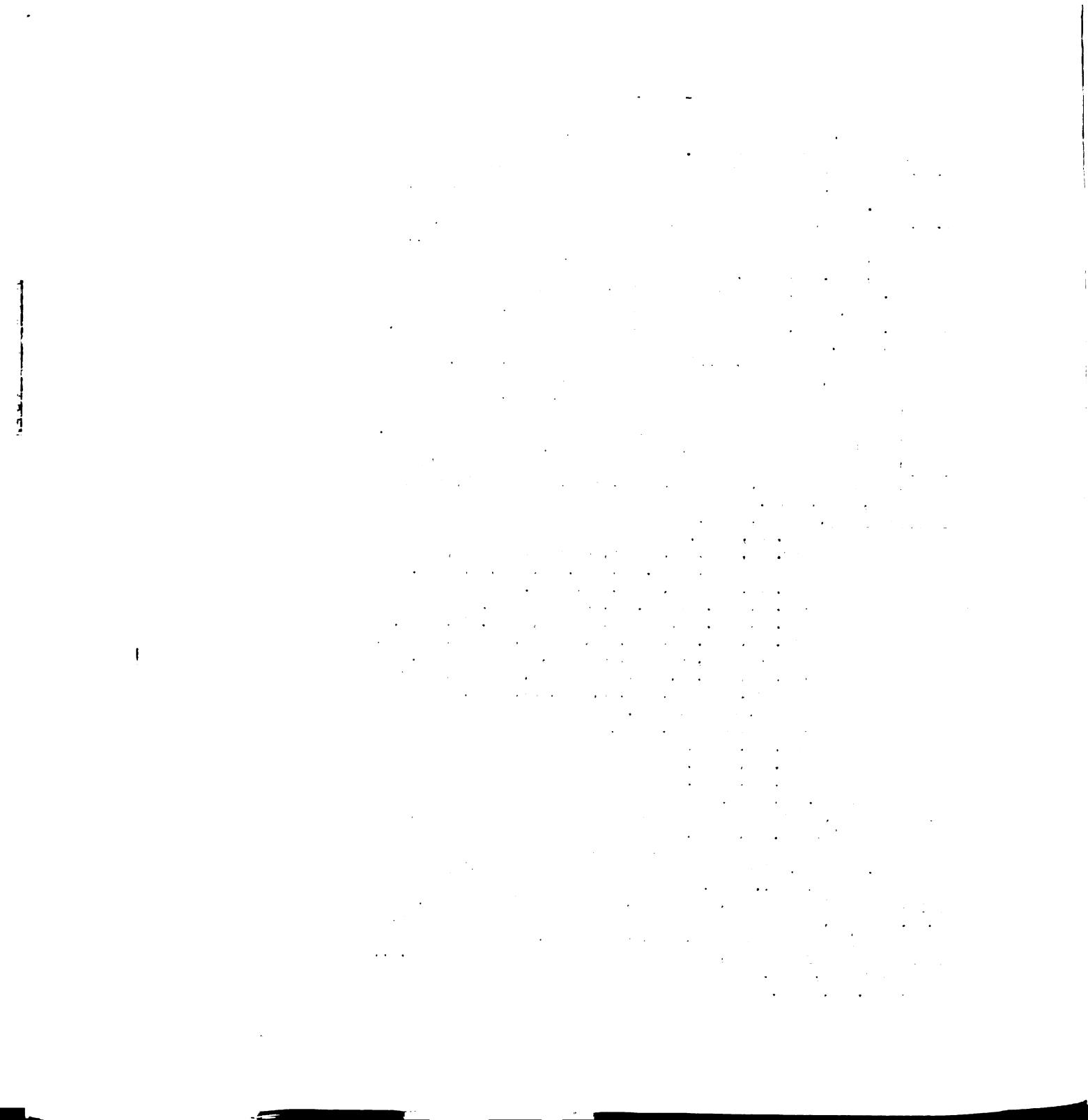

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