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Regina versus K. C. Irving: A case study in Canadian media ownership.

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REGINA VERSUS K. C. IRVING
A CASE STUDY IN CANADIAN MEDIA OWNERSHIP

BY
ANDREW PAUL PROKOPICH

A Thesis
Submitted to the Faculty of Graduate Studies
Through the Department of
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ABSTRACT

REGINA VERSUS K. C. IRVING
A CASE STUDY IN CANADIAN MEDIA OWNERSHIP.

by
Andrew Paul Prokopich

The management of the communications industry in Canada implies three integral concepts: power, influence, and profits. These are directly related to ownership of the mass media. In Canada there are three kinds of ownership concentration: newspaper or broadcasting chains, mixed media holdings and conglomerates. This study is concerned with the concentration of media ownership, especially of the conglomerate kind: more specifically, the study is a case history examination of the media ownership of K. C. Irving in the province of New Brunswick. K. C. Irving Limited, the conglomerate, owns the majority of the media outlets in the province of New Brunswick. The case study focusses on the question of whether the concentration of ownership in New Brunswick had come to the point where it collided with the public interest.

The study employs a historical-critical method so as to reconstruct the case of "Regina v. K. C. Irving", chronologically, from 1968 to November 16, 1976. The Irving study is significant because for the first time, on October 17, 1972,
the government took a Canadian conglomerate media owner to court for monopolization of the sources of information.

The New Brunswick Supreme Court convicted Irving of operating a monopoly because, in the trial judge's view, once a complete monopoly had been established, evident in the one ownership of the five English-language dailies, detriment in law resulted. Irving appealed the New Brunswick Supreme Court decision and the conviction was overturned. In the Court of Appeal case, Mr. Justice Limerick ruled that the Crown's sole and specific ground of detriment to the public—a lessening of competition by reason of the consolidation ownership by K. C. Irving—was not supported by evidence of any actual lessening of competition.

The landmark case was taken to the Supreme Court of Canada with a final decision made in the case on November 16, 1976. Chief Justice Laskin of the Supreme Court of Canada ruled that there was no proof of detriment in fact, and one could not infer or presume that public detriment would arise from the elimination of competition due to monopoly ownership, as the Crown had done in the Irving case, because of the absence of legislative direction. Thus the Supreme Court of Canada dismissed the Crown's appeal and reaffirmed the decision of the Court of Appeal.

Therefore, the conclusion of the study "Regina v. K. C. Irving", specifically pertaining to Irving and public interest, was that the concentration of ownership evident in the K. C. Irving conglomerate case had not reached a point where it collided with the public interest.
ACKNOWLEDGMENTS

I would like to thank the people who have been instrumental in the development and completion of this study. Especially, I would like to thank Dr. Walter Romanow, my committee chairman, for originally suggesting this case study as an appropriate area of study related to the problems of the concentration of ownership in Canadian communications. As well, I would like to thank Professor Joseph Arvay of the Faculty of Law at the University of Windsor and Professor Hugh Edmunds of the Department of Communication Studies at the University of Windsor for their help and supervision in the final completion of this study.
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CHAPTER ONE

CONCENTRATION OF OWNERSHIP—A GENERAL OVERVIEW

Scholars of Canadian media are generally agreed that like Homer, who painted with his eye on the object, broadcasting and publishing should paint a picture of human nature, of people in society, their attitudes, values and goals. A specific function for media is found in directing individuals along the road to better self-understanding and familiarity with their society. For good broadcasting and publishing are, and always should be, "an index to a society's health as well as the nourishment of it."

Through their ability to reach large numbers of people, broadcasting and publishing contribute to the understanding of culture. They help to reveal the order of values present within the culture. If this hierarchy of values undergoes change, then broadcasting and publishing are expected to take the initiative to reflect this new value system in society or, as expressed by the Special Canadian Senate Committee on Mass Media in 1970, to take "the shock out of living." As a result, they guide the changing perceptions of society as well as fulfilling their function of providing the individual with information, education, and entertainment. In this day and age, such media responsibilities are realistic expectations by society by virtue of society's dependence upon information.
Broadcasting has been made an instrument of Canadian-ization through legislative mandate to reveal various aspects of Canada to national audiences. The same role is thrust upon the publishing media less formally through its gatekeeping role. The content of the media should reveal the values and attitudes of people all across Canada. If ways of thinking change from east to west, from province to province, then the Canadian people should become aware of the changing thought patterns through the channels of communication. Canadian communities should be in communication with each other through broadcasting and publishing: the process, then, is expected to contribute to a sense of Canadian identity.

In Canada the ownership of media channels is one of the determining factors in achieving communication among Canadian communities, and thus, in contributing to a sense of Canadian identity. But an important matter that has been brought to the fore, especially by the Report of the Special Senate Committee on Mass Media of 1970 (hereafter referred to as the Davey Report), is the pattern of media ownership in Canada and its influence on the Canadian public. The Davey Report identified as one of the most important problems in Canadian communications the concentration of media ownership into fewer and fewer hands. The Report observed that there is a "process of natural monopoly for the print and electronic media to merge into larger and larger economic hands." As an example, the Report offered this evidence:

Of Canada's 116 daily newspapers, 77 (or 66.4 per cent) are controlled or partially owned by groups. Of the
97 TV stations (including some relay stations), 47 (or 48.5 per cent) are controlled by groups. Of 272 radio stations, groups control or own a substantial interest in 129 (or 47.4 per cent). In comparison, "in 1930 ninety-nine publishers controlled 116 dailies." As well, the Report of the Ownership Study Group to the Canadian Radio-Television and Telecommunications Commission in 1978 (hereafter referred to as the Ownership Study Group Report) mentions that (a) 56 per cent of private television stations and 81 per cent of private radio stations were group operations; and (b) "newspapers are less concentrated than cable, but more highly concentrated than either radio and television." Furthermore, the Ownership Study Group found that "the overall group ownership effect on concentration [in terms of policy considerations] is greatest for radio, followed by cable and then television," with the cable industry exhibiting the greatest concentration of ownership between 1968 and 1975. Without a doubt, these figures and findings indicate the narrowing ownership base in Canadian publishing and broadcasting.

Three kinds of ownership concentration are cited in the Davey Report. These are newspaper chains, mixed-media holdings operating within a single market or in different markets, and conglomerates (multi-corporate structures including subsidiaries with media holdings). The third kind of ownership concentration, the conglomerate, poses a particular kind of threat because the public's access to information may become hindered; the media's job of preparing the Canadian public for social change may be curtailed; and the problem
of concentration of ownership may have escalated in the direction noted by Elizabeth Baldwin in 1977:

Both the concentration of the mass media and the number of complexes controlled by economically dominant corporations have increased considerably.\(^8\)

It is with the concentration of media ownership that this study is concerned: more specifically, the study is a case history examination of the media ownership of K. C. Irving in the province of New Brunswick.

It is an appropriate area of study because concentration of media ownership, especially the development of the conglomerate type and all of its parts, has occurred. For example, in terms of economics, the newspaper business is a natural monopoly industry. Along with economic considerations, laws and regulations involving income tax and succession duties and in a negative way, the apparent ineffective-ness of existing legislation governing mergers, trust and monopolies\(^9\) have contributed in a significant way to the concentration of ownership. Also, it is an appropriate area of study because it poses the question of whether the concentration of media ownership in the province of New Brunswick had reached a point where it collided with the public interest, and consequently whether the public's need and right to know through diverse and antagonistic sources of information had been impeded. One owner, K. C. Irving, owned the majority of the media outlets in the province of New Brunswick. Irving owned outright all five English-language daily newspapers in New Brunswick: the Saint John Telegraph-Journal and Saint John Times-Globe, the Moncton Times and Moncton Transcript, and the Fredericton

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Irving owned CHSJ, one of the four radio stations in Saint John, as well as a companion television station CHSJ-TV. The central matter came into focus with Irving's purchase in 1968 of 55 per cent of the stock of University Press of New Brunswick, the publisher of the Fredericton Gleaner. This gave him a virtually complete monopoly of the major media outlets in New Brunswick.

This study is necessary because media concentration is a significant problem in Canadian communications. In an address to the Canadian Senate, Senator Charles McElman, the Executive Assistant to Premier Robichaud of New Brunswick, urged that K. C. Irving should not be given the power to determine what will not become public issues. With respect to Irving specifically, in a Senate speech in the spring following the Davey Report's publication, McElman indicated:

There is the power, the power to decide what will not become public issues. The greatest concern lies in the power to determine what will not become public issues. To what degree, if any, did K. C. Irving have the power to decide what would or would not become public issues is significant and worthy of research and analysis.

There has not been a vast amount of literature written in the field of media concentration in Canada. One source is the three volumes of the Davey Report. Another recent source of information is the Report of the Ownership Study Group to the CRTC in 1978 entitled Ownership of Private Broadcasting: An Economic Analysis of Structure, Performance and Behaviour. As well, Wilfred Kesterton's book entitled
A *History of Journalism in Canada* looks at the subject of consolidation in the media. In addition, Wallace Clement's book *The Canadian Corporate Elite* and Elizabeth Baldwin's articles in *The Canadian Journal of Sociology*, in which she appraises Clement's corporate elite concept, concentration of ownership is examined. As well, in relation to this study, the background and history of K. C. Irving are described in a book entitled *K. C. Irving—The Art Of The Industrialist*.

The bibliography related to this study represents a compilation of documents related to the central issue. It is anticipated that this compilation will have value for scholars who are urged to conduct further research related to the multi-media ownership problem with which the Canadian society is faced.

A number of personages have become associated with the documentation in this study, and these include Senators Keith Davey and Charles McElman, Ralph Costello, President of New Brunswick Publishing Company Limited, and Brigadier Michael Wardell, publisher of the *Fredericton Gleaner*. All of these appeared at the Special Senate Committee hearing on Mass Media in 1970. As well, D. H. W. Henry, Director of Investigation and Research under the *Combines Investigation Act* in Ottawa, had initial input into the K. C. Irving case.

There are two main reasons why this study has been undertaken. First, it raises the question of whether the people of New Brunswick have been fully informed about the events around them when one individual, K. C. Irving, virtually
had a complete monopoly of the sources of information. Second, the study is significant because the Canadian government on October 17, 1972, for the first time, took a conglomerate media owner to court for his monopolization of sources of information. Specifically, Mr. Justice Robichaud in the New Brunswick Supreme Court case stated that it was

... the first major prosecutions under the Combines Investigation Act to come before the New Brunswick Supreme Court, and particularly this being the first time in Canada, that newspapers have been prosecuted under the Act.\(^{17}\)

Since the case was the first of its kind, it would be possible to hypothesize, broadly, that the concentration of ownership, as demonstrated by the K. C. Irving conglomerate, reached a point where it violated the public interest.

In the discussion which follows in this study, particular terms are recurrent, and it is appropriate to define them at this point. First, a "conglomerate" is a multi-corporate structure which includes subsidiaries with media holdings. Second, the definition of "monopolization," as used in this study, involves "a control of the communicative act which structures the situation so that the individual has no opportunity to weigh alternatives."\(^{18}\) Third, "group ownership" here is defined as

... one of two or more broadcasting undertakings of the same type (TV or radio stations or cable systems) controlled by the same individual, firm or institution.\(^{19}\)

Fourth, "public interest" is defined for present purposes as the public's need and right to know through diverse and antagonistic sources of information so that they become fully
informed about the events around them. Finally, "public issue" is defined as the public's need and right to know about matters in dispute which may affect them individually and/or collectively and the reasons upon which decisions are made to resolve them.

In all, the study uses a historical critical method so as to reconstruct chronologically the case of "Regina v. K. C. Irving" from May 15, 1968, to November 16, 1976. In the overall context of the concentration of ownership problem in Canadian communications, Irving had achieved the country's "highest degree of regional concentration of mass media ownership."20 The specific events and activities examined are Irving's acquisition of the Fredericton Gleaner which initiated the case, Irving's appearance in the Special Senate Committee hearings on the Mass Media in 1970, the activities of the Combines Investigation Branch pertaining to Irving in 1971, the New Brunswick Supreme Court case on January 24, 1974, and the Court of Appeal case on June 4, 1975, and, the final Supreme Court of Canada case on November 16, 1976. Finally, the conclusions and implications of the study flow out of the examination of the reasons upon which the judges in the New Brunswick Supreme Court and Court of Appeal and Supreme Court of Canada made their decisions.

The starting point in the study of "Regina v. K. C. Irving" is an examination of the specific reasons for the concentration of ownership in Canadian media.
Historically, a number of Parliamentary Committees drew to the attention of government the fact that there was a tendency towards concentration of media ownership; but no guidelines were given to the regulatory boards, nor did it appear that the government was particularly worried. This is evident in the following three examples:

The 1942 Parliamentary Committee recommended against multiple holdings by one owner, suggesting that the minister and CBC should have the power to secure all the information necessary to enforce this provision.21

The 1947 Committee did not advise going so far as to prohibit what is called multiple ownership. It did not think that newspapers should be treated in any different manner than other applicants for broadcast licenses.22

As well, the Report of the Royal Commission on National development in the Arts, Letters and Sciences (the Massey Report), tabled in Parliament on June 1, 1951, set down no guidelines even though the concentration problem was gradually growing:

The commission found that 41 stations were owned in whole or in part by newspaper interests; it had no evidence that any abuse of power had resulted. Therefore no recommendation was made about 'multiple ownership,' or the granting of stations licenses to newspaper proprietors.23

These three examples illustrate the fact that the federal government and the broadcasting regulatory agency at the time, the CBC, had become aware that the problem of multiple ownership was developing. But both entities did not have the foresight to perceive that this problem was gradually escalating to the point where, in the 1970s, it would become very difficult to solve. The existence of guidelines or criteria at any earlier point might have solved this
problem before it arose. Such a problem, for example, might be found in the instance of economic corporations with media subsidiaries using their media holdings to endorse their economic interests.

