ONTARIO COURT OF JUSTICE (PROVINCIAL DIVISION)

HER MAJESTY THE QUEEN

against

MR. GAS LIMITED

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R E A S O N S F O R J U D G M E N T

GIVEN BY THE HONOURABLE JUDGE D.W. DEMPSEY
on August 11, 1995, at OTTAWA, Ontario

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CHARGE:

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APPEARANCES:

G. Assad, Esq. — Counsel for the Crown

R. Wakefield, Esq. — Counsel for the defendant

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Quebec, contrary to section 61(1)(a) of the Competition Act, as amended, and did thereby commit an indictable offence, contrary to section 61(9) of the said Act.

The accused corporation is also charged in the third count in the Information that between and including the 4th day of August, 1992 and the 5th day of August, 1992, at or near the Village of Limoges, in the East Region, in the Province of Ontario, being a person engaged in the business of supplying a product, to wit, retail gasoline, unlawfully did, directly or indirectly, by a threat, or any like means, attempt to influence upward or to discourage the reduction of the price at which Caltex Petroleum Inc., carrying on business as Caltex, supplied or offered to supply the said product on St. Joseph Boulevard, in the City of Gloucester, in the Province of Ontario, contrary to section 61(1)(a) of the Competition Act, as amended, and did thereby commit an indictable offence, contrary to section 61(9) of the said Act.

The accused, as well, is further charged on or about the 4th day of August, 1992, at or near the City of Cornwall, in the East Region, in the Province of Ontario, being a person engaged in the business of supplying a product, to wit, retail gasoline, unlawfully did, directly or indirectly, by a threat, or any like means, attempt to influence upward or to discourage the reduction of the price at which Seaway Gas and Fuel Limited, carrying on business as Seaway, supplied or offered to supply the said product at or near Cyrville Road, at or near the City of Gloucester, in the Province of Ontario, contrary to section 61(1)(a) of the Competition Act, as amended, and did thereby commit an indictable offence, contrary to section 61(9) of the said Act.

The accused is further charged with further offences as contained in counts five through ten in the Information, alleging similar types of offences as contained in count number three, except for the location and the individual corporation that it was dealing with. The

accused has elected to be tried by this Court.

At the commencement of the trial both the Crown and the accused agreed that in order to expedite the trial that agreed statements of fact would be filed. The said agreed statements of fact are Exhibits 1, 2, and 5 at trial. Exhibit 5 is the addendum to the agreed statement of facts.

It is agreed that in regards to the second count in the Information that the relevant time frame involved is the period from June 1st, 1988 to June 2nd, 1993, both inclusive.

The accused is a company incorporated under the Canada Business Corporations Act and has been engaged in the retailing of gasoline, mainly in Eastern Ontario, since 1972. It operates 71 service stations, six car washes and 25 convenience stores in Ontario and Quebec. It is considered as an independent, being one of 13 such independents in the Ottawa area, who have a total of 91 outlets and 32.5 percent of

the total gasoline sales.

In the Ottawa area there are also three major gas retailers as well as two regional majors, with a combined total of 149 outlets and sales accounting for 67.4 percent of the total gasoline sales.

Mr. Gas Limited does not operate a given outlet, but enters into service station operation contracts with individuals who are paid a commission based on the amount of gasoline sold at that location. It maintains the right to set pump prices. The accused has one affiliate company, being Mr. Gas Properties Incorporated, which owns the land that Mr. Gas Limited leases as service station sites.

During its day-to-day operation the accused has its operators prepare retail price surveys which contain the names of its competitors in each of its markets. The price surveys are used by the company to set retail prices.

The accused establishes a pricing policy for each of its stations. Competitors are identified according to the specific market in which they compete and the pricing policy for that competition is shown.

During the relevant time period certain pricing norms or standards, as they were referred to in the agreed statement of facts, were being followed in the Ottawa area. The basic convention was that independents would price four-tenths of a cent below majors, for the same type of product, and that self-serve was two-tenths of a cent less than full-service.

The agreed statement of facts as well indicates that the pricing policy of the accused is to set the highest possible price without being undersold by the competition and that while it is in the business to earn profit as an independent, it tries to price under the major oil company service stations. Its pricing philosophies will vary on the specific market, but its price will rise when one of the majors

move up.

It is agreed that the accused's product is gasoline, which is a homogeneous product not easily differentiated from another supplier's product and consequently convenience of location and the price of gasoline are their most critical competitive factors.

In addition, it is agreed that the accused as well as the entire retail petroleum industry are acutely price sensitive and must continuously monitor the retail gas price market.

While the accused, according to the agreed statement of facts, strives to gain a price advantage over retail outlets operated by the major oil companies, it is generally recognized that it would not attempt to undersell competing independent stations under normal market conditions.

The company's pricing standard is to match

prices posted by independent competitors during normal market conditions and in order to do so requires each of its service stations to survey retail prices in their own district and provide same to its head office weekly.

During periods of market instability, for example during a price war, the respective operators will sometimes be required to file price surveys daily, and on some occasions of extreme market instability, four to five times per day.

In periods of price decrease operators are naturally inclined to report price changes in order to remain competitive in their market and to protect their volume and commissions.

However, in periods of increasing prices and especially at the end of a price war, when prices are being restored to their original levels, there is a tendency acknowledged for operators to resist reporting price increases as they would rather keep their gas prices low

to give themselves a temporary price advantage and hopefully higher volume and higher commissions over their competitors with higher prices.

This practice of failing to notify head office of a competitor's price increase has led to a practice whereby the head office of independents in the retail petroleum industry, including the accused, notify competitors of their current retail prices and ascertain the competitor's current retail price.

Once competitors are advised that a price restoration is in progress it is hoped that these competitors will react and raise their retail price to the newly restored level.

In the agreed statement of facts Mr. Phillipe Gagnon, the president of Mr. Gas Limited, describes that if a price survey reveals that one competitor has moved up, as a rule, so will Mr. Gas. In areas where Mr. Gas is not a major player, they will not move first, but where it

has an important concentration of stations, it will in fact lead a price restoration.

A 24 hour period is usually allowed to monitor competitors following a price increase and during that time period Mr. Gas advises the head office of its competitors of the increase in price with the hope that any competitor lagging behind in restoring its price will raise its price. If the restoration attempt fails, Mr. Gas will lower its price to match the lagging competitor's price.

Mr. Gagnon admits that the practice of advising competitor's head office of an attempted price restoration has been going on for years as he describes the independent gas retail industry as a tight-knit family that follows certain industry norms. He indicates, as well, that it is generally recognized that communication of retail gas price information between members of the family is an industry norm.

The sales manager of the accused, through the

means of the agreed statement of fact, indicates that he, along with the pricing coordinator, are responsible for setting gasoline prices at the retail level. He confirms that during the course of a year some 4 to 5,000 gasoline price surveys are prepared and processed.

To confirm these surveys competitors are contacted approximately 100 times a year. The sales manager states that as part of his duties and functions he would meet with the competitors and speak to them about retail gas prices as well as other matters of concern in the retail petroleum industry.

It is generally recognized that calling the competitor's head office was a cheap, efficient, and accurate way to verify the competitor's price and to make competitors aware of Mr. Gas' current retail price, but not the only means to do so.

