

IN THE DISTRICT COURT OF ONTARIO

493-1

5 B E T W E E N:

HER MAJESTY THE QUEEN

- and -

SUNOCO INC.

10

Oral Reasons for Judgment

15

B E F O R E:

The Honourable Judge P. German

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APPEARANCES:

J. W. LEISING, Esq.,

for the Crown

F.J.C. NEWBOULD, Q.C.,

for the Accused

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The Court House
361 University Ave.
Toronto, Ontario

June 24, 1986

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5 (GERMAN, Dist. Ct. J.)

I propose at this time to give my judgment
in the case of Her Majesty the Queen against Sunoco Inc.

10 Briefly, the accused has been charged with
breaches of s. 38(1)(a) and s. 38(1)(b) of the Combines
Investigation Act. In order to conserve time, I do not propose
to read the indictment out. It was read in open court at the
beginning of the trial and it is available for anyone who wishes
15 to read it.

The onus is on the Crown to prove beyond a
reasonable doubt that the accused is guilty or the company
must be found not guilty. Evidence having been given on behalf
of the accused, if it causes me to have a reasonable doubt I
20 must acquit the accused. Even if the defence does not raise
a doubt in my mind, the burden is still on the Crown to prove
its case beyond a reasonable doubt.

25 I would like to thank both counsel for their
assistance in this case. I found it to be of great benefit.

The salient portions of s. 38(1)(a) and (b)
are that:

30 " No person who is engaged in the business
" of producing or supplying a product ...
" shall directly or indirectly,

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" a) by agreement, threat, promise or
" any like means, attempt to influence
" upward, or to discourage the reduction
" of, the price at which any other person
" supplies or offers to supply ... a pro-
" duct within Canada: or
" b) refuse to supply a product to or
" otherwise discriminate against any
" other person engaged in business ... "

Subsection 38(8) of the Combines Investigation Act says that any violation of s.38(1) is an offence. It was submitted by the Crown and agreed to by the defence that the purpose of s. 38 is to proscribe the manufacturer dictating the retail price so that the public loses the benefit of competition.

It is agreed that the Crown must prove all of the elements of the offences, but there is no dispute that Sunoco is or was, at the time in question, a manufacturer. Also, while there may be some doubt as to the date upon which certain events occurred, which I will deal with later, there is no dispute that the dates set out in the indictment, namely October 1st, 1984 to February 28th, 1985 are the dates within which the parties had dealings, although there is, of course

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5 a dispute as to what took place during those dates. Similarly,
there is no dispute that the events took place in Metropolitan
Toronto and the Town of Markham, and that Phulel Singh and Sons
Limited is a person engaged in the business of supplying the
10 product in Canada. During this judgment I will sometimes refer
to Phulel Singh and Sons Limited as "Singh" or "the Singh station".

The Crown called its witness David Joseph
Lambe to prove the seizure of documents which were entered into
evidence as exhibits and are not disputed. In addition, the
15 Crown called Daniel Murray, Abnash Singh and Gurucharanjit
Singh who testified viva voce, and a number of documents were
admitted. James Moore, Claire Penfield, Bertrand Martel and
Max Dawson testified for the defence. I do not propose to repeat
20 all of the evidence but I will cover what I think is relevant.

I would like to deal first with the evidence of
Gurucharanjit Singh who I will refer to as "Mr. Singh" or "Guru
Singh". The evidence, which is not disputed, is that the gas
25 station was owned by Phulel Singh, the father of Guru Singh, since
1971, but it was managed by Guru Singh since 1974. I find as a
fact that Guru Singh had the authority to bind the company.

Originally the Singh service station was a
30 Texaco station and I believe at the present time it is once again
a Texaco station. For reasons which are not relevant in this

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5 case, there was a falling out between Texaco and the Singhs
and in 1984 and '85, for a time, the station was a Sunoco
station.

