THE CANADIAN BAR REVIEW

VOL. XXXI DECEMBER 1953 NO. 10

# Combines, Controls or Competition?

D. GORDON BLAIR*
*Ottawa*

## I. *Introduction*

The recently published report on an alleged combine in the electric wire and cable industry[1] will be the last, it seems, to bear the imprint of the Combines Investigation Commission. This agency is about to disappear from the Canadian scene, its place being taken by, and its work divided between, two bodies more cumbrously, if more accurately, styled "The Director of Investigation and Research" and "The Restrictive Trade Practices Commission".[2] But the report has more than nostalgic significance. It is an example of the quickened pace of anti-combines activities in the post-war years, for nineteen reports, or about half of the thirty-five reports made under the various Combines Investigation Acts, have been published since 1947. It serves also as a reminder that the course of anti-combines policy appears now more firmly set than at any time in its long and rather erratic history. The main lines of that policy, developed over more than half a century of experimenta-

*D. Gordon Blair, B.A., LL.B. (Sask.), B.C.L. (Oxon), of the Bars of Saskatchewan and Ontario; a member of the firm of Herridge, Tolmie, Gray & Coyne, Ottawa.

[1] Report of H. Carl Goldenberg, Q.C., Special Commissioner, of an investigation into an alleged combine in the manufacture, distribution and sale of Electrical Wire and Cable Products (Department of Justice, Ottawa, 1953).

[2] Combines Investigation Act, R.S.C., 1952, c. 314, ss. 5 and 16, which were originally enacted in Stats. Can., 1952, c. 39.

tion, were recently approved by the MacQuarrie Committee[3] and endorsed by Parliament.[4] The machinery of anti-combines administration has been overhauled; the staff has been expanded; more generous appropriations have been provided; and all outward appearances indicate intensified anti-combines activity in the years immediately ahead.

Because Parliament has so recently confirmed the basis of Canadian anti-combines policy, it seems that, for the present, discussion of the latest report, and indeed all combines questions, will be concerned principally with the practical implications of the present law. This is not to say that the larger arguments over the advisability of government intervention in this field, or over the rôle of competition itself in modern industrial society, have been set permanently at rest. At least momentarily, however, a quietus has been put upon them in Canada and, without expecting perfection, it appears that a basic assumption "that some combines or anti-trust legislation is necessary"[5] is accepted by Canadians. This necessity is accepted in order to ensure the existence of "an effective degree of competition"[6] and it is assumed that competition is at once the mainspring and the regulator of our free enterprise system. The absence of effective competition would, it is assumed, invite government regulation and control, and would destroy the free economic system upon which both the spectacular development of this country and its political freedoms have been founded.[7]

Although the desirability of anti-combines legislation is generally recognized, there is considerable disagreement over the form it should take. In particular, it would appear that a substantial section of the Canadian business community is critical of some of its principal features. The main controversy centers around the "kind" of combine which should be prohibited and the contention that only "bad" combines, in the sense of those producing immediate and patently demonstrable abuses, should be prohibited or restrained.[8] Primarily, it is intended in this article to raise some of the legal, historical and doctrinal considerations which are rele-

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

[4] Stats. Can., 1952, c. 39, now incorporated in R.S.C., 1952, c. 314.

[5] Report of the MacQuarrie Committee, p. 22, quoting from the submission of the Canadian Manuacturers' Association.

[6] *Ibid.*, p. 21.

[7] These assumptions are set forth at length in the Report of the MacQuarrie Committee, pp. 21 *et seq.*, and it seems correct to say that they are supported by the vast majority of Canadians.

[8] For two expressions of this view, see: Hazen Hansard, Q.C., Combines, "Criminal" Law and the Constitution, and R. Bruce Taylor, Industry and Combines (1952), 30 Can. Bar Rev. 566 and 587.

vant to any distinction between "good" and "bad" combines, and the advisability of setting up such a distinction under the Canadian anti-combines legislation.

## II. *Summary of the Legislation*

At the outset, it may be of assistance to summarize briefly the salient features of Canadian anti-combines legislation, as judicially interpreted. Five main aspects are apparent:

(1) "*Combines*" *are prohibited.* The prohibition of combines has been the most important feature of the legislation. "Combine" is ordinarily used in the sense of an agreement among suppliers of goods covering a substantial part of the market, the effect of which is to fix prices, limit facilities of production or distribution, or to prevent others from engaging in a given business. Such agreements, sometimes called "horizontal" agreements, are forbidden by both the Criminal Code and the Combines Investigation Act.[9] Virtually all reports and prosecutions have been concerned with combines of this type and in practically all cases the crux has been price fixing.

(2) "*Reasonableness*" *not a defence.* The outstanding judicial contribution to the law gives rise to the principal issue to be discussed here. In prosecutions of "combines" (in the sense just discussed) involving price-fixing arrangements, the courts have refused to entertain the defence that the prices fixed or the other restrictions imposed on the industry or trade are "reasonable". The decided cases declare that the public is entitled to have prices and others conditions of trade regulated by competition and that the usurpation of this regulatory function by a combine is *per se* illegal if the usurpation extends to a substantial proportion of the market.[10] Although the courts have never laid down what proportion of a trade must be affected in order to make an arrangement illegal, the proportions actually affected in the arrangements brought before and condemned by the courts have been of the dimensions of seventy-five per cent or more.

(3) *Monopolies are restrained.* A person or corporation may not acquire control over the business of another, or substantially or completely control, locally or generally, a particular business, in a manner that is or is likely to be detrimental to the public.[11]

[9] Criminal Code, R.S.C., 1927, c. 36, s. 498, and Combines Investigation Act, R.S.C., 1952, c. 314, ss. 2 and 32.

[10] The development of this doctrine is considered in detail by S. F. Sommerfeld, Free Competition and the Public Interest (1948), 7 U. of Toronto L.J. 413.

[11] Combines Investigation Act, R.S.C., 1952, c. 314, s. 2(e). The princi-

(4) *Resale price maintenance forbidden.* A supplier of goods may not prescribe the prices at or above which the goods are to be resold by his trade customers.[12]

(5) *Discriminatory practices prohibited.* A supplier may not practise discrimination among customers who are in competition with each other by giving one of them prices not available to the others, if they are willing to buy in the same quantities, and he may not practise predatory price cutting with the design or effect of eliminating competition.[13]

The sanctions attached to these provisions can be briefly summarized. The traditional criminal remedies of fine and imprisonment[14] have for long been associated with the threat of removal of tariff,[15] patent and trade mark[16] protection. More recently the sanction of a prohibitory injunction[17] has been developed to prevent the re-creation of a combine or to cut it off in an inchoate stage. The most spectacular sanction, however, has always been the report of the investigation into an alleged combine, which ordinarily must be published, whether or not it is followed by a prosecution.[18]

The chief concern of the legislation has so far been with "com-

pal cases in which a prosecution has been instituted on a charge of being party to a "merger, trust or monopoly" are *Rex* v. *Staples et al.*, [1940] 4 D.L.R. 699, and *Rex* v. *Eddy Match Company, Limited et al.* (1952), 13 C.R. 217. The conviction in the latter case has been confirmed by a judgment of the Quebec Court of Queen's Bench (Appeal Side) as yet unreported. Leave to appeal to the Supreme Court of Canada has been refused.

[12] Combines Investigation Act, R.S.C., 1952, c. 314, s. 34, enacted pursuant to the recommendation of the Interim Report of the MacQuarrie Committee (included in the report, *supra* footnote 3).

[13] Criminal Code, R.S.C., 1927, c. 36, s. 498A. No prosecution has ever taken place under this section, although a complaint under the section has recently been the subject of a report by the Restrictive Trade Practices Commission: Report Concerning Alleged Price Discrimination between Retail Hardware Dealers in North Bay, Ontario (Department of Justice, Ottawa, 1953).

[14] The 1952 amendments to s. 498 of the Criminal Code and the Combines Investigation Act removed the ceilings that had previously existed upon the fines that might be imposed for combines offences and left the amount in the discretion of the court. Although the sections do provide, and have provided, terms of imprisonment as an alternative to fines in the case of individuals, no individual has in fact been imprisoned to date.