This practice developed out of the recognition

that service station operators had a clear self-interest in maintaining a lower retail price than their competitors. He also confirms that it is important for Mr. Gas to know whether or not a competitor's prices are being set out of ignorance of Mr. Gas' current retail price or out of a deliberate consideration for that price.

He admits that if his competitors did not have that information it is possible that any attempt by either Mr. Gas or other competitors to restore retail prices in certain markets could fail.

The pricing coordinator for the accused, in the agreed statement of facts, indicates that under the direction of the sales manager she orders the preparation of price surveys and she gathers information for and is responsible for all communications to and from management. During periods of instability in prices she may receive, on average, 100 phone calls a day, placing 50 calls herself to competitors with

respect to retail gasoline prices and local market conditions. She receives calls when prices are restoring or increasing in a particular market and Mr. Gas' prices have not gone up.

The purpose of these calls is to inform her of price increases in the market in case she is not aware of them. She recalls instances where a competitor would call her to inform her of a price increase before it was posted at the service station and while this was not a practice at Mr. Gas, she does admit informing a competitor of an increase in price ordered by the management of Mr. Gas but not yet posted by a Mr. Gas station operator.

During her calls to competitors, to make them aware of the current retail prices, the need to restore prices is frequently mentioned.

The agreed statement of facts, as well, refers to the evidence of the general manager of Mr. Gas who would state that during the

relevant time period he was in charge of the day-to-day operations of the company. In periods of price instability he acknowledges that there was numerous communications between his company and various competitors with respect to current gas retail prices as well as an exchange of price survey information with competing companies. The hope is that the competition will follow suit if Mr. Gas' retail gas prices are increased.

It was stressed that communications between head offices must take place for a price restoration to be successful, as normally only head office has the authority to set prices. The practice of communicating between head offices is one that has been going on for years and is almost an industry norm.

He explains, as well, that when one wishes to restore market prices, accurate, current price information is essential. The most reliable, accurate, and cheapest way to obtain that information, according to him, is to contact a

key figure in the market. He states that if a strong competitor is on side, the rest of the market will usually follow.

Through the agreed statement of facts, as well, evidence was led of the fact that area sales supervisors, both of Mr. Gas as well as their competitors would discuss current retail gas pricing as well as the situation in the industry. Evidence was led through the agreed statement of facts of the practices of competitors of the accused, who confirmed the practice of contacting each other to ascertain accurate, current retail gas prices and to inquire about price movement in a specific market area.

As indicated previously, the accused is facing nine charges under section 61 of the Competition Act. The alleged offences arise out of or as a result of actions taken by the accused following a reduction in the price of regular unleaded gas by two of its competitors, Caltex Petroleum, which will be here and after

referred to as "Caltex" and Seaway Gas and Fuel Limited, here and after referred to as "Seaway". The specific offences dealing with those two companies are contained in the last eight counts in the Information.

On or about August 4th of 1992, Caltex lowered its price at its station on St. Joseph Boulevard, Orleans, Ontario, from 55.9 cents per litre to 49.9 cents per litre. On the same day the evidence indicates that the accused reciprocated by authorizing an identical price drop at its retail station in Limoges, Ontario. It is agreed that the price reduction by Caltex, in Orleans, was hurting the accused in an area where it had several stations. In lieu of lowering its price in Orleans, it did so in Limoges, Ontario, where the son of the owner of Caltex operated a retail gas outlet.

It is admitted that the action taken by the accused was meant to send a message to Caltex that if it caused the accused to lose money in Orleans, that Mr. Gas could do the same in

Limoges. The accused's ultimate objective was to incite Caltex to restore prices in Orleans. On August 5th of 1992, the evidence indicates that Caltex raised its price to 53.9 cents per litre at its Orleans location.

The evidence, as agreed to as well, indicates that in the weeks previous to August 4th, 1992, Seaway had been following a pattern of dropping its price 0.1 or 0.2 cents per litre below its competitors in the Cyrville Road, Orleans, market.

On August 4th, 1992, Seaway lowered its price from 55.2 to 55.1 cents per litre. On the same day the accused, who also operates a station on the Cyrville Road, retaliated by lowering its price at its Cornwall outlet by the same 0.1 cent per litre and then proceeded to match Seaway's price at its Cyrville Road location.

The evidence indicates that in the Cornwall market Seaway operates several stations while the accused had only one.

On August 6th of 1992, when the accused was following a price restoration, which brought gas prices in its Cyrville Road market from 55.1 to 58.3 cents per litre, Seaway responded by dropping its prices in the same market to 53.8 cents per litre.

The action taken by the accused in dropping its price in Cornwall was meant to fight Seaway's low price on Cyrville Road and to send Seaway a message that Mr. Gas would lower its prices in Cornwall, where Seaway is strong, in response to its price policy on Cyrville Road. The accused's action was meant to encourage Seaway to restore gas prices on Cyrville Road. On August 10th, 1993, the evidence indicates that Seaway raised its price at its Cyrville Road station to 57.9 cents per litre.

In September of 1992, as well, the evidence indicates that when the accused dropped its self-service price in Orleans, in order to maintain its 0.2 cent per litre advantage over the Caltex full-service station on St. Joseph

Boulevard, in Orleans, Caltex responded on September 3rd, 1992, by dropping its price a full cent below the accused's price, to 54.7 cents per litre.

The evidence indicates, as well, that on the evening of September 3rd, 1992 it lowered its price in Orleans in order to maintain its 0.2 cents per litre advantage. In addition, the accused lowered its price at its Lincoln Heights station on Richmond Road, in Ottawa, to 54.7 cents per litre. Caltex operates a service station directly across from the accused's station on Richmond Road.

In the agreed statement of facts it is accepted that the price reduction at the accused's Lincoln Heights station resulted from Caltex lowering its price a full cent in the Orleans market. It is also agreed that at a meeting in Caltex's office representatives of the accused inquired why Caltex was not conceding the 0.2 cents per litre advantage to the accused's self-service stations, as dictated by industry

norms, which Mr. Gas indicated it would do.

As to count seven in the Information, it is agreed that from September 4th, 1992 to September 14th of the same year Seaway, during a period of price instability, began to lower its prices at its Cyrville Road location. On September 14th, 1992, Seaway lowered its price to 49.7 cents per litre against the accused's 52.9 cents at the same location.

On the same day the accused reciprocated by lowering its price at its Cornwall location to 49.7 cents per litre. It did so to again warn Seaway that if it lowered its price in the accused's market in Orleans, the accused would lower its price in Seaway's market in Cornwall. The accused's goal was to incite Seaway to restore prices on Cyrville Road.

Count eight in the Information again deals with the accused's actions taken as a result of actions taken by Caltex. In late August of 1992 Caltex, at its full-service location on

St. Joseph Boulevard, in Orleans, began to match the accused's price at its self-serve outlet situated across the street. It is agreed that accepted industry norms in the Ottawa retail market dictate that independent full-service stations should set its price 0.2 cents per litre above those charged by self-serve outlets.