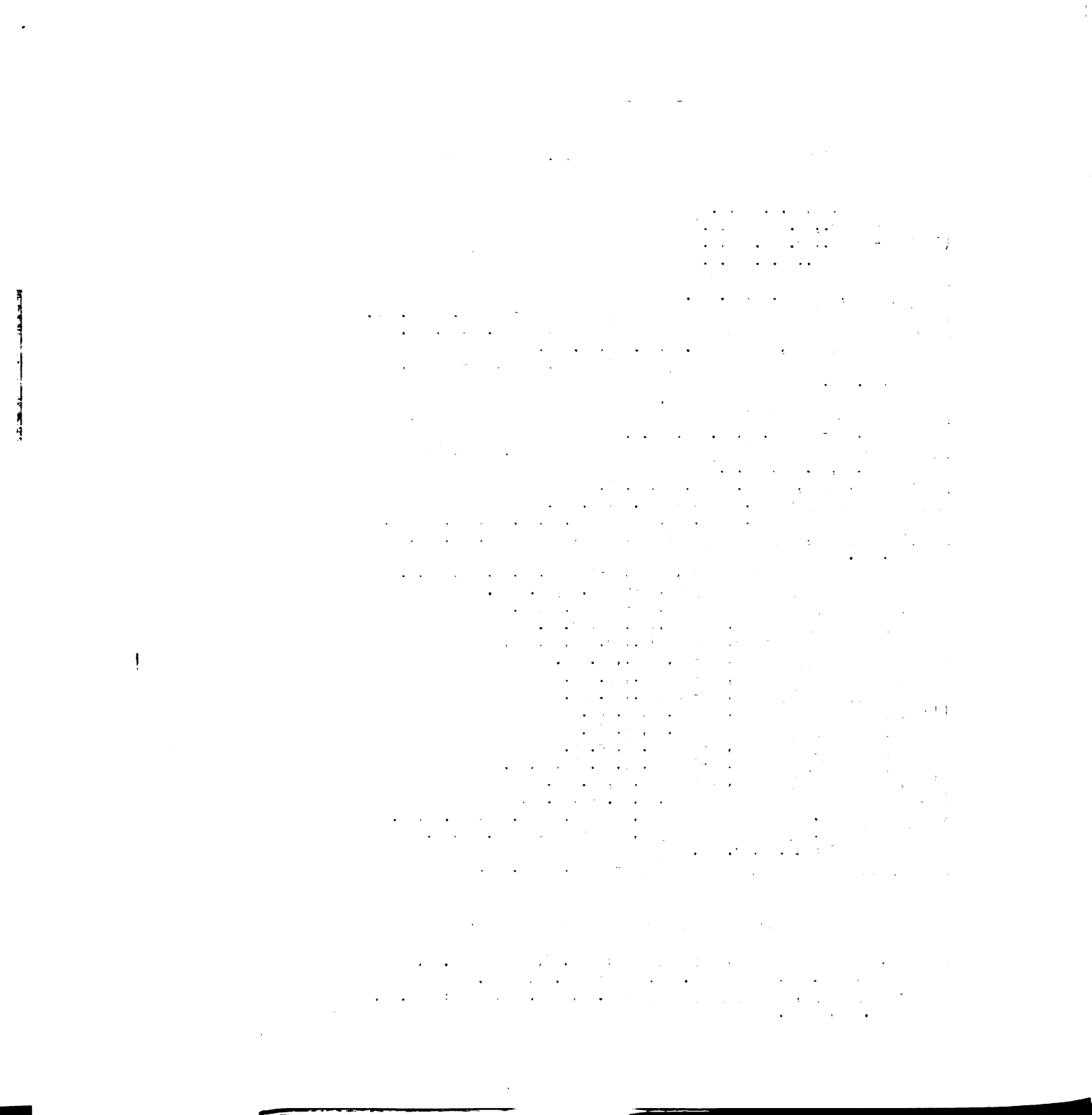

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