[15] Combines Investigation Act, R.S.C., 1952, c. 314, s. 29 (never used).

[16] *Ibid.*, s. 30 (never used). This does not mean, however, that tariff action or patent action has never been taken as a result of combines reports. In a number of cases reports have in fact influenced tariff policy and as a result of the report on optical goods in 1948 several actions were brought in the Exchequer Court by the Attorney General of Canada seeking the voidance of patents.

[17] Combines Investigation Act, R.S.C., 1952, c. 314, s. 31, originally enacted in 1952 pursuant to the recommendations of the MacQuarrie Committee.

[18] *Ibid.*, s. 19.

bines" as the word is popularly understood. The other features of the legislation, some of which themselves raise difficult problems, remain to be explored and developed by both the administration and the courts. It must be emphasized that almost all the Canadian cases in the field, reported or prosecuted, have been "combines" cases, if for no other purpose than to make clear that a considerable portion of the discussion of American anti-trust laws is not relevant to the Canadian experience. Since the "monopoly" provisions have hardly been used, Canadian combines administration cannot be charged, for example, with an attack on "bigness" for its own sake.[19] Likewise, since the only Canadian legislation on "unfair practices" is the relatively untried provisions forbidding discriminatory and predatory pricing,[20] the Canadian combines administration cannot be the object of the criticism, which has been directed against the United States administration, of interfering unjustifiably with the pricing, transportation and other policies of suppliers and of, in effect, being more concerned with the welfare of "competitors" than "competition". There is much to be learned from the United States experience, but it is essential to realize that the most violent current criticisms in the United States are not fairly applicable to Canada and that, indeed, the most responsible and severe critics of the United States anti-trust administration frequently exclude expressly from their criticism that aspect of United States administration which corresponds with the actual Canadian field of enforcement.[21]

## III. *History*

The present combines legislation is a product of a long and frequently contradictory history. It has been shaped by varying views of economic policy and, perhaps even more significantly, by the exigencies of constitutional law. A brief reference to this history is essential to an understanding of the practical problems raised by the legislation.

---

[19]The attack upon "bigness" under the "monopoly" section of the United States Sherman Act culminated in the judgment of Judge Learned Hand in the *Alcoa* case (*U.S.* v. *Aluminum Company of America* (1945), 148 F. 2d 416). The result of this judgment has been represented to be that a dominant firm in any industry may be subject to the legislation regardless of whether it has attained its position by efficient and progressive business practices.

[20] Criminal Code, R.S.C., 1927, c. 36, s. 498A.

[21] David E. Lilienthal, Big Business: A New Era (Harper, 1952, 1st ed.), and Clare E. Griffin, An Economic Approach to Antitrust Problems (American Enterprise Association, Inc., 1951).

(a) *Common Law*

The pre-occupation of the common law of the nineteenth century with the principle of freedom of contract had largely eroded its ancient hostility to restraints upon trade. By the end of the century, it became clear that the common law was not capable of regulating effectively the various types of trade combinations which are now the subject of anti-combines legislation.[22] It is true that in the *Nordenfelt* case[23] Lord Macnaghten paid lip service to the ancient rule against restraints of trade, when he said that the restraint would be justified:

> if . . . reasonable — reasonable that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public.

In practice the test of reasonableness came to be determined solely with reference to the interest of the parties, and in recent times no agreement in restraint of trade ever appears to have been declared void at common law as unreasonable as against the public interest.[24] At all events, no judicial test of reasonableness in the public interest has ever emerged at common law.

(b) *The Criminal Code*

Canada's pioneering experiment in anti-combines legislation still stands as the basic foundation of combines jurisprudence and administration. On May 2nd, 1889, more than a year before the passage of the United States Sherman Act, Parliament passed "An Act for the Prevention and Suppression of Combinations formed in restraint of Trade".[25] This act recited that "it is expedient to declare the law relating to conspiracies and combinations formed in restraint of trade and to provide penalties for the violation of the same", and it proceeded:

> 1. Every person who conspires, combines, agrees or arranges with any other person, or with any railway, steamship, steamboat or transportation company, unlawfully,
>
> (a) To unduly limit the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article or commodity which may be a subject of trade or commerce; or

[22] The relation of the common law to section 498 is considered in several of the judgments in *Weidman* v. *Shragge* (1912), 46 S.C.R. 1. See Duff J. at p. 33.

[23] *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Company*, [1894] A.C. 535, at p. 565.

[24] See Sommerfeld, *op. cit.*, at p. 415.

[25] 52 Vict. (1889), c. 41.

(b) To restrain or injure trade or commerce in relation to any such article or commodity; or

(c) To unduly prevent, limit, or lessen the manufacture or production of any such article or commodity, or to unreasonably enhance the price thereof; or

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

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

It will be apparent that this section resembles very closely the present section 498[26] of the Criminal Code, to which statute the provision was transferred in 1892. A significant difference lay in the presence, in the third line of the 1889 text, of the word "unlawfully". The anomaly of describing the offence as conspiring, "unlawfully", to practise certain restraints "unduly" became partially evident to the legislators of 1899, when the word "unduly" was struck out of the sub-clauses (a), (c) and (d). The effect of this was to relate the offence to what was "unlawful" at common law and apparently to introduce the rule of "reasonableness" to be derived from the *Nordenfelt* case. In 1900, however, Parliament showed that it meant to go further than the restrictive concept of the common law and did so by striking out the word "unlawfully" and restoring the word "unduly" to its former position in the section. The jurisprudential importance of this early legislative history was recognized by the courts and is reviewed authoritatively by Osler J. A. in the following words:[27]

[26] "498. (1) Every one who conspires, combines, agrees or arranges with another person

(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 a fine in the discretion of the court or to imprisonment for a term not exceeding two years or to both.

"(2) For the purposes 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."

[27] *Rex* v. *Elliott* (1905), 9 O.L.R. 656, at p. 661.

> Thus we are no longer thrown back upon the general law to ascertain what is (a) an unlawful limitation of the facilities for transporting, etc., articles or commodities which may be the subject of trade or commerce; (c) unlawfully preventing the manufacture or production of such article or commodity, or (d) unlawfully preventing or lessening competition in its production, purchase, etc. It is the conspiracy to do these things *unduly* which is now made unlawful and an offence within the meaning of the section. . . . What is 'undue' with reference to the acts which are the subject of the conspiracy, combination, agreement, or arrangement is now a question of fact upon the circumstances of each particular case, . . .

(c) *The Combines Investigation Act, 1910*

The limited use made of section 498 showed the difficulty of securing and marshalling the evidence in a combines prosecution. The Combines Investigation Act of 1910 sought to remedy this defect by providing special machinery for investigation. This act defined a "combine" in the same general sense as does section 498 and at the same time introduced the concept of a harmful "merger, trust or monopoly".[28] An application might be made by six citizens

[28] The present form of the provision is contained in section 2(a) and (e) of the Combines Investigation Act:

"2. In this Act,

(a) '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

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

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

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

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

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

(vi) otherwise restraining or injuring trade or commerce,

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.

"(e) 'merger, trust or monopoly' means one or more persons

(i) 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

(ii) 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; but this paragraph shall not be construed or applied so as to limit or impair any right or interest derived under the *Patent Act*, or under any other statute of Canada; and . . ."

to a superior court judge for an order directing an investigation into an alleged combine and the judge, if satisfied there was reasonable ground therefor, might issue such an order, whereupon the Minister of Labour was required to appoint an *ad hoc* board comprising a representative of the applicants, a representative of the parties alleged to be a combine and a third member to be designated by these two. The report of the board was available to the press on request and was published in the Canada Gazette, and it might be given such further publication as the minister considered advisable. Any person reported to have been a party to a combine *and who thereafter* continued to offend was guilty of an indictable offence.