Caltex continued to match the accused's price and the price fell below 50 cents per litre on September 15th of 1992. On that day the accused lowered its price at its Limoges district outlet from 52.5 cents per litre to 49.9, which was the prevailing price at that same time in the Orleans market.

It is agreed that the accused's price drop in Limoges was in response to the price war in Orleans with Caltex and that the accused wanted, as in the past, to send a message to Caltex to restore prices in Orleans.

Count nine in the Information deals with an

incident which began on January 3rd of 1993, when Caltex lowered its price at its St. Joseph Boulevard station in Orleans from 53.7 to 52.7 cents per litre.

On January 4th, 1993, the accused reciprocated by lowering its price at its location on Richmond Road from 55.4 to 53.9. The accused's Lincoln Heights station on Richmond Road is situated directly across from one apparently owned by the owner of Caltex. This reciprocal action was meant to incite Caltex to restore prices in the Orleans market. In fact, on January 6th of 1993, the evidence indicates that Caltex increased its price in Orleans to 53.7 cents per litre.

The following count in the Information deals with an incident where on January 5th of 1993 Seaway lowered its price at its Cyrville Road outlet from 53.9 to 49.9 cents per litre. On the morning of January 6th of 1993 the accused lowered its price at its Cornwall location to 49.9 cents per litre. The accused's action in

Cornwall was in response to Seaway's drop in price on Cyrville Road and was again meant to send Seaway a message to restore prices on the Cyrville Road market.

In addition to the agreed statement of facts that have been filed, evidence was received from Dr. George Lermer, Dean of the Faculty of Management of the University of Lethbridge. Dr. Lermer's resume, filed as Exhibit 3(b), confirms that between the years 1976 to 1981 he was the director of the Resources Branch, Bureau of Competition Policy, of Consumer Affairs Canada, where he specialized in the enforcement of the Combines Investigation Act, in the agricultural and energy industries.

Dr. Lermer has taught Economics at various universities in Canada and has acted as a consultant for numerous government departments and private citizens. He has, as well, appeared as a witness before many tribunals and courts in this country. He is also the author and editor of several books and articles

contained and published in professional journals that deal with risk, financial institutions, trade, industrial situations, and economic regulation.

He was, with the consent of the defence, qualified as a person capable of giving expert opinion evidence in the mechanism of gasoline retail marketing. He was also involved in the completion of an economic report dated April 18th, 1995, which report is now before the Court as Exhibit 3.

In preparing his report, Dr. Lermer analyzed weekly averages of gasoline retail prices and rack prices for the period starting January, 1986, and ending in mid March of 1995. This time frame was divided by him into periods described by him as being, firstly, the pre-inquiry period, from January of 1986 to April 30th, 1992, and, secondly, the inquiry period from May 1st, 1992 to April 30th, 1993. He describes the last period as being the post-inquiry period, being the period after May 1st

of 1993.

Dr. Lermer was unable to find that the price of gasoline in Ottawa was distorted during the inquiry period. Prices in Toronto, Ottawa, and Montreal were all on the way down and were reducing at an equal pace. He noted, however, that during the inquiry period the Montreal retail price fell from a 5 cent to a 3.4 cent premium over Ottawa's average price and that Ottawa's price was 3.2 cents higher than Toronto.

He noted, as well, that the Ottawa service station retail price margins were lower than Toronto, but that the combined wholesale retail margin was higher in Montreal than it was in Ottawa.

The report indicates that the differences in gasoline prices between Toronto on the one hand and Montreal and Ottawa on the other seemed largely to reflect different volumes of gasoline being pumped per station, since the

service station costs and especially for a self-service station, are largely fixed and vary little as volumes increase, their per litre cost of operating a station falls sharply as volume increases.

According to the evidence of Dr. Lermer, the number of service stations in Canada has been and continues to fall in contrast to the situation in the United States where station numbers were noted to fall steeply to the year 1988 and to have remained stable since that time.

The evidence of Dr. Lermer is that the U.S. average gas sales are reported to be between 8 to 10,000 litres per day, which are double that of the Canadian average, except for Toronto, where volumes are roughly in line with the United States.

Dr. Lermer indicates, as well, that Canadian service stations' retail margin are approximately one half of the U.S. seven cents

per litre and that as well 75 percent of the gasoline sold in the U.S. is sold at self-serve stations, compared to just 25 percent in Canada. As a result, Canadian service stations will on average incur higher costs than in the United States and will, as well, face lower gross margins.

Dr. Lermer concludes, as well, that the market is oversupplied with service stations in Ottawa. He notes that in Ontario, outside Toronto and Ottawa, service station numbers fell by 30 percent between the years 1990 and 1994, whereas in Ottawa, over the same period, the drop was only ten percent.

His conclusion is that for the market to be best served, the industry should be moving away from low volume, high priced service stations towards high volume, low priced stations. He notes that the major retailers, as well as the independents, respect a price differential of 0.2 cents per litre in favour of an independent retailer and between a self-serve and a full-

serve outlet for the same brand. That price differential is far lower than the same differential in the United States.

He notes, as well, that the major refiner-marketers remain well organized as to their ability to gather price data and are prepared to reduce prices to meet reductions in price.

It appears to Dr. Lermer that the initiators of price wars are low volume independent retailers. Independent retailers in Ottawa, in 1992, operated 38 percent of the stations and sold 32 percent of the gasoline. Dr. Lermer indicates that that market share should be sufficient to influence market prices, regardless of the policies of the major retailers, since brand loyalty is low and most independent stations could handle three times their current volumes without any further investment.

In principle, Dr. Lermer concludes that the existing independents could supply the entire

Ottawa gasoline market with, at most, modest crowding at peak periods.

He as well indicates that from his reviews the majors do not communicate among themselves or with independents, but that they do monitor the market carefully and can alter retail prices at their own stations and the prices charged by branded dealers by influencing the tank wagon price. This arrangement allows dealers to survive periodic price wars and ensures the dealers a margin on which he or she can operate regardless of the retail price.

His review, as well, concludes that although the combined wholesale retail margin available to retailers are lower in Toronto than Ottawa, the margin may in fact be too low in Toronto for dealers to earn a sustainable and reasonable rate of return. He has been unable to determine that fact. However, given the increased volume pumped in the City of Toronto, being some 40 percent more than a comparable Ottawa station.

In terms of the role that price wars take, Dr. Lermer argues that they should be part of the process by which the service station business is rationalized. Price wars lower the profitability for most service station operators and repeated price wars would force financially weaker operators to leave the business.

He argues that since the number of stations in the Ottawa market needs to fall, that price wars are pro-competitive behaviour that assist in the rationalization of the industry. He concludes that if coordination among independent service station operators dampen the depth, duration, or number of price wars, it is reasonable to conclude that the number of stations closing would be reduced.

According to Dr. Lermer, intense competition and price wars are manifestations of a healthy market system, working to facilitate the necessary downscaling of the industry. He notes, however, that given today's excess

capacity in production and distribution in the petroleum industry as well as easy access to the import of gasoline in most parts of Canada and the sensitivity of each retailer's sales to its posted price relative to those of other retailers in its neighbourhood, there are few opportunities for successfully enhancing gasoline prices through collective action.