Fundamentally, though, there are regulatory and economic reasons for the concentration of media ownership. Before the 1968 Broadcasting Act was enacted, foreign ownership of broadcasting in Canada was evident from the extensive holdings of the Columbia Broadcasting System, Famous Players, and Marconi. With the passage of the 1968 Broadcasting Act, the Canadian Radio-Television Commission, upon the advice of the Governor-in-Council, stipulated that foreign ownership of any one station (radio, television, or cable) was to be no more than 20 per cent. As a result, a divestiture policy was implemented by the Canadian Radio-Television Commission. The problem, however, with the divestiture process was that the only people who could buy these extensive holdings of the Columbia Broadcasting System, Famous Players and Marconi, to cite but three examples, were Canadian media owners who already had substantial media assets:

The dilemma, therefore, was to reconcile the conflicting desires to restrict concentration of ownership on the one hand and allow the participation of large entities on the other. The solution to this dilemma remains elusive.

Finally, in the CRTC annual reports there is continuous mention of the problem of concentration of ownership: "Concentration of ownership and control of the mass media has been and continues to be a concern of the commission."
Yet, in spite of the fact that there has been a persistent concern for the problem, there is still a concomitant continuing inaction.

In terms of economics, the newspaper business is a natural monopoly industry:

Classical economics also tells us that, in natural-monopoly industries where two or more firms are competing, their separate shares of the available market are always unstable, . . . they battle for supremacy. One firm may cut advertising rates and buy circulation, thus boosting production and lowering its per-unit costs—and in the process forcing the rival's firm's per-unit cost upward.27

If the rival paper is unable to reduce its high per-unit cost or develop a favourable cost-per-thousand advertising rate, it will eventually go out of business or be sold to a firm that can afford to buy it—often, a newspaper chain. "If a newspaper to be sold is a weaker participant in a competitive situation, chain ownership is more likely to ensure the paper's survival."28 Chains have the financial resources to withstand competition and to fight back in a competitive newspaper situation. Therefore, the trend has developed toward one-newspaper communities and chain newspaper ownership in Canada. An analysis of the Ayer Directory of Publications 1978 reveals that of the 120 dailies in Canada, 74 or 61.7 per cent are in one-newspaper communities. As well, an examination of the Canada Year Book 1976-1977 Special Edition reveals that the three major chains in Canada (Southam, Thomson and F. P. Publications) own 57 of the 117 Canadian dailies, or 48.7 per cent.
Once a newspaper has a monopoly situation, it consequently begins to attract more advertising. Large newspapers tend to become larger still because they pass on these "massive economies of scale to their advertisers." The more advertising they receive, the more profitable and larger the newspapers become.

In contrast, the Ownership Study Group Report concludes that no significant economies of scale arose from group-ownership in broadcasting; the Report does not exclude the existence of economies of scale in broadcasting, acknowledging rather that they defy measurement.

The profitable nature of media enterprises is another reason why concentration of ownership has developed:

The daily newspapers and broadcasting industries make profits that are on the average, very generous. In most cases, these large profits are made possible by conditions of natural monopoly.

These large profit margins, combined with the media industry's tendency to keep secret its own balance sheets, allow media corporations to pay for the acquisition of other media holdings out of retained earnings.

Retained earnings involve money collected by media enterprises as profits but which are not passed on to their shareholders as dividends. Under Canadian tax laws, up until 1972, shareholders were taxed only on earnings they received as dividends. The remaining profits were kept by media corporations as retained earnings and were not taxable until the day they were distributed. The effect was that media corporations kept earning profits, built up larger and larger
reserves of retained earnings: in terms of profitable investment, the best place to invest has been in another profitable newspaper or broadcasting outlet.

Presently, the Ownership Study Group Report finds, group owners of broadcasting undertakings (radio, television, and cable) have paid out a good portion of their earnings as dividends, with only about 25 per cent of the earnings being retained by the group broadcasting owners. The reasons given in the Report for the small proportion of retained earnings were the level of maturity achieved by the broadcasting industry and the lack of growth opportunity within the industry, especially for group-operated stations and cable systems.

As a footnote to this access to capital concept, large newspaper chains, for example, are able to raise equity capital by selling shares to the public. Also, they can borrow more because they have far more collateral available when a newspaper comes up for sale. Thus, retained earnings have been an extremely significant source of capital and this explains, in part, the tendency towards ownership concentration. The result is that communications in Canada has become big business and highly profitable.

Furthermore, the consequences of succession duties and a "desire to avoid the impending capital gains taxes feared by many media owners" provide further incentives to some media organizations to sell to media corporations which are the only entities capable of paying the asking price of
these independent owners. As well, the lack of an Ownership Review Board for print media, as suggested by the Davey Report, has resulted in a number of newspapers being incorporated into newspaper chains at the time of, and following, the Davey Commission study.

In an article entitled "Exactly What Has Emerged Since 1970? (If Anything)" in Content magazine dated December 1973, Senator Keith Davey indicated that the absence of a Press Ownership Review Board was one main reason for the recent acquisition of the following papers by newspaper chains: St. John's Evening Telegram by Thomson; Owen Sound Times by Southam; Cape Breton Post by Thomson; Montreal Star by F. P. Publications; Belleville Intelligencer by Thomson; Brockville Recorder by Thomson; Summerside Journal Pioneer by Thomson; Brantford Expositor by Southam; Montreal Gazette by Southam; Windsor Star by Southam; and the Niagara Falls Review by Thomson.

These acquisitions reveal the further concentration of ownership evident in the newspaper industry. These further acquisitions by already large media owners lead to another reason for the concentration of media ownership: "Among the groups, whether public or private, there is a strong and deep-seated compulsion toward constant growth and expansion." This group compulsion toward constant growth and expansion is substantiated by the Ownership Study Group Report.

Finally, the ineffectiveness of the Combines Investigation Act has been instrumental in furthering
concentration. Specifically, D. W. Henry notes five points that illustrate the ineffectiveness of the Combines Act towards the mass media. These are:

A merger is not unlawful unless it limits competition to the 'detriment of the public.' This expression has not been defined by Parliament and it is therefore left to the courts to give it more particular meaning.

Thus far, the courts have looked at the effect of the merger on competition, as the statute requires, but have held that competition must be virtually stifled before the merger can be struck down under the law.

As the provisions create a criminal offence, the onus is on the Crown to prove the offence beyond a reasonable doubt.

The courts have been reluctant to enter into any sophisticated economic analysis of the situation resulting from the merger and have tended in lieu thereof to find a reasonable doubt in the face of evidence of some competition remaining.

The virtual monopoly test is open to challenge on the basis of other judicial pronouncements, but as long as a virtual monopoly test for mergers persists, the merger provision as a practical measure is rendered nugatory. There is clearly no possibility that it could be used to arrest monopoly in its incipiency; it could be invoked only in the final stages of monopolization when concentration has proceeded far beyond the degree where competition remains an effective force.

Therefore, since the Combines Act carries the force of penal sanctions, the Crown must demonstrate beyond a reasonable doubt that the effect of acquisition is detrimental to the public, an undefined expression left to the courts to define. This onus of proof becomes an almost impossible task to accommodate in economic situations because the courts have been reluctant to enter into any sophisticated analysis and judgment of mergers, as noted by D. W. Henry. Furthermore, preventing the concentration of
ownership into fewer and fewer hands has become that much more difficult because the law concerning media monopoly cannot be applied until the final stages of monopolization when competition is virtually stifled.
Footnotes

Chapter One


3 Ibid., p. 3.

4 Ibid., p. 5.


7 Ibid., p. 36.


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Ibid., p. 389.

Ibid., p. 415.

The Ownership Study Group Report found that group ownership, resulting from regulatory decisions, had contributed significantly to the levels of concentration.


Ibid., p. 46.

Ibid., p. 43.

Ibid., p. 63.


Ibid., p. 19.

CHAPTER TWO

DEVELOPMENTS IN THE CASE

In the province of New Brunswick, the channels of communication are mainly in the hands of K. C. Irving. Insight into K. C. Irving the industrialist is given in the book by Russell Hunt and Robert Campbell *K. C. Irving--The Art of the Industrialist*, the first serious biographical study of K. C. Irving. The authors relied solely on written public documents, notably from Irving-owned newspapers, legislative reports, and the Davey Report. The book drew the fire of the Irving press, since Irving abhors public exposure. Furthermore, any mention of Irving in a broadcast immediately brings requests for copies of the script from Irving lawyers in Saint John. Therefore, a few comments about K. C. Irving, the man, are in order.

Up until Irving's departure from New Brunswick to Nassau in the Bahamas in 1972, he held 10 per cent of the land area of New Brunswick, employed one in every twelve of New Brunswick workers, and was estimated to be worth $600 million. He is one of Canada's richest individuals, and he made it all at home in New Brunswick.

According to J. E. Belliveau, a public relations policy adviser to former Premier Robichaud of New Brunswick
between 1960 and 1970, Irving was deliberately and inherently mysterious and possessed of a twentieth century computer-like business mind and the determination to pursue a course of action made evident in his attitude that when he owned something, he owned it outright. Irving was a one-dimensional man who had only his work, and he worked constantly. He was a man who kept to himself, who did things in person, privately, and felt no obligation to explain himself to anyone. Nobody knew the inner force that drove K. C. Irving. Richard Wilbur, a freelance writer and a former professor of history at the University of New Brunswick, suggests that the reasons for Irving's phenomenal success were "his combativeness, his tenacity, his 'tendency toward the concrete and the physical rather than the abstract'."¹ Yet Irving remained, as J. E. Belliveau suggests, "impenetrable and inexplicable like a primary force in nature."²

Furthermore, Irving was dedicated to the task of developing the resources of New Brunswick and improving the well-being of New Brunswickers. Irving believed he knew, and did what he felt was, the best for New Brunswick. He built up great industries because he had the creative genius and the practical experience. J. E. Belliveau states:

I am certain that Irving identifies his own interests with the public interest, that in fact he considers them identical. Everything he had done in his opinion, has been done for the good of New Brunswick.³

For Irving to do the best for New Brunswick meant doing it only his way. Therefore, Belliveau goes on to state, the
real story of K. C. Irving was the "saga of a well meaning man [growing] so powerful that he could not distinguish between the public interest and his own."\(^4\)

In the political realm, Irving figured prominently in the mind of any government. Belliveau notes that New Brunswick governments were always uncomfortably aware of, and sensitive to, Irving's money, influence and power. For example, in the 1960 election, Irving was a financial and moral supporter of the Liberal party with a $35,000 contribution. However, in the 1967 election, speculation was that Charlie Van Horne, an ex-legal trouble shooter of Irving's, had returned to New Brunswick to run for the Conservative party against Premier Louis Robichaud, financed by Irving. But this could not be proven. Thus, as Belliveau declares, Irving was "always a political force simply because he was Irving."\(^5\) Furthermore, Richard Wilbur notes:

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Since 1965 the Liberal administration . . . staggered from one financial crisis to another suggesting a principle peculiar to present day New Brunswick: no government can survive for long if it ignores or bucks K. C. Irving. \(^6\)
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Therefore, Irving wielded a tremendous amount of political and economic power in the province of New Brunswick.

On January 18, 1972, an Irving statement from Nassau said that he was no longer a resident of New Brunswick and that his enterprises would be directed by three sons—John K. Irving, Arthur L. Irving and James E. Irving. With respect to the Irving media, Arthur and James Irving were to control the Saint John Telegraph-Journal and Times-Globe,
while the Moncton Times and Transcript and Fredericton Gleaner were put in the hands of John Irving.

Although nobody knows for sure why Irving left Canada, speculation is that one reason for his departure was New Brunswick's proposed new death tax, repealed December 31, 1971. This new law would tax the beneficiary no matter where the deceased lived nor where the property was situated. Another possible reason was the new capital gains tax introduced in 1972. Under the new income tax laws, if an individual left Canada, he had to pay tax on accrued capital gains before he departed. If Irving had stayed after January 1, 1972, he would have had to determine the value of his assets which would have been a major task. Besides the tax bite and the opportunities of a tax haven in the Bahamas, Belliveau intimates that another reason for Irving's departure was that he could "no longer feel entirely comfortable in his native province."  

Finally, Belliveau considers K. C. Irving's most important and significant aspect to be not "his money but what he represents: K. C. Irving is the last of the great feudal barons of Canada."  

At the time of his departure, K. C. Irving owned five of the six dailies in New Brunswick, the sixth being the French-language L'Évangeline of Moncton. He also owned radio station CHSJ and CHSJ-TV in Saint John, CHSJ-TV satellite in Bon Accord, and CHMT-TV the satellite in Moncton. Furthermore, CKCW Moncton is owned by an estate on
which Irving has claim as a creditor. In effect, Irving held the greatest regional concentration of mass media in Canada, and as Beland Honderich, publisher of The Toronto Star, notes: "Mr. Irving has in effect created a private empire of New Brunswick, complete with its official press--print and electronic." 

The beginning of the Irving press empire began in 1944 when K. C. Irving Limited acquired complete control of New Brunswick Publishing Company Limited, the publisher of the Telegraph-Journal and the Times-Globe, the only two English-language daily newspapers in Saint John. In 1948, Irving's New Brunswick Publishing Company acquired the Moncton Publishing Company Limited, the publisher of the Moncton Times and Transcript, the only two English-language daily newspapers in Moncton. Finally, in 1968, K. C. Irving Limited secretly acquired control of the Fredericton Gleaner, the remaining English-language newspaper in New Brunswick. Thus, by 1968, Irving owned and controlled all five English-language daily newspapers in the province of New Brunswick. However, it was his secret acquisition of control of the Gleaner that became the starting point in the actual case of "Regina v. K. C. Irving."

K. C. Irving's secret acquisition of the Fredericton Gleaner was done in three stages. First, in 1958 Irving purchased 25 per cent of the voting shares of University Press of New Brunswick Limited which published the Gleaner. Then in May of 1968, Irving acquired the majority of the
voting shares of University Press. Finally, he purchased the balance of the voting shares of University Press in July 1971.

