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Monopoly, Reasonableness and Public Interest in the Canadian Anti-Combines Law

W. FRIEDMANN*
Toronto

The tempo of prosecutions under section 498 (now section 411) of the Criminal Code and under the Combines Investigation Act is increasing. The first half century of Canadian anti-monopoly legislation has produced only a moderate crop of relatively insignificant prosecutions: of junk and bottle dealers,[1] cinema exhibitors, associations of master plumbers and electricians, with only a few cases of rather greater economic importance, such as the *Container Materials* case[2] or the combine established by the importers of British coal.[3]

It has been a very different story in the last few years. Industries of great national importance have been brought before the courts or are the subject of investigations still under way: the rubber goods and rubber tire industries, the match industry, the fine paper in-

*Wolfgang Friedmann, LL.D. (London), Dr. iur. (Berlin), LL.M. (Melbourne), of the Middle Temple, Barrister-at-law; Professor of Law, University of Toronto; author, among other works, of *Legal Theory* (3rd. ed., 1953), *Law and Social Change in Contemporary Britain* (1951), *Introduction to World Politics* (2nd ed., 1952) and *Principles of Australian Administrative Law* (1950).

[1] *Weidman* v. *Shragge* (1912), 46 S.C.R. 1. (This was a civil action.)

[2] *Container Materials Ltd.* v. *The King*, [1942] S.C.R. 147, [1942] 1 D. L.R. 529.

[3] *R.* v. *Canadian Import Company*, [1935] 3 D.L.R. 330.

dustry, the wire and cable and the wire fencing manufacturers, for example, all these are industries whose organization greatly affects the economic life of Canada.

It is not surprising therefore that, although the first Canadian legislation on the subject antedates the Sherman Act by one year, the Canadian law of restrictive practices is only now coming to grips with many problems that have been the subject of abundant and intensive judicial and extra-judicial discussion in the United States. One issue is at the bottom of the host of unsolved or controversial questions: Is it possible, and, if so, what are the proper tests, to sort out the vast sphere of legitimate and indispensable acts of collaboration in industry and business from improper concentrations, attempts to monopolize and other restrictive trade practices? Or, to put the same issue in a different way: At what point does legitimate competitive expansion—which inevitably proceeds at the expense of some competitor—become improper domination? Conversely, at what point are the numerous restrictive agreements which substitute for a fight to the finish a collaborative scheme between competing firms in the same industry or business—shielding the weaker from extinction or absorption by the stronger or, sometimes, dividing a market between parties of roughly equal strength—become improper restrictiveness instead of a proper means of preventing the relentless growth of the strongest?

Around those basic problems circle numerous derivative questions whose technical implications continue to be the concern of lawyers and economists: Can a reliable and reasonably certain distinction be drawn between "good" and "bad" restrictive practices or monopolies? Is size as such an offence against the law, or is some predatory or aggressive action required to constitute an offence? If some distinction is to be made between excusable, or even commendable, restrictive practices and illegal ones, who should be the judge? Is the task one which law courts cannot and should not undertake? If it is not, should it be entrusted to some administrative agency—a quasi-judicial tribunal—or to a political authority?

Of all the countries in the world, the United States and Canada alone have made the ordinary law courts the ultimate arbiters of these questions. In both these countries, investigators and prosecutors must orient themselves by the tests evolved by the courts. Not many other countries have tackled the problem seriously at all. Those which have done so in recent years, like the United Kingdom and the Scandinavian countries, have kept the courts out of the process. The British Monopolies Act of 1948 entrusts the investiga-

tion of conditions which "operate or may be expected to operate against the public interest" to a commission composed predominantly of economists, businessmen and accountants, with lawyers being in a definite minority. The commission makes certain recommendations to the minister, who may or may not act upon them. But at no stage does the matter come before the law courts.[4] Whether the restraint, regulation or suppression of monopolies, cartels and other restrictive practices should be in the hands of administrative agencies rather than courts is one of the many contested problems in this highly complex and controversial field. But where the courts do have the ultimate responsibility, as they have in the United States and Canada, they must be judged by their ability to cope with the problem.

Three Basic Difficulties

Any attempt to solve the problem of restrictive trade practices meets with three major difficulties. One of these is inherent in the problem itself, the other two are, at least to some extent, the result of legislative or judicial weaknesses.

There is first the inherent difficulty of any legal regulation of major economic tendencies in a dynamic industrial society. The ideology of free enterprise, which the right of free competition is meant to protect, is based on the idea of the survival of the fittest. Sooner or later, favoured by capital resources, ability, ruthlessness, luck or other circumstances, one competitor will push others to the wall and thereby restrict or altogether extinguish competition. In order to prevent this, the legislator must establish certain rules of the game and, in order to enforce them, must establish a complex bureaucratic apparatus, which is of course anathema to the idea of free enterprise and free competition. Although similar dilemmas occur in many fields of law, nowhere do they seem to affect such fundamental processes of economic life.

The dilemma has, however, been unnecessarily heightened by the unfortunate tendency of the courts to use such terms as "right of competition", "freedom of enterprise" and "public interest" as if they were absolutes. Even without the detailed discussion of the problems which have arisen in the interpretation of anti-monopoly law, it should be clear that there is always a problem of adjustment, of so much of the one and so much of the other. In *Weidman* v. *Shragge*,[5] Idington J. spoke of "the almost

[4] This is, of course, apart from the common-law rules on agreements in restraint of trade, on which see the observations later, footnote 24.

[5] (1912), 46 S.C.R. 1, at p. 26.

exultant tone of exposition" which several of the judgments in the *Mogul* case had adopted. In this celebrated case,[6] the English courts sanctioned, in the name of free trade, a scheme designed to monopolize the China tea trade, which would undoubtedly be a flagrant violation of section 498 (411)[7] of the Criminal Code as well as of the Combines Investigation Act. That this was a scheme to extinguish freedom of trade in the name of freedom of trade was a dilemma hardly noticed by judges deeply steeped in the tenets of a fervent, though perhaps somewhat primitive, economic liberalism. It may be, on the other hand, that the unqualified way in which the great majority of the Canadian courts describe the purpose of the Canadian legislation, as being unqualifiedly that of maintaining "the right of free competition", is hardly less misleading in its superficial simplicity. It is an almost inevitable corollary of this approach that the Canadian courts, with far greater unanimity than the American courts, have refused to consider the economic implications of their judgments, or even the issues underlying them, on the ground that it is not the judge's task "to adjudicate between conflicting theories of political economy".[8] It will be shown later that the blank refusal to consider openly economic concepts, and the economic implications of legal decisions that deeply affect the economic life of the community, lead only too easily to half-articulate law-making and an interference with economic structure, which is not less far-reaching for being unintended.

The difficulties outlined so far have arisen in the United States as much as, or more than, in Canada. The Canadian complexities have been greatly increased, however, by the strange state of the legislation. Even in the latest reforms of 1952, Parliament has not found it necessary to unify the two major parts of the anti-combines legislation, that is the Combines Investigation Act and the two relevant sections of the Criminal Code. As a result, the offences are distributed between the two acts, which partly, but not entirely, overlap. Broadly speaking, the Criminal Code is directed at restrictive trade practices in general, the Combines Investigation Act at certain specific types of restriction which are defined as "combines".

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[6] *Mogul S.S. Co.* v. *McGregor, Gow & Co.*, [1892] A.C. 25.

[7] In the new version of the Criminal Code, which is to come into effect on April 1st, 1955, sections 498 and 498a of the old Criminal Code have become sections 411 and 412. Throughout the rest of this article, reference will be made to the old numbers.

[8] Lord Finlay in *Crown Milling Company* v. *The King*, [1927] A.C. at p. 394. Cf. Hope J. in *R.* v. *Container Materials Ltd.* (1940), 74 C.C.C. 113, [1940] 4 D.L.R. at pp. 298-299, and Spence J. in *R.* v. *Howard Smith Paper Mills Ltd.*, [1954] O.R. 543, [1954] 4 D.L.R. 161.

