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The MacQuarrie Report and the Reform of Combines Legislation

The amendments to the Combines Investigation Act and the Criminal Code, enacted by the Parliament of Canada in June, 1952, gave legislative form, in large measure, to the recommendations of the Committee to Study Combines Legislation, commonly called the MacQuarrie Committee. In the symposium that follows the Review presents the comments of six Canadians, four of them lawyers, on the MacQuarrie Report and this implementing legislation. From the varying viewpoints of the contributors, the symposium is a critical examination of the report and the legislation, both in a technical legal sense and in the wider aspect of their social meaning to Canada's economy.

The principal task of the MacQuarrie Committee and the apparent aim of the combines legislation was to make Canadian anti-trust law "a more effective instrument for the encouraging and safeguarding of our free economy". Government action through legislation may be one method of protecting freedom, be it economic or political. But there are other means besides legislation and other institutions besides government. There are traditions in this country which are the very spirit of freedom, and there are organizations which exist to keep the flame of freedom alive. From time immemorial the legal profession has been a watch dog of freedom. In line with this great tradition the Canadian Bar Review has the duty of examining the legislative activities of government to see that the controls proposed by the state accord with current ideas of how much those controls should encompass. In other words, the state best protects freedom by allowing business enterprise to keep on its agenda, beyond the often heavy-handed

reach of the state, those things that private enterprise can do best. Of course, most people recognize that since 1776, when Adam Smith issued his famous dictum that the state should only concern itself with three duties which he conceived as the defence of the country, the administration of justice and the maintenance of certain public works, the modern state has greatly increased its controls. Indeed, it may even now or in the future be necessary for lovers of freedom to check the centralizing power of the state in the same way that the arbitrary power of King John was curtailed by the barons and by Magna Carta.

What we have said about the dangers of the modern state implies no criticism of combines legislation or of the motives behind it. Indeed, as the members of the symposium indicate, either explicitly or implicitly, few responsible Canadians would deny the *raison d'être* for anti-trust legislation, but question only the *methods* and *techniques* of combines regulation. The underlying premise of the MacQuarrie Committee, of the combines legislation, past and present, and of most of the members of the symposium seems to be that technological changes combined with risk-taking activity produce a shifting balance of competition within our economy which produces "the greatest good for the greatest number". A second notable premise is that when business or industry controls product prices and increases them beyond levels that would automatically result in a free market, legislative regulation and restraint of those who would stifle free competition are proper.

The discussion is introduced by Professor Maxwell Cohen in a paper on "The Background, Main Features and Problems". The two papers immediately following have at least this in common that both are by lawyers who have served clients in this field: Mr. Hazen Hansard, Q.C., writes on "Combines, 'Criminal' Law and the Constitution" and Mr. Donald D. Carrick under a title rather arbitrarily given his paper by the editors, "The Recent Regulation of Monopolies". The next two contributions may perhaps be grouped together also. An industrialist and a labour economist, Mr. R. Bruce Taylor and Mr. A. Andras, write, respectively, on "Industry and Combines" and "Labour and Combines". The symposium ends with "Some Practical Aspects of Combines Control" by Mr. I. M. MacKeigan.

The Background, Main Features and Problems

Maxwell Cohen *

With the publication of the Report of the Committee to Study Combines Legislation,¹ and the passage at the last session of Parliament of legislation intended to implement the recommendations of the report,² Canadian anti-trust policy enters a new phase. The appointment of the Committee by the Minister of Justice was announced on June 27th, 1950, and its terms of reference were:³

to study, in the light of present day conditions, the purposes and methods of the Combines Investigation Act and related Canadian statutes, and the legislation and procedures of other countries, in so far as the latter appear likely to afford assistance, and to recommend what amendments, if any, should be made to our Canadian legislation in order to make it a more effective instrument for the encouraging and safeguarding of our free economy.

Composed of a judge of the Supreme Court of Nova Scotia, a law faculty dean and two well-known economists,⁴ the Committee was designed as an informal study and advisory group for the Minister of Justice, rather than a formal body, such as a royal commission.

There were two main aspects to the Committee's work. First, there was a study of the problem of resale price maintenance, which led to an interim report on October 1st, 1951.⁵ Here the conclusions and recommendations of the Committee were soon translated into legislation prohibiting manufacturers and suppliers from prescribing minimum resale prices. The principal efforts of the Committee, however, were directed toward the

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¹ Report to the Minister of Justice, Committee to study Combines Legislation (Ottawa, Queen's Printer), March 8th, 1952.

² 1 Elizabeth II, c. 39. Bill 306 received the royal assent on June 16th, 1952.

³ See statement of Minister of Justice, House of Commons, June 27th, 1950, in Report, p. 5.

⁴ Hon. J. H. MacQuarrie; Dean George F. Curtis, of the University of British Columbia, Principal W. A. Mackintosh, of Queen's University, Professor Maurice Lamontagne, of Laval University.

⁵ Report, *op. cit.*, pp. 53-72. For the resulting amendments to the Combines Investigation Act, see Stats. Can. 1951 (2nd sess.) c. 30, adding s. 37A.

much more difficult and complex task of considering the character and effectiveness of existing combines legislation, and making such recommendations for changes as should emerge from representations and from the Committee's own study. The Committee's recommendations became the basis for the legislation presented by the Minister of Justice to the House of Commons on June 2nd, 1952,⁶ and finally enacted before the end of the session. Except for certain minor amendments in the Senate,⁷ the bill was passed in the form in which it was introduced into the House of Commons.

The new amendments to the Combines Investigation Act and the Criminal Code do not change materially the existing substantive provisions prohibiting combines and restraints upon trade and competition. The essential nature of the new provisions are *procedural*, and to that extent the report and the legislation are primarily concerned with questions of method — how best to have and to operate effective "anti-trust" machinery in Canada. Nevertheless, throughout the report as well as the debates on the amendments, there was the expressed and implied concern for this basic problem of substance for the general rôle of anti-trust legislation in Canadian society.⁸

The anti-trust or "monopoly" problem⁹ is, at bottom, a problem of social and economic power, and of the use of resources. The "social-power" aspect of monopoly is that in a free society there may be important sectors of social decision-making — for example, fixing of prices, or control of supplies — where the power to decide is to be found, not in the market or in some duly responsible and democratically constructed institution, but rather in a possibly non-responsible person, natural or juristic. The

⁶ Bill 306.

⁷ For reference to changes by the Senate, see below.

⁸ There have been relatively few detailed studies of anti-trust policy and law in Canada. See the following: Reynolds, *The Control of Competition in Canada* (1940); Ball, *Canadian Anti-Trust Legislation* (1934); Bladen, *Combines and Public Policy* (1932), *Proceedings of the Canadian Political Science Association*; Curtis, *Resale Price Maintenance* (1938), 4 *Can. J. Econ. Pol. Sc.* 350; Cohen, *The Canadian Anti-Trust Laws: Doctrinal and Legislative Beginnings* (1938), 16 *Can. Bar Rev.* 439; Cohen, *Can Trust-Busting Preserve Competition? Public Affairs* (December, 1947), p. 6; Fox, *Patents in Relation to Monopoly* (1946), 12 *Can. J. Econ. Pol. Sc.* 328; MacKeigan, *Notes on "Patents in Relation to Monopoly"* (1946), 12 *Can. J. Econ. Pol. Sc.* 387. For three important public documents in the history of anti-trust legislation and policy in Canada see Report of the Royal Commission on Price Spreads (Sess. Pap. 1934); Report of the Select Committee (1888) to investigate and Report upon Alleged Combinations in Manufacture, Trade and Insurance in Canada (Sess. Pap., 6th Parl. 2nd sess., May 16th, 1888); Canada and International Cartels; Report of the Commissioner (1945).

⁹ The word "monopoly" is used in the generic sense employed by the report itself, "... monopoly power is defined in terms of control over the market and its degree may vary from one case the to other" (p. 23).

"economic-power" aspect is concerned with the impact of "monopoly" on the most effective use of resources, and the interference by monopoly with competition and thus with the "automatic" regulator of the workings of a free economy.¹⁰ Of course, it is quite true that in the English-speaking world, as elsewhere, there long have been sectors of the economy that cannot be regarded as competitive. Nevertheless, the continuing aim in most Anglo-American societies, under peacetime conditions, may be said to be the retention of as much of an unregulated competitive economy as at any given time may be "socially possible", trusting to "competition", and the freedom and incentives it provides, to encourage maximum entrepreneurial activity, while the same competition brings the varied economic forces and claims within the community into some kind of rational balance.

The Common Law has long been aware of monopoly. Indeed, it is something of a tribute to the hard-headed realism of that law that it was dealing in a practical manner with "monopoly" and "restraints upon trade"¹¹ long before economic theory itself had come to rationalize the facts of modern business life by evolving concepts of "imperfect competition" as working, theoretical tools.¹² For two or three hundred years the English common law was dealing realistically with the allegedly baneful effects of monopolies upon the growing complex of English business life, and dealing, too, with those more varied restraints upon trade that were expressing themselves in contractual arrangements of all kinds. Thus, the terms "monopoly", "restraint of trade" and "conspiracy" were all well-developed parts of the common law of contract and torts by the early nineteenth century.¹³ To this very day some of the older "conspiracy" and trade restraint cases, such as the celebrated trinity, *Allen v. Flood*, *Sorrel v. Smith* and *Quinn v. Leatham*,¹⁴ continue to be landmarks of doctrinal analysis, influencing the interpretation of anti-trust legislation, to say nothing of their parallel importance to labour law.¹⁵

¹⁰ Cassells, *Monopolistic Competition and Economic Realism* (1937), 3 *Can. J. Econ. Pol. Sc.* 376; Mason, *Monopoly and Economics* (1937), 47 *Yale L. J.* 34.

¹¹ See Cohen, *supra* footnote 8, and references pp. 444-449, with particular reference to the celebrated Case of Monopolies (1602), 11 *Coke* 84b.

¹² Chamberlain, *The Theory of Monopolistic Competition* (1933); Robinson, *The Economics of Imperfect Competition* (1933).

¹³ Cohen, *supra* footnote 8, pp. 446-448.

¹⁴ Respectively, [1898] A.C. 1; [1925] A.C. 700; [1901] A.C. 495; to which perhaps should be added the *Mogul Steamship* case, [1892] A.C. 25, and the *Nordenfellt* case, [1894] A.C. 535.

¹⁵ For discussion of the effect of these conspiracy and restraint of trade cases on Labour Law, see Cohen, *The Role of Law and Lawyers in Industrial Relations* (1951), 11 *La Revue du Barreau* 477, at pp. 483-484.

Nor is it without significance that the attempt to prevent monopoly as "the natural outgrowth of industrial freedom"¹⁶ by specific legislative measures should have, in the English-speaking world, made its first appearance in Canada and the United States, and at about the same time, 1889-1890. For the sensitivity of a community where heavy and well-established industry was not yet the dominant economic sector, and where agriculture and imports were of principal concern, gave to those communities a quick reaction to the formation of monopolies or combines that could raise the prices of either consumer goods, on the one hand, or necessary supplies for the agricultural community, on the other.¹⁷

Thus Canada has had almost three generations of experience with various approaches to the problem of maintaining competition. From the relatively direct conspiracy and restraint of trade language that became section 498 of the Criminal Code,¹⁸ to the various attempts at more elaborate machinery in 1910 in the first Combines Investigation Act,¹⁹ in 1919 with the post-war Combines and Fair Prices Act,²⁰ in 1923 with the introduction of the present Combines Investigation Act,²¹ in 1935 in the neo-N.R.A. attempts at legalizing certain restrictive arrangements under the Dominion Trade and Industry Commission Act,²² and then after 1937 with an amended Combines Investigation Act,²³ which remained in effect until these recent changes were made. This experience has taken place through great variations in the business cycle — mass unemployment and depression, booms, wartime controls and, latterly, full employment and large-scale expansion, with suggestions of "inflation".

It is quite remarkable to consider that this public awareness of the problem of restraints upon competition remains as acute today as it was seventy-five years ago, despite the vast changes in economic organization and standards of living in the interval. The answer to this awareness is not difficult to find. It is there because the problem of restraints upon competition touches the real or imagined interests of very important sectors of the community; and, apart from touching their economic interests, it

¹⁶ Burns, *The Decline of Competition* (1936) p. 523.

¹⁷ See House of Commons Report (1888) *supra* footnote 8.

¹⁸ For this section and s. 498A as presently worded see *infra* footnote 31.

¹⁹ Stats. Can. (1910) c. 9.

²⁰ Stats. Can. (1919) c. 45. See also the Board of Commerce Act, Stats. Can. (1919) c. 31.

²¹ Stats. Can. (1923) c. 9; R.S.C., 1927, c. 26.

²² Stats. Can. (1935) c. 59.

²³ Stats. Can. (1937) c. 3.

touches their sense of the intrusion that "monopoly" makes upon the operations of a "free" social and economic order. Indeed, the appointment of the MacQuarrie Committee was partly a response to the considerable public reaction to the dispute between the former Commissioner, Mr. F. A. McGregor, and the government over the delay in publishing his report in the Flour Milling case.²⁴ To the public that delay seemed to suggest the possibility of condoning business practices that, at least in the mythology of the Canadian social order, were regarded as generally offensive.

In a generation that has witnessed many significant and original federal studies²⁵ the MacQuarrie Report stands as a significant document. It is one of the best brief summaries for the layman in print of the nature of monopoly and monopolistic practices, and of the historic development of Canadian, as well as American and British, legislation²⁶ dealing with monopoly and restraints upon competition generally.

In some respects, however, the historical summary of Canadian legislation it contains, which is divided into five phases²⁷—1889-1910, 1910-1919, 1919-1923, 1923-1935, and 1935 to the present—is too strictly descriptive of the statutes to be effective. The Committee was concerned merely with summarizing the legislative provisions and their development in these five periods without discussing the effect of the legislation in terms of specific prosecutions or of particular industries where combinations or restraints on competition appear to have taken place. For instance, in referring to the Combines Investigation Act of 1910, which was the first major attempt in Canada to use detailed and specialized administrative machinery to inquire into alleged combines, surely it would have been significant to say that only one case actually arose under that cumbersome machinery.²⁸ Indeed, for many years certain civil actions in the courts—notably *Shragge v. Weidman*²⁹—were far more important in their doctrinal effect

²⁴ Report of the Commissioner of an Investigation into an Alleged Combine in the Manufacture, Distribution and Sale of Flour and Other Grain Mill Products (1948), released for publication October 1949.

²⁵ *E.g.*, The Rowell-Sirois Report (1939); Proposals of the Government of Canada, Dominion-Provincial Conference, 1945; Report of Royal Commission on Transportation, 1951.

²⁶ Report, pp. 9-20.

²⁷ Report, pp. 9-16.

²⁸ *United Shoe Company v. Larandeau*, [1912] 2 D.L.R. 77. For details of the investigation of the case under the Act see (1911-12), 12 Can. Lab. Gaz. 168, 939; 13 Can. Lab. Gaz. 34-464.