The constitutional basis of section 498 of the Criminal Code was clearly to be found in the federal power over the criminal law. It was criminal legislation, in the sense of being a general condemnation entailing sanctions. The new legislation was a departure in that it made the offence depend upon a prior determination of detriment by an administrative tribunal. Canada's first labour minister—W. L. Mackenzie King—hinted that in his view the creation of combines was not in itself criminal and made clear the intention that investigation would supplant criminal prosecution as an effective method of combine control.[29] However, the constitutional validity of the new legislation was never tested and the legislation itself was virtually ignored. No permanent agency was established to enforce it and individuals were reluctant to set the complicated and costly machinery of investigation in motion.

(d) *The Board of Commerce Act, 1919*

The inflation following the first Great War was the occasion for the next experiment in combines control. In order to restrain hoarding, profiteering and other economic activities harmful to the

[29] At one stage in his remarks, Mr. King said: "I think I have shown the House that the legislation of 1889 has not been effective in dealing with the evil of trusts and combines, but that, on the contrary, its real effect in some cases has been to prevent investigation which would otherwise have taken place. The necessity of branding as criminals any body of men joined together for commercial purposes before you find out whether or not they have been guilty of a criminal offence, is a step which many a man will hesitate to take, no matter what grounds he will have for believing such men to be guilty of a public wrong. There is no doubt that this necessity has prevented many an investigation which would have been in the interest of the public. Therefore, this measure does not propose to place these parties in the position of defendants in a criminal court, but treats them as persons whose business for the time being is being examined into just as in the business of a railway company or a bank today to see whether or not it is being carried on in a fair and proper manner." (House of Commons Debates 1909-10, p. 6843).

nation, two complementary statutes superseding the 1910 statute were enacted: the Board of Commerce Act and the Combines and Fair Prices Act, 1919. The former set up a board of three members and charged it with the general administration of the latter act. The latter defined a combine in the same sense as the 1910 act, but the question whether the element of operating or being likely to operate "to the detriment of or against the interest of the public" was present depended on the opinion of the board. The board might investigate a suspected combine on its own initiative or upon the application of a British subject. If the board concluded that a combine existed or was being formed, it could issue a "cease and desist" order. Any person who failed to comply with such an order was guilty of an indictable offence. The board was also empowered to inquire into and restrain and prohibit accumulations of necessaries over and above reasonable personal or business needs, the taking of profits considered by the board to be unfair and other practices which in the opinion of the board were likely to enhance unfairly the prices of such necessaries.

These statutes were declared by the Privy Council to be ultra vires the federal Parliament,[30] after the Supreme Court of Canada had divided equally. They were not justifiable under the heading of criminal law and Viscount Haldane particularly stressed, in this connection, the power the legislation purported to confer to make rulings restricted to particular cases and circumstances. He said:

> As their Lordships have already indicated, the jurisdiction attempted to be conferred on the new Board of Commerce appears to them to be ultra vires for the reasons now discussed. It implies a claim of title, in the cases of non-traders as well as of traders, to make orders prohibiting the accumulation of certain articles required for every-day life, and the withholding of such articles from sale at prices to be defined by the Board, whenever they exceed the amount of the material which appears to the Board to be required for domestic purposes or for the ordinary purposes of business. The Board is also given jurisdiction to regulate profits and dealings which may give rise to profit. The power sought to be given to the Board applies to articles produced for his own use by the householder himself, as well as to articles accumulated, not for the market but for the purposes of their own processes of manufacture by manufacturers. The Board is empowered to inquire into individual cases and to deal with them individually, and not merely as the result of applying principles to be laid down as of general application. This would cover such instances as those of coal mines and of local Provincial undertakings for meeting Provincial requirements of social life.[31]

[30] *In re The Board of Commerce Act, 1919, and The Combines and Fair Prices Act, 1919* (1920), 60 S.C.R. 446; [1922] 1 A.C. 191.

[31] [1922] 1 A.C. 191, at p. 199.

The Board of Commerce legislation might with propriety be considered as emergency economic legislation rather than as a long-term experiment in combines control. In any case, the declaration of constitutional invalidity obviated any reconsideration of the advisability of controlling combines in this fashion. In essence, the legislation transferred power to an administrative tribunal to regulate and control combines and other practices solely on the basis of its opinion as to whether they were detrimental to the community.

(e) *The Combines Investigation Act, 1923*

The invalidation of the 1919 acts left a gap which was filled by the enactment of a new Combines Investigation Act in 1923.[32] It provided for investigations into suspected combines by either the registrar appointed under the act, as a continuing officer, or by an *ad hoc* commissioner. Investigations could be commenced by application of six citizens, direction of the minister or the registrar's initiative, and the report of an investigation was required to be published. Although it defined a combine in the same sense as the 1910 legislation, it differed materially in that the criminality of an arrangement was not made dependent upon the opinion of an investigating officer. Conviction and punishment would follow only from a normal prosecution.

The Privy Council, in a constitutional reference, upheld the validity of both section 498 of the Criminal Code and the Combines Investigation Act, 1923.[33] Lord Atkin considered both enactments to be legislation in relation to criminal law:

> 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. 'Criminal Law' means 'the criminal law in its widest sense': . . .[34]

[32] The Combines Investigation Act, 1923, Stats. Can., 1923, c. 9.
[33] *Proprietary Articles Trade Association* v. *Attorney General for Canada*, [1931] A.C. 310.
[34] *Ibid.*, p. 323.

Contrasting the legislation then under consideration with the legislation dealt with in the *Board of Commerce* case, Lord Atkin said:

> Their Lordships pointed out five respects in which the Act was subject to criticism. It empowered the Board of Commerce to prohibit accumulations in the case of non-traders; to compel surplus articles to be sold at prices fixed by the Board; to regulate profits; to exercise their powers over articles produced for his own use by the householder himself; to inquire into individual cases without applying any principles of general application. None of these powers exists in the provisions now under discussion. 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.[35]

In introducing the first Combines Act in 1910, Mr. King had, as has been stated, hinted at the distinction between "good" and "bad" combines. In the 1923 debates, he was much more explicit and it could be inferred fairly from certain passages in his remarks that the legislation was directed at "bad" combines and that those which operated "reasonably" would not be affected by it.[36]

(f) *The Dominion Trade and Industry Commission Act, 1935*

The depression of the 1930's resulted in another shift in the policy and methods of combines control, as is evidenced by the enactment of the Dominion Trade and Industry Commission Act,

[35] *Ibid.*, p. 325.

[36] Typical of the passages in Mr. King's speeches in 1923, which have given rise to considerable confusion, are the following from House of Commons Debates, 1923, p. 2520:

". . . The legislation does not seek in any way to restrict just combinations or agreements between business and industrial houses and firms, but it does seek to protect the public against the possible ill effects of these combinations. . . ."

". . . If the House will look at the definition and I will draw particular attention to the wording when we are in committee, hon. members will see that the kind of combination referred to is limited to a combination that operates or tends to operate, that has operated or is likely to operate to the detriment of or against the interest of the public, whether consumers, producers of others. No other class of combinations comes within the provisions of this act. If that point is quite clear, I think it will help to remove a good deal of the misconception that has arisen in reference to the legislation. For example, I notice in one press report it was stated that the act did not distinguish between good combines and bad combines. Well, that is the very distinction that is carefully made in the definition itself. Any combination, whether it is in the nature of a trust or merger or the result of some agreement, which is carrying on its business in a reasonable way, not operating to the detriment of the public or against the interest of the public, would not come under the important provisions of this legislation; once, however, it is shown that a combination is so operating as to prejudice the public interest, then that class of combination comes within the provisions of the act, first for purposes of investigation, and secondly, if need be, for purposes of prosecution under the criminal section which has been suggested."

1935[37] and section 498A of the Criminal Code. Parliament was concerned particularly with the large spreads that appeared to exist between the prices received by producers and the prices paid by consumers, and with price differentials obtained by mass buyers, which did not depend upon economies in production and were unfairly oppressive towards weak suppliers and at the same time gave the buyer an undeserved advantage over his own smaller competitors.