10 Physically the station is situated on the north-
east corner of Steeles Avenue and Kennedy Road. It is a full
service station, which means it is manned by attendants and
the customer does not have to leave his car to obtain gas.
15 Across the road on the northwest corner is a Pioneer station
which is a self service station which, as you might anticipate,
means the customer must serve himself. In addition, Pioneer
is also an unbranded station, which means it does not offer its
own credit card, it sells unbranded gas and does not advertise.
20 Kennedy Road proceeds north and south of Steeles Avenue but not
in a straight line, the southerly portion being a quarter to
one half mile west of the portion of Kennedy Road north of Steeles
Avenue. At the southeast corner of Kennedy Road and Steeles is a
Petro-Canada full service gas station. At the junction of the
25 14th Line and Kennedy Road which is north of Steeles Avenue there
is an Esso full service gas station.

30 Mr. Guru Singh stated that the only service
station visible from his station was the Pioneer station across
the road. He testified that he decided the price of gas while
the Singh station was a Texaco station and now that they are back,

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5 if Pioneer prices changed, they matched them. He testified that it was a consistent policy of the Singh station to match the lowest price on the strip.

10 It is not disputed that there were negotiations between the Singhs on the one hand and Sunoco on the other hand, and in October, 1984, three agreements were signed. These contracts do not stand alone. One contract was the supply contract which may be found at Tab 3 in Exhibit 2 and is entitled "Sunoco Branded Product Supply Agreement". Another document is a lease
15 by Phulel Singh, the owner of the land, to Sunoco. This lease is found at Tab 4 of Exhibit 2. Another document is found at Tab 5 of Exhibit 2.

20 Without going into the specific details of each of the documents, the effect thereof is that Singh contracted to buy all of its gas from Sunoco and Sunoco agrees to supply gas to Singh. These documents also established that the dealer would pay to Sunoco the tankwagon price for gas and Sunoco would pay
25 to the landlord rent for the land based on the gallons of gas sold. The tankwagon price is the price set by Sunoco for their gas and includes Sunoco's cost plus profit. But, in fact, sales rarely take place at the tankwagon price and the dealer is given price
30 support based on the sale price of the competition.

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5 Mr. Singh testified that he had discussions
with Mr. Kemp of Sunoco but was told to deal directly with
Jim Moore about prices. He testified he had discussions with
Jim Moore to establish the price at which he would be supported.
10 Mr. Singh's evidence was that at Texaco he was permitted to price
to Petro-Canada or Pioneer, and Texaco would sell to him at the
pump price less his dealer margin. Mr. Singh's evidence was
that the agreement he reached with Sunoco was that he would get
15 a support price of at least three cents per litre and could match
Pioneer or Petro-Canada or anyone in the area but he could not
initiate a price change. He testified that he maintained this
system while with Sunoco. Mr. Singh also testified that there
was never any agreement about diesel fuel that was satisfactory
20 to him, and Sunoco agreed to look at it in the spring.

Mr. Singh testified that problems over pricing
arose in January, 1985, starting on January 23rd when he returned
to his office about 5:30 p.m. and saw a message to call the sta-
25 tion. When he called the station, Jim Moore said there were prob-
lems with pricing, the price was down and they were not pricing
properly. Mr. Singh testified that he went to the station, arriv-
ing in five to ten minutes, and that his standing instructions were
30 to price to Pioneer and Petro-Canada but he had not done anything
about prices that day.

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5 He testified that two or three days later he telephoned Sunoco for a price change and the woman who normally approved his price changes said she couldn't do anything. On 10 January 24th, his evidence was that Petro-Canada had moved its prices below Pioneer and Singh and always before when this situation occurred Sunoco would have reduced his price when he telephoned. Mr. Singh testified that he phoned Mr. Moore but Mr. Moore said he could not do anything, so he called Mr. Stevenson 15 and was told the company would not support his prices unless he did what they wanted. By removing his price support, Mr. Singh said he was effectually being put out of business because he would be selling below his cost.

20 He testified that he spoke to the Ontario government, Jim Moore, Bob Kemp and Mr. Stevenson and that eventually the company offered to terminate his contract which, after some negotiation, was done.