In his 1970 appearance at the Special Senate Committee hearings on the mass media, Irving spoke of his acquisition of the Fredericton Gleaner from Brigadier Michael Wardell, the former publisher of the paper. No announcement was made by anyone as to when these arrangements had taken place with Wardell because the transaction was not fully completed. Certain details had still to be worked out, and Irving indicated that the information about the transaction should not be divulged until all the details had been worked out. This exemplifies the private nature of Irving's business dealings. Brigadier Wardell reaffirmed the incompleteness of his arrangement with Irving in his statement:

There are many angles. It is complicated, a complicated thing that we did and we have not concluded by any means at all. . . . It has not been entirely consummated and at the present moment, he has not any representation on the board at all. 10

Besides his transaction with Brigadier Wardell, Irving discussed building up the resources of New Brunswick and his preference for local ownership of industry in New Brunswick. In Article 14 of his Brief to the Senate Committee, Irving stated that he had

. . . no objection to the investment of outside capital in any enterprise located in New Brunswick. Such investment is necessary and welcome but I favor local ownership. 11

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Irving bought commodities that came up for sale, providing he had the money and that they were reasonably priced, instead of letting them fall into the hands of companies controlled by people in Toronto and Montreal. Thus, Irving would buy a commodity rather than have it go out of New Brunswick. In Irving's eyes, fewer people would leave New Brunswick each year if the province had more local companies.

With respect to his acquisition of newspapers, Irving did not treat these transactions any differently than his procurement of other commodities. For Irving,

You have to select your commodities. . . . So far as a good commodity itself, I deal with all good commodities and I put the newspaper business in the same category.\textsuperscript{12} Irving saw newspapers as a good business if run well and if good people were in charge. He believed in, and had confidence in, the people running his newspapers and radio and television outlets because he felt they were doing a good job. However, he stated:

I do not participate in the operation of the newspapers or the radio and television stations. I am not consulted and at no time have interfered or attempted to interfere with news or editorial policies.\textsuperscript{13}

Furthermore, Irving disclosed that media profits were all invested in New Brunswick endeavors and that neither he nor any member of his family ever received any financial advantage from the ownership of his media holdings.

With respect to concentration of ownership, Irving indicated that he would be concerned if one person or company in Toronto owned all of the newspapers in Canada.
Irving felt that a point could be reached where concentration of ownership collided with the public interest. Yet Irving felt that community participation in ownership up to 49 percent would not solve the problem of concentration of ownership in New Brunswick because New Brunswick had more problems than other provinces. Also, Irving did not object to issuing the financial statements of his media properties but felt that there would need to be a valid reason for so doing.

Finally, based on Irving's initial remarks at the Special Senate Committee hearings, there was evident a strong conflict between Senator McElman and Irving pertaining to the integrity of the press in New Brunswick. Irving indicated that McElman had made various statements about the quality of the press in New Brunswick and was the prime mover in calling for an investigation of the press in New Brunswick under the Combines Investigation Act. Also, Irving mentioned that Senator McElman had made statements outside the Senate to the people of New Brunswick that CHSJ-TV would lose its license. McElman categorically denied that he had made such a statement, in spite of the fact that Irving stated that he had a witness to prove his allegations. Furthermore, Irving noted that political pressure was exerted by Premier Robichaud upon Brigadier Wardell because he had earlier supported former Progressive Conservative Premier Hugh John Flemming and former Progressive Conservative Prime Minister Diefenbaker. According to Irving, Robichaud tried everything he could to destroy Brigadier Wardell financially, evidenced...
by the fact that government printing and advertising contracts were taken away from Wardell's plant in Fredericton. Irving remarked that Premier Robichaud was unsuccessful in ruining Wardell financially. Irving also indicated that Senator McElman could substantiate these claims, since he had been the Executive Assistant to Premier Robichaud at that time.

Brigadier Wardell, at the Special Senate Committee hearings, reaffirmed Irving's statements of the political pressure exerted by Premier Robichaud to ruin him financially. About Irving, Wardell stated:

I have said--and I said it long before I was any part of his group--that he did more for New Brunswick than all the levels of government put together . . . and I have known some of the very great and active men in this world but I have never known any of them who could have done what Mr. Irving did in that province of New Brunswick.14

About his transaction with Irving, Wardell indicated that an agreement about an exchange of shares of 55 per cent dated the previous year, 1968, had taken place but that it was still incomplete.

Finally, Wardell regarded the establishment of the Senate Committee on the Mass Media as an attack on the freedom of the press. His rationale was that the combination of events--McElman supporting and using the establishment of the Senate Committee; McElman's threat to ask for a special investigation of the Irving monopoly by the Consumer Affairs Department which had already been implemented as evident in the October 20, 1969, raid of the office of the Gleaner by the Department of Consumer and Corporate Affairs; and
and McElman's challenging and threatening letters—were indicative of McElman's direct attempt at attacking, harassing and intimidating the Irving press in New Brunswick. Wardell viewed the press in New Brunswick as good, honest and not suffering from distortion and suppression, as had been suggested by McElman.

In his 1970 appearance at the Special Senate Committee hearing on the mass media, Ralph Costello, President of New Brunswick Publishing Company Limited, indicated that newspapers were responsible to the people in the province. For him, newspapers had a special responsibility over and beyond that of business enterprises. In New Brunswick it was hard for a newspaperman to do a good job because of the extensive Irving interests. However, Costello stated, "the development of the newspaper is taking place under the present owner but not under his direction. That happens to be my job." If the papers did not stand up under public scrutiny, then these failures were not the result of K. C. Irving as owner but were Costello's problem and his responsibility to solve. He also went on to say that an independent newspaper with no attachments was no guarantee that its publishing principles would be higher or more professional than newspapers owned by groups or conglomerates. Costello asserted that many newspapers in Canada had achieved financial stability and a high degree of integrity and professionalism under group ownership, but he could not cite specific examples or pinpoint areas where these benefits had accrued.
Pertaining to the New Brunswick press, Costello was very proud of the fact that his Saint John paper had achieved 70 per cent news content and 30 per cent advertising content. His number one priority at that time was the expansion of newspaper coverage in New Brunswick.

With respect to freedom of the press, Costello defined it as "an extension of the right of free speech." If freedom of the press was defined in law, Costello felt that the chances were it would be restrictive, and this he saw as dangerous. In his eyes, if legislation to protect sources of information were passed, individuals would abuse that right. Costello objected to Press Councils because he did not think they would work in New Brunswick. Finally, editorial opposition was found between Moncton and Saint John newspapers owned by K. C. Irving on matters such as Maritime union, a medical school, and a regional airport for New Brunswick. Therefore, Costello disclosed that New Brunswick newspapers were still "fighting individual platoons of individual fighters."

Finally, Costello accused Senator McElman of attacking the New Brunswick press by calling on the Senate to investigate the press of New Brunswick as well as calling for an investigation under the Combines Act. In Costello's view, it was mostly questioning and criticism by people such as Senator McElman, and not of any interference or direction from Irving, which made it difficult to publish newspapers and hold the public's confidence in the province of New
Brunswick. Costello asked that McElman withdraw from the Senate Committee because McElman had already made up his mind about the press in New Brunswick and would continue in that frame of mind as a member of the Senate Committee. For, Costello stated,

I believe this committee is handicapped by his presence. I look on him as an accuser and a prosecutor, and I do not suggest that he should be anything else, or anything less. But the validity of these hearings surely is open to question if our accuser and prosecutor is also to sit in judgement.18

In responding to the accusations of Irving, Wardell, and Costello, Senator McElman made four remarks. First, he indicated that his request for an investigation by the Combines people took place prior to the formation of the Senate Committee. Second, he was asked to join the Committee sometime after that. Third, he knew nothing further about the raid on the offices of the Gleaner by the Combines Branch until it was published by Brigadier Wardell. Finally McElman said:

It has been suggested that I have been attacking Mr. Irving. That is not the case. I have not raised questions about Mr. Irving's many numerous and--for New Brunswick--wonderful enterprises. I have raised questions about the involvement of his monopoly ownership of the media in New Brunswick.19

It is clear from the remarks of Irving, Costello and Wardell at the Special Senate Committee's hearings that there was considerable enmity between Irving's empire and the government of New Brunswick.

The final event in the developmental stage of the case "Regina v. K. C. Irving" is the action of the Combines
Investigation Branch personnel who were called on, at the request of Senator McElman, to investigate the Irving press. Based on an informant's belief, that of Lloyd H. Armstrong, that evidence was likely to be concealed and would not be available in the prosecution of the four charges against K. C. Irving Limited, Provincial Court Justice Tweedale issued seven warrants to search the premises of K. C. Irving Limited, New Brunswick Publishing Company Limited, Moncton Publishing Company Limited and University Press of New Brunswick Limited, as well as the residences of Kenneth C. Irving, Michael Wardell and Ralph Costello. The four charges, stemming from offences contrary to the provisions of the Combines Investigation Act, R. S. C. 1952, c. C-23 will be dealt with more specifically in Chapter Three. On March 26, 1971, the search warrants were issued in accordance with Form 5 of s. 429 of the Criminal Code, 1953-54 (Can.), c. 51, now s. 443, R. S. C. 1970, c. C-34.

On Wednesday, March 31, 1971, the seven search warrants were executed simultaneously by RCMP and Combines personnel. On April 1, 1971, a subsequent search was carried out at the premises of K. C. Irving Limited in which a number of papers and documents were taken and a receipt was given to Miss Winnifred J. Johnston, Mr. Irving's private secretary.

On April 8, 1971, defence counsel Gillis, on behalf of K. C. Irving Limited, made an application to quash the seven warrants to search issued by Mr. Justice Tweedale on March 26, 1971.
On July 12, 1971, Mr. Justice Robichaud made his decision on defence counsel's application to quash the search warrants: He ruled that the four search warrants issued on March 26, 1971, by Mr. Justice Tweedale authorizing the entry and search of Irving's four premises would remain. However, the three warrants to search the private residences of K. C. Irving, Ralph Costello, and Michael Wardell were quashed. The basis for the latter was that the issuance and execution of the warrants constituted an invasion of privacy.

Following the activities of the Combines investigation team and defence counsel's application, on behalf of K. C. Irving Limited, to quash the seven search warrants issued (that action being partially successful), four charges under federal combines law, "the first of their kind against daily newspapers in Canada," were laid in December 1971 against K. C. Irving Limited and his subsidiaries—New Brunswick Publishing Company, Moncton Publishing Company Limited and University Press of New Brunswick. Two charges cited offences between 1948 and 1960, the other two listed offences between 1960 and 1971. Specifically,

... the charges against the four Irving companies were laid after K. C. Irving, New Brunswick industrialist, bought the Fredericton Gleaner, the province's fifth English-language daily.21

Late in 1971, after reviewing evidence at the preliminary hearing, Provincial Court Justice Tweedale ruled,

... that there was sufficient, evidence against K. C. Irving Ltd., and its newspaper subsidiaries to send them to trial before the New Brunswick Supreme Court in October.22
After monopoly charges had been laid in December 1971, a change of ownership of the Irving papers was announced in June 1972. John Irving became sole owner of the Moncton Times and Transcript and Fredericton Gleaner, while James and Arthur Irving controlled the Saint John Telegraph-Journal and Times-Globe. This rearrangement of ownership involving K. C. Irving's three sons took place prior to the October trial. However, on Tuesday, October 17, 1972, the New Brunswick Supreme Court case of "Regina v. K. C. Irving Ltd. et al" began.
Footnotes

Chapter Two


3 Ibid., p. 82.

4 Ibid., p. 27.


11 Ibid., p. 5:40.

12 Ibid., p. 5:41.

13 Ibid., p. 5:33.

14 Ibid., p. 5:68.

15 Ibid., p. 5:49.

16 Ibid., p. 5:62.

17 Ibid., p. 5:52.

18 Ibid., p. 5:50.
19 Ibid., p. 5:77.

20 "Monopoly Case Cost $500,000; Called 'grudge'," 
**Editor & Publisher** 105 (30 December 1972): 28.

21 "Southam Press Policies Told In Monopoly Trial," 
**Editor & Publisher** 105 (11 November 1972): 82.

CHAPTER THREE

THE NEW BRUNSWICK SUPREME COURT CASE

In the New Brunswick Supreme Court case, two indictments were brought against K. C. Irving Limited and his three other corporations. In the first indictment charged were the New Brunswick Publishing Company, Moncton Publishing Company, and University Press of New Brunswick. The second indictment pertained solely to K. C. Irving Limited. Both cases pertaining to the two offences between 1948 and 1960 were under the Combines Investigation Act R. S. C. 1952, c. 314, and amendments as that Act stood prior to August 10, 1960; the other two offences were under the Combines Investigation Act R. S. C. 1970, c. C-23, under s. 2 and s. 33. Specifically, the four charges were:

(1) That K. C. Irving, Limited, New Brunswick Publishing Company Limited, Moncton Publishing Company Limited and University Press of New Brunswick Limited, . . . between the 10th day of August, 1960, and the 30th day of November, 1971, . . . were parties or privies to or knowingly assisted in, or in the formation of, a monopoly, . . . substantially or completely controlling throughout an area of Canada, namely, the Province of New Brunswick, a class or species of business of producing, supplying, selling or dealing in English language daily newspapers . . . , articles which may be the subject of trade or commerce, and have operated such business or are likely to operate it to the detriment or against the interest of the public, whether consumers, producers or others, . . .
(2) That K. C. Irving, Limited, New Brunswick Publishing Company Limited and University Press of New Brunswick Limited . . . between the 8th day of September, 1948, and the 9th day of August, 1960, . . . were parties or privies to or knowingly assisted in the formation or operation of a combine within the meaning of the Combines Investigation Act, to wit: a merger, trust or monopoly in that they, during the said period, purchased or otherwise acquired control over or interest in the whole or part of the business of other persons, . . . which merger, trust or monopoly has operated or was likely to operate during the said period to the detriment or against the interest of the public, whether consumers, producers or others, . . .

(3) That K. C. Irving Limited, New Brunswick Publishing Company Limited and University Press of New Brunswick Limited, . . . between the 8th day of September, 1948, and the 9th day of August, 1960, . . . were parties or privies to or knowingly assisted in the formation or operation of a combine within the meaning of the Combines Investigation Act, to wit: a merger, trust or monopoly, which, during the said period, substantially or completely controlled throughout the Province of New Brunswick the class or species of business in which they were engaged, to wit: the business of producing, supplying or dealing in English language daily newspapers, . . . which merger, trust or monopoly has operated or was likely to operate during the said period to the detriment or against the interest of the public, whether producers, consumers or others, . . .