These combines include practices that are dealt with in almost identical terms in the Criminal Code, and in addition they comprise "mergers", "trusts" and "monopolies", which are not as such treated in the Criminal Code. Apart from this, the Combines Investigation Act does, of course, provide a procedural machinery outside of, and in addition to ordinary criminal jurisdiction proper. But in so far as the substantial offences are largely duplicated, though not in identical terms, the Canadian law has unnecessarily added to the enormous difficulties in any legislation of this type.

Alternative Criteria

Reference has already been made to the dilemma to which the idea of freedom of competition inevitably leads. At a certain point, the law says halt to expansion at the expense of a competitor. But, quite apart from the implicit denial of freedom of competition at a certain point, it is obvious that co-operation and even concentration of resources, both in production and trade, may be demanded by modern industrial conditions.[8A] These may lie in the field of technological research or minimum efficiency of production, in the need to produce standardized products at a reasonable price. They may, last not least, be demanded by defence needs—and the last forty years have seen the major part of the western world constantly engaged in war, recovery from war or preparation for another war. Indeed, some of the industries indicted under the combines legislation were accused for having failed to change rapidly enough from wartime conditions—when co-operation, allocation of resources and distribution of orders were not only condoned but demanded by public authority—to an atmosphere of free, vigorous and uninhibited (but not too ruthless) competition.

The argument of technological efficiency has been perhaps the most important single ground given in favour of concentration and bigness of enterprise. Yet it is equally certain that a point comes when the dangers of dominance by an "overmighty subject" far outweigh the advantages of rationalization or production. Indeed, it seems to be generally accepted that beyond a certain point of bigness further growth may not add to but detract from efficiency. An amalgamation between General Motors and Ford, for example, would almost certainly increase the dangers of near-

[8A] In a study published in November 1951, Professor Adelman has estimated that 135 corporations own 45 per cent of the industrial assets in the United States: The Measurement of Industrial Concentration, The Review of Economics and Statistics, vol. xxxii, no. 4, at p. 289.

monopolistic control of the automobile market without adding much to the technological advantages which either of these enterprises already possess in the way of technological research and up-to-date mass production. If, as is so often stressed, public enterprises are subject to the danger of over-bigness and over-centralization, the same danger undoubtedly affects oversized private enterprises. It is for this reason that every serious legislative measure against restrictive trade practices has taken monopolization as one of its principal tests.

But immediately the further—and much debated—question arises whether all monopolies are bad *per se* or whether they *may* be bad because of certain objectionable practices. In the language of the economists, is it market *behaviour* or market *structure* which counts? Must an enterprise be condemned because of its size—attained maybe before prohibitive legislation became effective, or because of certain natural conditions, or because of the absence or demise of serious competitors—or is bigness objectionable only if it is used for aggressive and predatory tactics restricting freedom of trade and competition?[9] The latter is measured by the usual tests: price-fixing agreements, tying agreements, market-division arrangements, production quotas, loyalty and quantity discounts, stop lists and other devices usually applied to enforce compliance with restrictive practices in general.

In the United States, the "structure" philosophy had its most important victory to date in the first *Alcoa* case,[10] followed by the *United Shoe Machinery* case.[11] The mere fact that the Aluminum Company of America, at the time of the judgment, had a virtual monopoly of aluminum ingot production in the United States was the decisive factor in the judgment in which Learned Hand J., for the Second Circuit Court of Appeal, held that the company had violated section 2 of the Sherman Act, whether or not it had exploited its position to impose oppressive conditions on the users of its products, whether its prices and profits had been reasonable or not.

[9] The difference has been succinctly stated as follows by an American economist (Alfred E. Kahn, Standards for Anti-Trust Policy (1953), 67 Harv. L. Rev. 28, at p. 33): "Economists have developed two fairly distinct tests of monopoly. One looks to market structure for evidences of those characteristics from which, according to the theory of the firm, undesirable results follow. The other criterion applies the maxim 'by their fruits ye shall know them'. It may begin by identifying structural impurities, but its primary emphasis is on the economic record, that is, market performance; only if the results are 'bad' is the monoply power deemed excessive."

[10] *United States* v. *Aluminum Co. of America* (1945), 148 F. 2d 416.

[11] *United States* v. *United Shoe Machinery Co.* (1953), 110 F. Supp. 295 (D. Mass).

It is true that in both these cases the court emphasized that the condemned enterprises had not attained their position by sheer accident, that they had actively and deliberately used occurring opportunities to increase their dominating position in the industry, even though they might not have exploited the public.

As was to be expected, there has been strong opposition to this approach.[12] Perhaps the most explicit recent criticism is that of Professor Oppenheim, Co-Chairman of the Attorney-General's National Committee to Study the Anti-Trust Laws, who has formulated alternative criteria for judging the legality of monopolistic practices on the basis of the "rule of reason". Evidently, such tests assume the "behaviour" rather than the "structure" approach.[13] Parallel to, though not identical with, the antithesis of "structure" and "behaviour" tests is that of "pure" and "workable" or "effective" competition. All but a handful of economists recognize "perfect" or "pure" competition as a myth utterly incapable of realization in the twentieth century. As it was put at a recent meeting of the American Economic Association:[14]

> If we mean perfect or pure competition, i.e., the absence of any power over price, competition is not an important element in the contemporary American economy. And if we mean a system in which the principle of self interest leads spontaneously to economic activities in which the rivalry of buyers and sellers narrowly circumscribes the power of each, competition is also a thing of the past. But if we

[12] There will be no discussion, in this article, of the more fundamental attacks on the whole philosophy of anti-trust legislation which have, in the last few years, come from such well-known writers as David Lilienthal, the former chairman of the TVA, who (Big Business, 1953) has praised concentration as conducive to economic progress, or the Harvard economist, Kenneth Galbraith (American Capitalism, 1952), who sees in the countervailing power, for example, of producers and retailers, of capital and labour, an automatic restraint on the exploitation of monopoly power. The present discussion, which is mainly concerned with the interpretation of the relevant Canadian law, moves within the premises of anti-combines legislation.

[13] The following criteria have been formulated by Mr. Blackwell Smith, Effective Competition: Hypothesis for Modernizing the Antitrust Laws (1951), 26 N.Y.U.L.R. 405, at p. 441, and quoted with approval by Professor Oppenheim, Federal Anti-Trust Legislation: Guideposts to a Revised National Anti-Trust Policy (1952), 50 Mich. L. Rev. 1139, at p. 1188: (1) alternatives available to customers or sellers; (2) volume of production or services; (3) quality of the service of goods; (4) number of people benefited; (5) incentives to entrepreneurs; (6) efficiency and economy in manufacturing or distribution; (7) the welfare of employees; (8) the tendency to progress in technical development; (9) prices to customers; (10) conditions favourable to the public interest in defending the country from aggression; (11) the tendency to conserve the country's natural resources; (12) benefits to the public interest assuming the relief requested by the government in the proceedings. Very similar conclusions have been reached by the Business Advisory Council of the Secretary of Commerce in a report published in 1952.

> mean a carefully contrived system which facilitates the process of innovation and adaptation through time, in which individual self interest is given wide play on a carefully structured field, in which the opportunity for initiative and the level of initiative are high, in which there is constant striving to add to the body of knowledge and resources, in which the system of communication of economic information is operating well, and in which the market position of firms is consequently insecure, then I believe competition is an important element in the contemporary American economy.

The alternative, generally called "workable competition", is, not unnaturally, more difficult to state than the criticism. In the formulation of a recent American textbook:[15]

> A firm's size is lawful provided that it does not impose a substantial threat to the freedom of entrance, or provided that it is fully justified on grounds of technological efficiency.