25 On cross-examination, Mr. Singh agreed that there had been a meeting on the morning of January 23rd or 24th at which the pricing of diesel fuel was discussed and that there continued to be a disagreement as to who he would be priced to for diesel fuel. It is a fact that Mr. Singh chose not to go on 30 what is called the "dip system" for pricing oil in the tank after delivery, but I do not believe that this is particularly relevant

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5 for the purpose of this charge.

On cross-examination, it was put to Mr. Singh that when he was unable to persuade Sunoco to price the way he wanted for diesel fuel, he called the service station and told
10 Mr. Murray to drop the price to meet Pioneer and then telephoned the government to put pressure on Sunoco. This was denied by Mr. Singh. He also stated unequivocally that Mr. Murray had authority to move the price whenever Pioneer did.

15 Daniel Murray worked at the Singh service station during the period in question and still works for Mr. Singh, although not at the service station. It was his evidence that the Pioneer station was visible from the Singh station and that the Petro-Canada station down the street was not. His evidence
20 was that in the past if the Pioneer station lowered its prices he would call Mr. Guru Singh who would authorize him to move the price of gas at the Singh station down to meet the price at the Pioneer station.

25 On January 23rd Mr. Murray testified that Mr. Moore was at the station in the morning twice, and he returned around noon, and Mr. Murray further testified that the price of gas had dropped at the Pioneer station during the morning and
30 he had phoned Mr. Guru Singh and had been authorized to lower the price. When Mr. Moore arrived he asked why the price was

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5 down and told Mr. Murray to close the station, to raise the price
or to take the signs down.

10 Abnash Singh was working at the service station
at the same time. It was his evidence that Mr. Moore arrived
around 11:00 o'clock and asked who set the prices and he said
his boss. Mr. Moore told him he would have to raise the price
and he refused.

15 Turning to the evidence of the defence, James
Moore, the dealer representative of Sunoco, testified that he
had discussions with Mr. Singh in October of 1984 about Sunoco's
pricing policy and that he told Mr. Singh that his similar and
like competition would be the Esso station to the north and
20 the Petro-Canada station to the west because they were both
branded full service stations but Pioneer was not similar and
like competition because it was an unbranded station. Mr. Moore's
evidence was that Mr. Singh acknowledged he understood Sunoco's
temporary volunteer allowance and what they felt was his compe-
25 tition.

30 There was also discussion about the pricing
of diesel fuel. Mr. Moore's position was that the Woodbine Truck
Centre was not the same market and Mr. Singh understood this.
Mr. Moore said that the temporary volunteer allowance is a pro-
gram to allow the stations to compete with similar and like

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5 competition and that Sunoco had permitted the Singh station to
match the price at the Petro-Canada and the Esso station. Mr.
Moore's evidence was that Mr. Singh, in December, stated that
10 his volume of sales of diesel fuel was dropping because Singh
was not priced to Woodbine Truck Centre or the Gravel Pit. Their
disagreement led to a meeting on January 24th at around 8:00 a.m.
No agreement was reached at this meeting and Mr. Moore's evidence
was that he arrived back at the service station around 3:00 p.m.
15 At that time Esso and Petro-Canada were selling gas at 48.7 cents
per litre and Pioneer and Singh were selling at 48.4 cents.

Mr. Moore said he had a conversation with Mr.
Murray and Abnash Singh and that neither of them knew why the
price was changed. He tried to reach Mr. Guru Singh by telephone
20 and couldn't. Because he thought there had been a mistake made,
he told Mr. Murray and Abnash Singh to take the price off the
sign. Mr. Moore said he did not tell Mr. Murray to raise the
price or to close the station. Mr. Moore's evidence was that he
25 spoke to Mr. Singh at 5:30 p.m. and was told that he and his father
had decided on a new policy and that they were going to price with
the lowest on the strip. Mr. Moore's evidence was that he told
Mr. Singh that his T.V.A. would stay at the same level and it
30 would reflect the street price of 48.7 cents.

On cross-examination, Mr. Moore repeated his

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5 evidence that he did not tell the employees to raise the prices
and he told them to take down the numbers because he could not
find out who authorized the price and he thought a mistake had
been made. On cross-examination, Mr. Moore's evidence was that
10 the temporary voluntary allowance had been in place for a number
of years and that it would not be a realistic or economical
choice for a dealer to buy without the T.V.A. It was his evidence
that management froze Mr. Singh's T.V.A.