Section 498A of the Criminal Code prohibits, in the manner already described, both the granting of discriminatory discounts and predatory price cutting designed to destroy competitors. The section has also been held to be intra vires of Parliament.[38]

The Dominion Trade and Industry Commission Act established a Dominion Trade and Industry Commission, the composition of which was to coincide with that of the Tariff Board. The commission was charged with the administration of the Combines Investigation Act. Its principal power, conferred by section 14, provided that, if the commission upon investigation came to the opinion that an industry agreement regulating prices and production was necessary to prevent "wasteful or demoralizing" competition and would not be against the public interest, it might recommend approval of the agreement by the Governor in Council and, if approved, no party to it might be prosecuted under the Combines Investigation Act or section 498 of the Criminal Code except with the consent of the commission. The commission was empowered to receive and investigate complaints and recommend prosecution respecting "unfair trade practices" and to convene industry conferences to consider the commercial practices prevailing in an industry and determine whether any were unfair or undesirable "in the interest of the industry and of any person engaged in such industry and of the general public". The commission might also, at the instance of the Governor in Council, investigate and report upon questions relating to the general trend of social or economic conditions or problems. The commission was required to make public its reports, recommendations and any proposed industry arrangement.

Upon a reference to the Supreme Court of Canada,[39] section 14, authorizing approval of agreements to modify competition, was declared ultra vires as not being incidental to the exercise of powers

[37] Stats. Can., 1935, c. 59.
[38] *Reference re Section 498A of the Criminal Code*, [1936] S.C.R. 363.
[39] *Reference re Dominion Trade and Industry Commission Act*, [1936] S.C.R. 379.

in relation to criminal law or to the regulation of trade and commerce. The decision on section 14 was not appealed and, although the validity of the balance of the statute was later upheld by the Privy Council,[40] the purpose of the legislation was nullified by the destruction of its principal section.

The 1935 legislation, which in effect submerged the Combines Investigation Act in a wider purpose, can be compared with the Board of Commerce legislation of 1919. Both purported to give to an administrative tribunal the power to adjudicate on the propriety of combines and like business arrangements. The *quid pro quo* exacted for the licence thus to be given certain combines, not considered harmful to the public, was submission to administrative direction and control. The failure of this legislation to pass the constitutional test prevented any mature consideration of its long-term consequences on the Canadian economy.

(g) *The MacQuarrie Committee*

In 1937 the Combines Investigation Act, which had been subordinated to the 1935 legislation, was restored largely to its previous vigour. Anti-combines activity, however, was rendered virtually unnecessary in the period of wartime control when overall direction and regulation of the economy was undertaken by the government. In 1946 the act was amended to restore to the commissioner the initiative of commencing an investigation, which had been lost in the 1935-1937 legislative shuffle, and in 1949 the act was further amended to overcome certain evidentiary difficulties considered to have been raised by the *Dental* case.[41] In 1950, by which time practically all government price controls had ceased and business had returned to normal, the MacQuarrie Committee was appointed to review the Canadian anti-combines legislation and recommend such changes as would "make it a more effective instrument for the encouraging and safeguarding of our free economy".[42]

The recommendations of the MacQuarrie Committee, though important, lay in the direction of confirming the principles and improving the application of the legislation derived from section 498 and the 1923 Combines Investigation Act, and it is unnecessary to review them in detail. In 1951-1952 the recommendations of the committee were considered and accepted by Parliament. The principal changes made were the prohibition of resale price main-

[40] *Attorney-General for Ontario* v. *Attorney-General for Canada*, [1937] A.C. 405.
[41] *Rex* v. *Ash-Temple Company Limited et al.*, [1949] O.R. 315.
[42] Report of the Committee to Study Combines Legislation, p. 5.

tenance[43] and the division and separation of the functions of investigation and report, formerly exercised by a single commissioner. Ceilings were also removed from fines and the courts were invested with authority, in the nature of injunctive relief, to restrain the commission and continuation of combines offences.

Investigations are now commenced by the Director of Investigation and Research, usually upon his own initiative, although they may be directed by the Minister of Justice or requisitioned by the formal application of six citizens. The evidence gathered is appraised by the Restrictive Trade Practices Commission, which makes a report to the minister, publication of which is mandatory as under the old legislation. The commission has no responsibility except that of appraising evidence and controlling the exercise by the director of his power to summon witnesses and search premises. Its terms of reference are to "review the evidence and material, appraise the effect on the public interest of arrangements and practices disclosed in the evidence and . . . [make] recommendations as to the application of remedies provided in this Act or other remedies". No consequences flow from the commission's report except such as may result from legal action taken in the ordinary way as a result of the report, for example, a prosecution in a criminal court or a patent action in the Exchequer Court; or from administrative action prompted by the report, such as a tariff modification. Before writing its report the commission must afford an opportunity to be heard to any parties against whom allegations have been made in the course of the investigation.

### IV. *Judicial Interpretation of Legislation*

The long history of legislative experimentation with combines legislation at no time touched directly on section 498 of the Criminal Code, although the section was all but repealed by the legislation of 1919 and 1935 and was damned with faint praise when the statutes of 1910 and 1923 were enacted. But the section was never repealed and never in substance amended, even though the judicial interpretation placed upon it seemed to vary considerably from the combines policies from time to time approved by Parliament. Until 1952, the silence of Parliament on section 498 could be presumed to mean parliamentary approval of the construction placed upon it by the courts. As a result of the MacQuarrie Committee Report and the consequent legislative action, it would appear that more positive parliamentary approval has been given, since Parl-

[43] Combines Investigation Act, R.S.C., 1952, c. 314, s. 34.

iament was content to accept the specific recommendation of the MacQuarrie Committee that the jurisprudence grafted on section 498 should not be disturbed,[44] and went on to strengthen the legislation in other respects.

The offences described in section 498, it will be recalled, include combinations or agreements to *unduly* limit facilities for producing and dealing in an article; to *unduly* limit the production thereof; or to *unduly* prevent competition in the production or supply thereof. The courts were immediately faced with the task of ascribing a meaning to the word "unduly" and of deciding whether or not it imported into the statute some objective standard by which the effect of combinations or agreements could be appraised. In many combines prosecutions, therefore, the courts, as might have been expected, were invited to consider as a test of "undueness" whether the prices and other conditions of trade which were fixed by the arrangements were "reasonable" and whether any specifically demonstrable price or like detriment had in fact been suffered by the public.

From the beginning the courts have refused to be drawn into inquiries of this type. It is now well established that the essence of the offences under section 498 is the suppression of competition in the trade or industry affected by the arrangement. It is the usurpation of control and not the manner of its exercise which is the gist of the offence. The word "unduly" refers not to the immediate effects of the combine on prices or other conditions of the trade, but rather to the extent of the agreement in eliminating or suppressing competition.

This construction of section 498 was foreshadowed by the decisions at trial and on appeal in the early case of *Rex* v. *Elliott*.[45] It mainly derives its authority, however, from three decisions of the Supreme Court of Canada: *Weidman* v. *Shragge*;[46] *Stinson-Reeb Builders Supply Co.* v. *Rex*[47] and *Rex* v. *Container Materials*.[48] The effect of these cases, which were spaced over a period of thirty years, was thus expressed by Duff C.J. in the *Container Materials* case:[49]

> 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 judg-

[44] Report of the Committee to Study Combines Legislation, p. 37.
[45] (1905), 9 O.L.R. 648.
[46] (1912), 46 S.C.R. 1.
[47] [1929] S.C.R. 276.
[48] [1942] 1 D.L.R. 529.
[49] *Ibid.*, p. 533.

> ments of the learned Chief Justice, of 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* [italics added]. 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. That is only another way of putting what was laid down in *Stinson-Reeb Builders Supply Co.* v. *The King* (*supra*) which, it may be added, was intended to be in conformity with the decision in *Weidman* v. *Shragge*, as indicated in the passages quoted in the judgment.