²⁹ (1912), 46 S.C.R. 1. See also, *e.g.*, *Sterns v. Avery* (1913), 33 O.L.R. 251; *McEwan v. The Toronto General Trusts Corporation* (1915-16), 35 O.L.R. 244; *Dominion Supply Company v. Robertson Manufacturing Company* (1918), 29 O.L.R. 495.

on monopoly law in Canada than the administration of this early Combines Act and its limited judicial interpretation. It would have been a valuable service, and have improved the understanding with which the report could be approached, if the Committee had made more specific judgments on the recorded effect of anti-trust legislation in its impact upon the economy and the legal order. It is true that a strict reading of the Committee's terms of reference³⁰ may have required a different focus, but nevertheless the report suffers from the lack of some detailed estimate of Canadian experience.

Moreover, in any review of the Canadian legislation, it is perfectly clear that since 1910, or even 1923, the machinery of anti-trust enforcement has not been easy to operate. Not only has the definition of "combine" presented very considerable difficulty—even to the point where parts of the section setting out the definition of the word remain to this day inadequately interpreted³¹

³⁰ See *supra*, footnote 3.

³¹ Particularly "Merger, trust or monopoly", in s. 2, R.S.C., 1927, c. 26, as amended by Stats. Can. (1935) c. 54, s. 2 (4). The following are the provisions of s. 2 of the Act and ss. 498 and 498A of the Criminal Code:

"2. In this Act, unless the context otherwise requires,

(1) 'Combine' means a combination having relation to any commodity which may be the subject of trade or commerce, of two or more persons by way of actual or tacit contract, agreement or arrangement having or designed to have the effect of

(a) limiting facilities for transporting, producing, manufacturing, supplying, storing or dealing, or

(b) preventing, limiting or lessening manufacture or production, or

(c) fixing a common price or a resale price, or a common rental, or a common cost of storage or transportation, or

(d) enhancing the price, rental or cost of article, rental, storage or transportation, or

(e) preventing or lessening competition in, or substantially controlling within any particular area or district or generally, production, manufacture, purchase, barter, sale, storage, transportation, insurance or supply, or

(f) otherwise restraining or injuring trade or commerce, or a merger, trust or monopoly which combination, merger, trust or monopoly has operated or is likely to operate to the detriment or against the interest of the public, whether consumers, producers or others."

"(4) 'Merger, trust or monopoly' means one or more persons

(a) who has or have purchased, leased or otherwise acquired any control over or interest in the whole or part of the business of another; or

(b) who either substantially or completely control, throughout any particular area or district in Canada or throughout Canada the class or species of business in which he is or they are engaged, and extends and applies only to the business of manufacturing, producing, transporting, purchasing, supplying, storing or dealing in commodities which may be the subject of trade or commerce; Provided that this subsection shall not be construed or applied so as to limit or impair any right of interest derived under The Patent Act, 1935, or under any other statute of Canada."

"498. (1) Every one who conspires, combines, agrees or arranged with another person

—but the machinery was designed primarily for investigating and publicizing combines, rather than for simple prosecution, on the one hand, or prevention of recurrent similar activities, on the other. Again, the presence of section 498, and later 498A, of the Criminal Code has tended, with section 2 of the Act, to provide two sets of offences, alike in basic character, but sufficiently different in language to increase both the area of uncertainty for businessmen and the difficulty of the courts in understanding the interplay of these provisions. The report, although recommending the inclusion of sections 498 and 498A in the Combines Act, does not deal too effectively with this kind of matter.

In its survey of the economic background to monopoly problems, the report in five or six pages performs superbly in a succinct description of "monopolistic situations" and "monopolistic practices".³² It emphasizes that the study was made "with the underlying assumption that the vast majority of the Canadian people supports the free enterprise system",³³ and it therefore makes the fundamental point that the choice in a society of this kind is not between private control or government control but rather between *competitive control* and *private control*, with *government*

(a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article,

(b) to restrain or injure trade or commerce in relation to any article,

(c) to prevent, limit or lessen, unduly, the manufacture or production of an article, or to enhance unreasonably the price thereof, or

(d) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, transportation or supply of an article, or in the price of insurance upon persons or property, is guilty of an indictable offence and is liable on conviction to imprisonment for a term not exceeding two years.

(2) For the purpose of this section "article" means an article or commodity which may be a subject of trade or commerce.

(3) This section does not apply to combinations of workmen or employees for their own reasonable protection as workmen or employees."

"498A. (1) Every person engaged in trade, commerce or industry is guilty of an indictable offence and liable on conviction to imprisonment for a term not exceeding two years, who

(a) is a party or privy to, or assists in, any sale that discriminates, to his knowledge, directly or indirectly, against competitors of the purchaser, in that any discount, rebate, allowance, price concession or other advantage, is granted to the purchaser over and above any discount, rebate, allowance, price concession or other advantage, available at the time of such sale to such competitors in respect of a sale of goods of like quality and quantity;

(b) Engages in a policy of selling goods in any area of Canada at prices lower than those exacted by such seller elsewhere in Canada, having or designed to have the effect of substantially lessening competition or eliminating a competitor in such part of Canada;

(c) engages in a policy of selling goods at prices unreasonably low, having or designed to have the effect of substantially lessening competition or eliminating a competitor."

³² Report, pp. 23 to 27.

³³ Report, Introduction, p. 7.

control operating only in those sectors where it is socially desirable that it should do so. Thus, the maintenance of competition becomes the necessary device to prevent economic power from becoming private power, the latter condition surely as objectionable as unnecessarily extending public or governmental control. That such a view is accepted today by those who might otherwise consider anti-trust laws with some reserve is suggested by the report's quotation from the brief submitted by the Canadian Manufacturers Association.³⁴

The report concludes its economic analysis with the following observations:³⁵

As it can be seen, the monopoly problem takes many forms, is highly complex and requires continuous and careful examination. It is our conclusion then that continued government intervention in this field is not only justifiable but essential. Competition, on which freedom within the economy is based, will not persist without active support in law and administration.

It is, however, the findings and recommendations that are the heart of the report.³⁶ With a restatement that Canada is committed to a system of economic organization predominantly "free enterprise" in character, but recognizing that free enterprise sometimes leads from competition to monopoly,³⁷ the report rests its findings and recommendations on the following main position: "On the whole . . . we think that the procedures which have been built up under the Combines Investigation Act are the right ones, involving as they do the examination of successive cases and publication of the facts, analysis and conclusions. Our recommendations are directed to the strengthening and improving of the procedures, organization and remedies laid down in the Act, rather than to revolutionizing them."³⁸ On this premise the edifice of recommendations was built, influenced by certain administrative considerations, on the one hand, and con-

³⁴ Report, p. 22: "... The members of this Association have adhered to the belief that a system of economic enterprise that is free, private and individualistic is the foundation of our past achievements, our present high standard of living and economic prosperity and the best hope for rapid future development. This system, it is recognized, may be endangered either by undue government control or by undue industrial control. The operator of an individual firm may have his freedom of choice of what goods he will make, what technique of production he will use, what prices he will charge and what areas he will sell in, taken away from him just as effectively by an industrial combine or monopoly as by government edict. It is recognized, therefore, that some combines or anti-trust legislation is necessary."

³⁵ Report, p. 27.

³⁶ Report, pp. 28-46; a useful recapitulation of recommendations is set out in the report, pp. 47-49.

³⁷ Report, p. 28.

³⁸ Report, p. 29.

stitutional difficulties, on the other. The main recommendations may be summarized as follows:

(1) The Committee would leave the definition of the offences in the Act and the Code, and the penalties, as they were, save for the possible absorption of sections 498 and 498A into the Combines Act.

(2) It proposed that the functions of investigation be separated from those of appraisal, so that the Commissioner would not be both investigator and quasi-judge. Since the problems of investigation are closely linked to the availability of adequate data, and since research into the intergation of industrial enterprise and other monopolistic developments in Canada has been limited, the report recommends the establishment of an agency combining research and investigation functions under one director.

(3) The appraisal side of the work under the Act would now be vested in an administrative board, whose main duties would be to conduct the formal hearings and transmit its report and recommendations to the Minister. The Committee recognized that there had been considerable criticism from industry, which claimed that reports finding combines to exist often were a pre-judgment of the innocence or guilt of the parties mentioned in the report. Nevertheless, subject to a recommended modification in procedure — which would lessen the likelihood of a determination of guilt or innocence in the report by not requiring the Commission to make such a specific finding — the Committee stated categorically, "We think that the report should retain its importance, and that indeed its scope might be somewhat widened and its significance strengthened".

(4) The Director of Investigation is to report his findings to the board for review and appraisal and, when hearings before the board begin to take place, the matter will pass from the investigation or "agency" stage to the "board" stage. At the same time the Director of Investigation is not to have power to compel entrance and examine documents on premises, or witnesses, except upon *ex parte* application to the board giving him authority to do so.

(5) The board is to have power to invite the agency to make studies on its behalf, with particular reference to examining monopolistic developments in order to enable the board to recommend desirable legislative changes.

(6) A further problem was the definition of the offence. The Committee had before it representations suggesting that some specific economic consequence should be proven to have resulted from the alleged offence, for example, that prices were raised and

supplies restricted, or some other specific detriment. The report very properly disposed of these suggestions by pointing out that any further definition would require the court to examine into matters for which it had neither competence nor machinery; and, what was more important, that it was not necessarily a specific detriment to the public that was objectionable. Rather the heart of the offence was the very exercise of undesirable economic power in combination or through monopoly and that such exercise in itself was a public detriment. The preservation of competition is the policy to be protected, and, even though no specific price or supply detriment is found, a crime has taken place if "competition" itself has been diminished or eliminated to public detriment in general.³⁹

(7) An important procedural matter dealt with in the report was the question of section 30A of the Act, as introduced in 1949, where the records of a corporation were made admissible in evidence to establish a rebuttable presumption that an employee, acting in connection with an employer's business, has authority so to act. As the report makes clear, there remains still the onus on the Crown to prove a crime beyond reasonable doubt. But without this section it might be impossible in many proper cases to link the employee to his company, with, of course, serious results to the enforcement programme.

(8) The most interesting new remedy suggested by the report is the use of a "judicial restraining order" not unlike the injunction employed by the federal courts of the United States under the Sherman Act and the Clayton Act, or the "cease and desist" order under the Federal Trade Commission Act. While the Committee recognized that certain constitutional problems may have to be faced, it took a bold, hopeful look at "Criminal Law" and "Trade and Commerce" in section 91 of the British North America Act, and concluded that such a power in a court to restrain continuing practices, by a firm or group of firms, that have been found criminal, would be a more effective way of preventing a repetition of offences than ever could be achieved by a single prosecution.

(9) Other proposed devices to supplement prosecution or injunction are taken over from early combines legislation, as well as the Tariff Act and the Patent Act.⁴⁰ As the report makes perfectly

³⁹ The writer is not unaware that "unduly" in s. 498 and "public detriment" in s. 2 of the Act raise problems of measurement and definition for which there can be little but *ad hoc*, "reasonable", answers case by case.

⁴⁰ The use of the Customs Tariff Act for such purposes goes back to 1897. See Stats. Can. (1897) c. 16, s. 18 (as amended); for the earlier provisions dealing with the revocation of patents, see references in Stats. Can. (1910) c. 9, s. 21.

clear the abolition of tariff privileges or revocation of patent rights, or the requiring of compulsory licensing in cases of patent abuse, are all effective measures, and should be used wherever the public interest in a free and competitive economy is involved. Indeed, the report recommended changes in sections 29 and 30 of the Combines Act, to broaden the conditions under which action could be taken in tariff and patent abuse cases, by substituting the general notion of "public interest" for the present controlling language in section 29 "to promote unduly the advantage of manufacturers or dealers *at the expense of the public*".

(10) Finally, the report dealt realistically with the charges that Combines legislation is, in the definition of the offence, vague and uncertain, and should include a listing of specific business practices which are to be considered illegal. This cry for certainty is not new, and the report, while understanding its psychological need, disposes of it by recognizing that potential varieties of business arrangements involving "monopoly" far outrun the ability of draughtsmen to foresee these permutations and provide for them in suitable language. Moreover, such protests simply fail to understand the nature of law and the judicial process where broad standards of social control are involved.⁴¹

The enactment of the amendments to the Act largely implemented the main recommendations of the McQuarrie Report as just set out. These amendments provide mainly for establishing a Director of Investigation and Research — the "Agency" — for the creation of a Restrictive Trade Practices Commission and for introducing the use of a judicial restraining order against anticipated or found criminal practices. The Director is largely the old Commissioner *sans* reporting powers;⁴² but the Commission is established as an administrative body having the powers not unlike those under the Inquiries Act.⁴³ It will be responsible for formal hearings under the Act and for making a report in writing and transmitting it to the Minister.⁴⁴ Publication of the report by the Minister within thirty days is mandatory, unless the Commission advises the Minister to withhold publication on grounds of public interest, in which case the Minister has the discretion to publish or not to publish in whole or in part.⁴⁵

With respect to the "restraining order", the Act now provides that a person convicted under the Act, or under the parallel pro-

⁴¹ See Paton, *Jurisprudence* (1951, 2nd ed.), p. 150-175.

⁴² Secs. 5 to 15 inclusive, as amended.

⁴³ S. 16 of the Act as amended.

⁴⁴ Secs. 17 and 18 of the Act as amended.

⁴⁵ S. 19 of the Act as amended.

visions of the Criminal Code, may be subject to an order of a superior court of criminal jurisdiction prohibiting "the continuation or repetition of the offence or the doing of any act or thing by the person convicted or any other person directed toward the continuation or repetition of the offence . . .".⁴⁶ An interesting fact is that under subsection 2 of this amendment, offences may be anticipated and the court may prohibit the prospective "commission of the offence or the doing of any act by that person or any other person constituting or directed towards the commission of such an offence". This procedure is only possible where an information has already been laid by the Attorney General of Canada or the attorney general of any province. Imprisonment and fines are provided for disobedience to these orders.

Whether these interesting provisions are *intra vires* or not will doubtless be tested very soon. It is not unlikely that sections of the business community may find them threatening to normal manoeuvrability and to many now accepted commercial arrangements and techniques.

Two important suggestions in the report were rejected by the government. It refused to change the language of section 29 on the reduction and removal of customs duties, and left the expression "at the expense of the public", instead of the report's proposed "public interest". Obviously, the limitations on a court or administrator are far greater under this older test. The suggested absorption of sections 498 and 498A of the Criminal Code into the Act was not accepted also, and these provisions remain as parallel offences in the Criminal Code. There is something to be said for this decision. Sections 498 and 498A may have a minor rôle to play in providing reasonably direct machinery, on a local level, in dealing with not too complex trade restraint situations. Moreover, section 2 of the Combines Act deals with one or two types of business activity not mentioned in sections 498 and 498A, while sections 498 and 498A deal with insurance, as well as rebates, discounts and loss leaders possibly not covered by section 2. What is lost by overlapping and uncertainty may be gained by additional and decentralized machinery; but there can be no serious expectation of effective policing at the provincial level. The attorneys general of the provinces and their staffs are simply not geared for the complex studies required in such cases.