In his observations about the Ottawa market place for gasoline, Dr. Lermer concludes that if a number of independents combined by communications to set prices and the majors passively adopted equivalent prices, it is apparent that the level of prices could well have been affected.

He notes, however, that as price information is transparent in the industry and is diligently collected by all parties, that the evidence is ambiguous on the extent to which telephone communications were significant in their difference from other means of gathering price information.

Dr. Lermer, in his report, outlines how the dynamics of retail gasoline are affected by the relatively low search costs on the part of consumers for what they perceive to be a homogeneous product. Consumers passing several gasoline outlets are made aware of prices from the prominent price postings. Some of these consumers may be more price conscious than others, but it is difficult for the service station operator to distinguish between these groups and as a result, any station charging a significantly higher price than his competitors nearby will quickly lose significant volume of sales.

Dr. Lermer points then to the fact that given these local dynamics, there is a strong tendency for local prices to move together, both during and outside periods of price wars.

In his analysis of the price war, which took place in the Orleans area in 1992,
Dr. Lermer indicates that the accused, with three stations in the area, initiated lower

prices that were quickly followed by Caltex and shortly thereafter by all other stations in the area. Prices were noted to continue their fall from September 2nd to September 8th, when a price restoration was initiated by two of the major retailers. Other stations followed on September 9th, but on the 10th the accused reduced prices, followed quickly by Caltex and two majors.

Prices were noted to again start downward on September the 11th and continued to fall until two majors restored prices on September 17th, which restoration the accused followed. Everyone else was noted to restore prices on September 18th.

The only other witness at trial was Mr. David Cassidy, who is the regional manager for Eastern Ontario for Canadian Tire Petroleum. He was called by the Crown. Mr. Cassidy testified that Canadian Tire has 12 outlets in the Region, including one in Orleans, as well as an outlet in Arnprior. He gave evidence

that the managers of the outlets are responsible for retail pricing and that he acts as an advisor.

In-chief Mr. Cassidy acknowledged that he had received a telephone call from the pricing coordinator of the accused in September of 1992, which was received initially by means of a telephone answering device. He returned her call on the same day and his evidence was that she spoke of the depressed prices and price wars and she, according to Mr. Cassidy, indicated that there might be some restitution in Orleans. Mr. Cassidy responded by stating that if restoration did occur, that he hoped it worked.

The pricing coordinator, according to Mr. Cassidy's evidence, did not say who would lead the restoration. After speaking to the pricing coordinator of the accused, Mr. Cassidy then phoned his Orleans manager and suggested that she do a price survey, as he had heard that there was to be a restoration.

He indicated, as well, that they were already doing two surveys per day at that time. In cross-examination Mr. Cassidy testified that the call from the representative of Mr. Gas was treated by him as simply information.

Mr. Cassidy also recalled another telephone call from the pricing coordinator of the accused in late spring of 1992. At that time he recalled she advised him to watch his Arnprior market as there might be some movement, but she did not say when.

His reply was that he would, and he thanked her. Subsequent to that call, he phoned his manager in Arnprior and suggested that a price survey be conducted. After the survey was in fact conducted no change in the market was noted.

I then turn to the issues before this Court. The issues, as argued by counsel, are two-fold; firstly, does the exchange of current retail price information, by the accused, with his

competitors, as outlined in the evidence before this Court, amount to actions proscribed by section 61(1)(a) of the Competition Act. The second issue is whether the actions of the accused, in lowering its prices in Limoges, Cornwall, and on Richmond Road to match its competitor's prices set in Orleans, amount to a threat or like means, under section 61(1)(a) of the Competition Act.

Section 61(1)(a) of the Competition Act states,

> "No person who is engaged in the business of production or supplying a product or who extends credit by way of credit cards or is otherwise engaged in a business that relates to credit cards or who has the exclusive rights and privileges conferred by a patent trade mark, copyright, or registered industrial design shall directly or indirectly, by agreement, threat, promise, or any like means attempt to influence upwards or to discourage the reduction of the price at which any other

> person engaged in business in Canada supplies or offers to supply or advertises a product within Canada."

The Competition Act now enforced in Canada has, as its predecessor, the Combines Investigation Act, which was first enacted in 1910 to provide a mechanism to investigate matters relating to trade combination.

That Act was the subject of amendment in 1951, which prohibited resale price maintenance, which prohibitions are now contained in section 61 of the Act. It is now well established that the primary objective of the legislation is the maintenance of free competition.

In the case of R. v. Howard Smith Paper Mills, 1957, 118 C.C.C., 321. This principle was confirmed at page 324 by the Court in stating,

> "The public is entitled to free competition and the prohibitions of the Act cannot be

> evaded by good motives. Whether they be innocent and even commendable, they cannot alter the true character of the combine, which the law forbids, and the wish to accomplish desirable purposes constitutes no defence and will not condone the undo restraint, which is the elimination of the free domestic markets."

In the decision in R. v. Royal LePage Real Estate Service Limited, 50 C.P.R. (3d), 161, Mason, J. of the Alberta Queens Bench stated,

> "The purpose of the legislation is to prohibit actions which have the object of unlawfully hindering competition. The lessening of competition is considered an injury to the public.
>
> Section 61 is not just another regulatory provision, it rests on a substratum of values in support of competitive forces governing prices in a free market economy, as opposed to price settings by private

> arrangement with no opportunity for public scrutiny and examination. The conduct prescribed by section 61(1)(a) are private actions which influence upwards or discourage the reduction of prices, either by agreement, threat, promise or any like means."

I turn now to the arguments. In regards to the charge arising out of telephone contact between the accused and others and the supply of information, the Crown argues that the circumstantial evidence before the Court reveals an interdependent behaviour on the part of the accused and its rivals in the Ottawa gasoline retail market, which amounts to consciously parallel conduct, which should be interpreted as a form of agreement.

The Prosecution contends that the combination of communications and conscious parallel behaviour will allow the Court to conclude that the accused's actions satisfy the requirements of the agreement provisions of section 61(1)(a)

of the Act.

In regards to its argument that this Court can determine agreement from conscious parallel behaviour, the Crown points firstly to the Sherman Act in the United States and case authority from the Supreme Court of the United States.

In the case of The United States v. Interstate Circuit Inc. , 1939, 306 U.S., 208, the Court was dealing with the distribution of films and the decision by some distributors to impose restrictions upon certain exhibitors of those films. The Court held that the evidence was sufficient to establish an agreement in violation of the Sherman Act.

In The United States v. American Tobacco Company, 1946, 324 U.S., the Court was there dealing with the control of the tobacco industry in the United States by large American tobacco companies, whose control over the industry was so great that a conspiracy or

combination was found to exist among the said companies with power and intent to exclude competitors.

The Court found that no formal agreement is necessary to constitute an unlawful conspiracy and that the essential combination of a conspiracy may found in a course of dealings or other circumstances as well as in any exchange of words.

That same approach towards defining "agreement", under the Combines Investigation Act, was adopted by the Restrictive Trade Practices Commission report on pricing policies in the pencil industry. This report is reported at 1964, Restrictive Trade Practices Commission Number 31.