This approach abandons the illusion that any law can achieve the restoration of a world of small or medium sized enterprises competing with each other on equal terms and levels. Instead it demands that the law should protect freedom of entrance and outlaw co-operative action where it attempts to "give the outcome of the game".[16] Mr. Blackwell Smith's suggested tests[17] specify the factors to be weighed in the assessment.

The "structure" test has certain obvious advantages of the kind that will appeal to most, though not all, judges: it only entails an examination of relatively simple and essentially quantitative factors. The size, the percentage of productive or trading facilities in a given market, must be shown, and this is relatively easy to deduce from official statistics and other figures.[18] The "behaviour" test involves the adoption of far more controversial standards of economic behaviour. The test of "reasonableness", which the United States Supreme Court adopted in the *Standard Oil* case of 1911[19] and maintained, generally speaking, until the second *Tobacco* case[20] involved inevitably the appreciation of economic and social factors.

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[14] J. P. Miller, in Papers and Proceedings of the Sixty-sixth Annual Meeting of the American Economic Association (1954), 44 American Economic Review at p. 22.

[15] Papandreou and Wheeler, Competition and its Regulation (1954) p. 193.

[16] Papandreou and Wheeler, *op. cit.*, footnote 15, at p. 187.

[17] *Supra*, footnote 13.

[18] The controversy which has arisen around Judge Hand's analysis of Alcoa's monopoly position in the aluminum market shows, however, that even such an analysis is more than a matter of plainly legible statistics and involves a considerable amount of interpretation.

[19] *Standard Oil Co.* v. *United States* (1911), 221 U.S. 1.

[20] *American Tobacco Co.* v. *United States* (1946), 328 U.S. 781.

Such is indeed the character of the criteria suggested, among others, by Smith and Oppenheim.

If any tests of this kind are accepted, the court must openly face the task of going, with the help of experts, into economic "good and evil". And that means articulating a scale of economic values which must be deduced from current legislation, prevalent standards of public policy, contemporary scientific research and other factors as they have been analyzed by students of the judicial process. This is of course no easy matter. Yet problems of similar scope and complexity have been faced by courts.[21] Professor Oppenheim, among others, has convincingly criticized judicial protestations that judges, being unequipped for the appraisal of economic data,[22] would be unable to apply the "rule of reason" standard. In many cases the courts have taken a contrary approach. In any case, the alternative to an open appraisal of economic criteria is usually the inarticulate use of ill-digested economics. The interpretation, for example, of "detriment to the public interest" as being automatically implied in *any* restrictive agreement is a piece of economics, as is the theory of the *Northwestern Salt* case quoted later. A number of students of this problem have suggested that, if necessary, courts should be supplied with the assistance of experienced economists.[23] The worst possible compromise between the two approaches is that adopted many years ago by the English courts when they held that agreements in restraint of trade, including the most patently restrictive monopolies and cartel agreements, were reasonable towards the public if they were reasonable between the parties. This meant the adoption of the "reasonableness" test with a vengeance. The courts, while making themselves arbiters of good or bad behaviour in economics, found it possible in this way to do without any but the most superficial study of economics.[24]

[21] It is not perhaps widely enough known that the Australian Commonwealth Court of Arbitration has for many years determined such vital economic matters as a nation-wide basic minimum wage, maximum hours and similar matters by judgments reached on the basis of extensive economic materials and expert evidence. Few would maintain that the three-man court has been able to answer these questions beyond controversy, but it is generally accepted that it has used economic data and theory with reasonable competency.

[22] See Frankfurter J. in *Standard Oil Co. of California* v. *U.S.* (1949), 337 U.S. 293, at p. 313.

[23] As will be shown later, the Canadian law provides a suitable vehicle for the assessment of economic data in the new Restrictive Trade Practices Commission (see *post*, pp. 154 ff.).

[24] For a singularly naive approach of this kind, see *North Western Salt Co. Ltd.* v. *Electrolytic Alkali Co. Ltd.*, [1914] A.C. 461, where at pp. 471-2 Viscount Haldane L.C. made the following observations: ". . . It may well be that such a contract was, in view of the powerful position

The question whether and to what extent economic behaviour should be the criterion is the crux of the Canadian problem. With the increase in the momentum and significance of combines cases now coming under judicial scrutiny, many problems which have for years been examined and discussed in the United States are becoming acute in this country. It is, therefore, particularly important to examine to what extent American authority is pertinent for the interpretation of the Canadian law. In the Canadian cases, there are a number of rather cursory observations on this question.[25] A more exact comparison of the legislative prohibitions and standards adopted in the two countries is necessary.

American and Canadian Legislation Compared

The general approach to the problem of monopolistic and other restrictive trade practices by American and Canadian law is almost identical. The legislation of both countries condemns, gen-

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of the appellants, the respondents' best way of securing a market and adequate prices. And if this be once conceded I find nothing else in the detailed provisions of the contract excepting machinery for working out the bargain. If the general object was lawful, then these provisions were, in my opinion, free from objection on the score of illegality. Nor do I find that the public interest was necessarily or even probably injured.

"I have already adverted to the fact that competition from abroad and from other parts of the United Kingdom was not affected. It may be, for all that appears, that agreements of this kind were the only effective method of preventing domestic competition from being carried to a length which would ultimately prove not merely ruinous to the parties themselves, but injurious to the public, even outside that portion of it which was dependent on the prosperity of the salt manufacturing industry. No doubt if there were a monopoly attempted to be set up which was calculated to enhance prices to an unreasonable extent, that would, if it so appeared on the face of the contract, be ground for refusing to enforce it. But an effective attempt to set up such a monopoly or so to enhance prices can but rarely appear on the face of an agreement between two traders. Whether such an attempt is really being made is almost always a question of fact. It certainly does not appear as being made on the face of the agreement in question. It may well be that prices such as 18*s.* or 23*s.*, which were to be charged for the appellants' salt, were fair prices. The fact that the manufacturer is only to receive 8s. cannot, standing by itself, be treated as sufficient evidence to the contrary. For it may be well worth while for a firm like the respondents, which obviously had to face much competition, to take a low price in order to secure a steady market, and the appellants' prices may have been no higher than a manufacturer might under ordinary circumstances have expected to get."

Granted that there was not in English law any common-law or legislative policy, corresponding to that of the American or Canadian anti-combine legislation, this is still a singularly easy way of by-passing the problem.

[25] See in favour of an extensive use of the American authorities, among others, Idington J. in *Weidman* v. *Shragge* (1912), 46 S.C.R. 1, at p. 27; Bienvenue J. in *R.* v. *Eddy Match Co.* (1953), 104 C.C.C. 39, at p. 54; on the other hand, see Garrow J. in *R.* v. *Famous Players*, [1932] O.R. 307, at p. 344.

erally, restrictive trade practices and monopolies, an approach not shared by the law of any other country. It is in this field that Canadian law shows the most remarkable departure from the law of England, with which it has otherwise been so closely linked. Moreover, there are many problems of a general character, such as the definition of a monopoly in the legal sense, or the many alternative tests for objectionable economic behaviour, which have been briefly outlined, that make the decisions and discussions of American law relevant to Canada, regardless of specific parallels in legislative formulation. Yet the differences are not inconsiderable and must be borne in mind whenever American authority is quoted before a Canadian court. There are several.

1. Section 1 of the Sherman Act contains a general and unqualified condemnation of "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States . . .". Section 498 of the Canadian Criminal Code, on the other hand, is broken down into four specific offences, which, taken altogether, amount to a similar general condemnation of restrictive agreements and practices. The significant difference between the American and Canadian laws is that three of the four subsections of section 498 contain the word "unduly". The fourth simply outlaws conspiracies, combinations, agreements or arrangements "to restrain or injure trade or commerce in relation to any article". On first impression, this seems to make a fundamental difference. The qualitative test of unreasonableness,[26] which the American courts interpreted into an act that did not, on the face of it, contain such a qualification,[27] is specifically provided by the Canadian legislator. As will be shown later, the Canadian courts have effectively interpreted the word "unduly" out of the act, where the American courts put the word "unduly" or "standard of reason" into the act. Since the restoration of a purist interpretation by the American courts—broadly speaking since the *Alcoa* case of 1945, a development which has made some commentators speak of a "new" Sherman Act—the effective differences between the relevant sections of the American and Canadian acts appear in this respect to have been reduced to very small proportions.