(4) That K. C. Irving, Limited, . . . between the 10th day of August, 1960, and the 30th day of November, 1971, . . . was a party or privy to or knowingly assisted in, or in the formation of, a merger, which merger consisted of K. C. Irving, Limited, during the said period purchasing or otherwise acquiring control over or interest in the business of another person to wit: University Press of New Brunswick Limited, whereby competition in a trade or industry, to wit: the producing, supplying, selling or dealing in English language daily newspapers, articles that may be the subject of trade or commerce, was or is likely to be lessened to the detriment or against the interest of the public, whether consumers, producers or others . . .
In essence, K. C. Irving Limited and his three subsidiary companies were to be prosecuted on four charges under the merger and monopoly provisions of the Combines Investigation Act.

The case of "Regina v. K. C. Irving Ltd. and three other corporations" was a landmark case in two respects:

It is the first time that Canadian newspapers have been prosecuted under the monopoly law and the first time the definition of acts against the public interest have been extended to include such questions as the public's right to know.²

This landmark case actually went to trial on Tuesday, October 17, 1972, with the accused entering a plea of "Not Guilty"³ through his counsel Mr. D. M. Gillis.

At the hearing the preliminary matters saw both the prosecution and defence counsel agreeing that the evidence in the first case of K. C. Irving Ltd. and his three other companies being applicable to the second case. The whole evidence of Mr. K. C. Irving taken on commission in Bermuda on June 7, 1972, was ordered read into the record. Mr. Justice Robichaud, after careful personal analysis, also ruled irrelevant a considerable number of the seized documents obtained by the searching officials of the Combines staff in 1969 and 1971, totalling about 3,885 pages. Consequently, he prepared a list of documents he considered relevant to the cases. In the end the hearing of evidence occupied seventeen days of Court time, hearing thirty witnesses—twenty-five prosecution witnesses and five for the defence—from October 17 to November 17, 1972, inclusively,
plus one night session. Finally, the official transcript consisted of 1,673 pages: 1,567 pages covered the evidence, rulings or motions, and arguments, and the like, and the remaining 105 pages covered the oral arguments of both the prosecution and the defence.

The hearing itself saw a number of expert witnesses called by the Crown. One of the first witnesses was Claude Ryan, publisher of *Le Devoir*, Montreal, who spoke of the group ownership of newspapers in both Quebec, by the Desmarais group, and in New Brunswick by the Irving group, as dangerous to the public. He stated that the Desmarais group in Quebec represented "'a dangerous concentration of political power' if the owner ever decides to swing support to one or another of the political parties." He remarked that the current idea of newspaper ownership was that owners concern themselves only with the business affairs of newspapers while editorial policy remained with the individual the owner had appointed as publisher. He went on to say:

But the owner will inevitably appoint a publisher who shares his opinions . . . and the publisher will surround himself with senior colleagues of similar views. Essentially, for Ryan, the publisher remained an employee of the owner, and the owner's interest prevailed if the owner's interests conflicted with the public's interests because ownership implied control:

If an owner has interest in different fields, such interests are going to be reflected in his papers. . . . The possibility exists that he may intervene in their operation. Nobody can prevent him from doing that.
In spite of the fact that he had not made a professional study of New Brunswick's six dailies owned by Irving interests, Ryan spoke of the danger—"group ownership in an entire province is hazardous, extremely dangerous"—in the degree of Irving ownership of New Brunswick newspapers and, that, from the moment Irving had acquired "all the newspapers in New Brunswick,' his ownership became a detriment to the public interest."  

Next, political columnist Douglas Fisher of Ottawa told the court that "cursory reading of the Thomson and Irving papers would indicate they are very much alike." He viewed Thomson papers as mediocre and only in recent years had become willing to spend more money on their news operations. Fisher preferred to see the Thomson group take over a newspaper in a monopoly situation in order to break up a monopoly situation; he stated, "monopoly ownership blocks off the 'other voices, other opportunities, other means of communication' which the public forum requires." Finally, he saw newspaper chains having the potential to produce a good newspaper, but he felt "New Brunswick deserved better newspapers."

Another expert witness called by the Crown was Eric Wells of Winnipeg, a free lance writer and former editor of the Winnipeg Tribune. Wells saw one individual owning all the English daily newspapers in a province as socially undesirable. He stated:

Monopoly does not produce the best possible in journalism. Competition improves the quality of newspapers. Without
it the public will be deficient of information on its own affairs.\textsuperscript{12}

Furthermore, Wells went on to say, the interests and prejudices of owners are reflected in the decision of editors working for them and resulted in discarded stories, not because of any order by the publisher, but because some editors try to protect the publisher's interests.

Earle Beattie, a professor of mass communication at York University, testified that the one-man ownership of English-language dailies in New Brunswick was a very bad situation:

\begin{quote}
It put control of information in the hands of a small group. Whether used or not, there was always the chance for one man to put pressure on all papers to follow a certain line, especially in a time of crisis.\textsuperscript{13}
\end{quote}

Furthermore, Beattie indicated that Irving newspapers controlled the image of New Brunswick outside the province because the basis of Canadian press reports to other Canadian newspapers about New Brunswick news came from Irving-owned papers.

Another expert witness for the Crown was St. Clair Balfour, President of Southam Press Limited, who was on the stand for five days. He indicated in his testimony that no single group or individual should control all the newspapers in an area because he thought it "'more socially desirable' if there were two newspaper ownerships in an area. It was not a good idea for one group to own all."\textsuperscript{14} For Balfour, owners of newspapers and broadcasting outlets should not be involved in other kinds of business because, in his terms,
"I don't think a critic can be an actor in his own play." He spoke of Southam's policy of getting out of fields other than the newspaper business, confining its operations to publishing and printing. He indicated that there was no "Southam" editorial policy but that diversity and innovation were encouraged in Southam-owned newspapers. Balfour also told the Court of Southam's attempt to buy the Fredericton Gleaner in 1965 to 1968, but it was rejected by the then publisher Michael Wardell. He saw the trend toward greater group ownership of newspapers as not necessarily a bad thing, in that group ownership provided a newspaper with greater resources.

Like Claude Ryan, Mark Farrell, a publisher in the Southam chain, saw a danger in a concentration of newspaper ownership because "there is a tendency in concentration of ownership to speak with only one voice, and it needs different voices." He testified:

I'm not saying it does not happen, but the danger is that it might. . . . I think the more voices the better. The trouble is it's expensive to publish a newspaper. In Windsor it's economically viable to publish one.

On the other hand, Farrell cited the British press as an example of the danger of too much competition and how this leads papers to concentrate on crime and sex stories. He also remarked that the independent operation of each Southam newspaper is a practiced company policy. He told the Court that conflict of interest is bound to increase when a newspaper is part of an industrial or business conglomerate.
He cited the following as an example:

If a newspaper owner owns the transit system in town, it's unlikely to get a goosing—I mean, sufficiently harsh treatment from the newspaper.18

The final expert witness for the prosecution was Ralph Costello, the President of the New Brunswick Publishing Company Limited, and the only newspaper executive directly appointed by K. C. Irving. At the request of prosecutor Hoyt, Costello read a copy of a personal note seized in his house in raids by combines investigators that indicated he had advised Irving to sell the Fredericton Gleaner soon after it had come under his control. Costello wrote that

... selling the paper would be publicly beneficial to Irving and to the whole Irving organization ...; however, the Gleaner purchase has been in the public interest.19

Earlier testimony indicated that Irving bought the Gleaner to head off attempts by Liberal politicians and newspaper groups outside the Maritime provinces to buy the Gleaner.

Also, Costello identified two further memoranda from himself to Irving which stated:

The ownership of all English-language daily newspapers cannot be defended, especially if you also have radio and television interests.20

Dedicated and respected newspaper editors and publishers will not agree that it is in the best interest of the province or people.21

According to Costello, these memoranda were written after the acquisition of the Gleaner and prior to his and Irving's appearance in front of the Senate Committee hearing in December 1969.
Costello was also questioned about alleged attempts by Irving newspapers to get the French-language daily L'Evangeline out of the daily field. The prosecutor Hoyt repeatedly attempted to show that the Irving newspaper chain "had tried to drive the French daily out of business." 22

The L'Evangeline controversy involved the French daily's attempt to obtain "Perspectives," a French translation of "Weekend Magazine," a transaction which was opposed by the Irving papers since they held a franchise for the Montreal printed magazine. B. W. Isner, former Moncton Times and Transcript general manager, saw "Perspectives" threatening the financial health of the two Irving papers. The Irving newspapers dropped their opposition to "Perspectives" for the French daily in the interests of racial harmony because of the bitterness developing between French-speaking and English-speaking people in Moncton. Costello remarked that even though L'Evangeline was still not carrying "Perspectives," it was not due to any opposition from Irving newspapers.

In other testimony Costello told the Court that he could not recall

... 'any editorial directly critical of Mr. Irving or which pulled out any Irving company for criticism.' On the other hand, no story had ever been played down or 'killed' in the Saint John papers to protect Irving interests. 23

With respect to competition between Irving newspapers, he noted the aggressive policy of Moncton papers since their acquisition in 1948 which had resulted in the Moncton Times doubling its circulation at the expense of the Saint John
Telegraph-Journal. Costello also commented about the recently announced division of the Irving newspapers among Irving's three sons. He indicated that the division had nothing to do with the combines prosecution launched in December of 1971, but had become necessary to comply with "federal laws requiring 75 per cent of Canadian ownership of newspapers." He testified that family or individual ownership of newspapers was declining due to the inability of individuals to maintain financially stable operations and due to Canadian taxation policies, especially in the estate tax field.

With the testimony of expert Crown witnesses the prosecution had called to the stand, the onus on the Crown was to prove the formation of the alleged "combines, merger, trust or monopoly" and, once this was established, whether such "combines, merger, trust or monopoly" operated or were likely to operate, during the periods set out in the two indictments, to the detriment of the public.

In the Crown's case the only specific allegation of actual public detriment was the issue of "Perspectives," which took up a great deal of the Court's time. Mr. Hoyt made the following statement in his opening remarks:

> By way of evidence, my lord, we will show how in fact the monopoly we are charging in this case has used that detriment in an attempt to put its only daily competitor--L'Evangeline--out of business, and, my lord, I suggest that is the type of detriment which can occur in a monopoly situation and, indeed, has occurred in this particular situation.

However, in analyzing the L'Evangeline issue, Mr. Justice Robichaud found that even though its circulation was far from
being what it should have been, this was not due to the absence of "Perspectives" in its week-end edition, nor attributable to the defendants. Based on the evidence, he concluded that "the Crown has failed to prove . . . beyond a reasonable doubt"\textsuperscript{26} that the Irving conglomerate was trying to drive \textit{L'Evangeline} out of business.

K. C. Irving shed light on the \textit{L'Evangeline} issue in his statement which was read into record. Irving claimed that he had tried to help \textit{L'Evangeline} obtain the rights to "Perspectives" but had been overruled by the managers of his own newspapers who felt the circulation of the \textit{Moncton Times} and \textit{Transcript} would be hurt. Furthermore, Irving indicated that he exercised little control over his newspapers; the only exception he could think of occurred before he acquired the \textit{Gleaner} when he promised Michael Wardell cooperation in publicizing a new theatre. Irving stated:

\begin{quote}
[I] never took any responsibility of committing the papers to anything. Questions of policy were handed over to [my] newspaper executives.\textsuperscript{27}
\end{quote}

In any event, any criticisms pertaining to his newspapers were passed on to Ralph Costello.

In Irving's defence, Dalton Camp, a Toronto political columnist and public relations consultant, was called as a witness. Camp noted that the principle of free ownership must not be violated if there was to be a free press. For Camp, "Newspapers must be freely acquired, freely held and freely sold, despite whatever risks are involved."\textsuperscript{28} He felt that no government should dictate who should own or

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operate a newspaper. Camp saw the idea of newspapers, like broadcasting, regulated by government as preposterous because the press had its critics, including politicians. He added, "'the constant war between government and the media' necessary to democracy would only work when the press was free and known to be free."29

Another defence witness, Canadian Press general manager John Dauphinee indicated that a concentration of newspaper ownership was "potentially undesirable" but depended entirely "on the direction of the newspapers involved."30 Furthermore, Dauphinee noted that newspapers could not monopolize the news because of the competition from radio and television.

Defence lawyer Donald Gillis called as his expert witness Jesse W. Markham, an economics professor at Harvard who had made an economic study of daily newspapers and competing media in New Brunswick entitled "Economic Analysis Pertaining to the Case of Her Majesty the Queen Against K. C. Irving Limited et al."31 Markham's economic study is significant because Robichaud, J. agreed with defence counsel Gillis when he stated:

> It is very significant to note that of all the expert witnesses called by the Crown, none made any study of any kind with respect to the actual newspaper operation as it exists in the Province of New Brunswick.32

In his testimony, Markham revealed the findings of his study:

> 'However, the New Brunswick media profile clearly supports the conclusion that no single newspaper, or newspaper ownership group, monopolize national, international or Provincial news in the Province
of New Brunswick. . . . The conclusion also follows from this analysis that the Province of New Brunswick is not the relevant market for purposes of determining the presence or absence of monopoly in local news and local advertising.

'The circulation figures for the Saint John Telegraph-Journal and the Fredericton Gleaner by K. C. Irving strongly suggest that the two papers are complementary rather than competing newspapers.'

Markham noted that New Brunswick had too many other sources of news and information for daily newspapers to have a monopoly. He saw the situation in New Brunswick similar to other parts of North America in which daily newspapers were not competing with each other in their own markets but faced competition from other media sources such as television. Markham found no evidence of the Saint John Telegraph-Journal or Fredericton Gleaner being operated as a single entity or that changes in the circulation growth pattern of the Gleaner had resulted since it had come under Irving control in 1968.

In response to Markham's study and finding, Crown counsel Hoyt submitted his own Brief entitled "Relevant Market and Undueness," the contents of which were accepted by Mr. Justice Robichaud. The Brief stated:

The crux of any anti-combines case is the effect on free competition of the arrangement or situation, . . . In assessing this effect, both the nature of the arrangement in relation to the particular product and the effect of such an arrangement on competition generally must be considered. . . . In Canadian jurisprudence the restriction is frequently discussed in terms of undueness, . . . One measure for testing the effect, or undueness, is to look at the field in which the limitation on competition operates. This concept may be expressed by saying that the relevant market is a determining factor in deciding if the restriction on competition is undue. Thus whether a situation is discussed in terms of undueness or of the relevant
market, the underlying concept is the same. An arrangement or situation that affects competition in a relevant market is undue.  