The Commission, at page 50 of the report indicates,

> "An agreement within the meaning of the Combines Investigation Act is not the

> equivalent of a contract. An agreement may come into existence from the disclosure of an intent shared by the parties, but no more is required to constitute it than the mutual "expectation", that the parties will act pursuant to this intent. The conduct of the parties after the disclosure of intent will reveal if there was such an agreement."

In that case the Commission found that the Eagle Pencil Company had sought and obtained assurances from its competitors that they would follow its lead in increasing its prices. It also found that Eagle had increased the minimum order required for a discount after obtaining a favourable response from competitors that they would follow its lead. There was also a finding that Eagle and a competitor agreed to produce certain types of pencils at identical prices in order to meet competition from imports.

In the case of R. v. B.C. Professional

Pharmacists, 17 D.L.R. (3d), 285, the Supreme Court of British Columbia was dealing with charges under section 32(1)(c) and 32(1)(d) of the Combines Investigation Act, as it then was, which charges had been laid against the British Columbia Professional Pharmacists Society and the Pharmaceutical Association of the Province of British Columbia.

The charges arose as a result of an attempt to have a surcharge imposed by pharmacists on certain prescriptions. The Court found that notices had gone out to all pharmacists and all pharmacies in British Columbia and not merely members of the Society. On the evidence the Court found an agreement was reached by the Society with others to prevent or lessen competition and to injure and restrain trade.

The Crown alludes, as well, to the findings made in the case of R. v. Armco Canada, as well as the decision in R. v. Canadian General Electric. In the Canadian General Electric decision the Court found that three large

manufacturers of electrical lamps had such a percentage of the market that competition was minimal at best and that the accused had, by their agreement, virtually excluded all competition. The Court found that the accused's sales plan, facilitated and enforced by the free exchange of information, which was meant to ensure coordination, constituted an agreement whereby the accused was able to carry on its activities unaffected by the influence of competition.

The Crown, in argument, indicates, as well, that it has now been established by the Courts that an agreement may come into an existence from either the disclosure of an intent shared with rival parties, the publication of price lists, or by the communication of future actions, all with the intent and expectation that it will act as an inducement for other rival parties to follow suit when such actions are done in conjunction with conscious parallel behaviour.

The consciously parallel behaviour argued by the Prosecution is the admitted fact that the retail petroleum industry is price sensitive and the accused must continuously monitor prices and adjust its own prices accordingly. The Crown, as well, points to the interdependency between the accused and its competitors, which is so deeply incorporated it argues in its daily company operations that the accused's staff a pricing coordinator who processes thousands of surveys of prices charged by competitors in the Ottawa market.

The Crown, as well, points to the admitted evidence that if a price survey reveals that a competitor's price has moved up, the location of the price increase will determine if the accused will follow. In areas where the accused is not a major player, it will not move first, but would do so where it has an important concentration of service stations. The accused indicates that it will lead a price restoration among the independent dealers, but will not lead the market.

The Crown argues that those admitted facts, as to the price leadership and price followship, is strikingly similar to the conduct of the accused in the Armco Canada decision. It notes that the combined effect of publishing a price list with evidence of price leadership and price followship conduct by the accused in that situation was sufficient to satisfy the element of agreement.

In addition, the Crown argues that the accused's conscious parallel conduct is combined with the element of communication. It points to the admission that the communication of retail gas price information between members of the industry as being an industry norm.

It argues that the evidence is such that the accused admits that the communications are done with the specific purpose of raising gasoline prices. It points to the admission that the pricing coordinator of the accused stated that most of her calls to competitors are made to competitors who have not raised their price, to

make them aware of the current retail price, and the need to restore prices is frequently mentioned during those telephone conversations.

The Prosecution, as well, points to what it argues is representations made by the accused as to its future conduct with the intention that such conduct on its part will act as an inducement to act accordingly. In particular, it refers firstly to the evidence of the pricing coordinator, in which it is admitted that she informed the competitor of a price increase by the accused, which price increase had not at that time been posted by any of the accused's operators.

In addition, the Crown points to the evidence of the officers of the accused, confirming that once a competitor is advised that a price restoration is in progress, it is hoped that the competitor will react and raise its prices.

It is also the Prosecution's contention that the conduct of the parties, after the accused's

disclosure of interest, reveals the existence of a mutual expectation that the contacted rivals will act pursuant to this intent.

In summary, the Crown argues therefor that the evidence reveals the following; firstly, that the accused closely monitors retail gasoline prices in the Ottawa market, secondly, that the accused engages in price leadership in restoring gasoline prices, and, thirdly, that the accused discloses to its competitors its intention to raise prices with the sole expectation that the communication will act as an inducement for others to follow, and fourthly, and lastly, that the immediate conduct of the competitor fulfills the accused's plan of action.

As to the fourth or last element of evidence, the Crown argues that the conduct of the accused's competitors reveals the existence of an agreement and shows that the concerted action was contemplated and invited by the accused and that the competitors gave their

adherence to the scheme. In this regard the Crown relies upon and eludes to the evidence of Mr. David Cassidy, the regional manager of Canadian Tire Petroleum.

The Crown, in further argument on the issue, refers the Court to the decision of The United States Supreme Court and the case of United States v. Container Corporation of America et al, 1969 Trade Cases, 409-85.

The Court in that case found a contravention of section 1 of the Sherman Act. It found that the defendants who accounted for about 90 percent of the shipment of corrugated containers from plants in the south-eastern United States violated the Sherman Act by the reciprocal exchange between them of price information.

Mr. Justice Douglas, in delivering the judgment of the Court found that the exchange of information had an anti-competitive effect in the industry and chilled the vigor of price

competition. Mr. Justice Fortas, in a concurring decision stated the following;

> "I do not understand the Court's opinion to hold that the exchange of specific information among sellers, as to prices charged to individual customers, pursuant to mutual arrangement, is a per se violation of the Sherman Act. Absent per se violations, proof is essential that the practice resulted in an unreasonable restraint of trade.
>
> There is no single test to determine when the record adequately shows an unreasonable restraint of trade, but a practice such as that here involved, which is adopted for the purpose of arriving at a determination of prices to be quoted to individual customers inevitably suggests the probability that it is so materially interfered with the operation of the price mechanism of the marketplace as to bring it within the condemnation of this Court's

decisions."

He continued,

> "Theoretical probability however is not enough, unless we are to regard mere exchange of current price information as so akin to price fixing by combination of a conspiracy as to deserve the per se classification.
>
> I am not prepared to do this, nor is it necessary here in this case. The probability that the exchange of specific price information lead to an unlawful effect upon prices is adequately buttressed by evidence in the record.
>
> This evidence, although not overwhelming, is sufficient in the special circumstances of this case to show an actual effect on pricing and to compel us to hold that the Court below erred in dismissing the government's complaint.

In summary, the record shows that the defendant sought and obtained from competitors, who were part of the arrangement, information about the competitor's prices to specific customers.

In the majority of instances, once a defendant had this information, he quoted substantially the same prices as the competitor although a higher or lower price would occasionally be quoted. Thus, the exchange of prices made it possible for individual defendants confidentially to name a price equal to that which their competitors were asking.

The obvious effect was to stabilize prices by a joint arrangement, at least to limit any price cuts to the minimum, to meet competition.