2. Section 2 of the Sherman Act declares it an offence to

[26] In the *Standard Oil* case (*supra*, footnote 19) and other leading American cases, the term "undue" is used as synonymous with "unreasonable".

[27] As mentioned earlier, the reasonableness test predominated between the first *Standard Oil* decision of 1911 and the *Alcoa* case of 1945.

"monopolize or attempt to monopolize or combine or conspire, with any other person . . .". The American legislation thus appeared to attack not the enjoyment of monopoly power as such but the act or attempt of "monopolizing". By contrast, the Canadian Combines Investigation Act condemns a "merger, trust or monopoly", of which it gives the following definition: "(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". Section 32 of the same act makes it an offence for a person to be a party or privy to or knowingly to assist in the formation or operation of a combine—which, by definition, includes monopolies. Thus it appears that the Canadian legislation condemns monopolies as such, not only the act of monopolizing but the attempt to monopolize. As has been shown, recent American cases, since the *Alcoa* case, have gone a long way to turn the condemnation of "monopolizing" into a condemnation of the enjoyment of monopoly power as such, subject only to the rather modest restriction that monopoly power must not have been attained simply passively, as a result of developments in which the accused enterprise took no active part. In this respect, then, recent American judicial interpretations appear to have brought the American law closer to the position as it has been formulated from the beginning in the Canadian Combines Investigation Acts.

3. A further narrowing of the gap results from the Clayton Act of 1914, in the amended form of the Anti-Merger Act of 1950. Under this act, the acquisition of "the whole or any part of the stock or other share capital and . . . the whole or any part of the assets of another corporation engaged also in commerce . . . is forbidden in the sphere of federally regulated commerce where "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly . . .". This prohibition, originally confined to the acquisition of stock, was in 1950 extended to the purchase of physical assets, a form of merger increasingly favoured in modern commercial practice. The significant limitation in the Clayton Act, for which there is no parallel in the general prohibition of restrictive trade practices in the Sherman Act, consists of course in the condition that it must "substantially lessen competition". In other words, mergers, unlike

restrictive trade agreements or attempts to monopolize, are not unconditionally prohibited.

By contrast the Canadian Combines Investigation Act contains the much debated and, on the face of it, significant limitation, that the "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; . . .". Here is, one would think, a most fundamental difference between the American and the Canadian approach to restrictive combines. Canadian law seems also to be the antithesis of the English common-law approach, which, as we have seen, was content to equate the public with the private interest. The much-quoted remarks of Mr. Mackenzie King, in introducing the 1923 version of the act, emphasized the importance of the "public interest" qualification.[28] Yet the Canadian courts, as we shall see, have virtually eliminated the substantial significance of the "public interest" clause, so that the differences between Canadian and American law have at least theoretically been reduced to insignificance.

Anti-Combines Law and Judicial Law-Making

The immensely complex problem of legislative and judicial control of economic behaviour in modern industrial society has been superficially simplified by one of the most widespread of illusions current among lawyers: that a law court, because it should not usurp the function of the legislator, is not concerned with questions of economic policy. In an often-quoted dictum Hope J. (as he then was) said:[29] "It is well for the Courts to avoid even the suspicion of political bias but rather to leave to the statesmen and the economist, the decision as to what modifications of the law, indeed if any, are in the public interest. . . . I do not feel that I am justified in the circumstances of this case, in developing any new jurisprudence based on alleged new or fashionable economic theories, nor can I find anything in the reported judgments subsequent to *Stinson-Reeb Builders Supply Co.* v. *The King*, [1929] 3 D.L.R. 331, S.C.R. 276, 52 Can. C. C. 66, either in Ontario or the other Provinces or in the Dominion Courts, which departs in principle from the last named case". This dictum, based on a similar observation by Lord Finlay,[30]

[28] House of Commons Debates, 1923, p. 2520. Cf. Blair, Combines, Controls or Competition? (1953), 31 Can. Bar Rev. at p. 1094.

[29] *R.* v. *Container Materials Ltd.*, [1940] 4 D.L.R. at pp. 298-9, 74 C. C.C. at pp. 118-9.

[30] See *supra*, footnote 8.

was quoted with approval by Spence J. in the *Fine Paper* case.[31] The American courts, having for many decades been constantly concerned with the political, social and economic implications of constitutional clauses and other legislation, do not share this simple belief in anything like the same generality.

It is, of course, true that in a society based on a separation of powers and the independence of the judiciary some basic distinction between the making and the application of law is vital and salutary. But, once again, the elevation of a general guiding principle into an absolute and unqualified dogma has led to a remarkable display of self-deception. This is, of course, part of the wider problem of the judicial process, which it is not the purpose of this article to discuss in detail.[32] The belief that courts are not in any circumstances concerned with the economic and political foundations or consequences of their judgments leads only too often to the substitution of an inarticulate or semi-articulate philosophy for a sober investigation. There is no more telling illustration of such an illusion than the judicial interpretation of anti-monopoly law.

American, British and Canadian courts alike, in interpreting the respective laws dealing with restrictive trade practices, have engaged in law-making on the grand scale. It may well be that they had no alternative. The present writer's criticism is not of their attempt to decide on one policy or another but rather of their complacency in believing that in making such a choice they steered clear of conflicting economic or political theories.

Reference has already been made to the truly remarkable simplicity with which the British courts have equated the public with the private interest in matters of restraint of trade, cartel practices and monopolies to such an extent that not a single decision of any consequence[32A] has held an agreement to be in violation of the public interest where it was held to be reasonable as between the parties. The result was that, until the enactment of the Monopolies and Restrictive Practices (Inquiry and Control) Act of 1948, car-

[31] *R.* v. *Howard Smith Paper Mills et al.*, [1954] 4 D.L.R. 161.

[32] On this problem see my articles, Judges, Politics and the Law (1951), 29 Can. Bar Rev. 811, and Stare Decisis at Common Law and under the Civil Code of Quebec (1953), 31 Can. Bar Rev. 723. See further Stone, Province and Function of Law (1947), Ch. VII; Paton, Jurisprudence (2nd ed., 1951), Ch. VIII; Friedmann, Legal Theory (3rd ed., 1953), Ch. 23.

[32A] The solitary exception was *Wyatt* v. *Kreglinges & Fernau*, [1933] 1 K. B. 793, where the Court of Appeal held the plaintiff disentitled to claim a pension which the defendants (his employers) had coupled with an undertaking not to enter into business in the wood trade. The aged plaintiff had no intention to start another business; he wanted his pension. But, for once, the "public interest" was disinterred to hold the agreement void

tels, monopolies and other restrictive practices proceeded practically unhindered.[33] The American courts, as has also been mentioned, resorted to a different kind of law-making when the Supreme Court in 1911 interpolated the standard of reasonableness into section 1 of the Sherman Act and thus, for several decades, turned the unconditional condemnation of restrictive trade practices into a conditional one, with the result that mergers and many other forms of restrictive agreements proceeded apace until a stricter interpretation of the legislation attempted to stem the process.