In addition, Crown counsel Hoyt submitted that United States jurisprudence had held that the sale of newspapers was a distinct relevant market and that Markham's views had been repeatedly rejected by the United States courts where the issue was exactly the same. Robichaud, J. disagreed with Markham's conclusion that the Saint John Telegraph-Journal and the Fredericton Gleaner were complementary rather than competing newspapers because the evidence as a whole proved otherwise. Specifically, Mr. Justice Robichaud made his decision based on the statement made by an expert journalist Ralph Costello who stated in a letter dated December 7, 1962, addressed to Brigadier Michael Wardell who was then publisher of the Gleaner: "The fact is, in Saint John and Moncton we think of you (with your Gleaner and Advocate) as a pretty tough competitor, . . ."  

Nevertheless, in his Brief defence counsel Gillis submitted that "the provisions of the Combines Investigation Act are inapplicable to daily newspapers in New Brunswick" based on the major ground "that the province of New Brunswick is not a relevant market place." The grounds on which defence counsel Gillis based his submission were that the province was not a relevant market place, that competition existed between daily newspapers and radio and television, that a monopoly was impossible as to (a) news and (b) advertising, Professor Markham's economic analysis, and the advantages or benefits of chain ownership.
The defence in its Brief suggested that acquisition, rather than being detrimental to the public, had actually resulted in public benefit in four ways.

The Saint John and Moncton newspaper companies were installed in new premises and with the most modern equipment.

The acquisition of the Fredericton Daily Gleaner resulted in the continued operation of the Atlantic Advocate and the printing plant with the result of continuing employment of 50 employees and a plant improvement costing one quarter of a million dollars.

Any earnings or profits in the newspaper companies were not drained out of the province by way of dividends but were reinvested in the Province of New Brunswick enterprises for the purpose of stimulating the economy of the residents.

The residents of New Brunswick and the North Shore area in particular are served by not one but two morning newspapers, both of which sustain financial loss in their continued publication.

Based on the evidence, the defence submitted that the Court should find that the Crown had not established beyond a reasonable doubt that if there was a monopoly or merger, it had in fact operated, or was likely to operate, to the detriment of the public.

In looking at the defence's Brief, Mr. Justice Robichaud looked at the crucial question of the applicability of the Combines Act to daily newspapers in New Brunswick from two perspectives, (1) the market structure, and (2) the behaviour or conduct of the participants. With respect to the market structure, Robichaud, J. noted that Canadian decisions as to the existence of a market were a matter of judgment based upon the particular facts of a case. As such,
Robichaud, J. found as a fact that geographically the province of New Brunswick was the relevant market place for its five English-language daily newspapers based on the factual evidence in the case of his acceptance of the reasoning in Crown counsel Hoyt's Brief, which stated:

The Province of New Brunswick is a separate political entity. As such, it necessarily generates news of particular interest to its inhabitants and of less direct interest to others. Many, perhaps most, of the laws that affect the citizen in his daily life are provincial laws administered by provincial officials. . . . In short the news about most of the matters of direct and immediate concern relates to provincial activities.41

In regard to the second viewpoint—the conduct of the participants—Mr. Justice Robichaud also analyzed it from two perspectives: the formation of the alleged combines, merger, trust or monopoly; and with its establishment, whether such combines, merger, trust or monopoly operated or were likely to operate to the detriment of the public.

With respect to the first question, Robichaud, J. found beyond a reasonable doubt, based on the evidence, that the acquisition and ownership of the five New Brunswick English-language daily newspapers had been accomplished. The trial judge also looked at the important question of control of the five English-language dailies in New Brunswick. He found the evidence overwhelming that the owner K. C. Irving never did influence or attempt to influence the publishers and editors of his five English dailies:

The . . . evidence indicates that Mr. K. C. Irving and his family who are, after all, the owners of the acquiring company, K. C. Irving Limited, have never exercised any control of direction in the gathering and
publication of news and have always left total editorial independence to the publishers and editors of the five English-language daily newspapers in New Brunswick. . . . I find, as a fact, that these newspapers have complete editorial autonomy and the owners have never cast over their columns any editorial shadow whatsoever. 42

Robichaud, J. declared that Irving's three editing publishers, Ralph Costello, Desmond Sparling, and Jack Grainger, had complete editorial autonomy over their respective dailies.

However, Mr. Justice Robichaud went on to comment on the right to control by K. C. Irving Limited after it had complete and total ownership of the five English-language dailies. He said:

So, even if, as it appears, the direction of the acquiring company saw fit not to exercise this right, this prerogative of control, yet the potential was always there to be exercised at any time, and the likelihood that such control could be exercised was always present. It was never extinguished. 43

Robichaud, J. concluded that actual control in the acquired operations of Moncton Publishing Limited, publisher of the Moncton Times and Transcript, and University Press of New Brunswick, publisher of the Fredericton Gleaner, was exercised by Ralph Costello, Irving's right-hand man. Furthermore, he found that the formation of the alleged combines, merger, trust or monopoly had been established beyond all reasonable doubt and that they, in fact, operated in New Brunswick, which he found to be the relevant market based on evidence, "in point of fact as well as in point of law." 44 Therefore, he concluded that the provisions of the Combines Act were applicable to the newspaper business in Canada, and in particular, in the province of New Brunswick—a geographical area of Canada.
To the most vital question of whether such combines, merger, trust or monopoly operated or were likely to operate during the periods set out in the indictments, to the detriment of the public, Mr. Justice Robichaud considered it from the factual and legal standpoint. From the factual standpoint, the evidence seemed to confirm that with the acquisition of the Gleaner, "the door became completely closed to any competition in the field of English-language daily newspapers in New Brunswick." Therefore, free competition was absolutely stifled. The evidence clearly established that K. C. Irving personally arranged and finalized the acquisition of the Fredericton Gleaner in the name of his company K. C. Irving Limited between 1957 and 1958 to November 30, 1971.

As well, the factual evidence by Ralph Costello and Mr. Grainger corroborated Irving's efforts to permit L'Evangeline to obtain "Perspectives." The refusal to allow L'Evangeline access to "Perspectives" originally was purely a business decision based on the economics of the Moncton Times and Transcript. Robichaud, J. concluded, as mentioned previously, that the Irving monopoly had not attempted to drive its competitor L'Evangeline out of business.

In analyzing both the prosecution and defence submissions on the issue of detriment, Mr. Justice Robichaud indicated that it was the responsibility of the court, in this case his responsibility, to make sure that the line of undue prevention or lessening of competition was not crossed. In the trial judge's view,
... once a complete monopoly has been established, such as the evidence clearly discloses, inasmuch as the post-1960 charges are concerned, detriment, in law, resulted. The ownership and control by K. C. Irving Limited of 100 per cent of the English-language daily newspapers published in New Brunswick, during that period, unquestionably amounted to a complete crossing of 'the line.'

As for the pre-1960 charges, Robichaud, J. indicated that K. C. Irving Limited's ownership and control of 80 per cent of the English-language dailies in New Brunswick and 25 per cent ownership in University Press of New Brunswick, the publisher of the Gleaner, constituted a virtual monopoly of the English-language newspapers of New Brunswick. Thus, Mr. Justice Robichaud ruled that K. C. Irving Limited from 1948 to August 9, 1960, had seriously breached the boundary of undue lessening of competition ultimately leading to the "final crossing."

As to the defence's submission that acquisition resulted in public benefit, the trial judge stated:

Because of a constant trend of judicial decisions in anti-combines cases, it has been established that in instances of complete, or almost complete, virtual ownership, it is not necessary to consider economic advantages.

Thus, Mr. Justice Robichaud agreed with the Crown's submission on the interpretation of detriment—the restriction of competition including other factors which may be affected by restraints on competition—over that of the defence. He concluded that the "combines, trust, merger or monopoly" operated, or were likely to operate, during the periods set out in the two indictments to the detriment of, or against, the interest of the public.
From a legal standpoint, Robichaud, J. noted that the governing considerations in Canadian jurisprudence appear to be "the public interest" and "the possible detriment" to any person or the general public through the formation of the prohibited combine, merger, trust or monopoly. Furthermore, the cornerstone of Canadian jurisprudence on the combines branch of the law was the public's basic right to the benefit of free competition and that agreements or arrangements designed to prevent or lessen competition, to restrain trade or result in no competition at all were considered illegal "even though it may not appear to have actually produced any result detrimental to public interest."

Thus, the prime question of fact Mr. Justice Robichaud had to decide was whether or not the result of the alleged monopoly and combine—counts one to three of the first indictment, and of the alleged merger in the second indictment—amounted to "undue prevention or lessening of competition in violation of the statute."

In his decision Robichaud, J. made six conclusions. First, the provisions of the Combines Act were applicable to the newspaper industry in Canada including the province of New Brunswick, a geographical area of Canada. Second, the products referred to in the indictment, English-language daily newspapers, were articles of trade as statutorily defined in the Combines Act. Third, the relevant market for the five English-language newspapers was the province of New Brunswick. Fourth, the acquiring company, K. C. Irving Limited,
from September 8, 1948, to August 9, 1960, gained ownership and control of 80 per cent of the newspapers in New Brunswick and ultimately controlled 100 per cent with its acquisition of the Gleaner by November 30, 1971. Fifth,

The Crown has established, beyond a reasonable doubt that a 'monopoly,' 'combine' and 'merger' were set up by the accused corporation (excepting, however, University Press of New Brunswick Limited, in so far as counts 2 and 3 of the first indictment are concerned), . . . whose object was . . . 'the prevention or lessening of free competition unduly' within the meaning of the Act, . . . that such interference with 'free competition' in the said products and market, . . . was against 'the public interest' . . .52

Consequently, Mr. Justice Robichaud found K. C. Irving Limited, New Brunswick Publishing Company Limited, Moncton Publishing Company Limited and University Press of New Brunswick Limited guilty of the offence charged in count one of the first indictment. Also, K. C. Irving Limited and New Brunswick Publishing Company Limited were found guilty of the offences charged in counts two and three of the first indictment. However, the University Press of New Brunswick was found not guilty of the offences charged in counts two and three of the first indictment because there was reasonable doubt as to the guilt of the accused corporation since it had retained ownership and control of its publishing until May 15, 1968, almost eight years after the last date of the period covered by counts two and three of the first indictment. Finally, K. C. Irving Limited was found guilty as charged in the second indictment.
Comments about the trial itself came from the defence and Crown counsels as well as from Mr. Justice Robichaud himself. Defence lawyer Gillis contended during the long trial that the charges were part of a "vicious vendetta" engineered by New Brunswick Liberal Senator Charles McElman against K. C. Irving. In response to this accusation of a vendetta or political grudge on the part of the defence, Crown counsel Hoyt accused Gillis of trying "to drag red herrings across the path of Justice." Robichaud, J. indicated that political pressure and interference were to be found in the trial, evident in his statement:

I was convinced that some political undertones would be aired during the trial. This made my position, as presiding judge, difficult. My apprehension proved to be right. The evidence and material before me did reveal that political pressure and interference lay behind the facade of these proceedings. It is a fact that political undertones, as well as overtones, were noticeable at the hearing.

In spite of the political pressures, Mr. Justice Robichaud preferred to ignore this side issue and indicated that it would not influence his decision in the trial.

Sentencing was deferred from May 12, 1974, until Tuesday, April 2, 1974. At that time, K. C. Irving Limited was fined $20,000 on each of the three counts of the first indictment on which it was found guilty, for a total of $60,000. New Brunswick Publishing Company Limited was fined $10,000 on each of the three counts in which it was found guilty, for a total of $30,000. Moncton Publishing Company Limited and University Press of New Brunswick Limited were each fined $10,000 in the first indictment. The total amount
of the fines under the first indictment was $110,000. In the second indictment, the accused K. C. Irving Limited was fined $40,000. The total of the fines imposed amounted to $150,000. The fines levied were all to be paid to the Receiver General of Canada within thirty days after the cases were finally determined under appeal.

In addition to the fines imposed on June 13, 1974, Robichaud, J. examined a formal application to the court by the prosecution for a detailed order of prohibition—a court order to break up the monopoly. Robichaud, J. stated:

The trend of Canadian decisions seems to be favourable to the issuing of such orders following a guilty finding in cases of merger, combines or monopoly.

In the Crown submission, two reasons were given for favouring the issuance of the prohibitory order. First, there was no specific evidence that a dissolution had been implemented and, second, the alleged transfer to Irving's sons did not amount to dissolution. The transfer of the ownership of Irving companies over to his sons resulted in John Irving acquiring the Moncton Times and Transcript as well as the Fredericton Gleaner with James and Arthur Irving each controlling 40 per cent ownership of New Brunswick Publishing Company Limited with the remaining 20 per cent retained by K. C. Irving Limited. Based on Costello's evidence, R. Irving turned "the direction of his office, the ownership of his companies, over to his sons" in April 1972. Defence counsel Gillis opposed the granting of the prohibitory order because the charges of "combines, merger or monopoly" were
confined to the period September 8, 1948, to November 30, 1971, and that, with the dissolution of K. C. Irving Limited amongst the sons, the illegal monopoly or merger did not exist anymore. The Crown responded by noting that even by accepting Costello's evidence that the alleged dissolution had taken place in April 1972, the fact remained that "Court proceedings had been formally initiated against the accused companies several months before the alleged dissolution."\(^{58}\)

In analyzing both sides of the order, Mr. Justice Robichaud did not comply with the Crown's submission to order the sale of the two Saint John newspapers. Robichaud, J. responded:

The public good of the New Brunswick people would be jeopardized were I to order the sale of such widely read, good newspapers to some yet unknown interested purchaser. In my view, the public good of our people must come before everything in our small Province.\(^{59}\)

Reaction to the Crown's proposal to order the sale of the two Saint John newspapers is also evident in the following remark by Mr. Robinette, counsel for the defence, who described the proposal as "a most oppressive, vindictive document, possibly dictated by political or other expediency."\(^{60}\)

However, Robichaud, J. agreed with Crown counsel Hoyt that any alleged transfers to Irving's sons in 1972 did not meet the norms envisaged by Canadian Court decisions in the interpretation and application of the provisions of the **Combines Act**. Therefore, he ordered the **Moncton Times** and **Transcript** sold and disposed of according to the terms of his prohibition order.
The order stipulated that John E. Irving, the alleged owner of Moncton Publishing Company Limited and publisher of the *Moncton Times* and *Transcript*, transfer all of his personal and real business assets within twelve months from the final decision of the appeal court pertaining to the two Irving indictments. However, this transfer could not be made to any person, organization, or subsidiary affiliated or associated with the Irving organization. Also, the Attorney General of Canada was to be notified in writing within sixty days by John E. Irving of the name and address of the buyer together with the terms, conditions, and other pertinent information pertaining to the sale. Finally, if New Brunswick Publishing Company Limited, Moncton Publishing Company Limited, and its alleged present owner John E. Irving, did not comply with the terms of the prohibitory order, the Attorney General of Canada would order the sale or disposal of the *Moncton Times* and *Transcript* as the court saw fit.
Footnotes

Chapter Three


4 "Views on Group Ownership Aired in Canada Trial," *Editor & Publisher* 105 (18 November 1972):42.