In addition, there was evidence that in some instances, during periods when various defendants ceased exchanging prices,

> exceptionally sharp and vigorous price reductions resulted.
>
> On this record, taking into account the specially sensitive function of the price term in the anti-trust equation, I cannot see that we would be justified in reaching any conclusion other than that the defendant's tacit agreement to exchange information about current prices to specific customers did in fact substantially limit the amount of price competition in the industry.
>
> That being so, there is no need to consider the possibility of a per se violation."

The Crown in the case at bar argues that the spirit objectives of both the Sherman Act of the United States and the Canadian Competition Act and the facts in this case and the facts in the case authority referred to by it will allow this Court to draw upon the positions taken by the United States Supreme Court in order to

conclude the unlawfulness of the accused's conduct.

The Prosecution alludes to three further decisions of the United States Supreme Court, in the cases of United States v. The Socony Vacuum Oil, and American Column and Lumber Company and American Linseed Oil Company.

In the Socony Vacuum Oil decision the Court dealt with the actions of numerous oil companies and individuals who conspired to raise and maintain spot market prices of gasoline by buying gasoline on the spot market and thus eliminating it as a market factor.

In the American Column and Lumber decision the Court found that a so called open competition policy adopted by hardwood manufacturers controlling one third of the total production of hardwood in the United States amounted to a combination in restraint of trade.

The Court found that the plan proposed a system

of cooperation among its members, for the avowed purpose of substituting "cooperative competition" for "cut throat competition".

Finally, in the Linseed Oil case the Court was dealing with a situation where it was found that 12 large corporations manufacturing, selling, and distributing linseed oil in the United States had entered into an agreement which the Court found took away their freedom of action by requiring each to reveal to all the intimate details of its affairs which violated the Sherman Act, which the Court found was intended to secure equality of opportunity and to protect the public against evils commonly incident to monopolies and those abnormal contracts and combinations, which tended directly to suppress the conflict for advantage called "competition".

As to the issue of the alleged threats by the accused, as outlined in the last eight counts in the Information before me, it is agreed that section 61(1)(a) of the Act bans the practice

of influencing upward or discouraging the reduction of prices by the use of threats or any like means.

The Crown's position is that the accused, in its relations with Caltex and Seaway, used means that amounted to a threat or like means, which resulted in their raising of their prices.

The Crown relies upon the decision of Mr. Justice Kennedy, in the case of R. v. Shell Canada Products Limited, 1989, 24 C.P.R. (3d), 501. The Court in that case was dealing with the issue of whether the accused's representations toward a gasoline retailer constituted an attempt to influence prices upwards by threat.

The evidence revealed that the accused had made comments to the dealer, who had previously lowered its prices, that the dealer's business was being operated irresponsibly and that it would effect other independent dealers. The

dealer testified that he was afraid of offending Shell and therefor jeopardizing his valuable relationship. The Court ruled that by creating a fear in the mind of the dealer, that the relationship might be prejudiced, the accused had made a threat in contravention of the Act.

The Court defined the word "threat" as an urged course of action, which carries with it some sanction or penalty if not carried out. It further described a threat as being a form of intimidation, fulmination, harassment, or warning, which carries with it some form of penalty.

In the decision of R. v. Dave Downey Sales Agency Inc. et al, 1984, 14 W.C.B., 33, Judge Hutchinson of the County Court of Vancouver found that the accused's attempts to prevent the complainant from selling certain skis below the suggested retail price amounted to a threat, as the complainant's evidence, which he had accepted, confirmed the

complainant was concerned that he would be denied the supply of the product and be cut off as a dealer.

As well, in the case of R. v. Campbell, 1979, 51 C.P.R. (2d), 284, the accused, in an effort to stop the price war and restore the local car rental market to profitable levels, threatened two competitors with a further lowering of prices if prices were not otherwise increased.

The Court in that case found that as competitors understood that further lowering of prices was a possibility, that an offence under section 38(1)(a) of the Act, as it then was, had been made out.

The Crown asks this Court to consider as well the decision of Locke, J. in the case of R. v. Levis Strauss, 1979, 45 C.P.R. (2d), 215. The accused, on the basis of its plea of guilt and on an agreed statement of facts was found to have contravened section 38 of the Competition Act, as it then was, in that it did

induce by threats and other methods the price its products were resold to the public.

The admitted evidence revealed that the accused, Levis Strauss of Canada Inc., had set in motion sophisticated machinery by which it policed those retailers who ignored its price line, including deliberately filling orders with the wrong and unordered goods as well as delaying or cutting off supply completely.

The Prosecution herein argues that what can be gleaned from the case authority referred to is that any retaliatory action by an individual or a corporation whose purpose it is to bully other retailers into coming to heal and to maintain or restore prices can be constituted as a threat or like means, under the Act.

The Crown's position in the case at bar is that the accused introduced deliberately low gasoline prices in a competitor's home market to punish the competitor for its low price policies in the accused's home market and to

bring the competitor back into line.

In light of the definition found in the case authority referred to, the Crown argues that the accused's actions amounts to a threat as set out in section 61(1)(a) of the Act.

The Crown argues that the accused's retaliatory price cutting is an urged course of action, which carries with it some sanction if not carried out by its competitors and as well satisfies the elements of "like means" under section 61(1)(a) of the Act.

The Prosecution urges this Court to compare the facts in the case at bar to those before the Court in the Levis Strauss situation and conclude that when so compared, that the accused's actions herein amount to a means similar to a threat aimed at influencing gasoline prices.

In summary, the Prosecution argues that the effect of what it describes as concerted and

retaliatory action of the accused, along with its consciously parallel behaviour in its operations in the gasoline retail market is clearly anti-competitive and offends the primary objective of competition legislation in Canada.

It argues that the actions of the accused have had a chilling effect on the depth, duration, and scope in a number of price wars, which price wars it argues are pro-competitive.

The Crown, as well, contends that the combined effect of retail price coordination and communication, retaliatory price cutting, disclosure of future actions and discussions between competitors to lessen competition, along with a price conscious parallel behaviour, which it argues categorized the accused's business practices, all contribute to limit and restrict the freedom of competition to the detriment of the public interest.

The defence in reply argues that the exchange

of current retail price information by the accused with its competitors is simply an efficient, low cost, reliable method of verifying current retail price information, which information is publicly available and prominently displayed at the roadside by most service station operators.

It points to the evidence in the agreed statement of facts that the head office cannot always rely on its operators to promptly and reliably convey this information to head office. The defence in response to the Crown's allegation of retaliatory pricing argues that the accused's conduct was simply an appropriate competitive response to lower market prices set by a competitor.

The defence argues that there is no evidence that any communication took place between the accused and Caltex or Seaway prior to any price change, nor is there any evidence that either Caltex or Seaway raised their prices as a result of anything done by the accused.

The defence argues that Parliament in drafting section 61(1)(a) of the Competition Act did not place an absolute prohibition on efforts to influence upwards or discourage the reduction of retail prices.

Parliament, the defence argues, only intended to restrict attempts to influence prices that fall within section 61(1)(a). Other methods to influence prices upwards or discourage their reduction, assuming that they do not offend other provisions of the Act, are permitted.