The maintenance of competition in Canada is a much larger issue than the effective operation of anti-trust laws, as the Com-

⁴⁶ S. 31 of the Act as amended.

mittee itself recognized.⁴⁷ But since "competition" is a conception and a method of economic organization to which this country generally is dedicated, it is worth asking in brief how successful has been the record, that is, how effective have been our attempts at equating practice with concepts and, therefore, what may we expect in the future with this additional machinery.

To begin with, the list of criminal prosecutions or administrative investigations and reports since 1889 or 1923 tells only part of the story, for there is no way of measuring how far even defective anti-trust policy and machinery contributed to maintaining a freer economy than otherwise might have been the case. There are, however, a number of legal and administrative lessons from the record since 1923 that have a bearing on any guesses for the future. These lessons may be summarized as follows:

(1) An examination of the administration of the Combines Investigation Act since 1923 discloses long periods of relative inactivity which can largely be explained by ministerial unawareness or indifference. This position is evident also in the lack of provision of adequate facilities by way of staff, budget, and the like. Since the beginning of the Act there have been only thirteen major prosecutions,⁴⁸ and twenty-four major inquiries leading to a published report.⁴⁹ These prosecutions represent an interesting mixture of distributive trades and manufacturing — although the latter are mostly minor, secondary industries. Of course, there were numbers of civil actions for breach of contract, or involving other issues in which restraint of trade questions arose, and indirectly, therefore, these actions have had their repercussions on monopoly business patterns in Canada.⁵⁰ It should not be forgotten, however, that the Commission has made several hundred informal investigations, as well as scores of somewhat more formal preliminary inquiries that did not reach the stage of public report or prosecu-

⁴⁷ Report, p. 42: "Numerous other aspects of the Federal Government policy may greatly contribute to strengthen or weaken monopoly power. Money lending, currency management, negotiation of international trade agreements, import and export controls, public works, taxation, technological research may all directly or indirectly affect the interests of particular business groups."

⁴⁸ See article below by Donald D. Carrick, footnote 24.

⁴⁹ Information provided by Combines Investigation Commission, July 23, 1952.

⁵⁰ See for example *Vancouver Breweries Limited v. Vancouver Malt and Brewing Company Limited*, [1934] A.C. 181; *Transport Oil Limited v. Imperial Oil Ltd.*, [1935] 2 D.L.R. 500; *Underwriters' Survey Bureau Limited et al. v. Massie and Renwick Limited*, [1937] S.C.R. 265; *Diva Shoe Company Limited v. Gagnon et al.*, 70 Quebec K.B. 411; *Thermionics Limited et al. v. Philco Products Limited*, [1939] 3 D.L.R. 133 and [1943] S.C.R. 396; *Connors v. Connors Brothers Limited et al.*, [1941] 1 D.L.R. 81; *Smith et al. v. Macdonald*, [1951] O.R. 167.

tion.⁵¹ Here again it is difficult to measure the effect on an industry of an inquiry into its practices, for in all likelihood the firms concerned reacted strongly to investigation and may well have modified particular practices which gave rise to the inquiries.

(2) The legal problems remain formidable. It was good sense for the Committee to recognize that a jury trial has little place in an anti-trust prosecution because juries can handle the complex facts and documentation only with some difficulty compared with a competent single judge, or, possible even better, a board of three judges.⁵² Apart from the trial question, the niceties of doctrine and of statutory interpretation represent one of the more fascinating areas of legal analysis. Nowhere in the law, with the possible exception of certain taxation and rate-making problems, do economic, statistical and accounting generalities impinge on legal conceptions with such directness. What is "competition"? What is restricting it "unduly"? What is "to the detriment of the public", actual or "likely"? How are all of these general concepts to be filled with concrete business meaning? The Canadian constitution also does not easily permit unified, national economic policies to be translated into law, where these policies are dealing directly with prices and products. Indeed, the depression of the nineteen-thirties led to extensive provincial movements in the direction of control in the marketing of products, in the setting of floor or fixed prices, and like practices.⁵³ Hence, anti-trust laws and policy on a national scale have had to be adjusted to regulative policy on a provincial scale. The constitutional problem, therefore, will remain as before, intermingled with those doctrinal and statutory interpretation questions ever-present in the language of the offences of the Combines Act, and the Criminal Code, and for which there never can be fixed answers. The judge in these cases perforce must translate into legal norms the community sense most currently held of the limits to be placed on business activity that may be harmful to competition.

(3) The effective handling of anti-trust cases in the courts needs not only a bench sensitive to these legal and economic subtleties, but a bar competent to present the evidence and argument in a form manageable by courts. It is not too much to suggest that a survey of prosecutions and defences since 1926 would

⁵¹ See Cohen, *supra* footnote 7, Public Affairs, for information up to 1947.

⁵² Compare the use of a board of three Judges in the United States Federal Courts to deal with special anti-trust matters, see 15 United States Code Annotated, Secs. 28 and 29; U.S.C.A. Secs. 44 and 45.

⁵³ See Reynolds, *supra* footnote 7, for a detailed discussion of various arrangements in this field.

show that both the Crown and the accused were represented on occasions by counsel who were not completely aware of the varied meaning in the facts and doctrines with which they were dealing. Perhaps a generation of lawyers more familiar with these interactions of legal and economic ideas will treat such issues with more technical facility than did some of its predecessors.

(4) The new legislation contemplates quite substantial administrative machinery. The Director of Investigation and Research will need a sizeable staff of lawyers, economists, accountants and general researchers, as well as the co-operation of industry and other government departments, to do effective studies not only of individual cases but of the main trends of monopoly and monopolistic practices in the Canadian economy. His work should provide, therefore, useful information for other government departments and for the public as a whole.

(5) The newly established Commission, however, may for some time be hard put to keep itself busy. There are likely to be long stretches before the Director decides that he has the kind of case that warrants a formal hearing leading to a formal report. It would not surprise me if the Commission takes a larger degree of initiative in research simply because there may not be a sufficient amount of formal work for it to do, at least in the early stages of the development of this new technique. The Combines Investigation Commission has operated on a budget which in 1951-52 amounted to only \$248,000, and for 1952-53 will exceed \$300,000. At present there is a staff of thirty-two, including clerical help. Such a budget and staff will not be sufficient for a serious approach to investigation, research, reporting or prosecutions under the Act.⁵⁴ It remains to be seen, therefore, whether the ambitious programme envisaged by the legislation, mapped out by the report and encouraged by public opinion can be translated into effective administration.

(6) Significantly, both the report and the present amendments are silent on the relation of anti-trust legislation to trade union activity. This silence seems to accept the older position which excluded collective union behaviour from the operation of combines regulation. But it is no secret that unions often have been capable of engaging in restrictive activities having effects on particular prices or supplies in an industry, and that such effects may be even the very objective of a particular union programme, either on its own or in co-operation with management. Very recently

⁵⁴ Information provided by Combines Investigation Commission, July 23, 1952.

and for the first time in the administration of the legislation, however, a specific union policy aimed at preventing the reduction in the price of a product has been found to be a violation of the Act, and the recent report of the Commissioner in the Winnipeg Bread case, accusing thirteen trade union leaders and members of joining in an illegal combine, becomes an interesting introduction to this uncharted field of the relations between anti-trust law and union practices.⁵⁵

There is no simple programme for the maintenance of "competition"—if it is truly desired—under the intensely dynamic conditions of modern economic organization and development, as well as under present political conditions where a principal social aim has become group security through the prevention of unemployment in industry or price decline in agriculture. Economic policy in the modern state has many objectives; the maintenance of competition is only one of them, albeit for Canadians an important one. But just as it is but one among many socio-economic objectives, so it is itself linked with many techniques that are required to maintain a relatively free economy. The real test for the support of anti-trust legislation comes at those moments of severe economic strain or recession when the urge to "rationalize" the economy, in order to protect an existing pie and its distribution, is greater than the urge to encourage a competitive scramble which may lead to even larger output. If Canadian anti-trust legislation has any chance of political support and administrative effectiveness, it is today when the benefits of free enterprise seem to be linked with an expanding Canadian economy, while at the same time there is a growing sense of popular resistance to exaggerated forms of power, whether private or public. In competition, sensibly policed, the resurgent ideals of freedom may find today an avenue of beneficent expression.

Combines, 'Criminal' Law and the Constitution

Hazen Hansard, Q.C.*

No right thinking person will deny that agreements in restraint of trade and oppressive use of monopoly advantages, which in

⁵⁵ See Montreal Daily Star, Friday, July 18, 1952, p. 1.

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either case result in public detriment, ought to be prohibited by law. It is not clear, however, that "restrictive trade practices" as such ought to be made crimes and punishable by fine and imprisonment.

The essence of a crime, properly so called, is *mens rea* or guilty intent. Although there are instances where this fundamental principle has been departed from, usually on grounds of expediency, it still remains true that guilty intent is the basic requirement of our criminal law. Instances where an accused, who has done the thing prohibited and produced the undesirable result, still goes free because *mens rea* was lacking, are too numerous and well-known to require specific mention.

In direct and marked contrast, our existing anti-combines legislation, as so far interpreted by the courts and its administrators, favours a finding of guilt based upon result rather than intent. Moreover, because of the use of the word "likely" in section 2 of the Combines Investigation Act,¹ actual result tends to be ignored and mere likelihood is regarded as a sufficient basis for the establishment of guilt. The courts have held that the word "unduly" in section 498 of the Criminal Code is the substantial equivalent of the phrase "has operated or is likely to operate to the detriment or against the interests of the public" in section 2 of the Combines Investigation Act. In *Container Materials Limited v. The King*² the Supreme Court of Canada, dealing with a case under section 498, held, if the interpretation put upon their decision by the combines division is correct, that a finding that competition had been stifled necessarily indicated public detriment, so that proof of actual detriment might be dispensed with.

Neither the final report of the MacQuarrie Commission³ nor the legislation introduced to implement it recommends or effects any change in the basic provisions of the Combines Investigation Act and section 498 of the Criminal Code, which create the "crimes" in question. Nevertheless, in considering the MacQuarrie Report and the implementing act I submit that we should bear in mind that they relate to legislation which (a) makes "crimes" of many actions not ordinarily considered crimes, and (b) places those accused of such "crimes" in the extremely difficult position of defending themselves against the result, or likely result, of actions they may have performed innocently.

¹ R.S.C., 1927, c. 26; as amended by Stat. Can., 1937, c. 23.

² [1942] S.C.R. 147.

³ Report of the Committee to Study Combines Legislation (Queen's Printer, Ottawa, 1952).

Why has it been found expedient to make crimes of what may be essentially innocent actions and situations? The answer is to be found in the British North America Act, under which the field of legislative jurisdiction is divided between the federal authority, on the one hand, and the provinces, on the other. A similar division exists in the United States and in other countries that enjoy, or possibly are afflicted with, a federal system. It does not exist of course in the United Kingdom, where all legislative authority vests in Parliament, and it is significant that in Britain they have not found it necessary to make anti-combines legislation the subject of criminal law.

In Canada one of the legislative powers assigned to the Dominion Parliament relates to criminal law, including procedure in criminal matters. Since anti-combines legislation interferes so obviously with the provincial power to legislate in relation to property and civil rights the constitutional validity of the federal anti-combines legislation has had to be supported on the ground that it is genuine criminal law or necessarily incidental or ancillary to criminal law. It was on this ground that the Privy Council in the *Proprietary Articles Trade Association* case⁴ held the Combines Investigation Act, as well as sections 498 and 498A of the Criminal Code, as they stood before the amendments now introduced by Parliament, were within the legislative competence of the Dominion Parliament. Lord Atkin, in distinguishing the earlier decision of the Privy Council in the *Board of Commerce* case,⁵ which had held previous anti-combines legislation enacted by the Dominion Parliament to be ultra vires, said at page 323:

In their Lordships' opinion s. 498 of the Criminal Code and the greater part of the provisions of the Combines Investigation Act fall within the power of the Dominion Parliament to legislate as to matters falling within the class of subjects 'the criminal law including the procedure in criminal matters' (s. 91, head 27). The substance of the Act is by S. 2 to define, and by S. 32 to make criminal, combines which the legislature in the public interest intends to prohibit. The definition is wide, and may cover activities which have not hitherto been considered to be criminal. But only those combines are affected 'which have operated or are likely to operate to the detriment or against the interest of the public, whether consumers, producers, or others'; and if Parliament genuinely determines that commercial activities which can be so described are to be suppressed in the public interest, their Lordships see no reason why Parliament should not make them crimes.

Again at page 325 he said:

⁴ [1931] A.C. 310.

⁵ [1922] 1 A.C. 191.

There is a general definition, and a general condemnation; and if penal consequences follow, they can only follow from the determination by existing courts of an issue of fact defined in express words by the statute. The greater part of the statute is occupied in setting up and directing machinery for making preliminary inquiries whether the alleged offence has been committed. It is noteworthy that no penal consequences follow directly from a report of either commissioner or registrar that a combine exists. It is not even made evidence. The offender, if he is to be punished, must be tried on indictment, and the offence proved in due course of law. Penal consequences, no doubt, follow the breach of orders made for the discovery of evidence; but if the main object be *intra vires*, the enforcement of orders genuinely authorized and genuinely made to secure that object are not open to attack.

Lord Atkin then goes on to support the constitutional validity of certain provisions of the Combines Act dealing with customs duties and patents, which were apparently not regarded as ancillary to the main criminal provisions, by the specific provisions of the British North America Act granting the Dominion power to deal with taxation and patents of invention.

Having regard to the history of anti-combines legislation in Canada, it is not unreasonable to suggest that, had Canada not been a confederation and had all legislative power been vested in one parliament, much if not all the content of these statutory enactments would never have been made criminal law, although it might have been otherwise prohibited. The point is that, in order to assume jurisdiction over matters that otherwise belong to the provincial field, Parliament has chosen to make crimes of acts and situations that would not ordinarily have been regarded as criminal, and in doing so has confronted the business and industrial community with the continuing threat of being prosecuted and treated as criminals for things done entirely without guilty intent.

Moreover, having embarked on this course, Parliament has increasingly placed the accused and potential accused under its legislation in a far less favourable position to defend themselves than is the true criminal accused of a genuine crime. It is fundamental under British criminal justice that an accused is presumed to be innocent until he is proven guilty by due process of law. The most hardened criminal accused of the most revolting crime is given the benefit of every doubt and provided with every safeguard. Everything possible to afford him a fair trial is laid down. Notably, apart from the presumption of his innocence, he is entitled to be present while the case against him is presented and to cross-examine the witnesses for the prosecution, he cannot be compelled to testify, he is entitled to a trial by a jury of his peers,

and his previous record will not be gone into on the issue of his guilt or innocence. The burden of proving guilt is cast fully upon the Crown, confessions made under duress or without a carefully prescribed statutory warning are inadmissible and, from the moment the accusation is laid, all these safeguards are available to the accused under the direct supervision of experienced courts trained in ensuring full protection of these *rights* of the accused.