It is often asserted that the Canadian courts, by their interpretation of the Canadian legislation, have adopted a clear, simple and consistent line.[34] Perhaps the simplicity is deceptive. What can scarcely be denied is that it has been reached by a process of law-making. If Parliament qualified the condemnation of restrictive trade practices and of combines by such terms as "unduly" or "detriment" to the "interest of the public", it can reasonably be presumed that some meaning was to be attached to the qualifications. There is strong support for this in the remarks of Mr. King in the House of Commons previously mentioned. Yet, the courts have steadily eliminated the material significance of both qualifying formulas to the point where they might just as well not have been written into the law. For the details, reference can be made to the able discussions of the problem in this Review and elsewhere.[35] There is indeed isolated support for the proposition that "unduly" and "has operated or is likely to operate to the detriment of the interest of the public" have a substantial meaning. In *R.* v. *Famous Players*, the court acquitted the defendants of the charge of having offended against the Combines Investigation Act by preventing or lessening competition in the exhibition of films. Garrow J. stressed that it must be shown that such a combine "operate[s] or tend[s] to operate to the detriment of the public whether consumers, producers

[33] For a detailed analysis, see Friedmann, Law and Social Change in Contemporary Britain (1951), Chap. 6.

[34] See, *e.g.*, Restrictive Trade Practices Commission: Report Concerning an Alleged Combine in the Distribution and Sale of Gasoline at Retail in the Vancouver Area (1954) p. 102.

[35] See Blair, Combines, Controls or Competition? (1953), 31 Can. Bar Rev. 1083; Sommerfeld, Free Competition and the Public Interest (1948), 7 U. of Toronto L.J. 413; and Wahn, Canadian Law of Trade Combinations (1945), 23 Can. Bar Rev. 10, *95*. See also now Clarry in (1955), 33 Can. Bar Rev. 96. Wahn differs from the others in maintaining that the courts have only condemned combines where they were in effect detrimental to the public interest, but his study concludes with pre-war cases and, whatever the correctness of the assertion up to that time—which is doubtful enough—later decisions have undoubtedly confirmed the contrary view.

or others".[36] In *R.* v. *Ash-Temple Co.*[37] Robertson C.J.O. observed, in a decision mainly based on procedural grounds, that Parliament must obviously have assumed that there were cases of restrictive trade agreements which were not "undue". In *R.* v. *Staples*[38] the Supreme Court of British Columbia (Robertson J.) gave as one of the alternative grounds of decision that the purchase of fifty per cent of the shares of one company by another was not an offence against the Combines Investigation Act, prohibiting mergers, trusts or monopolies, as it had not been shown that the purchase had "operated or was likely to operate to the detriment of or against the interests of the public".[39]

But the authority to the contrary is far more weighty. Above all, the three decisions of the Supreme Court in this field[40] all stress that the limitation of free competition as such, which is the "right" the legislator protects, is in itself presumed to be an offence against both the Criminal Code and the Combines Investigation Act. All the recent decisions confirm and underline this interpretation, as do the conclusions of the Commissioner in the Rubber Products, and of the Special Commissioner, in the Electrical Wire and Cable Products, Reports. In all these cases the courts rejected the argument that restrictive practices had not operated to the detriment of the public because prices had been reasonable, profits not excessive and co-operative arrangements necessary for the sake of the maintenance and stability of the industry, or indeed in the national economic interest. They have time and again adopted the phrases originally used by Osler J. in *R.* v. *Elliott*,[41] borrowed by Anglin J. in *Weidman* v. *Shragge*,[42] and reiterated by Kerwin J. in the *Container Materials* case[43] that, in the words of Anglin J.,

> the difference, in my opinion, between the meaning to be attached to 'unreasonably' and that which should be given to 'unduly' when em-

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[36] [1932] O.R. 307, at p. 344.
[37] [1949] O.R. 315, at pp. 338-339; 93 C.C.C. 267, at p. 281.
[38] [1940] 2 W.W.R. 627, at p. 642.
[39] This decision rests mainly on the remarkable ground that the purchase of fifty per cent of the shares of a wholesale fruit trading company by a retail company in the same field did not only not give control of the company's business but did not even, in the language of the Combines Investigation Act, give the purchaser an "interest in the business". It is difficult indeed to find any justification for this reasoning.
[40] *Weidman* v. *Shragge* (1912), 46 S.C.R. 1; *Stinson-Reeb Builders Supply Co.* v. *The King*, [1929] S.C.R. 276, 3 D.L.R. 331; *Container Materials Ltd.* v. *The King*, [1942] S.C.R. 147, [1942] 1 D.L.R. 529.
[41] (1905), 9 O.L.R. 648, at p. 662; 9 C.C.C. 505, at p. 520.
[42] (1912), 46 S.C.R. 1, at pp. 42-43.
[43] *Container Materials* v. *The King*, [1942] S.C.R. 147, at p. 159; [1942] 1 D.L.R. 529, at p. 539.

> ployed in a statutory provision[44] such as that under consideration is that under the former a chief consideration might be whether the restraint upon competition effected by the agreement is unnecessarily great having regard to the business requirements of the parties, whereas under the latter the *prime question certainly must be, does it, 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 every one?* [Italics supplied.]

It has not, to the present writer's knowledge, ever been pointed out that, of the four adjectives "improper, inordinate, excessive or oppressive", only one can be described as essentially quantitative. The other three are clearly qualitative and might well have left the courts to decide whether a particular practice was improper, inordinate or oppressive in relation to some standard of economic good or evil.[44A] The courts have chosen, however, to interpret all these words as purely quantitative and, therefore, to deprive the word "unduly" of any qualitative connotation.[45]

Although it was not perhaps inevitable, the interpretation of "has operated or is likely to operate to the detriment of the interest of the public" has moved along parallel lines. As in fact most prosecutions are nowadays based on both the Criminal Code and the Combines Investigation Act, it would have been very difficult for the court to deprive the word "unduly" of substantial meaning in the code and to give the words "detriment to the public interest" a substantial meaning in the act. Consequently, with a few exceptions stated earlier, the courts have held time and again that any limitation or restriction of the freedom of competition "is an encroachment on the public right".[46] In the *Eddy Match* case, the court admitted that the presumption that restriction of competition

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[43] No such distinction is made by the American courts, which appear to use both terms as interchangeable. See *Standard Oil* v. *U.S.* (1911), 221 U.S. 1.

[44A] Cf., in support, Clarry, *op. cit.*, footnote 35, at p. 106.

[45] In *R.* v. *Howard Smith Paper Mills Ltd.*, [1954] O.R. 543, [1954] 4 D.L.R. 161, 109 C.C.C. 65, Spence J. dealt with these expressions but the present writer finds it difficult to follow his reasoning. Counsel had argued that the words "inordinate, excessive and oppressive" were all words of quantity, whereas the word "prevent" was absolute. Therefore the qualifying adjective must mean an aspect of prevention or lessening of competition not necessarily inherent in the bare act of preventing or lessening. The learned judge professed to agree with this submission, but continued by saying that the words referred "to the manner of the prevention or lessening and *not* to the quantity of the prevention or lessening". In the light of his further observations, which will be analyzed later in the text, he seems to have meant that they were words of *quality* and that the word "undue" did, after all, have some qualitative meaning.

[46] Casey J. for the Court of Queen's Bench (Appeal Side) in *Eddy Match Co.* v. *The Queen* (1954), 109 C.C.C. 1, at p. 20.

was *per se* detrimental to the public interest "may be rebutted and it does not seem unreasonable to suggest that some 'control' might in exceptional circumstances be more advantageous to the public than if the business had been left free. But when faced with facts which disclose the systematic elimination of competition, the presumption of detriment becomes violent."[47] However, it seems clear why the Canadian courts have been so anxious not to weigh the factors which could determine whether or not the public interest has been involved. For such an examination must inevitably lead to an appreciation of economic factors like price policy, national importance of an industry, technological efficiency, reasonableness of profit and the other factors outlined in Mr. Blackwell Smith's suggested criteria.[48]

The motives which have led the Canadian courts to escape from the complex and difficult field of economic statistics and evaluation of economic policies are understandable enough. But, in order to arrive at this result, they have had to interfere patently with the words of the law and, every now and then, some courts seem to feel a certain uneasiness at this process, preferable though it is to the British courts' identification of the public with the private interest.