In support, the defence refers the Court to the decision in R. v. Philips Electronics Ltd., 116 D.O.R. (3d), 298, a decision of the Ontario Court of Appeal, which decision was apparently confirmed by the Supreme Court of Canada without reasons.

Mr. Justice Goodman delivered the majority judgment in Philips. In that case the Court was dealing with an indictment alleging two breaches of section 38(1) of the Competition

Act, as it then was.

The accused had advertised television cable converters in the Toronto Star and Ottawa Citizen, in which advertisement the accused listed stores where it could be purchased and in one case showed the price to be $44.95 and the other $49.95. The Crown conceded in that case that there was no evidence of any agreement, threat, or promise, but submitted that the advertisements complained of constituted "like means".

It was not disputed by the accused that the advertisements were conduct covered by section 38(4) of the Act, as it then was, and accordingly constituted an attempt by the accused to influence upward or discourage the reduction of the selling price of its product sold by dealers into whose hands the products went for resale.

The Court found that the advertisements standing by themselves were in no way similar

to an agreement, threat, or promise and were not included within the purview of the words "any like means".

Goodman, J. at page 308 stated the following;

> "The onus is on the Crown to prove not only that an attempt was made by the respondent to influence upward or to discourage the reduction of the price, but also that the attempt was made in a manner set forth in section 38(1). Crown counsel submitted that the effect of section 38(4) is to deem, for the purposes of the section, that the conduct set out in section 38(4) is a like means within section 38(1).
>
> I do not agree with that submission. If Parliament had intended that to be the case, it should have stated so in the section. The fact that it has not done so is more consistent with the view that I take, that it did not intend that such conduct be deemed any like means."

At page 305 Goodman, J. continued,

"Crown counsel also relied, as had my brother Jessop on the provisions of section 11 of the Interpretation Act. He has submitted that it is the duty of the Court to give effect to the intention of Parliament and to adopt a construction of the statute that will best effect' that intention.

There can be no doubt that Parliament intended to restrict attempts by producers and suppliers to influence prices upwards or to discourage the reduction of prices. In my view, however, Parliament has already specified in the Act what manner of attempt is prohibited.

It is clear that every manner of attempt has not been prohibited by section 38(1). Accordingly, mere proof of an attempt proves only one of the elements of the offence created by section 38(1), the

provisions of section 38(1) are clear and unambiguous in their meaning.

In my view, the Court should not, by resorting to the provisions of section 11 of the Interpretation Act, give an interpretation to this section, which represents the Court's views as to the intention of Parliament in substitution for the meaning of the section as disclosed by its clear wording. It is the latter meaning which must be taken as disclosing Parliament's intention."

Goodman, J. continued at page 308 in dealing with the impact of section 11 by stating,

"Although there can be no doubt that section 11 applies to the penal provisions of any Canadian statute, I am of the opinion that the application of the common-law principle requiring strict interpretation of the provisions of the penal statute, to said statute, is not

inconsistent with the provisions of that section."

The defence directs this Court, as well, to the decisions in the cases of R. v. Les Must de Cartier Canada, Inc., 1989, 45 D.L.R., 167, and R. v. Royal LePage Real Estate Services Limited, 1953, 50 C.P.R. (3d), 171.

In the Cartier decision Borins, J. at 172, referred to the decision in Philips and concluded,

"Thus, for example, it is not illegal to attempt to maintain prices by discussion, persuasion, complaints, suggestions, requests, or advice, provided that the attempt does not include the means prohibited by section 38(1)(a)."

In the Royal LePage decision Mason, J. described, at 171,

"Not any attempt to influence prices is

prohibited, only those that eliminate competition or competitive market forces."

The defence admits that as there is no direct evidence that any agreement was entered into by the accused and its competitors or that it made any promises or threats to maintain prices, that the central issue to be determined by this Court is the meaning to be given to the words "any like means" as found in section 61(1)(a) of the Act.

Not surprisingly, the defence, contrary to the position of the Crown, submits that this Court should find in favour of a strict and exact interpretation of the phrase. The defence argues, firstly, that that should be so as unlike other sections of the Act, section 61(1)(a), requires no clearly defined mens rea for a conviction to be registered and that therefor a narrow interpretation of the actus reus is required.

It argues that the actus reus should be

narrowly interpreted to avoid vagueness, overbreadth, and so that citizens can promptly identify prohibited conduct.

It argues further that that approach is consistent with the judicial interpretation found in the decisions in Philips, Royal LePage, and Cartier.

The defence, as well, notes that Parliament, by amendment, narrowed the scope of the section by substituting the words "or any like means" for the previous and much broader words "any other means whatsoever".

In this regard it relies, as well, on the words of Goodman, J. in Philips where at page 305, he stated,

> "It is significant that the present section, among other significant changes, has substituted the words "any like means" for "any other means whatsoever". This is a clear indication of the intention of

> Parliament to substantially restrict the type of attempts which constitute an offence under section 38(1)."

In addition, the defence submits that even though the Court can apply the ejusdeux generis rule to the words in question, it need not do so as Parliament has used the word "like" to determine the general word "means". Accordingly, the defence argues the interpretation of "means" must be limited by the words "agreement, threat, promise" for a litreal and exact interpretation of the words of section 61(1)(a).

Defence, as well, relies upon the rejection of the Crown's argument for a broad interpretation of the words "like means" found in the decision of the Ontario Court of Appeal in Philips Electronics.

As well, it points to the approval given by Goodman, J. in that decision to the following passage from Maxwell on the interpretation of

statutes, (12d), 1969, page 239,

> "The principle applied in construing a penal Act is that if, in construing the relevant provisions, "there appears any doubt or ambiguity," it will be resolved in favour of the person who would be liable to the penalty. "If there is a reasonable interpretation, which will avoid the penalty in any particular case," said Lord Esher, M.R., "we must adopt that construction. If there are two reasonable constructions, we must give the most lenient one. That is the settled rule for the construction of penal sections." Or, as Plowman, J. has said more recently: "In every case the question is simply what is the meaning of the words which the statute has used to describe the prohibitive act or transaction? If these words have a natural meaning, that is their meaning and such meaning is not to be extended by any reasoning based on the substance of the transaction. If the language of the

statute is equivocal and there are two reasonable meanings of that language, the interpretation which will avoid the penalty is adopted." The Court must always see that the person to be penalized comes fairly and squarely within the words of the enactment. It is not enough that what he has done comes substantially within the mischief aimed at by the statute:

Goodman, J. for the majority in that decision rejected the interpretation advanced by Mr. Jessop, J. when at page 307, he stated,

"My brother Jessop has reached the conclusion on the authority of R. v. Robinson et al, 1951, S.C.R., 522, that the common-law principle is applicable in construing penal statutes do not apply to the present case. I am not in agreement with that view."

Given the majority decision of the Ontario

Court of Appeal in Philips Electronics and given the fact that Parliament has clearly indicated its wish to restrict the application of the section as a result of the amendment made to the wording therein I find that the words "or any like means", as they are contained in section 61(1)(a) of the Competition Act, must be restricted to their exact and litreal meaning. The words "any like means" must therefor be read to be limited to something like or akin to "agreement, threat, or promise".