The contrast between the position of the ordinary criminal and of the trader or business man brought under the shadow of our combines legislation is so great as almost to defy comment. It will be observed from the passages quoted from Lord Atkin's judgment in the *Proprietary Trade Articles* case that the so-called "investigatory provisions" of the Combines Act were held to be ancillary and so *intra vices* because they were "machinery for making preliminary inquiries whether the alleged offence has been committed". Under the practice which has developed in administering the Combines Investigation Act, investigations, whether provoked by complaint or initiated by the Commissioner, have been conducted, and all the so-called "evidence" has been put in, before any specific offence is alleged against those under investigation. The only information they have is that someone suspects "a combine" exists or is being formed. As a result there have never been any "issues" upon which evidence properly so called could be taken. There has never been any limit to the scope of the inquiry. Individual witnesses have been examined, in the absence of all other parties affected, upon a vast mass of material obtained *ex parte* from numerous and often undisclosed sources, and no proper opportunity for cross-examination has existed or indeed could exist in such circumstances. Objections to the relevancy of questions put and documents tendered are impossible, for where there are no issues there can be no question of relevancy.

On his examination before the Commissioner or the Commissioner's deputy the individual witness has been allowed representation by counsel and, as a concession but not as a matter of right, a so-called "co-ordinating" counsel representing other parties under investigation has in recent cases been allowed to be present. In practice, however, counsel can not know all that witnesses other than his own have said or produced, or may say or produce, and, there being no defined issues, he is in an impossible position both on examination in chief and cross-examination of his own witness. He has of course no opportunity to object to the "evidence" put in through, or to cross-examine, other witnesses.

In the result counsel have been obliged to take a substantially inactive and relatively helpless part in the making of the so-called "evidence".

In fact, therefore, the welter of testimony and documents put in before the Commissioner, referred to in the mass as "evidence", is not evidence at all and is almost certainly a one-sided story. It is true that opportunity has been afforded to those investigated, at the close of the Commission's case, to make representations and submit evidence of their own, but by the very nature of the inquiry, and the complete absence of an issue or issues to defend, the opportunity has been substantially meaningless.

At the close of the investigation, because the Combines Act is made subject to the provisions of the Inquiries Act, a "statement by counsel" has been submitted to those under investigation, purporting to set forth the offences with which they are charged. Although there may be variations, such statements have in the main constituted a recital of the so-called "evidence" made before the Commissioner and an expression of opinion by commission counsel that the accused are guilty of participating in the formation or operation of a combine, under one or other of the permutations and combinations of what a combine under the statute may be. These "statements by counsel" in no way tell the person investigated what actions of his or others are alleged to constitute what specific crime. An opportunity to be heard on such a "statement of counsel" is accordingly of little or no value.

The Commissioner has then taken under advisement the one-sided story that in all probability has resulted from an investigation conducted in these circumstances, plus such representations as could be made, and in due course produced his report. These reports, with one or two notable exceptions, have invariably been unfavourable to the industry and individuals investigated. It is not surprising that this result flows.

An unfavourable report must be published unless the Commissioner, or under the new law the Commission, recommends otherwise. In past practice recommendations against publication have rarely if ever been made and there is no reason to suppose that the new law will bring about a change. At best those under investigation will, in this respect, be at the mercy of three men, instead of one, and they are only directed by the new section 19(3) to recommend withholding publication where they believe the public interest would be better served. The Minister of Justice may still publish the report notwithstanding such a recommenda-

tion. All that the Commission's recommendation can do is relieve the Minister of the absolute duty to publish that is otherwise placed upon him.

Human nature being what it is, there can be no doubt that the publishing of an unfavourable report constitutes a verdict of guilty in the eyes of the public. Moreover, it is too much to hope that a report, which is printed, widely circulated and available to anyone, will not come into the hands of the judges and jurors who may be called upon to try guilt or innocence if and when a prosecution is launched. How, then, can an accused receive a fair trial? That reports do come into the hands of the judges is shown by what occurred during a recent trial under the Combines Act where, when question of the identity of some individual came up, the judge on several occasions said: "Never mind, I can look it up in *Who's Who*", this being a jocular reference to the Commissioner's report in that case. No matter how fair-minded a judge is, he is bound to be influenced by the fact that someone, after investigation, has already reached the conclusion that the accused before him is guilty. The case of the juror who has no such training in impartiality as the judge is of course even worse. Trial by jury may still be had by an individual accused, although the right to trial by jury is now denied to a corporate accused by an amendment enacted at the same time and for the same purpose as section 39A referred to later.

These then are the conditions in which the unfortunate accused under this legislation comes to trial. Once before the courts he is again placed in an infinitely less favourable position than a person charged with a true criminal offence. Notably, he is obliged to defend himself under the completely different set of evidentiary rules that are contained in section 39A, now to become new section 41. This section was enacted in 1949, apparently for the sole purpose of facilitating the work of the prosecutor, following failure of the Crown's case for want of proper proof in *Rex v. Ash-Temple Ltd.*⁶ A detailed analysis of this section is impossible here. It should be the subject of a special study, since few people realize how far it goes. The MacQuarrie Report, after noting that section 39A has been the subject of "some criticism", states:

Without this section the prosecution would, in many cases, encounter serious difficulty in proving matters essential to its case which lie wholly within the knowledge of the accused and are not accessible to the prosecution.⁷

⁶ (1949), 93 C.C.C. 267. There is a comment on this case at (1949), 27 Can. Bar Rev. 461.

⁷ Report, *op. cit.*, p. 39.

I suggest that this statement clearly indicates a disregard of the fundamental right of an accused not to testify. The MacQuarrie Report goes on:

The Section does not shift the onus of disproving the offence to the accused as has been suggested in certain representations submitted to us. The evidence made available by the statutory presumptions is only *prima facie* evidence and is subject to rebuttal. The onus remains upon the Crown to show that the evidence as a whole establishes guilt beyond a reasonable doubt.⁸

The few lawyers who have so far been charged with the defence of a combines action where the provisions of this section have been brought into play know that for all practical purposes it does shift the burden of proof from the Crown to the accused in respect of the documents introduced. As an illustration of the effect of section 39A, what can happen and has already happened is that twenty-five year old correspondence containing apparently incriminating matter, exchanged between two individuals long since dead, is placed in the record as indicating the origin of a conspiracy in which accused are alleged to have participated. How, it is asked, can the accused, confronted with such documents, make counter proof of their contents sufficient to destroy the "prima facie" effect created by the section?

Until now the emphasis in our combines legislation has been on conspiracies in restraint of trade rather than on monopolies as such. Section 489A of the Criminal Code and the new section 37A (now to become 34), passed to implement the interim MacQuarrie Report, have to do with specific practices and may be disregarded in a general discussion of this kind. The whole of section 498 of the Code, however, is concerned with conspiracy and, so far as the Combines Investigation Act is concerned, while the expression "merger, trust or monopoly" has appeared in the several statutes enacted since 1910, the monopoly feature has certainly not been emphasized. In fact, during a period of over forty years, so far as the writer is aware, there have been only two cases under the "merger, trust or monopoly" provisions. In one of these, under section 2 (4)(a), dealing with acquisition of control over the business of another, the prosecution failed. The other, under section 2 (4)(b), dealing with control of the class or species of business in which the accused are engaged, is the case against the wooden match industry, which is now pending before the Quebec Court of Appeal. Notwithstanding all this, we find throughout the MacQuarrie Report the use of the word "mono-

⁸ Report, *op. cit.*, p. 39.

poly" as a generic term to describe all offences contemplated by the legislation. In the single-page introduction to the report itself the words "monopoly" and "monopolistic" occur no less than nine times. This preoccupation with "monopoly", which persists throughout the report, is a new departure so far as Canadian law is concerned. It doubtless has its origin in the close study that the report indicates has been made of the "trust-busting" legislation in the United States, with which we have not so far been blessed. The nomenclature appears to have been adopted without question by members discussing the matter in Parliament, as has the introduction of a provision, noted later, which in fact imports into our law the teeth but not the mollifying features of the Sherman Anti-Trust Act.

In brief, the principal innovations recommended in the MacQuarrie Report and adopted in the implementing legislation are:

(1) division of the present functions of the Commissioner between an investigation and research agency headed by a director, on the one hand, and a three-man administrative board or commission, on the other;

(2) removal of the limit on fines;

(3) institution of a system of so-called "empirical" research;

(4) addition of "supplementary judicial remedies".

As indicated already, the report does not recommend any changes in the substantive provisions creating the "crimes" that are presumably necessary to give Parliament legislative jurisdiction. Moreover, it specifically recommends against any attempt to clarify the act, for the benefit of business men who wish to conform, in the following extraordinary passage:

We recommend:

C. (2) That it is undesirable to include in the Act a list of permissible practices. There is a good deal of complaint of uncertainty as to permitted practices and exposure to inquiry on the part of business firms, but it is not unfair that certain disadvantages and responsibilities should go with the possession of monopoly power and that freedom from inquiry should belong to those in highly competitive industries who have avoided restrictive agreements or any semblance of them.⁹

It is surely not necessary to point out the speciousness of this reasoning, which entirely begs the question.

The first of the four innovations contained in the report and legislation is no doubt sound in principle, since it has obviously been highly undesirable that the same individual should act as investigator, prosecutor and judge. But a mere division of

⁹ Report, *op. cit.*, p. 49.

powers that are in themselves undesirable obviously does not cure the fundamental defects already noted. It will still be impossible for the trader or business man to know what are the specific issues confronting him and so defend himself, whether innocent or guilty. A report that may blacken him and the industry in which he is engaged in the eyes of the public, and seriously prejudice his defence in a subsequent criminal prosecution, can still be brought down and made public without a real opportunity having been given to put forward the other side. Moreover, even wider powers are now being taken as, for example, in respect of the right of entry and search. New section 10 will enable the Director to enter "any premises" on which he believes there may be evidence relative to the matters being inquired into. The Canadian's home will certainly not be his castle if this provision means what it says.

The second innovation, involving removal of the limit on fines, can only be an invitation to the courts to inflict heavier penalties. We must assume that the courts will apply their new discretion in this regard fairly and reasonably. But it is interesting to note that, although here an upper limit of \$25,000 has been removed and imprisonment up to two years may be imposed in addition to an unlimited fine, in the United States, as noted in the MacQuarrie Report, the maximum fine is apparently \$5,000, with the alternative of one year's imprisonment. It seems strange that commercial activities which are not regarded as criminal in England, and which are made "crimes" in Canada for constitutional reasons, should be treated with such severity.

The third innovation has to do with research provisions, which are set out in new section 42 under the caption "Investigation of Monopolistic Situations". No attempt is made to define what is meant by a "monopolistic situation". If the MacQuarrie Report is to be taken as a dictionary in this regard, the field of inquiry is apparently unlimited. Surely the Act as it stood before afforded sufficient opportunity for "witch hunting" without this new provision which, apart from all other considerations, is open to the serious objection on constitutional grounds noted later. Moreover, the section requires the Commission to make a report on the material submitted by the Director, a report that will be published under section 19, although persons and industries mentioned in it may never have been aware that they were the subject of "research".

The "supplementary judicial remedies", introduced as a fourth innovation, are contained in new sections 31 and 33.

Under section 31, as amended in the Senate, the Attorney General of Canada or the Attorney General of the province may move the court at the time of conviction, or at any time within three years after conviction, to prohibit the continuation or repetition of the offence or the doing of any act or thing by the person convicted, or *any other person*, directed towards continuation or repetition of the offence. Moreover, where the conviction is with respect to the formation or operation of a merger, trust or monopoly, the person convicted, or *any other person*, may be directed "to do such acts or things as may be necessary to dissolve the merger, trust or monopoly in such manner as the court directs". It is a fundamental concept of our criminal law that the accused, upon conviction and payment of the penalty, purges himself of his crime and cannot be placed in jeopardy a second time for the same offence. Under this provision he remains in jeopardy for at least three years at the will of the attorneys general of Canada or of the province. If it is argued that the section is only directed against repetition of the offence, then it is useless, because that would already be prohibited by the statute. Furthermore, the provision about dissolution of a merger, trust or monopoly is a pure importation from the United States Sherman Act, without the civil remedies there made available. As worded, this provision leaves the accused entirely at the mercy of an unlimited discretion conferred upon the courts and in no way defined. These provisions are also objectionable on constitutional grounds.

Then, by section 33, after conviction and sentence the court is empowered for a period of three years to:

require the person convicted to submit such information with respect to the business of such person as the court deems advisable and without restricting the generality of the foregoing the court may require a full disclosure of all transactions, operations or activities since the date of the offence under or with respect to any contracts, agreements or arrangements actual or tacit that the convicted person may at any time have entered into with any other person touching or concerning the business of the person so convicted.

The same comments regarding the unlimited and undefined discretion of the court, continued jeopardy and objection on constitutional grounds may be made to this section.

It is submitted that new sections 31, 33 and 42, namely the "supplementary judicial remedies" and "research" provisions, are open to serious question on constitutional grounds. How can such provisions be said to be ancillary or necessarily incidental to criminal law as defined in the *Proprietary Articles Trade Association* case? They most certainly are not concerned with "making

preliminary inquiries whether the alleged offence has been committed", in the language of Lord Atkin in that case.

Doubts about the constitutional validity of such provisions are expressed several times in the MacQuarrie Report. Yet attempts to secure a reference to the courts while the legislation was before Parliament have been brushed aside. The Minister of Justice, in introducing the legislation in the House of Commons on June 10th, 1952, dismissed the constitutional problem in these words:

It would not be appropriate for me to discuss at this stage the detailed provisions of the bill, but I think I should elaborate to some extent on the brief comments I made on the resolution in regard to the new remedy of court order of prohibition which has some parallel with injunction orders in civil proceedings. Hon. members are aware that orders, of the nature of cease and desist orders, to be issued in discretion of an administrative tribunal were ruled *ultra vires* in the Board of Commerce cases.

The MacQuarrie committee stressed the desirability of providing for some form of judicial order which could be used to deal with combines offences in the incipient stage or to reach situations which might not be corrected by criminal prosecution. The committee pointed to the constitutional problems involved in devising legislation of this kind and suggested that the matter be studied by the law officers. The section in the bill is the result of such study, and in the opinion of the law officers there are strong reasons for believing that the section is within federal competence.