This interpretation has been applied in subsequent combines decisions and recently was re-stated by McBride J. in the *Western Bread* case:[50]

> . . . Apart from any earlier law in force in Canada, for 62 years, by statute, competition with respect to 'any article or commodity which may be a subject of trade or commerce' has been the *right* of every one in Canada, and every person or corporation invading that *right* by conspiring, combining, or agreeing or arranging with another to unduly lessen or prevent that competition is guilty of a crime involving severe punishment.[51]

In view of the sweeping effect given to section 498, it is not surprising that reliance has been put upon it in prosecutions, rather than upon the description of the offence of forming or operating a combine contained in the Combines Investigation Act.[52] In that act the offence relates to a combine "operated or likely to operate to the detriment or against the interest of the public". In *Rex* v. *Alexander*,[53] Raney J. expressed the opinion that this phrase included the word "unduly" as used in section 498, and elsewhere in his judgment he seemed to treat the expressions in the two acts as synonymous. This judgment is not conclusive nor is the reasoning of the Quebec Court of Appeal in *Rex* v. *Canadian Import Co.*,[54] in which the court seemed to assimilate the two statutes. The weight of opinion, however, seems to favour the view that the same test of detriment is applicable to the Combines Investigation Act as to section 498. Thus it may be that a statute, which some would con-

[50] *Rex* v. *McGavin Bakeries Limited et al.*, (1951) 3 W.W.R. (N.S.) 289.
[51] *Ibid.*, p. 295.
[52] See the definition of "combine" reproduced in footnote 28 *supra*. The offence is actually created by s. 32.
[53] [1932] 2 D.L.R. 109.
[54] [1935] 3 D.L.R. 330. Cf. Sommerfeld, *op. cit.*, p. 444.

tend was designed to avoid the inelasticity of section 498, is itself subject to the same strict judicial construction.

The policy of the law as determined by the courts is, then, to maintain competition and to refuse to classify particular restraints as reasonable or unreasonable. Except where areas of industry and commerce have been withdrawn, by competent legislation, from the field of free enterprise, the conditions of trade, including principally the settling of prices, must be determined by competition. This economic policy has been vigorously attacked as being inconsistent with both today's political and economic developments. Before considering these issues it will be useful to review the experience of the United States and the United Kingdom with this type of legislation.

## V. *United States and United Kingdom Legislation*

The differences between the United Kingdom and United States legislation typify the two principal approaches to combines control and bear directly on the issue raised by the judicial construction of section 498. The United Kingdom system considers each combine or monopoly on an *ad hoc* basis and attempts to determine whether and to what extent its operations have resulted in undue price enhancement or other immediate and readily recognized abuses. The United States, like Canada, follows the pattern of generally condemning agreements in restraint of trade.

The governing United States legislation is the Sherman Act of 1890,[55] the first section of which declares illegal "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations". Violations of the statute constitute a criminal offence. In addition, the United States federal courts are given equity jurisdiction to prevent and restrain violations of the act,[56] and individuals injured in their business by conduct forbidden by the statute may recover treble damages.[57] The second section makes it an offence "to monopolize or attempt to monopolize any part of trade or commerce among the several States", and its enforcement in late years has given rise to controversy over alleged attacks on big business, which is not relevant to Canadian experience. The pattern of the United States legislation is rounded out by var-

---

[55] Act of July 2nd, 1890, c. 647, 26 Stat. 209, as amended.
[56] Sherman Act, s. 4.
[57] *Ibid.*, s. 7.

ious statutes, such as the Federal Trade Commission Act, 1914, the Clayton Act, 1914, and the Robinson-Patman Act, 1936, which are designed to prohibit and regulate certain business practices considered to be unfair. The broader range of the United States legislation and the greater choice of sanctions have given some flexibility in administration not permitted by the narrow base of the Canadian law.[58] Nevertheless, so far at least as the approach to the problem of "combines" is concerned, the tendency of the two laws is virtually identical.

The first section of the Sherman Act, although literally all-embracing in its condemnation of restraints of trade, is subject to the so-called "rule of reason",[59] which has been re-stated to the effect that the words "restraint of trade" as used in section 1 of the Sherman Act were designed to have and did have the effect of embracing only "acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition or unduly obstructing the due course of trade or which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrained trade".[60]

This rule is similar to the interpretation placed upon section 498 by the Canadian courts. The condemnation of the statute operates only against combinations which suppress competition in a manner significant to the public and does not affect the attainment of ordinary business objectives or arrangements having no significant effect upon trade.

It would appear that in the United States the ban upon price-fixing arrangements of the kind with which the Canadian administration has been chiefly concerned is accepted pretty generally by the business community. The major criticism made against the United States administration has arisen from its so-called attacks on "big business" as such and its attempts to create canons of presumptive proof of collusion, such as the "conscious parallelism of action" concept. These cases, it has been alleged, constitute an unjustified extension of the Sherman Act and are an impractical attempt to revert to an earlier stage of economic development less characterized by concentrations of capital.

Typical of the general approval of the use of the anti-trust laws

[58] The Federal Trade Commission may enjoin unfair practices by cease and desist orders. This power appears to have permitted some administrative regulation of business.

[59] First enunciated in *Standard Oil Co. of N.J.* v. *U.S.* (1911), 221 U.S. 1, *per* White C.J.

[60] *U.S.* v. *American Tobacco Co.* (1911), 221 U.S. 106, *per* White C.J.

to curb the collusive arrangements which have featured Canadian combines cases is the following passage from Lilienthal's otherwise searching criticism of the administration of the United States legislation:

> . . . those charged with the administration of these laws . . . constitute a kind of F.B.I. of the world of business competition, with a responsibility to detect and to protect the public against acts of coercion, deceit, boycott, collusion or forms of business violence that inflict injury on competitors and the consuming public. Agreements to limit production, or fix prices, to allocate or divide markets, to suppress innovation, to exert economic pressure or to engage in a boycott to keep newcomers from entering into competition — these are among the many courses of conduct over which these public servants have for years exercised a policeman's function, and a highly salutory one.[61]

A contrast is provided by the first venture of the United Kingdom in combines control, the Monopolies and Restrictive Practices (Inquiry and Control) Act, 1948. This statute does not condemn combines or monopolies as such, but rather authorizes the Board of Trade to refer to the commission established under the act the investigation of particular industries from the standpoint of determining whether monopolistic or restrictive practices exist and, usually, recommending action to meet them. The approach is empirical: each report is considered by the government and by Parliament and the appropriate government department may be authorized by Parliament to make such orders as may be considered necessary to rectify any abuses disclosed. In the short period since its enactment only a limited experience has been acquired and it may be premature to generalize upon it. Generally, the reports have resulted in requests to the industries concerned to voluntarily rectify unsatisfactory conditions. Voluntary action has been unenthusiastic and has produced indifferent results. The more drastic sanction of a statutory order has been applied in only one case.[62]

In several instances where the commission has not recommended the abrogation of specific restrictive arrangements it has recommended a strict supervision of their operations. An extreme example of this occurred in the report on the Match monopoly.[63] Since a charge of monopoly is currently being pursued in Canada against the match industry,[64] a rather unusual opportunity for

[61] Lilienthal, *op. cit.*, p. 169.

[62] Monopolies and Restrictive Practices (Dental Goods) Order, 1951: S.I. 1951, No. 1200.

[63] Report on the Supply and Export of Matches and the Supply of Match-Making Machinery (London, H.M.S.O., 1953).

[64] Investigation into an Alleged Combine in the Manufacture, Distribu-

comparison of the philosophies and effects of the United Kingdom and the Canadian legislation is afforded. The Canadian match industry is being prosecuted in the Canadian courts under a specific provision enacted by Parliament and interpreted by the courts. The Restrictive Practices Commission of the United Kingdom, on the other hand, made the following recommendation for the United Kingdom match industry:[65]

> We recommend that the Government should assume for the future a definite and continuing responsibility for the supervision of the costs and prices of manufacturers, importers and distributors of matches. This supervision should be a great deal stricter than the price control which was exercised by the Board of Trade during and after the war. Maximum prices should be fixed for both home produced and imported matches at all stages of distribution.