In my opinion, the Crown, in order to obtain a conviction under section 61(1)(a) of the Competition Act, as it now reads, must establish beyond a reasonable doubt that an accused directly or indirectly, by agreement, threat, promise, or by any means similar or akin to an agreement, threat, or promise attempted to influence upwards or discourage the reduction of price at which other persons in Canada supplied or offered to supply or advertised a product within Canada.

Evidence which establishes only that a price increase has occurred or that a price reduction has been discouraged is insufficient as it lacks the required evidence that the accused, as a result of an agreement, promise, or threat, or something like or akin to a agreement, promise, or threat has affected the price.

The Crown argument as previously outlined herein relies not on any direct evidence of any agreement, but asks this Court to find on the basis of circumstantial evidence which it argues reveals an interdependent behaviour amounting to what has been referred to as consciously parallel conduct.

The Crown has alluded to a series of authorities, both in the United States and Canada, which I have in these reasons set out in some detail. I have done so to illustrate the factual foundation on which the principles of law established were based as it can never be forgotten that principles of law are

developed out of factual situations quite dissimilar to those in which they are later argued.

In the American decisions referred to, the Court was dealing with the interpretation of the Sherman Act, which provides in section 1 thereof as follows;

> "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony."

Section 1 of the Sherman Act then sets out the penalty to be imposed on conviction.

In my opinion, a clear reading of section 1 of the Sherman Act would lead one to the

conclusion that the intended application thereof is much wider than section 61(1)(a) of the Competition Act, as it now reads, and that a review of case authority based on the Sherman Act must recognize that fact.

I note, as well, in many if not most of the authorities referred to, arising both in Canada and the United States, certain factors were present which are not in the case at bar. Firstly, that the facts were such that it was determined that the accused parties themselves controlled a very significant proportion of the market in which they were involved. Secondly, the relationship between the accused party and the complainant or directed party was that of a supplier/dealer arrangement where it was found that the accused had threatened to cut off supply of goods or in fact threatened to end the relationship if the complainant or dealer failed to act in a certain fashion, or, thirdly, the Court was dealing with a plea of guilt to the offence or offences charged.

It is the Prosecution's contention that the conduct of the parties, after the accused's disclosure of interest, reveals that a mutual expectation existed, that the accused's competitors would act pursuant to the intent and hopes of the accused.

The Crown, as indicated, argues that the facts of the case before this Court reveal the following chain of events as taken place; namely, firstly, the close monitoring by the accused of retail gasoline prices in Ottawa, secondly, the accused's decision to engage in price leadership in restoring gasoline prices, thirdly, the disclosure to the competitor of the accused's intention to raise prices, which disclosure is made with the sole expectation that the communication will act as an inducement for others to follow, and fourthly and lastly, the immediate conduct of the competitor in fulfillment the accused's plan of action.

The Crown argues that the mere conduct of the

competitors by itself reveals the existence of a fact agreement and that the accused's competitors knowing that concerted action was contemplated and invited by the accused gave their adherence to the scheme.

Exhibit 5 at trial is an addendum to the agreed statement of facts. The said exhibit outlines the establishment by the Director of the Bureau of Competition Policy of an inquiry, pursuant to section 10(b) of the Competition Act. That inquiry and the expansion thereof dealt with certain activities of the accused as well as two other companies. The inquiry heard evidence from 46 witnesses, 13 of whom were officers or employees of the accused. The employees and officers of 12 competitors of the accused, including Seaway and Caltex, were called to testify at the inquiry.

In the course of its investigation the Bureau amassed 3,000 to 5,000 pages of documentary evidence. The Bureau's Report and a copy of the news release of the Minister of Industry

are included with the said exhibit.

In this regard I remind myself that the contents of and the conclusions reached in that news release and report are not determinative of the issues before me. At trial the evidence consisted solely of the contents of the agreed statement of facts, the report and viva voce evidence of Dr. Lermer, the listing of retail prices by service stations in the Orleans market and the addendum to the agreed statement of facts, as well as the evidence of Mr. Cassidy, the Regional Manager of Canadian Tire Petroleum. No other evidence was lead nor attempted to be lead at trial.

After careful consideration of the totality of the evidence at trial I find that the accused clearly falls within section 61(1)(a) of the Competition Act to the extent that it is a person engaged in the business of supplying a product, namely gasoline. On the admitted evidence, as well, I find that the accused attempted, directly or indirectly, to influence

upwards the price at which other persons engaged in business in Canada supplied or offered to supply or advertised a product, being gasoline, in Canada.

However, in addition, I must and do find that on the totality of the evidence at trial that the said evidence falls far short of proof beyond a reasonable doubt that the accused did so by agreement or promise or any like means, as prohibited by section 61(1)(a) of the Act.

As to the issue of whether a threat was used, the defence submits that the actions contemplated by the legislation would be similar to that as outlined in the case of R. v. Campbell. As noted in that case, the accused, frustrated by a prolonged and ruinous price war, attended at the offices of a competitor and threatened that if there was further price wars that the Sears company would be entering the market with greatly reduced rates.

The defence argues that the gravamen of the offence is the communication of an intention in advance to take some adverse future action. I agree.

The admitted evidence as contained in the agreed statement of facts, as to count six in the Information, confirms that in September of 1992 the accused was involved in a price war with Caltex, in Orleans. The accused continued to drop its self-serve prices in order to maintain a 0.2 cent per litre advantage over Caltex's full-serve outlet.

As well, the evidence confirms that two representatives of the accused attended around that time at the offices of Caltex and met with the president of Caltex. During that meeting the representatives of the accused inquired as to why Caltex was not conceding the 0.2 cent per litre advantage to the accused's self-serve station, as dictated by industry norms.

As well, one of the said representatives of the

accused indicated that the accused would continue to follow its pricing policy of maintaining a 0.2 cent per litre advantage against full-serve outlets. I can only conclude that that comment amounts to the communication of an intention in advance to take some adverse future action, as illustrated in the Campbell decision and as a result, amounts to a threat under section 61(1)(a) of the Competition Act.

I am satisfied that the comment made amounted to a veiled warning that Caltex was facing a gas war if it did not change its pricing policy.

The Crown relies on the decision in Levis Strauss to argue that retaliatory action by an individual or a corporation whose purpose it is is to bully other retailers into maintaining or restraining prices can be constituted as a threat or like means under the Act.

It must be remembered however that the Court,

in the Strauss decision, was proceeding after a plea of guilt and with admitted acts of bullying. This is quite different than the situation in the case at bar.

After careful consideration of the evidence and the arguments raised I must conclude that the Crown has failed to prove beyond a reasonable doubt an essential element of a threat or like means, that being proof of communication in advance of the alleged threat as to the balance of the allegations contained in the Information.

As a result, the accused is found guilty of the charge as contained in count six in the Information, but not guilty of the balance of the remaining eight counts contained therein. Thank you.

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THE HONOURABLE JUDGE D.W. DEMPSEY

THIS IS TO CERTIFY that the foregoing is a true and accurate transcription from the record made by sound recording apparatus, to the best of my skill and ability.

.....C. Ivanoff.....
C. Ivanoff
Certified Court Reporter

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