The orders envisaged by the section are, in contrast to those in issue in the Board of Commerce cases, to be granted by the courts by the application of general principles. In the case of a conviction for a combines offence it will enable the court to prohibit the continuance or repetition of the offence; and if the conviction is with respect to a combine by way of merger, trust or monopoly, the court may direct its dissolution. It will also be possible for the court to prohibit acts which are directed toward the commission of a combines offence or which are likely to constitute such an offence. In other words, it will not be necessary for the administration to wait until an offence has been committed before taking action in cases where it is apparent that restrictive practices are being developed which are likely to operate against the interest of the public.¹⁰

I submit that, where this is the best that can be said of advice received from the law officers of the Crown, a clear case for reference was indicated.

In conclusion it is well to restate that the purpose of the present article is in no sense to excuse those persons who, by their improper and unwarranted actions, bring about public detriment in the true sense of that word, or to argue against proper punish-

¹⁰ House of Commons Debates (unrevised), vol. 94, pp. 3117-8.

ment of a criminal nature where such persons have been motivated by guilty intent. Doubtless there is every justification for the existence of a provision like section 498 of the Criminal Code, on the basis that it prohibits unlawful conspiracies in restraint of trade and penalizes those who engage in them. What I object to is the opportunity the Combines Investigation Act hitherto, and particularly as now amended, has afforded and will afford to those charged with its administration to pillory business generally, without regard to the consequences upon the innocent and without regard to what is normally meant by a "fair trial".

As a final comment on the MacQuarrie Report and the implementing legislation, I can do no better than refer to the statement made by the Honourable G. P. Burchill in the Senate on June 27th, 1952, on the adoption of the Report of the Senate Banking and Commerce Committee, when he said:

Honourable senators, I would not be honest with myself if I did not say something before this report is carried. I think that some of the sections go further than is necessary, and are what might be called hasty legislation.

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This bill is based on the report of the MacQuarrie Committee. There was no representative of business or anyone having a practical knowledge of the business world on that committee. Moreover, I wonder how many honourable senators have read the committee's report.

The bill introduces some new principles of law which have never before been a part of the criminal law of this nation for dealing with any crime whatever. Another new feature is the provision to investigate situations before any crime has been committed. While the powers given by the bill can no doubt be safely left in the hands of our present Minister of Justice and his deputies, we must remember that we are passing legislation which will be a part of the laws of this nation long after we have disappeared, and it seems to me these powers are capable of being made use of some day by another government in a very unscrupulous manner.

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For these reasons, I think it would have been the part of wisdom and fairness to delay some sections of the legislation for further study next session, until Canadian business men, through their associations, had more time to make their representations, as they requested.¹¹

¹¹ Official Report of Debates (unrevised), p. 571.

The Recent Regulation of Monopolies

Donald D. Carrick*

The MacQuarrie Committee Report and the Act to give legislative effect to the recommendations contained in the report, which received the royal assent on July 4th, 1952, represent the latest attempt to deal with the economic evils arising from monopolies and combinations in restraint of trade to the detriment of the public. The brief history of combines legislation contained in the report gives a synopsis of the developments to the present time. It does not, however, set out the background of struggle by the commercial interests against the legislation and the human personalities involved. The movement that was initiated in 1888 by Mr. Clark Wallace of Toronto, who obtained the appointment of a special committee of the House of Commons to investigate trusts and monopolies, the lobbying by special interests, attended by the familiar technique of referring bills to committees to kill them, the emasculation of effective legislation, the nugatory effect of the administration of the legislation by an unsympathetic government, and the ebb and flow of the struggle, are described more fully in Reynolds, *The Control of Competition in Canada*.¹ What has happened since the MacQuarrie Committee began its sittings has made it clear that the struggle against the legislation continues to the present time.

The problem involved is the preservation of the economic system in a form that will allow it to operate to the public benefit. It is assumed in the Committee's terms of reference² and by the Committee itself³ that a continuance of the economic system of free enterprise is desirable. The fundamental question is what legislation is necessary to eliminate or prevent the growth of

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¹ L. G. Reynolds, *The Control of Competition in Canada* (Harvard University Press, 1940), pp. 131-171.

² Report of the Committee to Study Combines Legislation (Queen's Printer and Controller of Stationery, Ottawa, 1952), p. 5.

³ Report, *op. cit.*, p. 7.

economic evils that would exist in the absence of controlling legislation. To state the problem is to indicate its importance to the community.

The report contains a chapter on the economic background of monopoly problems, which sets out the reasons why it is necessary to preserve or stimulate competition if the system of free enterprise is to continue.⁴ For a full discussion of the problems, however, one must seek elsewhere. Those who are interested in pursuing this aspect of the inquiry will find a fuller treatment in Burns, *The Decline of Competition*, published in 1936, in which the major theme is the inevitability of the growth of monopoly and the hopelessness of preventing it by law, and in Stocking and Watkins, *Monopoly and Free Enterprise*, published in 1951, in which Burns' reasons and conclusions are analyzed and a view more hopeful to believers in the system of free enterprise is set forth.⁵

As a result of the recommendations of the MacQuarrie Committee contained in its Interim Report on Resale Price Maintenance, section 37A was added in December 1951 to the Combines Investigation Act.⁶ This section made certain acts constituting resale price maintenance an offence, thereby in effect declaring that they operate or are likely to operate to the detriment or against the interest of the public.

The final report of the Committee and the Act to implement its recommendations result in no important change in the substantive law prescribing the acts that constitute offences, except that it is now necessary to establish a practice of discrimination as defined in section 498A of the Criminal Code, and not merely a single act of discrimination, to constitute an offence. Certain other terminological changes are made in sections 498 and 498A of the Criminal Code.

A good deal of unjustifiable criticism has been directed against section 498 of the Criminal Code, defining offences in restraint of trade, and section 2 of the Combines Investigation Act, defining a combine, charging that they are ambiguous in meaning and uncertain in application. The criticism is unjustified because of necessity the sections involve questions of degree, and where

⁴ Report, *op. cit.*, Ch. II, pp. 21ff.

⁵ A. R. Burns, *The Decline of Competition* (McGraw-Hill Book Co. Inc., 1936) and G. W. Stocking and M. W. Watkins, *Monopoly and Free Enterprise* (The 20th Century Fund, New York, 1951).

⁶ Stats. 1951 (2nd sess.) c. 30. The Combines Investigation Act is R.S.C., 1927, c. 26; am. 1935, c. 54; 1937, c. 23; 1946, c. 44; 1949 (2nd sess.) c. 12. Chapter 39, an Act to Amend the Combines Investigation Act and the Criminal Code, was given royal assent on July 4th, 1952.

that exists there must be borderline cases of uncertainty. Combinations that do not result in undue restraint of trade are not illegal under section 498, nor are combinations or monopolies that have not operated or are not likely to operate to the detriment of the public illegal under section 2 of the Combines Investigation Act. It is only when such combinations unduly restrain trade, or when they or monopolies have operated or are likely to operate to the detriment of the public, that they become illegal. The only way the element of uncertainty could be eliminated would be to make all combinations or monopolies illegal and obviously that solution would be undesirable. The Committee convincingly rejects the alternative suggestion that a list of permitted and prohibited practices be included in the legislation.⁷

In so far as combination cases are concerned, the courts have defined what is meant by the word "unduly" in section 498 of the Criminal Code. In *Container Materials Ltd. et al. v. The King*,⁸ Sir Lyman P. Duff C.J.C. says at page 533:

The enactment before us, I have no doubt, was passed for the protection of the specific public interest in free competition. That, in effect, I think, is the view expressed in *Weidman v. Shragge* in the judgments of the learned Chief Justice or Mr. Justice Idington and Mr. Justice Anglin, as well as by myself. This protection is afforded by stamping with illegality agreements which, when carried into effect, prevent or lessen competition unduly and making such agreements punishable offences; and, as the enactment is aimed at protecting the public interest in free competition, it is from that point of view that the question must be considered whether or not the prevention or lessening agreed upon will be undue. Speaking broadly, the legislation is not aimed at protecting one party to the agreement against stipulations which may be oppressive and unfair as between him and the others; it is aimed at protecting the public interest in free competition.

Mr. Justice Kerwin at page 539 quotes from the judgment of Anglin J. in *Weidman v. Shragge*:⁹

The prime question certainly must be, does it [the agreement alleged to be obnoxious to s. 498], however advantageous or even necessary for the protection of the business interests of the parties, impose improper, inordinate, excessive or oppressive restrictions upon that competition, the benefit of which is the right of everyone?

In *Rex v. Alexander*¹⁰ Mr. Justice Raney in the Supreme Court of Ontario says that the expression "to the detriment or against the interest of the public", in what is now section 2 of the

⁷ Report, *op. cit.*, p. 45.

⁸ [1942] 1 D.L.R. 529, at p. 533.

⁹ [1912] 2 D.L.R. 760, at p. 760.

¹⁰ [1932] 2 D.L.R. 109, at p. 111.

Combines Investigation Act, was intended to include "unduly" in section 498 of the Criminal Code.

The Criminal Code does not deal with monopolies. They are dealt with in the Combines Investigation Act, which defines a combine as including a merger, trust or monopoly which "has operated or is likely to operate to the detriment or against the interest of the public, whether consumers, producers or others". Section 2 goes on to define a "merger, trust or monopoly" as meaning one or more persons:

- (a) who has or have purchased, leased or otherwise acquired any control over or interest in the whole or part of the business of another; or
- (b) who either substantially or completely control, throughout any particular area or district in Canada, or throughout Canada the class or species of business in which he is or they are engaged.

Most of the prosecutions that have taken place in Canada have involved combination offences. The number of cases involving monopolies has been very few and in none of them is much light cast on the meaning of section 2 of the Combines Investigation Act.¹¹

The most notable change resulting from the report and implementing Act is the substitution for the Commissioner under the Combines Investigation Act of a Director of Investigation and Research and a Restrictive Trade Practices Commission. One of the reasons for the change is to put an end to the dual position occupied by the Commissioner as both investigator and judge. The Committee was satisfied that the Commissioner has administered the Act fairly, but considered the dual position unsound in principle and destructive of the public support the Act should have.¹² Although the test of fair administration is not to be found in statistics, it is interesting to observe that since 1926, out of thirteen prosecutions following thirteen investigations in which the Commissioner or Special Commissioner concluded an offence had been committed, nine resulted in convictions and four in acquittals. Of the four acquittals, two were decided on technical grounds, unrelated to the merits, and in the remaining two the court found the evidence insufficient to warrant a conviction. When one bears in mind the complexity of the facts, the difficulty of obtaining evidence, resulting partly from the ease with

¹¹ The following cases deal with monopolies: *Rex v. Canadian Import Co. et al.*, [1935] 3 D.L.R. 330; *Rex v. Staples et al.*, [1940] 4 D.L.R. 699 (B.C. Supreme Court); *Rex v. Eddy Match Co. Ltd. et al.* (1952), 13 C.R. 217; *Stewart v. Thorpe et al.* (1916), 27 C.C.C. 409 (trial), (1917), 36 D.L.R. 752 (Alta. C.A.), (1918), 49 D.L.R. 694 (S.C.C.).

¹² Report, *op. cit.*, p. 30.

which it can be destroyed,¹³ the frequent necessity of calling unfriendly witnesses bound by economic ties to the accused, and the obligation of the Crown to prove guilt not merely by a preponderance of evidence but beyond reasonable doubt, it is remarkable that there was such a large proportion of convictions.¹⁴

¹³ See observations of Sifton C.J. in *Rex v. Clarke* (1908), 1 A.L.R. 358 (Alta. S.C.) at p. 362.

¹⁴ The following is a list of the results of the thirteen prosecutions that have taken place since 1926:

Alleged jobber-broker combine in the distribution of fruits and vegetables in Western Canada. Four individuals and four companies were convicted on March 13th, 1926, in the Supreme Court of British Columbia. The total fines amounted to \$200,000, each company being fined \$25,000, and each individual \$25,000 and one day imprisonment. The indictments charged (a) conspiracy to defraud; (b) offences against the Secret Commissions Act; (c) offences against section 498 of the Criminal Code; (d) offences against the Combines Investigation Act. The trial took place and resulted in convictions under counts covered by (a) and (b), the count under (c) being traversed to the next assize and never proceeded with. The counts under (d) were withdrawn.

Alleged combine of plumbing and heating contractors and others in Ontario. In 1930 and 1931, arising out of three separate trials in the Supreme Court of Ontario, thirty individuals were convicted of charges under the Combines Investigation Act and section 498 of the Criminal Code, and were fined a total of \$45,200.

Alleged combine of electrical contractors in the City of Toronto. In 1932 seven companies and fifteen individuals were convicted in the Supreme Court of Ontario of charges under the Combines Investigation Act and section 498 of the Criminal Code, and were fined a total of \$26,200.

Alleged combine in the motion picture industry in Canada. Proceedings were instituted in the Supreme Court of Ontario against fifteen companies and three individuals, charges being laid under the Combines Investigation Act and section 498 of the Criminal Code. In 1932 all parties charged were found not guilty.

Alleged combine of manufacturers of baskets and other wood veneer containers for fruits, vegetables and meats. Proceedings under the Combines Investigation Act and section 498 of the Criminal Code were instituted in the Supreme Court of Ontario against fifteen individuals. In 1933 all were convicted and fines imposed, totalling \$1,500.

Alleged combine in the importation and distribution of British anthracite coal in Canada. Proceedings under the Combines Investigation Act and section 498 of the Criminal Code were instituted in the Quebec Court of King's Bench (Crown Side) against eleven companies. Five of the companies were convicted in 1933 and another five companies were convicted in a separate trial in 1935. Fines totalling \$43,500 were imposed against these ten companies.

Alleged combine in the manufacture and sale of paperboard shipping containers. Proceedings were instituted under section 498 of the Criminal Code in the Supreme Court of Ontario. In one trial held in 1940 eighteen companies and one individual were convicted and fined a total of \$156,500. In another trial one company was convicted and fined \$2,500. In a third trial one individual and four companies were convicted and fined a total of \$17,000.

Alleged combine of wholesalers and shippers of fruit and vegetables in Western Canada. Proceedings under the Combines Investigation Act were instituted against eight companies in the Supreme Court of British Columbia. In 1940 all parties charged were found not guilty.

Alleged combine in the distribution of tobacco products in the Province of Alberta and elsewhere in Canada. Proceedings were instituted in the Supreme Court of Alberta under the Combines Investigation Act against twenty-seven companies and nine individuals. They were convicted in 1941 and fines totalling \$221,500 were imposed. On appeal to the Appellate Division, however, the convictions were quashed on technical grounds.

The separation of function between Director and Commission, resulting in the Director confining his activities to investigation and the Commission appraising the facts, is designed to remove even the possibility that the Act will not be administered fairly and impartially.