A serious doubt has, however, been thrown on the consistency and simplicity of the judicial interpretation of the terms "undue" and "interest of the public" by the recent decision of the Ontario High Court in the *Howard Smith* case.[49]

Tendency to Monopolize a Condition of Illegality?

Spence J. devoted considerable attention to the contention of Mr. Robinette, for one of the defendants, that no restrictive trade agreement was an offence against the Criminal Code unless the agreement had a monopolistic tendency. The learned judge accepted this contention. If this is confirmed by the Supreme Court, it will indeed mark a turning point in the interpretation of the Canadian law on restrictive trade practices.

On the face of it, the elaborate provisions of the Criminal Code dealing with restrictive trade practices would seem superfluous if

[47] *Ibid.*, p. 21. [48] *Supra*, footnote 13.

[49] *R.* v. *Howard Smith Paper Mills Ltd.*, [1954] O.R. 543, [1954] 4 D.L.R. 161. The actual decision in this case rests on the evidence that the defendants, comprising practically all the fine paper mills in Canada and a majority of the fine paper merchants, had both vertically and horizontally established a virtual monopoly in the production and merchandising of fine paper in Canada.

the law meant to penalize only monopolies. For monopolies are specifically dealt with in the Combines Investigation Act, together with mergers and trusts. Monopoly is indeed a species of restraint of trade, but it does not follow that it is the only one. There is some support for the contention of Spence J. in the earlier American cases, for example in the first *Standard Oil* case,[50] symbolic of the period in which the American courts aimed at a restrictive interpretation of the Sherman Act, and one almost entirely abandoned in recent cases. As for the Canadian cases, it has been observed[51] that the monopoly provisions of the Combines Investigation Act have hardly been used and that almost all Canadian cases to date[52] have been combines cases short of monopolistic situations. Even if, as Spence J. contends, many of the decided cases dealt with monopolistic or near-monopolistic situations, this is a very different matter from saying that only monopolistic agreements come under the legislation. The *Weidman* and *Container Materials* cases dealt with monopolies. The quotation from Duff J.'s judgment in the *Weidman* case establishes that in that particular case the agreement had for its object the establishment of a virtual monopoly in the junk and bottle trade, but it is no authority for the proposition that in no other circumstances would there have been an illegal agreement. In *R.* v. *Famous Players*,[53] also quoted by Spence J. in support, the learned judge found that there was no undue restriction of exhibition facilities. The decision in *R.* v. *Ash-Temple Co.* rests on rejection of the evidence produced by the Crown, and the only observation in faint support of the proposition of Spence J. is that "no witness was called to establish the magnitude of the business of the accused in comparison with the total business in dental supplies in Canada".[54] This is a feeble support for so sweeping a proposition. There is at least one authority directly contradicting the assertion (it is quoted by Spence J.) and that is the judgment of Boyd McBride J. in the *Bakeries* case,[55] where the contention that common design of an unlawful agreement under section 498(1)(d) must be a monopoly or virtually a monopoly is flatly rejected.

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[50] See Schwartz, Free Enterprise and Economic Organization (1952) p. 427.

[51] Blair, *op. cit.*, footnote 35, at p. 1087.

[52] That is, however, before the *Howard Smith* and the *Eddy Match* cases.

[53] [1932] O.R. 307.

[54] [1949] O.R. 315, at p. 331; 93 C.C.C. 267, at p. 273.

[55] *R.* v. *McGavin Bakeries Ltd. (No. 6)*, (1951) 3 W.W.R. (N.S.) 289, [1952] 1 D.L.R. 201.

It is, of course, a possible legislative policy to restrict objectionable trade practices to attempts to establish a monopoly. But this is a very different matter from holding that it is the present law of Canada. The attempt of Spence J. to do so is notable mainly as an indirect way of restoring some substantial meaning to the phrases "unduly" and "detriment to the interest of the public". Indeed it is in the same connection that the learned judge quotes Robertson C.J.O. in the *Ash-Temple* case to the effect that it was plainly in the contemplation of Parliament that some agreements may prevent or lessen competition but not do so "unduly". It may then be that the judgment of Spence J. reflects the dilemma in which the courts have landed themselves by flatly rejecting any consideration of "unduly" and "public interest" other than possibly a quantitative one. But only a little later Spence J. refuses to go into the implications of this doubt by reiterating the well-worn assertion that a court must not enter into the economic or political aspect of the situation lest it lose its judicial impartiality.

If the proposition that only agreements tending to monopolize are offences against the act were confirmed to be the law of Canada, it might establish a clear distinction, for purposes of the law of restrictive trade practices, between oligopolies and monopolies. There is much to be said for such a theory. It is, for example, contended in Professor Galbraith's *American Capitalism* that countervailing power among powerful groups of producers, wholesalers, retailers or producers of alternative materials in indirect competition with each other does establish enough of an equilibrium to prevent the dominance of any one group. There is a difference not only of quantity but of quality between the complete control of an industry by one firm and the predominance of two, three or four firms — by far the more frequent situation in many of the most important modern industries — which do compete, or are at least capable of competing, with each other. It would also be necessary to define the deceptively simple word "monopoly" more closely. Is it sufficient, for example, to prove monopoly in a certain limited area? This is obviously the view taken by the Restrictive Trade Practices Commission in its recent report on the distribution and sale of coal in the Timmins-Schumacher area.[55A] In that case, the distinction between "monopolistic" and other situations might amount to very little in practice. All these are, however, matters of economic analysis which the Canadian courts

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[55A] See, *infra*, footnote 61.

profess to be able to leave alone. At any rate, in accepting the contention that only monopolistic agreements come under the Canadian anti-combines legislation, Spence J. added a further piece of law-making to the already formidable record of the Canadian courts in this field.

Unsolved Policy Problems

The questions with which this article started remain largely unsolved. Uncertainty and uneasiness remain under the deceptive simplicity of the formula that any restriction of competition must be presumed to be *per se* an offence against the law. How much restriction must there be? To what extent and at what point do bigness, amalgamation and co-operative arrangements cease to be a sound process of rationalization, or the result of successful competition, and begin to offend the law? Is "competition" to be confined to production or trade in identical materials and processes, or is the more important aspect of competition in a dynamic society that between alternative materials and processes competing for the consumer's preference (for example, coal, electric power and natural gas; copper and aluminum; wool, silk and synthetic fibres; wood, metal and plastics)?

And it is still uncertain to what extent the Canadian law condemns bigness as such. Although there are some single-firm monopolies in Canada—and not minor ones either—the recent *Eddy Match* case[56] is the first major monopoly case to come before the courts (with the possible exception of the *Container Materials* case). Here the Eddy Match Co. Ltd. had acquired controlling interests in all the major Canadian manufacturers of matches, thus establishing an effective near-monopoly. But this case does not establish that, under Canadian law, bigness as such is an offence. There was enough evidence of aggressive abuse of dominant power, such as the introduction of "fighting brands" undercutting an independent competitor until he was driven out of business, when the fighting brand would be withdrawn and the former higher prices restored. One possible justification for a differentiation in treatment of monopolies, established through purchase, merger or other forms of integration, and restrictive combine agreements is that, in the former case, a firm takes all the risks of ownership whereas in the latter a number of firms seek to achieve

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[56] *Eddy Match Co.* v. *The Queen* (1954), 109 C.C.C. 1.

similar results in the cheap way.[57] In practice, of course, much depends on the scope and the direction of the investigating activities of the Director of Investigation and Research. It is obvious that out of the innumerable number of potentially unlawful restrictive agreements and combinations the Director of Investigation and Research must pick a very limited number. To some extent, the choice must depend on accident; the director's staff can hardly be adequate to comb even superficially the full range of business and industrial practices throughout the country, with a view to possible infringements of the law. But restrictive practices significant enough to offend a social group or an economic interest of any significance will sooner or later be uncovered, through provincial parliaments, press reports, complaints from interested groups, and so on. Thus an element of discrimination—in effect a rough process of sorting out "undue" restrictions of free trade from others—follows from the decision of the director whether to pursue a certain matter, to make a report on it, or to drop it as not worth serious consideration. After the preliminary sorting out at the investigating stage, a further sifting process occurs through the reports of the Restrictive Trade Practices Commission, which furnish the main, though perhaps not the only material for the decision of the Minister of Justice whether to prosecute or not.