5 Ibid.

6 Ibid.


9 "Views on Group Ownership Aired in Canada Trial," *Editor & Publisher* 105 (18 November 1972):42.


11 "Views on Group Ownership Aired in Canada Trial," *Editor & Publisher* 105 (18 November 1972):42.


13 Ibid., p. 17.

14 "Southam Press Policies Told in Monopoly Trial," *Editor & Publisher* 105 (11 November 1972):82.

15 Ibid.


18 Ibid.

19 "Irving Papers' Monopoly Case on Trial in Canada," *Editor & Publisher* 105 (4 November 1972):33.
20 Ibid.
23 Ibid.
24 Ibid.
26 Ibid., p. 98.
27 "Irving Papers' Monopoly Case on Trial in Canada," Editor & Publisher 105 (11 November 1972):33.
29 Ibid.
32 Ibid.
33 Ibid., p. 69-70.
34 Ibid., p. 70.
35 Ibid.
36 In the United States: (a) "relevant market" may be defined on the basis of geographical boundaries of the market, and on the basis of product differentiation; (b) before a merger can be violative of the Clayton Act, a possible lessening of competition must be measured in a defined "relevant market," that is, one that takes into account not only the product but also its geographic area of distribution.
37 Ibid., p. 71.
38 Ibid., p. 64-65.
39 Ibid., p. 66.
40 Ibid., p. 100.
41 Ibid., p. 76.
42 Ibid., p. 88.
43 Ibid., p. 90.
44 Ibid.
46 Ibid., p. 101.
47 Ibid.
48 Ibid.
49 Ibid., p. 112.
50 Ibid.
51 Ibid., p. 120.
52 Ibid., p. 121.
54 "Monopoly Case Cost $500,000; Called 'Grudge'," Editor & Publisher 105 (30 December 1972):28.
56 (1975) 22 C.C.C. (2d) 281 at 288.
57 Ibid., p. 289.
58 Ibid.
59 Ibid., p. 292.
In the New Brunswick Court of Appeal case, the defendants K. C. Irving Limited, New Brunswick Publishing Company Limited, Moncton Publishing Company Limited, and University Press of New Brunswick Limited appealed their convictions on the following two main grounds. The first was that the trial judge had erred in four ways:

. . . misdirecting himself in the interpretation and application of the provisions of the Combines Investigation Act;

holding detriment in law results once a complete monopoly has been established;

convicting the appellants on finding the alleged monopoly, combine or merger amounted to undue prevention or lessening of competition in violation of the statute; and

convicting the appellants on finding the acquisition of the Moncton Publishing Company Limited constituted the formation of a combine or merger, trust or monopoly.¹

The second ground for appeal was that the verdict was against the weight of the evidence:

The evidence failed to establish detriment to the public. The Crown failed to establish or adduce evidence of any lessening of competition.²
Mr. Justice Limerick of the New Brunswick Court of Appeal delivered the decision of the Court of Appeal on June 4, 1975.

Mr. Justice Limerick's statement focussed on five subject areas: the definition of monopoly; the concept of competition and the relationship of a lessening of competition and the public detriment; Mr. Costello's memorandum to K. C. Irving; the roles of the New Brunswick Publishing Company and Moncton Publishing Company in the formation of the monopoly; and the matter of the acquisition of the Fredericton Gleaner.

With respect to the definition of monopoly, Limerick, J. A. ruled that the trial judge employed the dictionary meaning of the word monopoly and not the restricted connotation of the word as defined in the Combines Act. He indicated that the trial judge had failed to give sufficient attention to the restrictive application of the word monopoly to those situations "where control or substantial control of a business is exercised or likely to be exercised to the detriment or against the interest of the public." Limerick, J. A. concurred that K. C. Irving Limited created a complete monopoly according to the dictionary meaning of the word with his final controlling interest in the Fredericton Gleaner. However, he differed from Mr. Justice Robichaud's statement that when a monopoly occurred, detriment in law resulted. For Limerick, J. A. and the New Brunswick Court of Appeal,

Whether the one ownership businesses have operated or are likely to operate to the detriment of or against the interest of the public is a question of
fact not of law and a question which must be decided against the appellants in this case before they can be found guilty; further it must be found against them beyond any reasonable doubt.  

Furthermore, Mr. Justice Limerick noted that no presumption was created by the Combines Act that the acquisition and control of the five English-language dailies by Irving resulted in competition being lessened which would be detrimental to the public. There was nothing in the Act to create such a presumption. Even if such an inference arose, Limerick, J. A. indicated that it was rebuttable.

With respect to the concept of competition, Mr. Justice Limerick found the Crown's statement that there was a lessening of competition—the element operating to the detriment of or against the interest of the public by reason of the acquisition of all five English dailies by K. C. Irving—as not supported by the evidence. Limerick, J. A. indicated that never before, nor now, was there any competition for markets between the three afternoon newspapers—the Gleaner, Transcript, and Times-Globe. He said that each paper had its own captive market, as it did prior to common ownership with each newspaper serving "its own limited area of distribution without any material overlap." As well, Mr. Justice Limerick noted that the acquisition of Moncton Publishing by New Brunswick Publishing, instead of lessening competition, allowed Moncton Publishing to become more competitive, resulting in an increase in its sales in the only competitive area—the North Shore market—between the Saint John Telegraph-Journal and the Moncton Times.
Furthermore, based on the evidence of Crown witnesses, all of the newspapers operated independently with no interference in editorial policy, distribution, and management from the owners, holding company or parent company. In the end, Limerick, J. A. ruled:

No lessening of competition has been established, nor any evidence pointed out to this Court or the trial judge to indicate any such lessening of competition. 6

Mr. Justice Limerick also remarked that the evidence disclosed no public detriment relating to newspapers as articles of trade or commerce or in editorial policy. Furthermore, in his view, editorial opposition (for example, the creation of a television station in Moncton, supported by the Moncton papers, but opposed by the Saint John newspapers), as well as articles critical of Irving enterprises, were carried by the newspapers in New Brunswick. For example, articles and editorials criticizing the pollution of the Saint John River by the Irving Pulp & Paper Mill in Saint John were carried by the various papers.

Pertaining to the Costello memorandum, Limerick, J. A. noted that the Crown had placed too much emphasis on the memorandum written by Costello to Irving discussing the reasons why he should dispose of his control of the Gleaner. In Mr. Justice Limerick's opinion, Costello's views were that of a layman, not qualified as an expert in the field of law, and his objective had been to raise all possible arguments for discussion so that Irving would be fully aware of all possible ramifications which might result if he retained
control of the Fredericton Gleaner. Limerick, J. A. said:

The opinions expressed in this memorandum have no bearing on the guilt or innocence of the defendant companies for the offences charged under the Combines Investigation Act. They are written by a layman without specific reference to the charges before this Court.7

The next subject to which Limerick, J. A. referred was the roles of the New Brunswick and Moncton Publishing Companies in the formation of a monopoly between 1960 and 1971. He viewed the selling of shares by Michael Wardell to K. C. Irving Limited, in that time period, as the only act directed to the formation of a monopoly. He found no evidence that Moncton Publishing and University Press of New Brunswick, as individual companies, had assisted in the operation of a monopoly as defined in the Combines Investigation Act. Mr. Justice Limerick noted that each company had its own independent board of directors who assumed responsibility to finance, plan and supply new plant and equipment for their respective companies, but left the management and editorial policy of the various newspapers in the hands of the publisher and editors. He found no evidence that University Press or Moncton Publishing received or sought direction from either K. C. Irving Limited or New Brunswick Publishing, except on one occasion when a Moncton paper published an editorial based on wrong facts. The publishers of these two companies denied any outside influence, and no evidence was found to prove otherwise.

As well, Limerick, J. A. indicated that Robichaud, J. had relied on many cases cited by the Crown and was very much
influenced by the wording of the charge "have operated . . . or are likely to operate to the detriment of the public."

In Mr. Justice Limerick's view:

The likelihood of a singly-owned group of companies to operate to the detriment of the public is a question of fact and must be supported by evidence of facts or by inferences to be drawn from facts.®

From the time of the acquisition of Moncton Publishing by New Brunswick Publishing in 1948, no evidence could be found that over the past twenty-five years a change in policy or combined action to the detriment of the public on the part of these two companies had resulted. Limerick, J. A. remarked:

In the absence of evidence of a change in policy or specific evidence of combined action to the detriment of the public in recent time, we can only judge the likelihood of future conduct on the basis of past performance.⁹

Therefore, Mr. Justice Limerick concluded:

The legal right of control of all five newspapers is unquestionably vested in K. C. Irving, Limited and through it, in Mr. K. C. Irving. But the fact remains, neither he nor that company has exercised the right of control and actual control is vested in the publishers and editors of the individual publishing companies, which are, in fact, as independent in regard to selling price of newspapers, advertising rates, editorial policy, news editing and management as they were prior to their legal takeover by N. B. Publishing and K. C. Irving, Limited.¹⁰

Furthermore, Limerick, J. A. noted that the evidence disclosed that the publishing companies had never declared any dividends since being acquired by Irving, nor had any member of the Irving family received financial compensation in any form from any of the companies. Based on the facts, Mr. Justice Limerick indicated that the trial judge had erred
in disregarding the facts and instead involved himself in the
realm of theory in holding that the likelihood of K. C. Irving
exercising his legal right of control was always present and
could be exercised. In Mr. Justice Limerick's view,
Robichaud, J. erred in his interpretation of likelihood:

The difference is co-extensive with the words 'probability'
and 'possibility.' The trial judge according to his
finding of facts interpreted 'likelihood' as the possi­
ibility.' The evidence does not justify a finding of
'probability' of control being assumed by the parent
company or by Mr. Irving. The word 'likely' as used in
s. 2 of the Combines Investigation Act means 'will
probably' not 'may possibly.'

The final subject area Limerick, J. A. spoke of was
the acquisition of the Fredericton Gleaner. He saw no differ­
ence in the Gleaner's situation after its acquisition than
prior to it. The Crown's contention, based on the evidence
of expert witnesses, was that it would be difficult, if not
impossible, for a newspaper to begin a successful operation
in New Brunswick with one owner owning all the newspapers.
In Mr. Justice Limerick's view, this situation was not
changed by the purchase of University Press--publisher of
the Gleaner--by K. C. Irving Limited. For Limerick, J. A.
the only significance was that a completely independent paper
no longer existed in New Brunswick. Mr. Justice Limerick
noted that Mr. Justice Robichaud's primary concern should
not have been whether the acquisition of the Gleaner pre­
vented another newspaper from commencing operation but
whether its purchase resulted in an operation detrimental to
the public interest. Thus, Limerick, J. A. stated:
As long as the Daily Gleaner operated independently without influence from the parent company and no evidence of detriment was disclosed by the evidence, the purchase of the Gleaner did not give rise to any cause of action under the Combines Investigation Act.12

In making his final analysis of the New Brunswick Supreme Court case, Limerick, J. A. made a number of findings. First, the Crown's sole and specific ground that there was a lessening of competition by reason of consolidation of ownership was not supported by evidence of any actual lessening of competition. Instead, the evidence established the contrary to be the case evident in the North Shore area. The three afternoon newspapers—Gleaner, Times-Globe and Transcript—were never competitive either before or after the Irving takeover. Also the three publishers had complete independence, and competition remained in the North Shore area where the Moncton Times greatly increased its circulation due partly to the infusion of new capital. Second, Limerick, J. A. indicated that charges of acquiring substantial control or complete control were alternative charges. The defendants could not be convicted of both in relation to the same acts. He noted that the intention of the Combines Act was not to create two distinct and separate offences, one of forming and one of operating a monopoly, and imposing double punishment on the individual who formed as well as operated a monopoly. Limerick, J. A. stated:

The charge of forming a monopoly which is likely to operate to the detriment of the public and the charge of operating a monopoly which is operated to the detriment of the public are alternative offences not two separate and distinct offences for which,
on the same evidence and fact, the defendants can be
twice convicted and twice punished. The defence of
res judicata applies and was raised by the general
plea of 'not guilty.'

Therefore, with respect to the above, Mr. Justice Limerick
indicated that Mr. Justice Robichaud should have acquitted
all four defendants on counts two and three of the first
indictment since the counts and charges were based on the
identical facts, circumstances and law as count one. In
Mr. Justice Limerick's view, once the defendants were con­
victed on count one, counts two and three became "res
judicata, a defence raised by the general plea of not
guilty."

Mr. Justice Limerick also noted that the same reason­
ing applied to the second indictment which charged K. C.
Irving Limited of assisting in the formation of a merger.
In this regard Limerick, J. A. said:

There is no evidence of detriment or likelihood of
detriment to the public relating to this indictment,
let alone a reasonable doubt thereof, nor any
evidence of any lessening of competition or likelihood
thereof.

Finally, Limerick, J. A. ruled that Robichaud, J.
had erred in finding that a presumption of detriment to the
public—a lessening of competition—arose out of the consoli­
dated ownership of the five English-language dailies by one
owner, K. C. Irving Limited. Limerick, J. A. based his
decision on the following points. First, "No such presump­
tion is created by the Act or if such presumption is created
it is rebuttable." Second, the Crown must prove that the
complete control of the five newspapers in New Brunswick operated or was likely to operate to the detriment of the public. But,

No evidence was adduced that any detriment to the public resulted. The Crown failed to establish or adduce evidence of any lessening of competition, the only allegation of detriment made by the Crown.17

Instead, the evidence disclosed more competition in the competitive North Shore area. Finally, the trial judge found that the publisher and editor of each newspaper had complete autonomy uninfluenced by the owner or parent company. Therefore, Mr. Justice Limerick allowed the appeals and set aside the convictions and sentences.