The division of function is intended to enable the Director to expand his activities so as to include an overall survey of the economic system and to conduct research into such fields as he considers desirable relating to monopolistic situations or restraint of trade. Under section 10 of the Combines Investigation Act, until recently in force, the Commissioner's duties were extensive and there is probably no field of investigation now open to him which he could not already have explored. His main difficulty has been too much work and too little staff. The preparation of the reports is an arduous task. It was estimated at the time the implementing bill was introduced in the House that, having regard to the investigations on hand, the preparation of reports in itself required the time of at least three persons.¹⁵ When the preparation of the reports is taken over by the Restrictive Trade Practices Commission, these three men will be available for the other work of the Director. It is to be hoped that the Director will be authorized to increase his staff, if necessary, and offer remuneration that will compare favourably with earnings or salaries for comparable ability paid in other fields, so that he will be able to discharge adequately his important duties.

One of the main duties of the Restrictive Trade Practices Commission under the implementing Act is to hold hearings, at which a statement of evidence obtained in the inquiry by the

Alleged combine in the manufacture and sale of dental supplies in Canada. Proceedings under section 498 of the Criminal Code were instituted in the Supreme Court of Ontario against eighteen companies. In March 1948 all accused were acquitted on technical grounds.

Alleged combine in the bread-baking industry in Saskatchewan, Alberta and British Columbia. An information charging six companies with an offence under section 498 of the Criminal Code was laid on January 20th, 1950, at Calgary, Alberta. Following the trial in 1951 the accused were convicted and fined a total of \$30,000. Notice of appeal has been filed by the accused.

Alleged combine in Ontario and Quebec in connection with the distribution and sale of flat glass. Proceedings were instituted in the Supreme Court of Ontario under section 498 of the Criminal Code against eight companies and one individual. The accused all pleaded guilty in September 1950 and were fined a total of \$44,000.

Alleged combine in the manufacture, distribution and sale of matches in Canada. An information charging five companies with offences under the Combines Investigation Act was laid in August 1950. Following the trial on one of the charges in 1951 the accused were convicted and fined a total of \$85,000. This case is at present under appeal. Also, three charges against one or more of the accused are outstanding.

¹⁵ Statement of Minister of Justice, Debates, House of Commons (unrevised) Vol. 94, p. 2816 (June 2nd, 1952).

Director will be considered, together with arguments of the Director in support of it, and the persons concerned in the investigation will be allowed full opportunity to be heard in person or by counsel. Its most important duty will be to make a report to the Minister of Justice, which will review the evidence and material, appraise the effect on the public interest of arrangements and practices disclosed in the evidence, and make recommendations on the application of remedies provided in the Combines Investigation Act or elsewhere.¹⁶ These were substantially part of the duties of the Commissioner under the Combines Investigation Act. The Restrictive Trade Practices Commission will also discharge other duties of a less important nature in connection with investigations being conducted by the Director. Its approval, obtainable *ex parte*, will be necessary to enable the Director to obtain returns of information by written notice,¹⁷ to enter premises, to copy or take away documents for copying,¹⁸ to require evidence upon affidavit by written notice¹⁹ and to examine persons under oath before a member of the Commission.²⁰ In most investigations conducted by the Commissioner, the documents obtained from persons under investigation constitute the most reliable evidence whether any offences in restraint of trade have been committed. Frequently, the oral evidence given before the Commissioner on crucial points has not been reliable. It will be interesting to see whether the separation of the functions of investigation and appraisal will result in witnesses giving evidence before the Restrictive Trade Practices Commission that will conform more closely to the written documents.

A new and important power is given to the Commission to make an interim report to the Minister of Justice in investigations in which the Commission is unable effectively to appraise the effect on the public interest of the arrangements and practices disclosed in the evidence, and to remain seized of the inquiry until it has obtained such further information as it deems necessary to appraise the effect on the public interest of such arrangements and practices. When the time has arrived, the Commission will make its final report.²¹ This section should prove useful in connection with incipient monopolies whose activities have not yet reached the point where it is clearly established that they are detrimental to the public.

¹⁶ C. 39, Stats. 1952, s. 18.

¹⁷ *Idem*, s. 9.

¹⁸ *Idem*, s. 10.

¹⁹ *Idem*, s. 12.

²⁰ *Idem*, s. 17.

²¹ *Idem*, s. 22.

The traditional weapons in Canadian legislation to fight monopolies and combinations in restraint of trade have been the publicity given such activities through the medium of investigations and reports by the Commissioner under the Combines Investigation Act and by criminal prosecution. This has come about as a result of the opinion generally held by the legal profession as to the narrow limits of what can be done by Parliament in the exercise of its exclusive authority over criminal law. The Committee has considered that a wider view might well be taken by the courts on what Parliament can competently enact under the criminal law and other headings in section 91 of the British North America Act, and the government has decided to act upon this view by introducing special remedies that make their appearance for the first time in Canadian legislation. Section 31 of the implementing Act provides that, where a person has been convicted of an offence, the court at the time of conviction, or subsequently, may prohibit the continuation or repetition of the offence. Where the conviction is with respect to the formation or operation of a merger, trust or monopoly, the court may direct that the merger, trust or monopoly be dissolved. One of the difficulties in the past in dealing with monopolies has arisen from the fact that the monopoly, when convicted as a combine, could pay the maximum fine of \$25,000 and continue its operations, prepared to pay another fine of equal amount if the government could convict a second time on new evidence. The fine might have amounted to only a small part of its net revenue from its illegal operations and the maximum penalty constituted nothing more than a licence fee. The amending Act now removes the maximum limitation of \$25,000 on fines, leaving the amount in the discretion of the trial judge, and gives the court power to put an end to the combine by way of merger, trust or monopoly by circumscribing its activities or ordering a dissolution. It is interesting to note that the first bill introduced in 1888 by Clark Wallace, but not passed in the House, provided that upon conviction for an offence a Dominion company was to forfeit its charter.²² No doubt difficult problems will arise, as they have in the United States where the courts possess a similar power, in dissolving the merger, trust or monopoly in such a way as to restore competition. The existence of the power will be a valuable weapon in the struggle against monopolies.

Section 31 of the amending Act also contains a provision authorizing the Attorney-General of Canada or a province to

²² Reynolds, *op. cit.*, p. 133.

apply to the court for an order prohibiting the commission of an offence or the doing of any act or thing constituting or directed towards the commission of an offence against section 32 or section 34 of the Combines Investigation Act or sections 498 and 498A of the Criminal Code. It is probable that the section will find its chief use in monopoly situations. The Director and Commission will not be compelled to stand aside and do nothing, as the Commissioner under the Combines Investigation Act had to do, while a monopoly to the detriment of the public is in the process of formation. The facts can be laid before the Attorney-General, who may apply to the court for an order to prevent the formation of the monopoly.

The MacQuarrie Committee Report and the implementing Act constitute a bold effort to deal with a problem that is of great importance to the people of Canada. At the minimum they should effect an extension of the activities of investigation and bring about a more accurate and comprehensive knowledge of monopoly and restraint of trade conditions. If the new remedies stand up under attack in the courts, the report and Act will constitute the most effective measures so far taken in Canada to combat monopolies and combinations in restraint of trade.

Industry and Combines

R. Bruce Taylor*

I would like to present my observations first on the recent amendments to the Combines Investigation Act and then on the MacQuarrie Report.

The changes in the previous law effected by the Amending Act are nearly all good. The principal change, that of separating the investigation function from the appraisal function is one that was recommended by businessmen. It was their opinion that it would always be difficult for an investigator, no matter who he might be, to give equal weight to the things he found that were unobjectionable, or even beneficial, and to the things he found that were objectionable. The investigator's task is to bring to light the

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things that are wrong and it would be hard for him to avoid concentrating on them. He would also be inclined to consider very slight evidence or even unsupported accusation as grounds for investigation.

Businessmen agree that the investigating agency should be zealous and watchful. In this respect it is like the police force of a community. No one, however, wants to be tried by the police and no one suggests that a police force should have the power to issue its own search warrants. It was wrong in principle for the Commissioner to have these powers. The government has recognized this and corrected the procedure.

The effectiveness of this improvement depends, of course, on the calibre and outlook of the persons comprising the new Restrictive Trade Practices Commission. For this reason it is hoped the appointees will be persons of broad experience and unconnected previously with the enforcement of combines legislation.

Because the law is, at least in the opinion of manufacturers, far from precise as to what co-operative practices are illegal, they recommended that the new legislation should provide procedure under which "cease and desist" orders could be made. It was considered that, in the great majority of cases, violations of the law were inadvertent and not deliberate. Prosecution, or even adverse publicity, seemed a severe penalty for inability to construe a complex law. It seemed that the discontinuance of the objectionable practices was the important thing and this could be secured at least as effectively and promptly by request or order as by prosecution.

It is regrettable that the procedure of publishing reports was retained, although the fact that reports will be issued, not by the investigating agency but by the Commission after what should be impartial and detached hearings and appraisal, removes some of the objectionable features. Nevertheless the reports, no matter how competent and impartial the Commission, constitute a penalty without trial and may prevent fair trial. The reason given, namely, that the public is entitled to know, hardly seems convincing. The public will know without any doubt if the firms reported on are prosecuted. If the firms should not or cannot be prosecuted they have done no wrong under the law. Publication of a report in these circumstances is the imposition of a heavy penalty without infraction of the law.

The new feature of the law which is giving manufacturers much concern is the function of research included in the duties of the Director. It causes apprehension on two grounds. In the first place,

research will do harm rather than good unless it is objective, impartial and competent. Secondly, research activities could place a heavy and costly burden of work on business. For these reasons it would have been better to have the government department which knows most about business do any necessary research. This is the Department of Trade and Commerce.

Manufacturers suggested two other changes in the law, about which nothing was done. The first was to include in the statute a definition of combine. When the basic present law was introduced in Parliament by the late Mr. Mackenzie King he explained with great care that there were two kinds of combinations, one harmful, and the other beneficial to the public. Mr. King emphasized that the law he was introducing was directed only against the first class. It has seemed to manufacturers that the courts, in their interpretation of the legislation have ignored the qualifying words "undue" or "to the detriment of the public". As a result, the prosecution is not called on to prove any harm, but only to prove that there has been substantial lessening of competition. This wipes out the distinction emphasized by Mr. King and radically changes the effect of the law. Manufacturers asked that the distinction between harmful and beneficial combines be re-affirmed.

It is granted that the courts would have complex factors to weigh in deciding whether certain lessening of competition had been to the detriment of the public, but weighing complex factors is done by the courts every day. They listen to expert evidence and draw their conclusions in such cases as property valuation, professional malpractice, and the like, and could do the same in combines cases.

Manufacturers asked to have declared as unobjectionable certain forms of co-operation or joint action, such as exchange of credit information, statistical and economic research, standard forms of contract, exchange of information on technological improvements. This has not been done, so that any of these practices may be construed as illegal.

The first striking thing about the MacQuarrie Report is its complete ignoring of the English law and practice in favour of the United States law and practice. Under the English law it is the Board of Trade, a government department corresponding to our Department of Trade and Commerce, which has jurisdiction. Under the United States law it is the Department of Justice. The English law is neutral to combinations as such, treating them as neither good nor evil in themselves, and only to be interfered with if found to operate against the public interest. The United States

law tends to make all combinations criminal. The MacQuarrie Report definitely follows the United States instead of the United Kingdom lead.

The next striking thing about the MacQuarrie Report is its unremitting suspicion of and hostility towards any form of co-operation or control by private enterprise. The MacQuarrie Committee seems convinced that these are almost certain to lead to detriment to the public. The only healthy state of business, in their opinion, is what has been described as "dog eat dog".

Is "dog eat dog" the only healthy business condition? It is rather hard to reconcile this view with the extent to which federal and provincial governments have taken direct and indirect action to eliminate competition in many lines. They have encouraged the formation of co-operatives for no other reason than to eliminate competition and have established complete monopolies by law in some lines. They have eliminated competition by fixing prices. We must credit these governments with good intentions. It must be concluded therefore that, in their opinion, lessening, or even the complete elimination of competition can be helpful to producers without being harmful to consumers. They must believe that protection on price for marginal producers, an assured share of whatever market is available and controlled orderly marketing is beneficial to the people at large in many circumstances.

The difference is that, in the one case, these activities are government-controlled or sponsored while, in the other, the activities are controlled by private enterprise. The view taken by the MacQuarrie Committee is that, under private control, these activities are likely to raise prices or restrict supply so as to harm the public. Manufacturers, on the other hand, feel that measures to encourage steady production, orderly marketing to eliminate duplication and other waste, can be as beneficial under private enterprise as under government control.

At one time any idea of co-operation with competitors would have seemed strange to most business men. It was "dog eat dog", and the result was the emergence of some huge dogs. It is interesting to recollect that the first monopoly legislation arose, not out of co-operation in industry, but out of fierce competition, which resulted in one member of the industry eliminating or weakening his competition so as to secure almost complete domination. The public did not like what was happening and the government of the United States, where this type of legislation originated, has been trying to break up these survivors of unrestricted competition ever since.

Although most manufacturers have got away from the "dog eat dog" concept of their activities, they have not lost the desire to get business away from competitors. The change is that they no longer try deliberately to put a competitor out of business. Their attitude is one of desiring to get more of the available business but not all of it. When they co-operate with a competitor it is definitely not for the purpose of preserving the status quo. It is in the belief that the elimination of waste and the increase of efficiency resulting from the co-operation will enure to the benefit both of the co-operators and of the consuming public.

It is a real dilemma into which industry is put by the MacQuarrie Report. Industry is to be fiercely competitive, but it is considered dangerous if any one member competes so successfully as to rise to a dominant position. Full employment is wanted, but private enterprise is suspected if it takes steps to introduce order into production or distribution. Low prices are wanted, but private enterprise risks prosecution if it co-operates to eliminate waste or duplication.

Consider also that employees through labour unions may largely eliminate competition in the supply of labour in whole industries, that producers of honey, turnips or other natural products may combine to eliminate competition in the supply and sale of these products, and that government may eliminate competition altogether in whole lines of activity. None of these reductions of competition is disapproved by the MacQuarrie Report.

A disturbing implication appears, namely, that wide open competition is not possible, if we are to obtain the economic security society wants, but only certain segments of society are to be allowed to reduce competition. Private enterprise must bargain for its labour with unions which are essentially monopolistic, and must compete for materials, labour and markets with monopolistic activities sponsored or controlled by governments. Is it reasonable or fair that at the same time it should be prevented from obtaining such advantages of co-operation as are not against the public interest?

Labour and Combines

A. Andras*

Labour's attitude to the problem of combines springs from the fact that union members are consumers. Their collective action as trade unionists aims at strengthening their ultimate position as consumers. The union is a means to an end, not an end in itself. The end is twofold: a larger slice of the national income pie, and a larger pie. Organized labour's existence, on this continent, is based on the assumption of a rising standard of living in an expanding economy.