The Restrictive Trade Practices Commission and the Public Interest

It may well be objected that it is unsatisfactory for industry and business, on the one hand, and for the public, on the other, to depend for a sifting of objectionable from harmless restrictive trade practices on the decisions of authorities, two of which are purely administrative or political. It remains to examine whether the third, the Restrictive Trade Practices Commission constituted by the legislation of 1952, supplies the missing link. Is it the function —and the practice—of the Restrictive Trade Practices Commis-

[57] Kahn, A Legal and Economic Appraisal of the "New" Sherman and Clayton Acts (1954), 63 Yale L.J. 293, at p. 345: "If a company is willing to assume the risks of ownership, it must be permitted a wider measure of control than where it is contracting with independent parties. Investment cannot be equated at law with coercion and exclusion. It would also be economically disastrous to deny to a big business the right to produce for its own needs or to do its own marketing; to utilize some by-product idea or material in a new field; or to enter some new market, perhaps by acquiring a firm already there. Such integration is a prime source of economic progress, and effective competition. The achievement of such differential advantages by coercion of suppliers into discriminatory preferences, or of marketers or customers into exclusive arrangements, does not make a comparable contribution."

sion to consider the public interest and the "undue" character of restrictive agreements, that is, to do what the law courts have almost consistently refused to do?

A strong suggestion that the new Restrictive Trade Practices Commission in fact do just that was contained in the report of the MacQuarrie Committee to Study Combines Legislation:[58]

> There has been some tendency for the report to become merely a preliminary stage in prosecution. This tendency should be checked. The report should review the evidence, set out the facts of the conditions or practices complained of and inform the Minister and the public as to how, in its opinion, the practices worked. Nothing that is helpful in understanding the conditions or practices or will contribute to the maintenance of competition and the lessening of monopoly should be excluded from the report. It should reach conclusions on whether or not competition has been restricted or lessened *and whether in the opinion of the board the conditions or practices have operated or are likely to operate to the detriment of the public.*[59] The board should not, however, be required or expected to determine specifically whether or not, in its opinion, an offence has been committed.
>
> We do not think the report should recommend prosecution or non-prosecution. This should be left to the Minister's decision on the basis of the report and such advice as he may seek. We consider that the report has important functions other than that of furnishing a preliminary verdict as to whether or not the accused shall be prosecuted.

While this statement left the ultimate decision on prosecution to the minister, as the politically responsible authority, it expressed a clear intention that the new commission should examine the substantial aspects of the public interest and not, like the law courts, presume that any substantial restriction is ipso facto "undue" or, in the case of a combine as defined by the Combines Investigation Act, "to the detriment or against the interest of the public". The amending act of 1952 would seem to have accepted this characterization of the commission's task, which it defined as follows in a new section 19(1):[60] "The Commission shall as soon as possible after the conclusion of proceedings taken under section 18, make a report in writing and without delay transmit it to the Minister; such report shall review the evidence and material, appraise the effect on the public interest of arrangements and practices disclosed in the evidence and contain recommendations as to the application of remedies provided in this Act or other remedies". Does the practice of the Restrictive Trade Practices

[58] Report of the Committee to Study Combines Legislation (Ottawa, Queen's Printer, 1952) p. 34.
[59] Emphasis supplied.
[60] Now R.S.C., 1952, c. 314, s. 19(1).

Commission give any indication about the way in which it interprets its own functions? So far the commission has published eight reports,[61] some of which, however, are exclusively concerned with fact inquiries and are of no legal interest.

In possibly the most important of the published reports the evidence submitted to the commission by the Director of Investigation and Research alleged that a combine existed during 1951 and 1952 in the Vancouver area in the province of British Columbia in connection with the retail sale of gasoline. The charge was that the retail dealers in gasoline in the Vancouver area had entered into an agreement to establish and maintain a minimum retail mark-up of twenty per cent of the wholesale tank-wagon price of gasoline, plus provincial tax, delivered into the area. The result had been a uniform retail price for gasoline at substantially all retail outlets. This, it was submitted, prevented or lessened competition in the sale of gasoline in the Vancouver area.

There was little dispute about the facts. The main defence of the investigated merchants and the several interested trade associations which had participated in the arrangements was twofold: (a) it was submitted that the general twenty per cent mark-up was only a generalized and standardized expression of a price movement which would have taken place in any case; and (b) it was also maintained that, without such a general mark-up, a substantial proportion of the gasoline dealers in the area would have been forced to close their stations or dispose of their businesses, because conditions in the gasoline retailing business would have become unprofitable.

The commission entered into a very detailed examination of these and related arguments. Nor did it content itself with the examination of the data and arguments submitted in evidence on behalf of the retailers; it obtained further statistical data

[61] Report Concerning Alleged Instances of Resale Price Maintenance of Soap Products in the Montreal District (1953); Report Concerning Alleged Price Discrimination between Retail Hardware Dealers in North Bay, Ontario (1953); Report Concerning Alleged Attempt at Resale Price Maintenance in the Sale of Certain Household Supplies in the Chicoutimi-Lake St. John District, Quebec (1953); Report Concerning an Alleged Combine in the Distribution and Sale of Gasoline at Retail in the Vancouver Area (1954); Report Concerning Alleged Instances of Resale Price Maintenance in the Sale of China and Earthenware (1954); Report Concerning Alleged Instance of Resale Price Maintenance in the Distribution and Sale of Television Sets in the Toronto District (1954); Report Concerning an Alleged Combine in the Manufacture, Distribution and Sale of Wire Fencing in Canada (1954); Report Concerning an Alleged Combine in the Distribution and Sale of Coal in the Timmins-Schumacher Area (1954).

from official sources. Having examined comparative turnover, prices, gross and net earnings, general price movements in the area, the number of retailers at different periods, and other relevant facts, it concluded that "even if we were to accept for the moment the proposition that the fixing by agreement of a uniform increased resale price for gasoline should not in itself be considered detrimental to the public, the attempt to show that the new prices were actually reasonable and even required by the circumstances has failed".[62] This detailed examination of the reasonableness of the arrangements does not, however, imply an acceptance by the commission of the thesis that it should make the reasonableness of any restrictive agreements from the point of view of the public interest the decisive issue. In a special section devoted to this matter,[63] the commission observed:

> (a) According to Section 2(1) of the Act, any combination having for its object the fixing of a common price or a resale price is deemed to be objectionable if it 'has operated or is likely to operate to the detriment of or against the public'. Parliament obviously intended to preclude the formation or operation of combinations, not only in cases where it may be verified that the public has suffered actual detriment as a consequence thereof, but also in cases where, on the face of the arrangements made and the circumstances in which they have been entered into, they are likely to operate in such a prejudicial manner.
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> (b) The judges of our courts, in applying this aspect of our legislation to specific cases, appear to have held quite uniformly that an agreement to fix a common resale price for a given commodity throughout an area of substantial importance is, by its very nature, necessarily contrary to the interest of the public. In our opinion, it must at least be admitted that proof of such an agreement establishes *prima facie* evidence of public detriment, and that it should be deemed reprehensible, unless, in the light of all the circumstances, reasonable and convincing justification therefor is given, showing clearly that the public could not have been affected prejudicially thereby.
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> (c) Under our economy, which is primarily one of free enterprise, the essential interest of the public in the existence of competition is accepted as a fundamental principle. This right of the public is automatically interfered with whenever arrangements are made which are designed to prevent the interplay of normal competitive factors, such as freedom on the part of dealers in a given commodity to set their own prices according to their individual circumstances. An agreement or arrangement to set a common resale price over a considerable area for a commodity in general use, more especially where there is no practical substitute for the commodity, can have but one result if it is made uniformly effective, viz., the complete elimination of price competition in which the public has this essential interest. Such was

[62] *Op. cit.*, p. 97.