Following Mr. Justice Limerick's decision to set aside the convictions and sentences, the Crown sought leave to appeal on a number of questions of law. However, the Crown's application for leave was not presented within the twenty-one days specified in s. 621 (1)(b) of the Criminal Code, nor had Crown applied for an extension of time from a Judge in Chambers. In spite of that, the Supreme Court of Canada did grant leave to extend the time for bringing the application for leave to appeal.

However, the Supreme Court noted that an applicant who applied concurrently for an extension of time and for leave, before the Court, instead of first seeking an extension from a Judge in Chambers, ran the risk of refusal of an extension if there had been "unreasonable delay or intervening factors of prejudice to the respondents."18
Supreme Court held that there was no unreasonable delay in the Crown's appeal in the Irving case, nor was there any indication of prejudice to the defendants.

Therefore, the Supreme Court of Canada granted the Crown leave to extend the time for bringing an application for leave to appeal as well as leave to appeal on the following three questions of law:

1. Did the Court of Appeal of New Brunswick err in its interpretation of the words 'to the detriment or against the interest of the public whether consumers, producers or others . . .' as those words are used in the definition of 'merger' and 'monopoly' in the Combines Investigation Act, R. S. C. 1970, c. C-23 and in the definition of 'combine' in predecessor Acts?

2. Did the Court of Appeal of New Brunswick err in holding that (a) no presumption arose of detriment or likely detriment to the public when competition has been prevented or lessened unduly and (b) even if there was such a presumption there was evidence to rebut it?

3. Did the Court of Appeal of New Brunswick err in its appreciation of the meaning of 'competition' as it related to the facts of the present case?

The case of "R. v. K. C. Irving Limited" ultimately reached the Supreme Court of Canada with the Honourable Bora Laskin, Chief Justice of the Supreme Court, making the final decision in the case on November 16, 1976. Leave to appeal to the Supreme Court of Canada was given on the three questions of law mentioned previously. Before his examination of the three questions of law, Chief Justice Laskin made three preliminary but significant remarks. First, he indicated there was no appeal "on questions of fact" and that the findings of fact of the New Brunswick Court of Appeal, if
they differed from those of the trial judge, were accepted. Second, in his view, the consolidation ownership by K. C. Irving Limited of all five English-language daily newspapers did not, "on the evidence, result in any change in the market areas served by the newspapers before their acquisition," nor was any attempt made to eliminate competition for circulation so as to limit the public's access to any of the newspapers. Instead, there was a substantial improvement for each of the newspapers over the 1948 to 1971 period, and no action was taken by the parent company or any subsidiary in order to give one newspaper an advantage over another. Third, Laskin, C. J. C. noted that the trial judge found, as a fact, complete editorial autonomy by the respective publishers and editors, with the owners retaining and in some instances increasing the staff of each of the newspapers. Furthermore, the trial judge found no actual detriment to the public as a result of the Irving acquisitions with respect to circulation rates, advertising content and rates, and instead found an improvement in the quality and quantity of news.

The Chief Justice also noted that in relation to the three questions of law on which leave to appeal was granted, the Crown counsel also submitted that the New Brunswick Court of Appeal had erred in three ways. First, the Court of Appeal had erred in holding that subsidiaries of a parent corporation could compete with each other and that pre-existing competition between previously competing and independently owned newspapers had not been lessened by Irving's
acquisition. Second, the Crown had also submitted that public detriment resulted from the prevention or lessening of competition. Finally, the Crown had submitted that the presumption of detriment was "not only not rebuttable but that detriment had in fact been proved."\textsuperscript{22}

In his analysis of the Crown's submission on the three questions of law, Chief Justice Laskin stated that in his view it was impossible "to contend in the face of reasons for judgment at trial and on appeal that there was any proof of detriment in fact."\textsuperscript{23} Laskin, C. J. C. reiterated the finding of the trial judge that the only allegation of actual detriment concerned the issue of "Perspectives" and the French-language daily \textit{L'Evangeline}, which was not substantiated.

In looking at the first question of law on which leave to appeal was granted, Laskin, C. J. C. found the Irving interests' control of the five English-language daily newspapers in New Brunswick to satisfy the opening parts of the definition of "merger" and "monopoly," \textit{Combines Investigation Act} R. S. C. 1970, and the definition of "merger, trust or monopoly," R. S. C. 1952. The question Chief Justice Laskin was presented with was whether competition was, or was likely to be, lessened to the detriment, or against the interest, of the public in relation to the meaning of "merger" and, in relation to the meaning of "monopoly" and of "merger, trust or monopoly"; whether the person or persons having such control had operated, or were
likely to operate, the controlled business of newspapers to the detriment of the public. Laskin, C. J. C. ruled that since there was no proof of detriment in fact, the Crown's submission, in his view, was based on

. . . . a mistaken application to the present case of the law governing unlawful conspiracies or agreements unduly to prevent or lessen competition. There is no charge against the respondents or any one of them of being parties or a party to an unlawful conspiracy under the Combines Investigation Act.24

Chief Justice Laskin indicated that the Crown relied on the conspiracy cases based on its submission that subsidiaries in the same business cannot compete with each other. Laskin, C. J. C. went on to say that the Crown appeared to put subsidiaries in the position of parties to an agreement to lessen competition evident by the interwoven corporate structure of which they are a part, with the parent company K. C. Irving Limited, the ultimate beneficiary of the profits flowing from the business.25

In examining the second question of law on which leave to appeal was granted—presumption and public detriment—Chief Justice Laskin found the Crown's submission as pointing to an inference of public detriment that had to be drawn from one basic fact—Irving's complete control of newspapers in New Brunswick. He said:

In using the term 'presumption,' the Crown did not use it as connoting an inference that may but need not be drawn from the evidence, but rather as pointing to an inference that must be drawn as to the presumed fact—here the required detriment—on proof of a basic fact—here the acquisition of a complete control of a business in a market area.28
Laskin, C. J. C. did not think it was open to a court in a criminal case to raise such a presumption as the Crown had done in the Irving case because of the absence of legislative direction. Chief Justice Laskin stated:

> Inference as part of the logical process of deduction from proved facts is one thing; a rebuttable presumption of law has the effect of altering the burden of proof which, if there is no legislative prescription to the contrary, rests on the Crown with respect to every element of an offence charged against an accused.27

With respect to the third and final question of law on which leave to appeal was granted—the concept of competition—Laskin, C. J. C. noted that total control over a business did not mean that competition was, or was likely to be, lessened or that the lessening, or likely lessening, of competition was to the detriment or against the public interest. In Chief Justice Laskin's view, even if total control would be enough to support an inference of lessening, or likely lessening, of competition, that inference could not be drawn in the Irving case because the evidence and findings by the trial judge and by the New Brunswick Court of Appeal were "that the pre-existing competition where it existed, remained and was to some degree intensified by the take-over of the newspapers."28

Therefore, based on his analysis of the three questions of law, Laskin, C. J. C. made four conclusions. First, he disposed of the charges alleging an illegal merger under the Combines Investigation Act R. S. C. 1970. Second, charges involving "merger, trust or monopoly" under the present Act
pertaining to the operation, or likely operation, of a completely controlled class of business in a market area to the detriment of the public, in this case newspapers in the province of New Brunswick, was also disposed of. In Chief Justice Laskin's view,

... proof must be adduced of this element and it cannot be presumed, as the Crown would have it, merely by showing complete control of a business, let alone substantial control only. The evidence must go beyond that and it was not adduced in the present case.²⁹

Third, Laskin, C. J. C. remarked that the testimony of expert witnesses, who spoke of the potential danger of centralized ownership likely resulting in public detriment, were speaking theoretically,

... without having made any study of the situation in New Brunswick, nor did they address themselves to the facts relating to the operation of newspapers involved in the present case.³⁰

Laskin, C. J. C. acquitted K. C. Irving Limited of the charge in the second indictment because of the unfounded factual basis underlying all the charges.

Therefore, Chief Justice Laskin dismissed the Crown's appeal and reaffirmed the decision of the New Brunswick Court of Appeal.
Footnotes

Chapter Four

2 Ibid.
3 Ibid., p. 166.
4 Ibid.
5 Ibid., p. 169.
6 Ibid.
7 Ibid., p. 176.
8 Ibid., p. 171.
9 Ibid., p. 172.
10 Ibid.
11 Ibid., p. 173.
12 Ibid., p. 174.
13 Ibid., p. 179.
14 Ibid., p. 178.
15 Ibid., p. 181.
16 Ibid.
17 Ibid.
20 Ibid., p. 466.
21 Ibid.
22 Ibid., p. 468.
23 Ibid.
24 Ibid., p. 470.
25 Ibid.
26 Ibid., p. 474.
27 Ibid., p. 475
28 Ibid.
29 Ibid.
30 Ibid., p. 476.
CHAPTER FIVE

SUMMARY AND CONCLUSIONS

In the analysis of the case "Regina v. K. C. Irving" from its initial stages through to the final Supreme Court of Canada decision delivered by Chief Justice Bora Laskin, a number of significant points can be summarized.

First, since this was the first time daily newspapers had been charged and prosecuted under the Combines Investigation Act, the uniqueness of the case must be underlined.

Second, it is clear from Irving's determination that New Brunswick's enterprises be locally owned that Belliveau is on firm ground in asserting that Irving identified the public interest with his own interests and responsibilities. The surreptitious manner in which he acquired the Fredericton Gleaner, after the attempts of Southam and others had failed, indicates that he felt the transaction was entirely private and that public disclosure was unnecessary. That Irving felt he was working to promote the public interest is evident in the fact that neither he nor any member of his family received any immediate financial benefit from the transaction: all of his profits from media operations were reinvested in the New Brunswick economy.

82
Examination of the testimony given by Costello, Wardell, and Irving himself to the Special Senate Committee hearing on the mass media reveals that the case was shrouded in political considerations. The defence counsel, Gillis, referred to a "vicious vendetta" under Senator McElman's direction while his co-counsel, Robinette, in fighting the order of prohibition, referred to it as "a vindictive document possibly dictated by political or other expediency." The remarks by Costello, Wardell, and Irving at the Special Senate Committee hearing on the mass media and by defence counsel Gillis signify the deep-rooted hostility between the Irving conglomerate and the Robichaud government of New Brunswick at that time.

It is indisputable that K. C. Irving held absolute control over all five of New Brunswick's English-language dailies through his corporate personality. However, facts disclose that Irving never availed himself of this ever-present opportunity to exercise his power over his newspapers or broadcast media. There is no evidence of his interference with the editorial policy of any of his papers. Now that he has established residence in the Bahamas, this control has been apportioned among his three sons. John Irving directs the Moncton Times and Transcript, as well as the University Press of New Brunswick, which publishes the Fredericton Gleaner. The other sons, James and Arthur, control jointly, by virtue of their individual 40 per cent holdings, the New Brunswick Publishing Company which
publishes the Saint John Telegraph-Journal and Times-Globe. The remaining 20 per cent equity in this enterprise is owned by K. C. Irving Limited. Thus total domination of the media by one conglomerate (more specifically by one man, K. C. Irving), so central to Irving's control of New Brunswick and to his own growth, ceased to exist in New Brunswick with Irving's departure and the partition of his media empire.

Furthermore, Mr. Justice Robichaud noted that the actual control of the five English-language dailies rested with the respective publishers and editors of each newspaper who enjoyed complete editorial autonomy. With respect to the New Brunswick Court of Appeal, in Mr. Justice Limerick's view, the fact remained that the individual publishing companies were as independent in regard to advertising rates, editorial policy, news editing and management as they were prior to the legal takeover by K. C. Irving Limited. Thus, the evidence confirmed the independent operation of each newspaper without interference in editorial policy, distribution or management from the owners, holding or parent company.

Turning to the concept of a lessening of competition, the Crown's sole allegation of public detriment, Robichaud, J. found no actual harm to the public as a result of Irving's acquisition with respect to circulation and advertising rates. Moreover, the trial judge concluded that, based on the evidence, the Crown had failed to prove beyond a reasonable doubt that the Irving conglomerate was trying to drive
the French-language daily L'Évangeline out of business by not allowing it the rights to "Perspectives." The "Perspectives" issue was the Crown's specific ground of public detriment and was not substantiated by the evidence. Also Limerick, J. A. of the New Brunswick Court of Appeal ruled that a lessening of competition by reason of centralized ownership was not supported by evidence. Based on the evidence in Mr. Justice Limerick's view, each newspaper had its own captive market. Furthermore, as Chief Justice Laskin of the Supreme Court of Canada noted, total control did not mean competition was or was likely to be lessened to the detriment of the public. In Chief Justice Laskin's view, even if total control were enough to support an inference of lessening or likely lessening of competition, that inference could not be drawn in the Irving case because the evidence and findings by the trial judge and the Court of Appeal were that "pre-existing competition, when it existed, remained and was to some degree intensified by the takeover of the newspapers." Therefore, the lessening of competition to the detriment of the public must be supported by factual evidence. Specifically, a lessening of competition to the detriment of the public was not proved in the Irving case.

In addition, the Crown submitted that a presumption of public detriment was not only not rebuttable, but, in fact, had been proved. In Mr. Justice Limerick's view, no such presumption of detriment—a lessening of competition due to the consolidated ownership of all five English-language
dailies by K. C. Irving—was created in view of the provisions of the Combines Act, and if such a presumption was created, it was rebuttable. Limerick, J. A. also noted that no evidence was adduced that public injury had resulted. As well, Chief Justice Laskin ruled that there was no proof of detriment in fact and that he did not think it was open to a court to raise such a presumption as the Crown had done in the Irving case because of the absence of legislative direction. For Limerick, J. A. and Laskin, C. J. C., proof of this element—a lessening of competition to the detriment of the public—must be proven and cannot be presumed. The final posture of the Supreme Court was that there could be no presumption of public detriment through restriction of competition unless it were proven outright by the facts of the case. Evidence simply did not support the Crown's allegation that Irving's consolidation of control over the province's English-language dailies had worked perceptible public harm.