Monopolies, combines, cartels, trusts, rings, or whatever they are called, may undermine this basic assumption in a variety of ways. They may raise prices, prevent or retard technical progress, lower the quality of the product. They have a deleterious effect on the labour market. They restrict job opportunities by "stabilizing" their particular industry. By restricting competition, by doing away with the need for expansion, by allocating markets, they affect employment not only in their own plants but in the economy as a whole:

It is generally agreed that the increasing influence of cartels in modern economic life has, in substituting the security of the monopolised market for the risk-taking involved by competition, slowed down technical progress and preserved out-of-date methods and equipment in the high-cost enterprises. Prices are fixed to cover the costs of the less-efficient firms; they enjoy a secure profit, and have little incentive to increase their efficiency. At the same time, that price allows a proportionately higher return to the more efficient firms. The only result is a tendency for the general efficiency in cartelised branches of industry to stagnate or even to deteriorate. And, in-so-far as cartelisation spreads, the volume of production is restricted and the standard-of-living is prevented from rising.

The disturbances and dislocations of employment caused by trade cycles are themselves aggravated by cartelisation. In a period of declining demand, the rigid and relatively high prices of cartel products are prevented from falling. The real purchasing power of consumers is not increased, and a further overall decline in production and growing unemployment results. The 'security' of the cartelised producers is bought at the expense of production and the increased sufferings of the unemployed. From the viewpoint of social justice, there are evidently grave

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defaults in a system which gives security to those who should bear the risk (carrying the losses in return for reaping the profits), while the insecurity is shifted to those who are least able to shoulder it.¹

Combines have long flourished like sturdy, ineradicable weeds in our economy. This is not surprising. When the "free enterprise" system was just getting started, Adam Smith observed:

People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices. It is impossible indeed to prevent such meetings, by any law which either could be executed, or would be consistent with liberty and justice. But though the law cannot hinder people of the same trade from sometimes assembling together, it ought to do nothing to facilitate such assemblies, much less to render them necessary.

Presumably it is the motive expressed in the last sentence which has moved the Canadian and other governments to act against combines: if we can't stop them, let's hobble them.

The MacQuarrie Committee started from two assumptions: that monopolistic conditions do indeed exist, and that "the vast majority of the Canadian people supports the free enterprise system". Both are reasonable points of departure. The first need hardly be elaborated. The second, however, at least deserves examination, more particularly of what "free enterprise" connotes. The Committee gives its definition, as well as others: "We can speak of a system of free enterprise only in the sense that free enterprise plays an important or dominant role in the economic life of a country". And again: "Mere freedom from government intervention does not ensure a system of free enterprise. The markets and those who buy and sell must be *subject to competitive rule*" (emphasis mine). For good measure, they add a statement by Stocking and Watkins:

In summary, a private enterprise system is one in which individuals and groups of their own initiative voluntarily organize and direct economic activities. Such a system is always private and always free in the equivocal sense that the government does not assume direct responsibility for determining positively who shall produce this or that and when, how and where production shall take place. But a private enterprise system requires more than the absence of government coercion or control. It requires that no individuals or private groups in any field legally open to private enterprise shall subvert the system itself and injure society by exercising monopolistic power. Whenever private economic power becomes so concentrated that the decisions of a few individuals or groups can substantially determine investment, employment, output and price policies in whole branches of industry, then and there business enterprise ceases to be really free and it may even cease to be truly enterprising.²

¹ Cartel (London, England) Vol. I, No. 1, July 1950.

² Monopoly and Free Enterprise (1951).

Freedom to compete is, then, the essence of free enterprise. The question arises to what extent enterprise in Canada is truly free or whether "free enterprise" has become merely a phrase to be used unctuously by the economic imperialists. If patriotism is the last refuge of the scoundrel, the slogan of "free enterprise" may be the last refuge of the monopolist.

The evidence points to a disturbing lack of freedom in Canadian enterprise, notwithstanding a succession of inquiries and statutes all aimed at curbing combines. Professor Lloyd Reynolds found:³

Canadian experience, then, supports the view that competition is self-annihilating rather than self-perpetuating. Where producers are few and large the pressure for price control is very strong and the obstacles can usually be surmounted over a period of time. Where producers are many and small, competition seems to result in the domination of the manufacturer by the merchant. It occasionally happens, of course, that an industry which has been controlled by agreement reverts to competition, but cases of this sort are much too rare to offset the tendency toward agreement. It is therefore reasonable to assume that the *major part of Canadian manufacturing output will continue to be sold at controlled prices.* [Emphasis mine]

And again:

There is ample evidence that the pressure for price control is strong and persistent in all parts of the economy. To the business man, 'cooperation' is the normal state of affairs and competition is a destructive element which must be controlled or eliminated.

A more recent government survey⁴ found direct tie-ups between Canadian firms and a variety of international cartels. The same report points out rather significantly that "International cartels rest upon and arise out of national monopolistic organizations", and draws a conclusion similar to one I have already quoted at some length: "To the extent that cartels attempt to resist change and maintain the status quo, to prefer security to progress, they tend to impoverish the world".

The MacQuarrie Committee's terms of reference did not include an examination of the present situation in Canada. But it could not refrain from delicately observing that "We are not unaware, of course, that there are sectors of the economy in which effective competition is not maintained . . .".

What all this adds up to, seemingly, is that free enterprise does not for long stay free, that Canadian enterprise is far from free,

³ The Control of Competition in Canada (1940) pp. 29,53. Professor Reynolds was writing of pre-war "price control": control by business men in collusion with one another.

⁴ Canada and International Cartels (Ottawa, King's Printer, 1945).

and will not be free if it can help it. A long series of reports by the Combines Commissioner during the last few years adds weight to this assertion.

It may be asked, however, if a multiplicity of small businesses is the desideratum. Would not a relatively few large and efficient firms be better for the economy than a larger number of small, inefficient ones? Efficient or inefficient for whom? If the fruits of efficiency are simply exploitation of the consumer by a few powerful producers, then the public could hardly care less if the producers are many and inefficient rather than few and efficient. The criterion must surely be the common good and not merely the satisfaction of the shareholders. Under "common good" should be included a good product, a reasonable price, improvements in the product in the light of technological progress, reductions in price as productivity increases (though improved productivity need not necessarily go solely into a lower price; it might also go toward a higher profit and higher wages and salaries, or any combination of the three), and a decent wage to the employees. If the tendency is for businesses to expand in size, whether through merger, absorption or the elimination of competitors, some government controls are inevitable, lest the gains in efficiency achieved through growth result in the very kind of evil which the Combines Investigation Act ostensibly is designed to combat.

All this leads to an evaluation of the Combines Investigation Act. How effective has the Act been? How effective can it be expected to be since the latest amendment? How effective can such an instrument be at all?

The pre-MacQuarrie Act has obviously not prevented combines from coming into being. It has, at best, brought to public notice the existence of some of them. It may conceivably have deterred some firms from entering into a combination for purposes forbidden by the Act. This, however, is doubtful since the stakes were so high, and the punishment failed so utterly to fit the crime that there was every inducement to take the risk. There is still a great deal of inducement.

The amendments which followed the MacQuarrie Committee Report are all to the good. The Act will now presumably operate more efficiently, since there will be a division of labour. Instead of a Commissioner responsible for every facet of the Act, there will be a Director of Investigation and Research to do the initial investigating and a Commission to appraise the Director's findings. The penalties have been stiffened. The test will be whether

a judge, in using his discretion under the new provisions, will impose a sufficiently stiff penalty for the Act to have a salutary effect on prospective combines.

But notwithstanding the improvements the amendments may have made, the Act still fails to deal with at least three important kinds of situation. It does not prohibit the existence of monopolies as such.⁵ It does not prohibit participation in an international cartel. It does not deal with services, in contrast to goods.

There are in Canada corporations which are pure monopolies or occupy so dominant a rôle in their industry that to all intents and purposes they enjoy a quasi-monopolistic position. But unless such a firm "operates or is likely to operate to the detriment of the public",⁶ it is free from attack under the Act. The Sherman Anti-trust Act outlaws monopolies in the United States and forces their break-up. The Canadian Act has no such provisions. There are constitutional difficulties and, as usual, no effort to overcome them. The Act does provide for inquiry into "monopolistic situations", but it is difficult to conceive of a corporation holding exclusive and valuable patent rights to some process, for example, or dominating its industry, and not using its position to do any better for itself than it could if it had to contend with aggressive competition.

The point has already been made that a cartel is essentially anti-social in character. The following instance provides an illustration of the supremacy of the cartel interest over that of the community:

The general effect of the agreements and understandings between ICI and du Pont with respect to the operations of CIL, as revealed in exhibits filed with U.S. Congressional Committees, may be summed up under three heads:

- (a) CIL is given exclusive rights in Canada to any processes owned by either of the major parties. However the exercise of such rights with respect to the development of manufacturing capacity in Canada is to be governed by the position of the major stockholders. The considerations to be applied are indicated in the following extract from the minutes of a tripartite meeting held in Montreal in 1930:

'It is very undesirable that CIL should provide manufacturing capacity in Canada if, from a family viewpoint, Canadian requirements can be more profitably supplied by the existing capacity owned by one of the major stockholders.'

⁵ Former Combines Commissioner F. A. McGregor made this quite plain a few years ago: House of Commons Special Committee on Prices, Minutes of Proceedings and Evidence, No. 5, February 17th, 1948.

⁶ *Ibid.*

- (b) CIL is made sole distributor for any products shipped to Canada by either ICI or du Pont. In handling products made by both major stockholders CIL is required to divide the business as far as possible on a 50/50 basis between ICI and du Pont. (In actual practice it has not been possible to maintain equality. CIL also makes purchases from other companies.)
- (c) CIL is to confine its operations to Canada and is not to engage in any export trade, even when it is in a favourable position to do so through tariff preferences or other causes.

The position of CIL has been described in the following manner by Lammot du Pont:

'We regard CIL as the vehicle of industrial effort for ICI and du Pont in Canada. The Canadian minority stockholders are investors who wish to place their money, or allow it to remain, with the ICI-du-Pont combination. The theory back of this CIL operation, so far as ICI and du Pont are concerned, is expressed in the old saying "Canada for Canadians" meaning — the industrial operations of the partners in Canada are intended to be conducted through CIL. CIL was not set up to do anything else and has, we believe, never been considered so.

'If the above is correct, it seems to us to follow directly and as a matter of course that CIL shall stay in Canada and not spread out into other countries, either by laying down plants, exporting their products or licensing under their processes, unless both ICI and du Pont believe it is advantageous to so spread out and then only to the extent and for the time and under the conditions that ICI and du Pont agree upon.'

Because of the restrictions on its operations CIL was unable to co-operate in the efforts made by the Canadian Government to expand trade with the West Indies through the subsidization of steamship facilities from Canada to the West Indies and the establishment of favourable trade terms. Minutes of a meeting between ICI and CIL officials in Montreal on September 16, 1932, record that an officer of CIL had stated:

'CIL, in company with other Canadian firms, were subject to considerable pressure by their Government to develop Canadian export trade with the West Indies especially because the Canadian Government was spending important sums in subsidizing steamship facilities with the West Indies. He felt that the CIL position with its Government would be strengthened if free to quote on certain products — where necessary protecting ICI prices — as refusal to quote had led to complaints to the Government on occasion in the past.'

In 1932 du Pont objected to CIL exporting to ICI in England 'Pontan', a coated textile product developed by du Pont, on the ground that an exclusive sales agency for du Pont had been given to another company. However in 1934 permission was given to CIL to fill an order for 'Pontan' on payment of a commission to du Pont. In 1933 du Pont refused CIL permission to export pyralin toilet articles to Australia although such trade was encouraged under the preferential tariff with Australia.⁷

Surely the effect of the foregoing kind of arrangement is as vi-

⁷ Canada and International Cartels, *supra*, p. 20.

cious as anything a wholly "native" combine can perpetrate. Yet the Act ignores it.

The omission of services leaves an important hole in the Act. A considerable portion of the business world is engaged in rendering services of one kind or another: professional services of many kinds, radio (and soon television), the various branches of communication, transport, and so on. In our industrial society, where the increasing standard of living reflects itself in the growth of service industries, it is impossible to ignore them without inviting the very kind of action the Act prohibits. Yet, for some inscrutable reason, they are ignored.

There is also another and, this time, a deliberate omission which a labour writer cannot afford to ignore. Section 498 of the Criminal Code, which is an adjunct to the Act, provides:

(3) This section does not apply to combinations of workmen or employees for their own reasonable protection as workmen or employees.

Until five years after Confederation, Canadian workmen who sought to form a union were guilty of engaging in a conspiracy in restraint of trade. The Toronto printers strike of 1872 brought the issue into the open and the Conservative government under Sir John A. Macdonald passed the Trade Unions Act, which freed unions from possible charges of conspiracy. Since then Parliament has been careful to write a protective provision like the one in section 498(3), into various acts dealing with trade.

But, apart from the historical explanation, cogent reasons can be given why labour should in any case be freed from the charge of being a combination of the kind dealt with in the Act. Actually, it is a simple matter of logic. A union is not a corporation. It does not do what corporations do. It does not act like a corporation. It cannot.

A union exists primarily as a collective bargaining agency to settle the price of its members' labour with one or more employers. To the extent that labour is a commodity, it does not lend itself to combinations or cartelisation. It cannot be stored in the hope of commanding a higher price sometime in the future. It cannot be handled in the ICI-du Pont-CIL type of arrangement. It cannot be patented and held exclusively by one agent to the exclusion of all others. It cannot deliberately and as a matter of policy be sold to one purchaser at one price, to another at a lower price: it is not subject to special discounts.

Much more fundamentally, trade unions consist of human beings. And human beings are not to be treated like steel ingots or bags of cement. They are subject to the laws which deal with people, not commodities, and properly so.

It may be, and it has recently been charged,⁸ that union men commit acts which are illegal under the Act. If so, it is the exception which proves the rule. In any case, judging from the history of the anti-combines legislation described in the MacQuarrie Committee Report, it is business and not union combinations that have been the concern of Parliament for some sixty or more years.

If, as this paper claims, it is in the nature of things for businesses to combine, the Combines Investigation Act, even as amended, will not be more than a slight or temporary deterrent. A river whose natural course is blocked soon cuts out another. If businesses are prevented from combining openly, events have shown that they will do so secretly, and it is exceedingly hard to catch them.

At least one section of organized labour, the Canadian Congress of Labour, would go well beyond the present Act. Having little faith that Canadian enterprise is either free or really desirous of being free (in the sense of the economist), it would prefer to see an expansion of government ownership via crown corporations, in at least the major industries where combines or monopolies are known to exist. This may not suit Canadian business, but it may prove itself to be the best solution for the long-suffering consumer.

Some Practical Aspects of Combines Control

Ian M. MacKeigan*

For over sixty years anti-trust legislation has existed in Canada. The most important document on the subject of that legislation is the report of the MacQuarrie Committee, important in its own right and because of the legislation it has inspired and the expanded activity promised.