15 Bertrand Martel testified for Sunoco. He is
the manager of the retail fuel sales in Canada for Sunoco. He
was a dealer for Sunoco prior to 1965. At that time the tank-
wagon price was paid but the dealer received a special allowance
so he could compete. It was his evidence that the name of the
20 allowance had changed but the policy was still the same. It
was this witness's evidence that the dealers received a discount
from the company's price, which is a minimum of three cents, and
that the purpose is not to control the price but to permit the
25 dealer to compete in the market with the major companies such as
Esso, Texaco or Petro-Canada. It was this witness's evidence
that the T.V.A. does not discourage a dealer from lowering his
price but it encourages him to stay with his competition.

30 On cross-examination, this witness stated that
the nub of Sunoco's pricing policy is that the company does not

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5 compete with independents, and that the dealer will be given three cents to compete with majors but if he competes with independents he would not be given the allowance.

10 Mr. Dawson testified for Sunoco. It was his evidence that it was his decision that they froze the price to Mr. Singh and that they decided it would be better to let Mr. Singh out of his contract. On cross-examination, Mr. Dawson stated that Mr. Singh was not meeting his competition and the program was to protect him if he priced to his like competition, 15 but that if he would not, he was not entitled to be in the program. This witness agreed that if Mr. Singh had raised his prices the company would not have had to terminate its supply contract.

20 I do not propose to deal in detail with the documentary evidence.

25 The position of the Crown is that the accused committed an offence in three ways. Firstly, under s. 38(1)(a) that the initial agreements reached with the Singhs was a breach of the section because it discouraged Singh from reducing prices; secondly, that Mr. Moore's acts on January 23rd or 24th were either attempts to enforce the old agreement or to enter into a 30 new agreement to force the price up; thirdly, the uncontradicted evidence of Mr. Singh when he spoke to Mr. Stevenson who told him

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5 that his price support would be frozen until he raised his prices.

The position of the defence on this first count is that the agreement which took place in October was not an attempt to influence Singh to raise his prices or discourage him from lowering his prices; that the price support was to assist the dealer to compete but he was not told what price to charge and that the intention was to permit Singh to compete.

10
15 The defence's position on the Crown's second argument is that Mr. Moore is a more believable witness and that he did not tell the station employees to raise their price or to close the station and he did think that a mistake had been made.

20 On the third point, the defence is that Mr. Singh was not told to raise his price; that he was told his price would be 48.7 cents and that he could terminate the contract if he wished, which is no offence.

25 I am satisfied on the evidence that there was an agreement between Sunoco and Phulel Singh in October or November of 1984 before gas was supplied that the Singhs would have price support so long as they matched what the company said was similar and like competition and did not initiate downward price changes.
30 This was an oral agreement.

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5 I accept the evidence of the company's witnesses
that the similar and like competition was the Esso and the Petro-
Canada station and I do not accept the evidence that he was per-
mitted to match Pioneer. This finding is supported by the docu-
10 mentary evidence. Mr. Singh's demeanour and bearing in the
witness box was such that I did not find him credible on this
point. The actions of the company in freezing Singh's T.V.A.
when Mr. Singh lowered his price adds further weight, in my view,
15 to the evidence that there was an agreement that Singh would
receive price support so long as he matched the price at the
Esso or Petro-Canada stations.

I would like to deal next with what occurred
on January 23rd or 24th. To start with, I am not sure that
20 there is any significance to the actual date but I think it is
more likely that it was January 24th that the meeting was held
because the memos at Tabe 12 and 13 of Exhibit 2 state January
24th and they were made at the time and I believe are more
25 likely to be correct.