The commission then proceeded to lay down nine detailed rules to govern costs, profits and prices. Here, the final result of the attempt to achieve and maintain a test of "reasonableness" seems to be nothing less than submission to complete government control, and any comparison, in which business freedom is rated desirable, is not unfavourable to Canada.

## VI. *Conditions Affecting the Rule of Competition*

It is now possible to consider some of the principal objections to the "rule of competition" which has been enunciated by the Canadian courts. In brief, these objections are that it is contradicted by general government policy and that it is economically obsolete.

### (a) *Legislative exceptions to the rule*

The sectors of industry and business which have been removed, in greater or lesser degree, from the domain of competition by federal or provincial legislation are fairly numerous. Some government monopolies have been established, as in the sale of liquor in most provinces. Generally speaking, public utilities are removed in large measure from the sphere of competition and, if not reserved for public authorities, are operated by private monopolies subject to close government scrutiny and control. In other fields, such as the marketing of some natural products, elaborate schemes regulating prices and other conditions of sale have replaced the open market. It is generally admitted that some at least, perhaps most,

---

tion and Sale of Matches (Department of Justice, Ottawa, 1949); *R.* v. *Eddy Match Company, Limited et al.* (1952), 13 C.R. 217. Cf. footnote 11. Other charges against the match companies are still outstanding.

[65] *Op. cit.*, p. 91.

of these exceptions from certain aspects of competition are necessary under modern conditions. It is assumed that, since they are operated under government authority and are subject to public scrutiny and control, they are different in kind from a private combine designed to regulate a particular industry. In other words, these exceptions are not, in theory and seldom in fact, of the nature of permissions to combine in a manner generally forbidden by section 498; they are rather the substitution of government management, either direct or indirect, for free enterprise management.

The growing number of cases of government sponsored departures from the rule of competition serves to highlight the uncompromising judicial doctrine of free competition in areas not touched by governmental control. Moreover, these cases are taken by some to represent a fundamental inconsistency in government policy: on the one hand, individual economic freedom is either eliminated or restricted and, on the other, the purest form of economic freedom is insisted upon. Moreover, abuses occur in the public sector, which, if they took place in the private sector, would be serious infringements of the anti-combines law. Examples come readily to mind. In many localities, the municipally owned light and power utility has been converted from an instrument of service to an engine of taxation; profits derived from excessive charges providing a rather painless substitute for more open forms of taxation. The operation of many marketing schemes gives no confidence that the public interest will always prevail over the welfare of particular producers: the history of milk marketing boards provides a sombre lesson in the abuse of statutory protection from competition. But even if the theoretically beneficent distinction between "public" and "private" control is not always present, none can deny that the ultimate price paid for public protection from competition is submission to government control by those sectors of the economy placed in an apparently privileged position.

(b) *"Pure" and "workable" competition*

The departures, under government auspices, from the rule of competition are paralleled by great and obvious changes in the structure of business and industry from those which existed when the classical economists postulated their theory of a competitive economy in the nineteenth century. Generally speaking, a state of "perfect" or near "perfect" competition contemplated a situation in which there were many sellers and many buyers of substantially equal degree, so that the individual actions of any one of them did

not exert a significant influence upon the market, and any one of them could modify his pricing and other policies in the light of what he conceived to be his immediate advantage, without being greatly deterred by fear of the reactions of his competitors. Although the classical economists did not claim, contrary to some current belief, that a state of perfect competition[66] in fact existed in their day, they did postulate it as a starting point from which to appraise the operation of the economy and to measure the aberrations, even then apparent.

The twentieth century has seen many sectors move progressively farther away from perfect competition. The state of imperfect competition arising from oligopoly[67] results in competitive behaviour much different from that postulated by the classicists and it is indisputable that this type of imperfect competition prevails in many, if not most, important fields today. In this state of imperfect competition, where a given market is supplied by a comparatively small number of suppliers, any one of them can predict with some certainty what his competitors' reaction will be to a change in pricing policy, and he is not likely to make a change when he has strong reason to believe that his competitors will all meet or better his new price and leave him with the same or even a smaller part of the market and a lower return. In these circumstances, price competition, as such, understandably appears to have a qualified appeal to business. Moreover, business men feel that prices, to a considerable extent, are no longer regulated by automatic economic forces beyond their power to control, but rather that they can be and are consciously determined. Hence it is argued that it is unrealistic to suggest that "competition" determines prices, and that it would be more realistic to permit competitors to agree frankly upon results, which will in any event come about in the absence of agreement, though with greater inconvenience to all parties. It is also suggested that, since the essential conditions of a combine are produced willy-nilly, it would be more advisable to attempt to control harmful combines than to prohibit them altogether.

This argument, as it has been developed in Canada, substantially repeats certain criticisms of the United States anti-trust ad-

---

[66] A somewhat rough analogy to the use of the intellectual concept of "perfect" competition may be found in the field of mathematics. Many sound calculations in mathematics involve such concepts as an angle of zero degrees, not in the sense that it exists physically but in the quite permissible sense that it affords a starting point from which to measure other angles.

[67] Characterized by a small number of sellers and a large number of buyers.

ministration which have already been mentioned. There, in recent years, it is charged that the natural and inevitable pricing practices of imperfect competition, including such conduct as "price leadership" and "conscious parallelism", are being seized upon by the administration as constructive or presumptive proof of combination in restraint of trade, even though no overt collusion can be shown. The fact that United States business has felt that it was being condemned for doing openly and independently what the realities of its peculiar competitive situation compelled it to do has led to considerable criticism of the anti-trust laws. In Canada, however, no attempt has ever been made to prove the existence of a combine from such circumstantial evidence and all combines reported and prosecuted here have been alleged to be the products of overt and demonstrable collusion. The criticism that has been levelled in this respect against the United States administration does not therefore really bear upon the Canadian situation.

The view that the courts should concern themselves with the "reasonableness" of the prices and other conditions of trade does not, however, depend entirely upon the assumption of a new kind of competition. Independently of this assumption, it is argued that a group of business men should be permitted to "rationalize" their industry by creating the stability that fixed prices and a fixed relation of supply to demand is presumed to engender; that such stability embraces not only the convenience and security of industry and trade but also the stability of employment; and that only where it can be demonstrated by the Crown that prices are unreasonable upon the basis of current costs, or that innovations have been suppressed or have not been actively pursued, should the law condemn the arrangement. In effect, business men say that the real purpose of the anti-combines law was to protect the public against combines formed and operated for the more or less express purpose of gouging the public and arbitrarily controlling the market for wholly selfish and anti-social reasons, and that it should not be invoked against arrangements made to bring stability to an area of trade or commerce.

This implies, of necessity, a challenge to the judicial rule that competition is, in itself, an absolute good. Among other things, it is said that the Sherman Act itself was really the product of unrestrained competition which had led to the destruction of weaker firms and the formation of monopolies and trusts.[68] Since then, the most vicious types of predatory competition in both the United

[68] R. Bruce Taylor, *op. cit.*, p. 590.

States and Canada have been eliminated by anti-combines and other legislation; but the very competition the Canadian and United States legislation insists upon may lead to equally undesirable concentrations of industry, though in a less spectacular way.

Again, it is pointed out that some of the least progressive and efficient industries are those like building, clothing and coal where a large number of relatively small firms compete on the classic model. In contrast, some of the most progressive industries, such as automobiles, chemicals and petroleum, are those dominated by large firms.[69] This observation, also, appears to be more relevant to the United States, where an attack on bigness as such has been alleged, rather than to Canada, where the aim of the legislation as presently enforced appears to be simply to maintain competition among units whether big or small.

All this will indicate that the construction placed on section 498 by the courts raises political and economic arguments of great importance and interest. It would be as rash to attempt to settle these arguments in a legal essay as it would be to ignore them. The proper course would appear to be to examine the implications of some of the arguments, upon the premise that it is desirable to maintain our free enterprise system because of the economic and political freedom it guarantees. In doing so, some of the more specific legal problems raised by the "rule of competition" can be mentioned.