⁸ Report of Commissioner, Combines Investigation Act, on Bread and Other Bakery Products, Investigation into an Alleged Combine in Connection with the Distribution and Sale of Bread and Other Bakery Products in the Winnipeg Area, Manitoba (Ottawa, Queen's Printer, 1952).

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The report and implementing legislation together have five important features: re-affirmation of faith in the philosophy of free enterprise underlying the legislation, emphasis on a broad approach to monopoly problems, provision for injunctive remedies to supplement the negative penalties of the criminal courts, separation of the investigatory and judicial functions in administration and, lastly, specific prohibition of most types of resale price maintenance.

Of these the most important is the first. After a long history of governmental apathy and outright opposition to the Combines Investigation Act, relieved by slightly widened activity and support immediately after 1945, but partially eclipsed again in the confusion surrounding the flour combine report, the MacQuarrie Committee has vigorously endorsed, generally, the necessity of anti-trust legislation and, in particular, the essential soundness of the substantive principles that combines investigation officials have attempted to apply. It has emphasized that a free enterprise system assumes an effective degree of competition and that effective competition can be ensured only by an adequate anti-trust policy. The system "has consumer's choice as the governor of production, distribution and exchange".¹ The alternative to competitive control of prices is not private control by combines, price agreements or cartels, but government control. If government control is to be avoided, competitive control, which is theoretically ideal, must be encouraged.

More particularly, the report answered—it is to be hoped finally and conclusively—the oft heard argument of trade groups charged with price-fixing and related practices, namely, that mere general restraint of trade should never be considered wrongful unless specific detriment to the public (such as prices proved to be excessive) or specific intent to injure the public is proved.² It emphasizes that such a policy would emasculate the Act, since it would make impossible the task of enforcement, imposing on the courts the work of a public utility board for all industries. If the policy were actually adopted and sincerely applied, an enormous staff would be required to maintain continued scrutiny of prices and efficiency, and the very antithesis of free enterprise would result.

It is to be regretted, however, that the report did not more strongly encourage³ the highly desirable and not impossible task of defining some offences more specifically, without losing the

¹ Report, p. 22.

² *Ibid.*, pp. 37-38.

³ *Ibid.*, pp. 45-46.

generality of the present prohibitions. In particular, the administration and, by implication, the Committee, have regarded price-fixing agreements by businesses in substantial control of a market as being contrary to public policy. The too common impression of many affected by the legislation is that such agreements are proper so long as prices are "reasonable"—again, the "specific detriment" view. Is it not necessary and fair to business that this impression be more emphatically removed by specific prohibitions? Similarly, as knowledge broadens, every effort should be made to define the types of specific practice prohibited, such as certain types of tying clauses (you can buy *A* from me only if you buy *B*), territorial division of markets, exclusion of new entrants.

The reaffirmation by the Committee extended not only to the substantive principles just discussed but also to the investigatory techniques employed by the Combines Investigation Commission in the past and to the current prosecution methods. Included in this is its approval of non-jury trials for corporations and of the much debated provision that makes admissible as *prima facie* evidence the documentary records of accused persons without specific proof of signatures, corporate authority, and so on. Also should be noted the abolition of any limitation on fines and the recommendation of provisions permitting continuing supervision by the Commission and by the courts of the offenders.

Closely related to the endorsement of the existing legislation is the Committee's emphasis on the need for a broad approach to anti-trust problems. It recommends that much effort be devoted by the new "agency", which is the investigating wing, and by the new board to general research in this field. In the past the Commission was largely forced by shortage of staff and appropriation, and by the limitations of the Act, to confine itself to case by case investigation on a purely enforcement basis. Under the new proposals a wing of the agency will devote its efforts to general research into the nature, extent and effect of various restrictive practices. The importance of such work can hardly be over emphasized. Only by greatly expanding our present knowledge can the legislation be made a more effective instrument for the maintenance of a free competitive economy.

Although this development is excellent, one can perhaps question the desirability of placing the research unit in the agency. The primary function of the "agency" is law enforcement—to investigate specific offences, to obtain evidence, and to present it before the new board and before the courts. Research to be effective must receive the full co-operation of business and must not

be tinged by any bias. Will business welcome investigators, who last week may have been obtaining evidence of an offence, and who this week are purporting to conduct general research? Is not the inclusion of the two functions in the same branch open to the criticism that the Committee itself directed against the previous arrangement, where the same man both investigated and reported? For these reasons it is submitted that it might have been better to place the research unit under the board rather than under the agency.

Equally important is the Committee's recommendation that anti-trust legislation and its administration must not be permitted, as in the past, to operate in a water-tight compartment, without regard to government policy generally and the activities of other government departments. The closest liaison must exist, and the necessity of broadening free competition must be encouraged to affect all governmental activities respecting trade. In the past, government policies in many fields—such as agriculture, tariffs, defence production, patents and trade marks, disposition of war assets—have often unnecessarily conflicted with what should be a primary governmental objective.

Although it is not mentioned specifically in the report, much closer liaison should exist with provincial and municipal governments so that they may avoid, so far as possible, introducing unnecessary trade restrictions in their legislation. For example, the cumulative effect in Canada of municipal building regulations limiting the use of new materials and construction methods may well be more serious than the activities of many private combines. Again, not mentioned in the report, is the great need for close liaison with anti-trust work in the United States. Many Canadian combines are off-shoots of American combines, and trade and business practices generally are closely similar in the two countries. Furthermore, the basic principles of anti-trust legislation in the two countries are the same. Although we must not slavishly imitate the work in the United States, we should use to the full any extra knowledge that may have been obtained there.

The third main feature of the report and the implementing legislation is the provision, for the first time, of injunction procedure to permit a court by specific direction to break down a combine or render its operation more difficult. In the past there have been too many cases where a mere fine has served only as a licence fee and the combine has continued to operate in its main aspects. The procedure provided by the new section 31 of the Act authorizes a restraining order, after conviction, to prohibit the

continuation of an offence and also a mandatory order in monopoly cases to direct the dissolution of the monopoly. Even where there has been no conviction, a restraining order is authorized where an offence is imminent.

It is suggested that this provision is constitutionally valid as legislation in aid of the criminal law; it is a branch of "preventive justice". Although it is a step in the right direction, its scope is greatly limited and by no means as broad as the injunction power that has been so widely used under the Sherman Act. It cannot be used as an alternative to prosecution but merely as a supplement. It is to be hoped that with further experience a constitutionally valid provision may be devised permitting its use without prior prosecution where an offence has been committed. There are many types of cases that should be brought before the courts, but where no one can dogmatically say an offence has been committed, and where the authorities are naturally reluctant to hale the accused before a criminal court. Although a restraining order can be obtained where an offence is imminent without prior prosecution, the provision would seem to have no application where an offence has already been committed, unless it can be interpreted as authorizing immediate injunction where an offence is continuing. Probably more specific language is required. One may also question, if that was the intention, why a mandatory dissolution order could not also be obtained.

The use of the injunction power will raise many practical problems that cannot be discussed in this short paper. What types of order may be issued? What sort of evidence will be required and how will it be given? How can an injunction in one provincial court effectively handle a Dominion-wide combine? At exactly what point would an order be considered as going beyond the scope of the section and invading property and civil rights — especially orders to dissolve mergers or monopolies? The important fact, however, is not the probable limitations of the section but that at last we are exploring techniques broader than mere prosecution to aid in enforcement of the law.

The fourth main feature of the report is the recommendation, which has been carried out, that the investigatory and report-making functions formerly vested in a commissioner be separated. This removes a "red herring" that has been greatly used in recent years, especially by persons whose activities have been condemned in combines reports. Though, as the report points out, no specific instance has been uncovered where injustice has in fact been done, the previous set-up encouraged criticism of the procedure

by which results were obtained. Secondly, the change removes from the administrator the impossible burden of trying to act in two quite different capacities. Even though every effort was made to ensure an unbiased approach by the person who sat in judgment, those under investigation were never prepared to acknowledge that the effort was made. Thirdly, the principle recommended by the Committee is undoubtedly sound, and it was never a sufficient answer to say that in particular cases no injustice was in fact done. As has been so often said, it is as important that justice appear to be done as that it actually be done.

The fifth main feature of the MacQuarrie Committee's work is contained in the interim report on resale price maintenance and the amendment to the Criminal Code that resulted. This is no place to debate the pros and cons of the interim report. Its principal importance is perhaps that it now makes more specific and clear what was always an uncertain and judicially untested principle of the legislation. If further study shows that the prohibition is too broad or not broad enough, it can be changed. The interim report recognizes the desirability, referred to already, of defining as clearly as possible, and as speedily as our knowledge permits, all specific offences included in the generality of the legislation that prohibits undue restraints of trade.

Although the report and the subsequent legislation mark an immense forward step in the effort to maintain a free enterprise system, they must be merely the start in rendering effective a policy to which too often only lip service has been paid. In the first place, it is perhaps to be regretted that the report did not more clearly emphasize that the anti-trust problem is primarily a law enforcement problem. If the law is a good one, as is submitted by the Committee, let every effort be made to see that it is enforced; if it is not good, let it be repealed or revised as necessary. But for the sake of the principles for which the law stands, and for the sake of law enforcement, let us not leave on the statute-book a law that is broken more than it is observed — a situation that probably exists today. This means that a concerted and continuing effort must be made along the lines briefly noted in what follows:

(a) If the law is to be enforced, there must be a will to obey. In large measure none exists today. Most businessmen do not know of the law, or completely misunderstand its objectives and effect, or are violently opposed to it. The first two classes must be effectively reached by every possible means, so that business itself will take the initiative in observing and pressing for the observ-

ance of legislation that from a long range point of view must be effectively enforced if business as we know it is to continue to operate.

(b) The prohibited offences must wherever possible be more specifically defined and, in particular, it must be made clear that horizontal price fixing is banned.

(c) Combines staff and appropriations will undoubtedly have to be increased greatly. Quite apart from general research, many branches of trade clearly call for investigation. Many large sectors in which restrictive practices are obviously prevalent have never received attention. Throughout the country there are also many small groups of businessmen who are offending, often unwittingly; indeed it is quite possible that, in their cumulative effect, local price fixing "rings" have a more serious effect than the big "trusts" that receive so much publicity.

(d) Every effort must be made to expand preventive machinery other than prosecution. Besides injunction, remedial action, as noted by the Committee, might well be taken through tariff and patent policy.

(e) Every effort must be made to speed up and simplify the procedure. In major cases in the past, several years have often been spent in preparing a report, to be followed by at least another year or two in the courts. One cannot help but be disturbed by the Committee's suggestion that the scope of the reports should be broadened. Broadening is obviously desirable where the object is research of a general nature, but where the object is to enforce the law in a specific case the emphasis should be on a clear and concise summary of the practices that are condemned, a summary much more concise, indeed, than has often been contained in the voluminous reports of the past. In this regard it is difficult to reconcile the Committee's suggestion⁴ that the new board should not be expected to determine whether an offence has been committed with the fact that it is expected to reach a conclusion whether competition has been restricted to the detriment of the public. If competition has been so restricted, has not an offence been committed?

(f) In the same context the Committee has not specifically referred to the possibility of prosecution, which still exists under the new section 15, immediately after investigation and without any prior report. Now that the legislation is reaching maturity, surely clear cut cases of price fixing, for example, should proceed immediately to prosecution without the delays of hearing and re-

⁴ *Ibid.*, p. 34.

port before a board. Possibly this is what the Committee had in mind, reserving reports for more complicated cases where the exact effect of the alleged practices may be difficult to assess. If so, no quarrel can be had with the Committee's recommendation. If the law is to be effectively enforced, the unnecessary extra steps of hearings and report should be avoided when possible.

(g) The research function should be separated from law enforcement investigation.

(h) The report does not recognize that an important *de facto* function of the investigatory staff in the past, and presumably in the future, is actively to brief and assist Crown counsel in prosecutions. This function has been imposed by necessity, since only the investigators know the evidence thoroughly. The new legislation seems to assume that prosecutions will be almost invariably by the Dominion government as in the past. Under the previous procedure a report was referred first to a provincial attorney-general and only if he declined to act, as he almost invariably did, would the Dominion act. Section 15 (1) and section 19 (2) of the new Act both delete reference, which they previously contained, to provincial attorneys-general. Since this is distinctively Dominion legislation, and since so many combines are Dominion-wide, the change is a useful one and removes one previous cause of delay. At the same time, presumably a provincial attorney-general or crown prosecutor still has every right to proceed under the general provisions of the Criminal Code.

It is expected that the promise of further progress implicit in the government's prompt implementation of the report will be fulfilled and that no opportunity will be lost to make Canada's anti-trust legislation fully effective. It is to be hoped that the public generally, and businessmen and their legal advisers, will more widely appreciate the integral role that, from a philosophical and practical point of view, is played by combines legislation in the economy. Too often, on both a national and international level, declarations on liberty and free enterprise have contained only general praise of the virtues and accomplishments of the system, without adequate explanation of its philosophic basis, and have thus lacked effectiveness in converting those of a different philosophy. Our system is based upon a sound economic theory, which finds part of its expression, and should find much of its support, in anti-trust legislation. This theory is that where prices are determined so far as possible by free competition in a free market, uncontrolled by unnecessary private or public restrictions, there industry is most efficient, prices are most reasonable, new products

and production techniques are most likely to be evolved, and businessmen, their employees and the public at large are most free. As a corollary to this theory, every effort must be made to permit, encourage and, indeed, force free competition to the largest degree possible, and to ensure that cartel or governmental controls or monopolies are authorized only when it has been proved, after thorough and impartial study on a case by case basis, that in a particular industry competition will not or cannot operate, and that the alternative controls are a necessary evil.

English Legal Philosophy

Why then has English legal philosophy not been valued more highly? I believe that the answer is that when we look at its history we find that it has many of the faults, but also many of the virtues of the Common Law. Like the Common Law it is difficult to find: English jurists have not always collected their thoughts in a single volume, but have left us to seek them in various places. Nor have they tended to form definite schools, with the possible exception of the Austinians, so that it is difficult to classify them. This, however, has the advantage that their ideas are not regimented, and that they are less concerned with the views expressed by other men. It has been said, with some truth, that Kant had the great advantage that he did not have to study Kant. Finally, like the Common Law, English legal philosophy has been based not so much on abstract ideas as on experience. Judge Cardozo summed this up when he said: 'the juristic philosophy of the common law is at bottom the philosophy of pragmatism'. This philosophy which has taught us that the ruler is bound by the law, that government is a trust for the people as a whole and is not the absolute right of those in power, that law must be a compromise between conflicting interests, and that the proper interpretation of the law depends not on abstract conceptions but on a wise judgment which does not forget that it is concerned with the lives of ordinary men,— this is a philosophy which has played, and which will continue to play, an important role in the world of ideas. (Arthur L. Goodhart, *English Contributions to the Philosophy of Law*, the seventh annual Benjamin N. Cardozo lecture delivered before the Association of the Bar of the City of New York, May 25th, 1948)