I find as a fact that it was January 24th when
Mr. Moore arrived back at the Singh station and found the price
at which gas was being sold was 48.4 cents, which was below
30 the price of gas at the Petro-Canada and the Esso stations but
matched Pioneer. It is the position of the accused that Mr. Singh

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5 had dropped his price and that he had not been competing with
Pioneer from the commencement of their dealings but had initiated
it on January 24th because he was annoyed with Sunoco. There
was a conflict in the evidence of the Crown witnesses between
10 Mr. Murray who testified he called Mr. Singh to tell him that
Pioneer had dropped its prices and that Mr. Singh authorized
him to drop prices on his own, and the evidence of Mr. Singh
who testified that it was standing instructions to meet Pioneer's
15 price and that Mr. Murray had the authority. On this point I
accept the evidence of Mr. Murray over that of Mr. Guru Singh.
Mr. Murray confirmed on cross-examination that he heard Mr.
Moore telling Mr. Guru Singh over the phone: "Thanks for changing
the policy." This confirms Mr. Moore's evidence that Mr. Guru
20 Singh told him he and his father had initiated the change in
policy.

I am quite satisfied that Mr. Guru Singh was
an aggressive business man who was not satisfied with Sunoco's
25 treatment of him over the pricing of diesel fuel. I believe he
told Mr. Murray to drop the price to meet Pioneer. I am also
satisfied and accept that on January 24th, when he was at the
Singh station, Mr. Moore did not tell Mr. Murray and Mr. Singh
30 to raise their prices. I believe that Mr. Moore was too well
aware that it was a breach of the Combines Investigation Act to

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5 tell a dealer to raise his prices.

10 In my view, Mr. Murray and Mr. Abnash Singh have reconstructed their evidence on this point. I find it unbelievable that they had not discussed their evidence during this time, and both Mr. Abnash Singh and Mr. Murray are still employed by the Singhs. I am satisfied and find as a fact that Mr. Murray told the employees at the Singh station to take down the prices from the signs. Having found that, however, I also find that Mr. Moore's evidence that he tried to get the employees
15 to take down the prices from the signs because he could not find out who made the changes and thought there had been a mistake to be somewhat unlikely. I think he was well aware of what was happening and hoped to avoid a price war. However, on the evidence,
20 I am left with a doubt about his motive, which must be resolved in favour of the accused.

25 In dealing with the law, it is the Crown's position that the proscribed conduct under s. 38 is a dictating by the supplier of the retail price so that the public loses the benefit of competition and that the attempt by the manufacturer to influence the retail price is the offence. The Crown says that the mens rea for the offence does not require an intention
30 to affect the price so long as the acts have that effect.

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5 The Crown relies on Regina v. H.D. Lee of Canada Ltd., 57 C.P.R. at 186 and on Regina v. Moffats Ltd., 118 C.C.C. at page 4.

10 It is the position of the defence that these cases no longer represent the law because they relied on Container Materials Limited v. The King (1942) S.C.R., 147 which has been overruled by Atlantic Sugar Refineries Co. Ltd., 115 D.L.R. (3d) 21 and Aetna Insurance Co., 34 C.C.C. (2d) 157.

15 For the purpose of this case I do not believe it is necessary for me to decide this point. In applying the position of the defence, I am satisfied that the offence under s. 38(1)(a) is committed if the manufacturer intends to enter
20 into an agreement which attempts to influence upward or discourage downward pricing by the dealer. I am satisfied that this was the intention of Sunoco in the agreement reached with the Singhs in October of 1984. I am satisfied that the intention of the
25 agreement in October, 1984 was that Singh would match his prices to Esso and Petro-Canada and that he was not permitted to initiate downward pricing. The essence of the agreement was that Sunoco determined who the competition would be, not the retailer, and that he could match the competition but not initiate down-
30 ward price changes.

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5 I am satisfied that this is the conduct which
the statute is designed to prohibit. The means by which Sunoco
carried out the prohibited conduct was the temporary voluntary
allowance. This was part of Sunoco's pricing policy, and, as
10 stated by Mr. Martel, so long as the dealer competed with major
stations he would be given an allowance, but if he chose to
compete with an independent then he is not entitled to an allow-
ance. Clearly, this policy violates the statute because it in-
15 directly discourages the dealer from reducing his price. In
applying the policy to Mr. Singh, the agreement was even more
in violation of the section because it prohibited him from ever
initiating a downward price.