### VII. *Is Mens Rea an Ingredient of the Offence?*

It is sometimes said that where no specific detriment need be proven, or indeed has been planned, against any section of the public, business men may be convicted of a crime which lacks the essential criminal ingredient of *mens rea*. This argument was dealt with by the Supreme Court in the *Container Materials* case. There, it was pointed out that the crime was the agreement to suppress competition and that an intention to accomplish this constitutes the *mens rea*. There was, and could be, no requirement that in addition those charged should have the malicious design of injuring particular individuals or the public at large.

### VIII. *Is the Legislation Anachronistic?*

Those who are critical of the present law have been aggravated on occasion by what appears to them to be a complacent judicial

[69] See J. K. Galbraith, American Capitalism: The Concept of Countervailing Power (Cambridge, Riverside Press, 1952) p. 96.

assumption that the bases upon which the earlier decisions were founded cannot be re-examined in the light of economic and social developments in this century. Sir Frederick Pollock's observation that "Our Lady of the Common Law is not a professed economist" has been mentioned as justifying judicial refusal to consider these basic economic developments.[70] Some feel that an uncritical use of the rule of stare decisis has enshrined a theoretical nineteenth century concept of economics in our law. Since the courts have developed many legal doctrines in the light of changing economic conditions—a notable example being the evolution of the common law on restraint of trade—criticism of this judicial attitude to section 498 is understandable.

It seems, however, less correct to criticize the judiciary for the interpretation placed on an act of Parliament than to conclude that the legislation, as such, has forced this interpretation upon the courts. If a change is desirable, it is more appropriate for the legislature to make the necessary decisions of public policy than the courts. This raises directly the question whether the legislation is based upon an anachronism and should be changed. Despite the assertions that a nineteenth century theory of "perfect" competition was in the mind of Parliament when this legislation was first enacted in 1889, the fact has to be recognized that even at that time perfect competition was a theoretical concept and in practice "workable" competition of varying degrees was the vogue in Canadian industry and commerce. This is evidenced not only by the parliamentary history of the legislation but also by the statute itself. It seems clear that the real purpose of the legislation at the time of its passing was to maintain the degree of competition of which any given situation was capable. The statute does not say for example that, where an industry or trade is in the hands of a small number of firms, they should for this reason alone be dissolved and re-formed into a larger number of firms, or that they should act as if they were a large number of small competing firms. All the statute does is to insist that their actions, however interrelated they may be, shall not be collusive. There appears to be no ground for maintaining that the legislation is anachronistic in the sense of being committed to the maintenance of an obsolete economic structure.

## IX. *Implications of a "Rule of Reasonableness"*

In a compendious way the problems being considered here involve

[70] *Rex* v. *Container Materials Ltd. et al.*, [1940] 4 D.L.R. 293, at p. 298.

the dispute between what may be called the present strict "rule of competition" and a suggested "rule of reasonableness". This latter rule comprehends the suggestion that an essential ingredient of the offence should be a finding that the prices or other conditions of trade resulting from a combine are patently unreasonable. Besides rejecting this suggestion on principle, the courts have indicated that it involves a type of inquiry for which they are not fitted.

As to the objection based on the problems the courts would face, the proof of combines offences is already complex, and the difficulty involved in an examination of the "reasonableness" of prices and other trade practices would be only one of degree. After all, the lack of "reasonableness" is already an essential element of certain crimes, particularly manslaughter and motor vehicle offences. In tort, the law of negligence is founded upon an appraisal of reasonable conduct. The branches of law in which "reasonableness" is a factor are difficult, but techniques of proof have been worked out with varying degrees of success. It may well be that the basic objection to the adoption of a rule of "reasonableness" is not that the difficulties of proof are insurmountable but that the other ramifications of the rule may be unacceptable.

Even if an inquiry into "reasonableness" were confined to the relatively narrow points of the reasonableness of the prices fixed and the profits taken by a given combine, it seems inevitably to involve extensive inquiries, which may be as unwelcome to business as insistence upon the present rule of competition. The experience of rate-making boards in the public utility field shows that the determination of reasonable prices involves a detailed inquiry into all the components of prices. Some of these components may be removed from consideration because they are beyond the control of the companies or industries affected. This is true, perhaps most forcefully, of wages determined by collective bargaining; but executive salaries, policies relating to expansion, capital expenditure, dividends, reserves and surpluses are all regarded as matters of discretion which can be regulated and controlled. These are the factors Schroeder J. may have had in mind when, in the recent *Rubber* case, he stated in reply to the submission that prices and profits were reasonable:[71]

> On this point it should be observed, of course, that the exact basis on which these figures were arrived at was not disclosed and if any reliance is to be placed upon them, there should be satisfactory information as to the capital structure of the Company and accurate information

[71] *The Queen* v. *Firestone Tire & Rubber Company of Canada, Limited et al.*, November 23rd, 1953, unreported.

as to executive salaries, extraordinary expenses, advertising costs and like matters.

Moreover, it is clear that the establishment of reasonable prices is something which requires constant surveillance and supervision — something more appropriate to administrative regulation than judicial decision. A passage from an American anti-trust decision, occasionally referred to by Canadian courts, forcefully states this position:[72]

> The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed. Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman Law the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions.

It would appear that these inherent complexities in the determination of reasonableness were recognized by the Parliament of Canada on the two occasions when it attempted to provide for the determination of reasonableness by administrative tribunals, the establishment of the Board of Commerce in 1919 and the Dominion Trade and Industry Commission in 1935. In all, the adoption of such a rule would involve more rather than less government interference in business. If the creation of an administrative agency again became necessary, the constitutional difficulty would of course be revived in an acute form, but this ought not to be taken as an excuse for a refusal to consider the merits of such a rule.

The application of a "rule of reasonableness", if the rule were grafted on the present Canadian system, might prove to be unfair to both the individuals affected and the public at large. One of two undesirable consequences might well develop: either the rule might be emasculated, so as to apply only where the abuse was attended by some completely outrageous or malicious circumstances, or some such situation would be reached as is described by the British economist, Sir Henry Clay, who recently complained about the British legislation, which does take the empirical approach:[73]

> The business man can no longer ascertain from his legal advisers what arrangements he could legally make with his competitors or suppliers

[72] *U.S.* v. *Trenton Potteries Co.* (1927), 273 U.S. 392, at p. 397.

[73] Sir Henry Clay, The Campaign against Monopoly and Restrictive Practices, Lloyds Bank Review, April 1952.

> or customers, and what arrangements are criminal or unenforceable; his legal adviser can tell him what the law is now, but cannot tell what it may be if his business is referred to the Commission.

With such an indefinite standard as "reasonableness", a mere error of judgment might subject a man to criminal prosecution. Conversely, if the courts were expected to supervise effectively the operation of a "rule of reasonableness", the pressure for more drastic and direct control of business by other public authority might become virtually irresistible.

It is apparent, then, that the implementation and operation of a "rule of reasonableness" creates obvious disadvantages and dangers for the free enterprise system. The problems already discussed would arise, basically, as a result of attempting to operate the "rule of reasonableness", but other and perhaps more fundamental questions arise over the desirability of substituting it for the "rule of competition". No attempt can be made to give a definitive answer to such problems here, but the importance of at least two of them is obvious. First, if it is admitted that the main reason for the establishment of combines is to "stabilize" an industry, the question arises why collusive arrangements are required by some but not by all industries. Obviously many important industries have been able to achieve a satisfactory "stability" without resort to collusive arrangements, and this raises the question whether there is in fact any basic necessity for facing the hazards which may result from the abandonment of competition. A second question relates to the efficiency and progressiveness of our economy. It is admitted that the quest for innovation and efficiency, the sources of our high standard of living, has been spurred by competition. Would an economy, in which the participants must merely act "reasonably", engender the same initiative and drive as the competitive system? These questions will help to indicate the importance and the ramifications of our combines legislation. From them it is plain that any discussion of possible changes in the law raises broad issues of public policy and it is not to be dealt with solely on the basis of meeting the convenience of business in the conduct of day to day transactions or the convenience of the administration in enforcement.