Therefore, the conclusion of the study "Regina v. K. C. Irving," pertaining specifically to Irving and public interest, was that the concentration of ownership evident in the K. C. Irving conglomerate case had not reached a point where it interfered with the public interest because monopoly ownership did not result in victimization of the public. Furthermore, one could neither infer nor presume that public detriment would arise from the elimination of competition due to monopoly ownership. As well, McElman's statement
that K. C. Irving wielded the power to decide what would not become public issues based on the evidence proved to be unsubstantiated.

Even though the owners never attempted to influence editorial policy, Irving had the power to appoint individuals to senior executive positions who shared his philosophy or at least would implement Irving philosophy in the newspapers according to his guidelines. The best example is Ralph Costello, a newspaper executive directly appointed by Irving. Ralph Costello was President of New Brunswick Publishing Company, the publisher of the two Saint John newspapers. As well, Costello was also the chairman of Moncton Publishing, the publisher of the two Moncton papers and also the President of University Press of New Brunswick, the publisher of the *Fredericton Gleaner*. By appointing individuals who shared his philosophy to key executive positions, Irving could testify publicly that he never interfered with the operation or editorial policies of his newspapers. Costello was Irving's right hand man, responsible for the operation of his newspapers and in a position to protect Irving's economic interests should conflict of interest situations arise between Irving's corporate enterprises and the responsibilities of the media in New Brunswick.

In addition, even though the potential dangers of concentration of ownership did not surface in the analysis of the Irving case, one cannot ignore entirely the volume of evidence presented in the case by expert witnesses--those
who work constantly with information. The expert witnesses of the Crown spoke of concentration of ownership in such terms as "dangerous to the public," "to speak with one voice" and "socially and potentially undesirable." Their concerns about concentration, for example, Ryan's concern about multi-media holdings cannot be ignored.

The Irving case dealt with evidence as it applied under Combines legislation dealing, essentially, with industry. The information and news industry is radically different from the commercial marketplace and it is of critical importance that responsibilities be clearly defined for those in whom society has reposed the trust of informing the body politic. It is clear that the public interest may be significantly damaged without there being any lessening of commercial competition: editorial despotism can exist in harmony with the public's purely economic interest, but not with its more fundamental right to unbiased coverage of critical political issues. Anti-trust legislation is meant to protect only the financial interest of the public: the more important issue of the public's right to know cannot be adequately monitored under the existing Combines Investigation Act.

The Irving decision indicated that the problem with controlling monopolies and mergers, in the context of monopoly media ownership, is complex, and that the present laws governing monopolies and mergers are in need of revision. Thus, the Irving case demonstrated the need for changes in laws regarding monopolies and mergers under the Combines Act.
in order that the combines laws become a much more signifi-
cant and effective deterrent to the concentration of media
ownership in Canada.

As well, the Irving case demonstrated that even
though one may possess an instinctive and unfavourable atti-
dude toward monopoly ownership, what individuals feel and
what can be proven under the combines laws are wholly differ-
ent things. According to Anthony Abbott, Consumer and
Corporate Affairs Minister at the time, since the Combinest
Act is written as part of the Criminal Code, the present laws
require "'a very high standard of proof' before a monopoly
could be ruled illegal."1 However, based on the Irving
decision by the Supreme Court of Canada, proposed amendments
to the Combinest Act have been introduced, evident in the
following two comments by Anthony Abbott:

The Irving decision was seen to be a landmark in
combines law as it affects newspapers, and was one
of the chief factors that convinced the Government
that amendments to the law were needed.2

New competitive-practices legislation would lower the
standard of proof now needed for courts to rule that
a monopoly is illegal, . . . that the Irving family
interest, which owned all five English-language daily
newspapers in New Brunswick would be found to be an
illegal monopoly if the case were considered under
the proposed new rules.3

Subsequently, revisions to the Combinest Act have
been introduced, evident in a proposed new bill C-13 (1977)
which would result in a "shift in emphasis from the criminal
to the civil review process by a Competition Board."4 This
Competition Board would replace the Restrictive Trade

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Practices Commission and would have jurisdiction in respect of "mergers and monopolization." Furthermore, the proposed new bill C-13 (1977) delineates specific factors the Competition Board must consider. The Board

must take into account in reaching a judgment as to how the public interest would best be served in respect of mergers, and specialization agreements and monopolistic practices.

Finally, the Board would have the power to (a) prohibit practices found to be restrictive of competition and (b) to direct the necessary action needed to eliminate this restrictive conduct. Under these proposed revisions, with the lower standard of proof required to rule a monopoly illegal, Consumer and Corporate Affairs Minister Abbott indicated, in an article in the Winnipeg Free Press, dated March 22, 1977, that Irving would be found guilty. This is a question worthy of future analysis.

In addition, the Irving study was striking proof of the necessity for the establishment of a Press Ownership Review Board as suggested in the Davey Report, the absence of which (in the time period since that recommendation was made) has resulted in the further concentration of media ownership as evidenced by Keith Davey's December 1973 article in Content magazine. The Board's primary concern would be the investigation and regulation of ownership concentration in the printed media only. The Press Board would have the power to approve or disapprove mergers between, or acquisition of, newspapers and periodicals guided by one broad basic guideline: "all transactions that increase
concentration of ownership in the mass media are undesirable and contrary to the public interest—unless shown to be otherwise." 7

Most importantly, the Press Board's mandate would be legally unique: it would concern itself exclusively with the editorial responsibility of newspaper ownership. The public has for generations come to expect self-regulation from bodies of professionals—medicine and law are excellent examples of callings which have shouldered the responsibility for the ethical conduct of their members.

Journalism is becoming a more formalized calling—the emergence of university degrees in this specialty point to a new sense of professionalism. As the discipline becomes more sharply defined, we may expect a greater sense of professional responsibility among the journalistic corps. A Press Ownership Review Board would regulate the profession from above, as a complement to the improvement that formal professionalism may be expected to generate on the level of the newsroom. The Board would provide a needed and appropriate response to the problem of media concentration in the print sector.

The creation of a Press Board with legal sanctions at its disposal inevitably raises the spectre of censorship. To what extent such a body could tyrannize individual editors and owners, however, would depend upon the legislative framework within which it operated. It must be understood from the outset that what the Board would be guarding against
would itself be censorship—the suppression of newsworthy material important to informing the public. The other side of the coin is, undeniably, the possibility that the fundamental right of free speech could be violated: such would occur as a result of arbitrary Board decisions that the public interest was harmed by what the Board considered an arbitrary or biased editorial policy.

However, the Press Board would not be able to stifle the voice of any particular paper, but would be empowered only to prevent the expansion of questionable or inappropriate editorial practices. The Board must be granted the implicit faith of the public that it is to serve, and to preserve this trust it must not be permitted to influence the well-being or independence of a single newspaper. It cannot be overly underscored that the Board's authority would cover only the financial affiliation of individual papers—that it have no retributive instrument over any owner, publisher or editor other than preventing the acquisition of other newspapers. That the Board would be required to reach its consensus and decision in good faith goes without saying. As noted earlier, the enabling legislation from which the Board derived its powers could and should impose guidelines on the exercise of the power and definite criteria for deciding when the public interest has become imperilled.

Following the British example, the Press Board might well utilize as guidelines whether the merger would result in
an excessive concentration of newspaper power, or whether it would threaten the survival of other newspapers. Another guideline might be whether there would be a serious danger of a change in policy on editorial freedom. Another guideline might be whether the new owner would be in a better position to serve the public interest than the previous owner. Thus, based on these guidelines, the Press Board would become an effective mechanism to meet the urgent need for regulation of ownership concentration in the print media.

Even though one could argue that its establishment would be too late now, there are still more significant newspaper mergers possible, for example, two newspaper chains joining forces. In the United States, Ben Bagdikian has recently noted, "Now that most independent dailies have been gobbled up, the chains are devouring chains." Chains combining would have serious effects on the public's access to diverse and antagonistic sources of information. In Canada, the elimination of diverse and antagonistic sources of information is evident by the fact, "that the previously-independent (Windsor) Star bureau in Ottawa has virtually disappeared, being replaced by Southam News Service reporters." The result is that an alternative perspective to events in Ottawa has been eliminated. Therefore, a Press Board is essential in order to prevent the further control of information in the hands of a small group of people: More specifically, newspaper chains like Southam, Thomson and F. P. Publications which own close to half of the total dailies in Canada.
In essence, the Irving case underlined the need for changes in the combines laws: this is what makes the case study so important and why changes are being implemented. As well, the Irving study indicated that the regulation of ownership in the printed media presently appears to be outside the competence of existing anti-combines laws. Specifically, Canadian industrial laws have been inapplicable to the whole area of information processing. Perhaps they were never intended to be applicable to the print industry. Furthermore, and more importantly, the Irving case revealed not so much the inadequacy of combines laws, but the lack of specific, clearly defined regulations related to information processing and handling. For example, the Davey Report did not establish any criteria pertaining to ownership concentration and the public interest. The Canadian Radio-Television Telecommunications Commission (CRTC) has still been unable to set down particular criteria applicable to ownership concentration because it is throwing the concentration issue out to the public for comment. On February 9, 1979, the CRTC gave notice of a public hearing to be held in Hull, Quebec, on May 15, 1979, to examine matters relating to cross-ownership and control of private broadcasting undertakings and is inviting comments from the public and interested parties. The CRTC does not seem to have given Canadians the necessary leadership in the past to solve this important communication problem of concentration of media ownership but approaches media transactions on a case by case approach because of the absence of criteria.
Perhaps, as suggested by the Ownership Study Group Report, one should not view ownership concentration as something undesirable in principle, but should approach the problem in terms of such considerations as "concentration of control of programming and domination of particular markets or regions."\textsuperscript{10}

In effect, we seem to be only beginning our journey towards finding and establishing an acceptable format or perspective from which to evaluate media ownership. The first step in the search for an acceptable format to evaluate properly media ownership is the necessity for Parliament to define clearly what is meant by "public detriment" as it relates to the handling of information in our society. By clearly defining public detriment, the courts will be put in a better position to apply the meaning of "detriment" in cases which deal with the monopolization of the sources of information. An examination of the Irving case demonstrated that the "industrial" standard of a lessening of competition to the detriment of the public is not a sufficient criterion to adjudicate adequately whether information is handled to the detriment of the public. Other criteria must also be employed, such as a change in editorial policy, or for example, instances of cross-ownership between cable television undertakings and newspapers, in which cable profits are invested in the newspaper enterprise, giving the newspaper an unfair economic advantage over other print media in the same area. Many criteria are necessary in defining
public detriment for, as the trial judge stated: "The uniqueness of the instant cases place me on the very threshhold of a previously unopened door in our Canadian jurisprudence." 11

In conclusion, if we do not establish a corpus of information law, a set of guidelines and regulations in respect of information handling and processing, and a mechanism to enforce these regulations—a Press Board for the print media (CRTC is already established for broadcasting)—concentration of ownership will increase further, the "information window" through which Canadians view themselves will grow smaller, and through the lack of diverse and antagonistic sources of information, the individual Canadian will be denied adequate information concerning his own affairs. The courts did not reach this conclusion because they were deprived of coordinates for judging whether the New Brunswick public had been deprived of information concerning its own affairs. Ultimately, though, we are heading more in the direction in which the sources of information will be in the hands of a select group of people (the conglomerate type of ownership) whose view of what is fit to print will closely coincide with what is in the best interests of their corporate entities.

Recommendations for Further Study

Flowing out of the research and preparation of this case study is the need to do further more detailed research into the area of concentration of media ownership. It is
imperative that any, all documents, relating to ownership concentration not lie dormant, but these documents must be brought to the surface for proper evaluation. The Irving study is simply a prelude to the collation of documents pertaining to the problem of ownership concentration in the media. Only through further research can the continuing search for a solution to the problem be successful.

A number of areas concerning the concentration of media ownership are in need of more extensive research: First, the Irving study demonstrated the need to establish an acceptable format from which to evaluate properly media ownership. To find possible criteria to adjudicate adequately the processing and handling of information in society when ownership of the media rests (a) with newspaper chains, (b) multi-media groups, (c) conglomerates is worthy of examination. Perhaps different criteria are needed to adjudicate the different types of ownership since the Special Senate Committee on Mass Media in 1970 noted that there was no sweeping regulatory principle applicable to all three types of ownership.

Second, an aligned study with that mentioned above, or as a separate study, is the need to define public detriment in the handling of information in a court of law. The first step is to define clearly and concisely the meaning of "public detriment" as it relates to the processing and handling of information in the media.
Third, the Irving case study examined whether the monopolization of the sources of information in one province had reached a point where it collided with the public interest. Further research is needed to find the point in time in which the monopolization of the sources of information by a conglomerate do in fact collide with the public interest.

Fourth, concentration of media ownership is a phenomenon that is here to stay. In the Irving case, a number of potential dangers of centralized ownership were cited. A valuable study would be to develop and employ the necessary criteria that will minimize the potential dangers of centralized ownership which is likely to result in detriment to the public. Another part of the study would be to develop and employ certain criteria that maximize those situations where monopoly ownership is to the overall benefit of the public. For example, newspapers under chain ownership have the advantage of greater resources to produce better newspapers, such as hiring superbly qualified talent in the publishing field.

Fifth, the role played and lack of leadership provided by the CRTC in stemming the concentration of ownership problem would be worthy of examination. In particular, the period from 1968 to 1975 (the period after the CRTC divestiture program) when the Ownership Study Group reported that group ownership, due to regulatory decisions, had contributed significantly to the levels of concentration.
Finally, Wallace Clement and Elizabeth Baldwin have done studies on the corporate elite—the media elite being a subset of the economic elite. There is a discrepancy between Clement and Baldwin over the degree of overlap because they used different criteria. A valuable study would be to find common criteria, to define them clearly, and to employ them consistently to ascertain the actual degree of overlap in order to establish the extent to which media holdings are in fact in the hands of corporate interests (economically dominant corporations). The central question running through such a study would be to find out how conflict of interest situations are handled by the media holdings.
Footnotes

Chapter Five


2 Ibid.

3 Ibid.


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