20 Sunoco's position that their policy permitted
competition by allowing the dealer to compete with his similar
and like competition is not a defence, in my mind.

25 In all of the circumstances, the Crown has
satisfied me that the agreement reached with Mr. Singh, et al.
in October, 1984 was an offence under s. 38(1)(a).

30 The Crown submitted that Mr. Moore's conduct
on January 24th, 1985, when he talked to the employees, was
a violation of the section. As I have stated, I accept Mr.
Moore's evidence on this point and I do not accept that he
ordered the employees to raise prices or close the station.

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5 After January 24th, 1985 the price at which
Mr. Singh would be supported was frozen, which had the effect
that Singh must either conform to Sunoco's wishes and meet his
10 competition as they decided or he would be effectively out of
business. This is tacitly admitted by Mr. Moore and Mr. Martel.

15 Mr. Guru Singh's conduct in breaching the
agreement by lowering his price and telephoning the government
would perhaps be sufficient for a defence by Sunoco in a civil
suit but is not relevant in the criminal charge. On all of the
evidence, as I stated, the Crown has satisfied me that an
20 offence has been committed under s. 38(1)(a) and there will be
a finding of guilt on count one.

25 The Crown has submitted that Sunoco is also
in breach of s. 38(1)(b). The essence of this section is to
prohibit a manufacturer, either directly or indirectly, from
refusing to supply a product or otherwise discriminate against
the dealer because of the low pricing policy of the dealer.
30 The Crown submits that since Singh was required to buy all its
gasoline from Sunoco and since Sunoco's pricing policy was to
set the price at tankwagon price and then give the dealer an
allowance to permit him to compete with the competition selected
by Sunoco, that once its T.V.A. had been frozen, this was an
indirect refusal to supply gas. In addition, the Crown submits

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5 that since every dealer receives a temporary voluntary allowance, to freeze Singh's T.V.A. was to discriminate against him.

10 The defence's position is that there was no direct or indirect refusal to supply gas to Singh and, in fact, gas was supplied until the business relationship was terminated. In addition, the defence states there was no evidence what arrangements Sunoco had with other dealers. Without such evidence, the Crown has not proved Sunoco discriminated.

15 In dealing with the discrimination aspect, I accept the defence's submission. In order to find that the accused discriminated against Singh, I believe it is necessary to have some evidence that other dealers initiated downward pricing or matched secondary competition and did not have
20 their T.V.A. frozen before it could be said that Sunoco discriminated against the Singh station. There is no such evidence in this case and I am not satisfied that the accused discriminated against Singh.

25 I have had more difficulty with the offence of failing to supply. It is clear and admitted that there was no direct refusal to supply gas to Singh, but it is the Crown's contention that by freezing his T.V.A. at 48.7 cents per litre,
30 thereby limiting his profit whenever the price fell below that price, Sunoco had, in effect, refused to supply gas to Singh

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5 because of his low pricing policy.

10 It was the position of the defence that far from refusing to supply gas to Singh, that Sunoco had continued to supply gas and that the T.V.A. was the pricing policy. While I accept the Crown's position that in some circumstances the refusal to sell at a price which allows the dealer to make a profit might amount to indirect refusal to supply, in this case I accept the defence's position that there was no restriction on the amount of gas which the Singh station could obtain. The
15 lease between Sunoco and Phulel Singh (Tab 4, Exhibit 2) provided an increase in rental payments if the amount of gas bought by the Singh station increased, and because of the inter-relationship between Phulel Singh and the station, the station could attempt
20 to make up in volume any profit that was lost because the T.V.A. was frozen. It is clear that Sunoco did not like the way Guru Singh was acting and did not wish him to carry on this way, but their business relationship was terminated by consent. This being
25 a penal statute, I believe the law is clear that it should be interpreted in favour of the accused and in all the circumstances of this case, I am not satisfied the conduct of the accused amounted to an indirect refusal to supply and there will be a finding
30 of not guilty and an acquittal on count two.