## X. *Conclusions*

The legal doctrine propounded by the courts has given rise to difficulties which must be frankly faced in the administration of combines legislation. The fact that important elements in the business

community are dissatisfied with the legislation and fear that it is not founded on a realistic appraisal of modern economic conditions cannot be lightly disregarded. Certainly the criticisms made of the legislation cannot be disposed of by any cavalier reflections upon the interests of the parties making them. At the same time, the purpose of the legislation, as it may be related to modern conditions, requires to be considered fairly and it seems wrong to pass it off simply as an expression of an outmoded economic theory. The experience which may be developed as a result of a more consistent and intense administration of the law in the next few years will be of considerable value in bringing into focus all considerations affecting its worth and efficacy in present circumstances. As a result of this experience, it is possible that a greater measure of agreement will emerge on the proper aims and purposes of combines legislation and the best methods of accomplishing them.

What is apparent at present is that substantial areas of disagreement exist. Firstly, there is disagreement over the most realistic methods of controlling the modern economy. Inherent in the criticisms of the present legislation is the suggestion that up to a point control can properly be left in private hands, not restrained by government fiat or by the exigencies of competition. There are some who believe that the economy possesses within itself balancing forces that would make it possible for this kind of economic structure to operate in the public interest.[74]

The more general opinion, however, is that in the end there are only two realistic ways of controlling the economy — either through "competitive control" or "government control".[75] It is admitted

[74] Galbraith, *op. cit.*, pp. 115 *et seq.*

[75] It would seem that the "rule of reason" might aggravate any element of uncertainty that may exist in the Canadian legislation. Some uncertainty of course cannot be avoided in this type of legislation, or in many other types, and one of the most vigorous criticisms of the Canadian law is that it is so general that a business man cannot tell what practices are lawful or unlawful. The MacQuarrie Committee rejected the suggestion that a list of permitted or prohibited practices should be written into the law, on the ground that any momentary gain in certainty would be outweighed by loss of flexibility and range, and would be rendered nugatory by the ultimate impossibility of specifying all prohibited practices and their variations in advance. To lay down hard and fast rules would mean forbidding some practices which, in certain circumstances, are innocuous and permitting other practices which, in certain circumstances, may be harmful. It is not the practice which is significant, but the purpose to which it is put. It would appear in any case that the designation of permitted and forbidden practices may be of more practical importance for the unfair trading practices mentioned in section 498A than for the offences involving collusion specified in section 498. So far as this last section is concerned, the introduction of a concept of "reasonableness" would not only add uncertainty but would indeed remove the one fixed standard now provided by the "rule of competition", by which the validity of all practices

by all that the public would not permit unfettered "private control", exercised through combines or other restrictive arrangements. The attempt to limit private control to what is "reasonable" opens the door to an increasing measure of government control. Once legislative policy permits the repression of competition, the inevitable tendency is to create administrative procedures for controlling and directing business. The experience of the United Kingdom, long accustomed to restrictive business practices, does not suggest that full-fledged government control would emerge forthwith, but it does suggest that in such circumstances the free enterprise system becomes enfeebled and directly or indirectly invites, and must submit to, increasing government supervision and control.

Secondly, there is misunderstanding of the rôle of the anti-combines administration. In principle, its purpose is to preserve a free economy unregulated by either private or public controls. It is certainly not the function of this branch of the government to interfere in private business, in the sense of regulating and directing its activities in detail. Business, not unnaturally, is apt to regard the activities of the combines administration as an example *par excellence* of government interference in private affairs. Any business man whose affairs have for long been involved in a combines investigation would be hard put to believe that this activity did not represent "government control" of a very drastic kind. The natural hostility to such immediate attempts to control business behaviour, which some business men believe sincerely to be in the best interests of the community, is usually much more evident than any concern over prospective controls that may be imposed from another government quarter at a later date.

Thirdly, there seems to be a basic misunderstanding of what is meant by competition. All that the statutes, as judicially interpreted, purport to do is to prevent the suppression of competition. They do not impose an opinion on the type of competition to be protected. In many important segments of our economy pure competition of the classic model has disappeared, perhaps forever. It is not the function or intention of the legislation to revive pure competition or, indeed, any other economic form which has thus been replaced.

---

can be appraised today. Hope J. thus described it in the *Container Materials* case, [1940] 4 D.L.R. 295, at p. 301: "Parliament has, in the Code, defined in moderately precise language the instances which it intended to be regarded as an infringement of its economic policy".

[76] See MacQuarrie Committee Report, pp. 21 *et seq.*

Under modern conditions, it is plain that competition does not depend for its existence upon a large number of small competing units. The big three in the automobile industry may compete much more vigorously than any number of retail druggists in a community. It is recognized that competition can be expressed in many forms besides simple price rivalry among suppliers of identical commodities. There is the competition of substitutes, the competition of innovations and the competition of service, all of which have given strength and vigour to our economy, and in all of which price competition itself finds in part its modern expression. The competition it is the present policy of the law to defend and protect embraces all possible varieties. A comparison of the development of the United States and Britain in the twentieth century, making all allowances for relevant differences in resources and history, points to the dangers of abridging any form of competition and of permitting the moderation of economic growth by the licensing of "reasonable" and "fair" arrangements, which take the edge off competition.

If, as seems to be the case, Canadian combines policy now can be developed on the assumption that no immediate legislative change is apt to occur, then it may be expected that some of the issues discussed in this article will be brought more and more closely to public attention. There has always been considerable emotionalism in the discussion of combines policy; it may be that these vigorous generalized arguments will be moderated and replaced by a more objective consideration of actual experience in the operation of the legislation. At the present time the situation is far from comfortable — the administration is under the necessity of enforcing laws which, although they have the undoubted support of the general public, have only a limited justification in the eyes of many of the business men they affect most directly. On the other hand, the business community, because of a continuing determination to regard the law not as it actually is but as many business men think it ought to be, exposes itself to the full force of the administration's investigational and enforcement activities.

There does seem room for some moderation of the historic attitude of both the administration and of business. Although it would be unrealistic to suggest that the administration should be expected to consider and pass upon, in advance, all types of business arrangements, it should follow a policy of frankly discussing proposed or existing arrangements with a view to assisting business to form a conclusion on their propriety. Consultation should occur in an

atmosphere where business men will feel that their attempts to do what is proper in the future will not expose them to an investigation of past practices, which they wish to abandon if their legality is in doubt. There are many indications in the addresses of the Minister of Justice and the Director under the Combines Act and his staff that such a policy is already well advanced. This type of consultation may be of greater importance in connection with unfair business practices than with actual collusive arrangements among competing businesses.

On the part of the business community, the realities of the situation seem to demand a recognition that the policy of the law has now been definitely established. The natural tendency of business men to regard the work of the combines administration as an unwarranted interference in private affairs tends to obscure the obvious fact that the purpose of the administration is to maintain as much economic freedom as modern political and economic conditions permit. Freedom of competition may not always be an unmixed blessing, but it stands more than favourable comparison with the dangers inherent in other types of economic control. This suggests that there is good reason to give our present type of combines control a fair opportunity to operate and prove its worth under the economic and political conditions which now exist.

---

## Independence of Bench and Bar

We believe in a strong and independent judiciary charged with adjusting and applying law to conditions of our time, with balancing the values of continuity against those of improvement, certainty against adaptability, liberty against authority. By independence of the judge we mean more than freedom from subservience to other branches of government; we mean the largest freedom humanly attainable from his own partisanship, class-interest, political bias or group pressures. We maintain our right respectfully to criticize what we may think errors of honest judgment by our courts and judges, but we can show no leniency toward judicial partisanship, faithlessness, carelessness or irresponsibility.

We believe in an independent Bar, free not only from government control, but intellectually independent of client control. In the client-and-attorney relation the client is not a master, the lawyer is not a mere hired hand — he is an officer of the court, with a duty of independent judgment in the performance of his professional service and under a duty to serve all sorts and conditions of men. (Mr. Justice Robert H. Jackson, in an address at the laying of the cornerstone of the new American Bar Centre of the American Bar Association, Chicago, November 2nd, 1953)