[63] *Op. cit.*, pp. 117ff.

the case here, where the application of the plan was unanimous, where the area covered was considerable and where the commodity involved, gasoline, was in such general use that the public had no alternative but to pay the prices so fixed. This lack of alternative was emphasized by the fact that for gasoline there is no readily available substitute.

(d) In normal circumstances, price control cannot be considered a safe or fair regulator of prices. Therefore, it should only be resorted to in case of necessity in the public interest. Free competition will always be a more normal regulator, and, except under very special circumstances, will result in prices that are not unfair to either the distributor or the consumer. Price control being an exception, justified only in cases dictated by a superior public interest, it should not be left in the hands of private citizens or private organizations. Only a public authority, such as Parliament, the Government, or an administrative body responsible to the representatives of the people, should be entrusted therewith. Human nature being what it is, we may be sure that price control, exercised by persons who have a direct interest as sellers of the commodity being regulated, will result in one-sided quasi legislation, to the very probable detriment of the public.

The Restrictive Trade Practices Commission reiterated much the same position in another report, concerning an alleged combine in the manufacture, distribution and sale of wire fencing in Canada. If anything, its position here comes even closer to that of the Supreme Court. The allegation examined in this second report was that a series of agreements existed among a number of companies producing virtually all the woven wire fabrics made in Canada, which thus enjoyed "a virtual monopoly of the production and sale of wire fencing and related products owing to their control over the production of woven wire fabrics and the fact that related products are sold in combination with these fabrics".[64] The report emphasizes the exclusion of competition through a comprehensive price-fixing agreement and bases on it the assertion that price-fixing as such must be presumed to be a detriment to the public interest.[65] The report specifically rejects the argument that price-fixing agreements must be proved to have caused specific detriment to the public in order to offend against the law:

[64] *Op. cit.*, p. 2.

[65] This is in accordance with prevalent American practice. See *Standard Oil Co. of New Jersey* v. *U.S.* (1911), 221 U.S. 1; *U.S.* v. *Trenton Potteries Co.* (1927), 273 U.S. 392. But Spence J., in *R.* v. *Howard Smith Paper Mills Ltd.* (*supra*, footnote 49) doubts this interpretation in view of the words: "enhance prices unduly" in s. 498 (1) (c) and suggests that a bare agreement to "fix prices" is not by itself sufficient to establish an offence under s. 498 (1) (d). The commission has reaffirmed its position in its Report Concerning an Alleged Combine in the Distribution and Sale of Coal in the Timmins-Schumacher Area, issued late in 1954. Here a group of dealers controlling over ninety per cent of the coal trade in the Timmins-Schumacher area had established uniform retail prices by agreeing on a margin or markup per ton of coal.

> It was argued before the Commission, as it has been in many previous proceedings under the Combines Investigations [*sic*] Act, that a combination by way of actual or tacit contract, agreement or arrangement having or designed to have the effect of fixing common prices or preventing or lessening competition in the sale or distribution of a commodity over a considerable area of trade should not be considered as operating or being likely to operate to the detriment or against the interest of the public unless it could be demonstrated that the prices so fixed were unreasonable or that the public suffered in some specific manner which could be measured as a result of the prevention or lessening of competition through the operations of the combination. Looked at closely this argument amounts to a contention that even though the operations of a free market in the particular commodity are so interfered with as to eliminate the element of competition in price it should not be held that the public interest had been detrimentally affected or was likely to be so unless it could be shown that the prices fixed by the combination were higher than those which would be set if the industry were subject to some form of public regulation. Placed on this basis the argument is, in effect, a rejection of the competitive principle and an acceptance of the thesis that a system of non-competitive prices administered by a private interested group is more in the public interest than the self-regulating system of a competitive economy. The legislation has never been construed in this fashion by Canadian courts which have consistently held that the legislation reflects a fundamental principle of our economic system, namely, 'the protection of the public interest in free competition'. In application of this principle it has been held by the courts that an agreement having for its direct object the fixing of a common price among competitors in the sale of a given commodity in any substantial part of the market is, by its very nature, an agreement which is detrimental or is likely to be detrimental to the public. The effect or design of such an agreement is to eliminate one of the essential elements of competition, namely, competition in price and to deprive the public of the benefit and safeguard of competition in the determination of prices.[66]

It was only a reinforcement of the conclusions of the report that, in many cases, the exclusion of competition by price-fixing had been masked by sham competitive tenders which, in effect, had been prearranged.[67] Another aspect of the public interest was stressed in an earlier report,[68] where a manufacturer had discriminated against a wholesale grocery which, by introducing a cash-and-carry system, had been able to sell products at less than the current price. The commission stressed the public interest in experimentation in methods of merchandising.

[66] *Op. cit.*, p. 102.

[67] Very much, it appears, as in the case of the Toronto electrical contractors, dealt with in *R.* v. *Alexander Ltd.*, [1932] 2 D.L.R. 109.

[68] Report Concerning Alleged Attempt at Resale Price Maintenance in the Sale of Certain Household Supplies in the Chicoutimi-Lake St. John District, Quebec (1953).

To judge by present performance, the only difference between the former and the present procedure appears to be that the Restrictive Trade Practices Commission will in fact give some attention to the economic merits of the arrangements in question, without, however, admitting that its conclusions need be influenced by the results of such an investigation. This seems an unnecessary and dubious half-way position. American judicial practice shows a periodic swing of the pendulum between the rule of reason and the *per se* rule. The practice of Britain and most other countries which have any anti-monopoly law worth mentioning seems to concentrate on the *ad hoc* examination of cartels, combines and other restrictive arrangements by administrative authorities or economic commissions which openly and avowedly examine the reasonableness of the arrangements from the point of view of public policy.[69] It would seem that the law of 1952 has presented Canada with a unique opportunity to combine two methods: a strictly legalistic approach by the courts (which have, as previously shown, freed themselves from any necessity of examining wider economic and public policy considerations by their interpretation of "undue" and "public interest") with a more widely based approach by a commission that is free—and has indeed been directed—to weigh all the factors involved from the standpoint of

[69] See, in Great Britain, the Monopolies and Restrictive Practices (Inquiry and Control) Act, 1948, 11 & 12 Geo. 6, c. 66, s. 14:

"14. *Public interest.*—In determining whether any conditions to which this Act applies or any things which are done by the parties concerned as a result of, or for the purpose of preserving, any conditions to which this Act applies, operate or may be expected to operate against the public interest, all matters which appear in the particular circumstances to be relevant shall be taken into account and, amongst other things, regard shall be had to the need, consistently with the general economic position of the United Kingdom, to achieve—

(a) the production, treatment and distribution by the most efficient and economical means of goods of such types and qualities, in such volume and at such prices as will best meet the requirements of home and overseas markets;

(b) the organization of industry and trade in such a way that their efficiency is progressively increased and new enterprise is encouraged;

(c) the fullest use and best distribution of men, materials and industrial capacity in the United Kingdom; and

(d) the development of technical improvements and the expansion of existing markets and the opening up of new markets."

In its reports to date, the commission has attempted to work out "public interest" criteria from case to case. It has, for example, condemned restrictions on freedom of entry or market-sharing arrangements, but not the dominant position of a firm as such, or collaboration even in respect of price-fixing, unless disadvantages (for example, unreasonably high prices) outweighed advantages (for example, maintenance of technical standards) from the public standpoint.

the public interest. If the commission emphasizes too strongly the traditional legal interpretation of the act, it will in effect become a law court of first instance, predigesting the material, but not effectively differing in approach from the three levels of law courts which may subsequently be seized of the same matter.

The need for a more discriminating and differentiated approach to the immensely complex problem of anti-combines law will be increasingly felt in Canada. The simplicity—one is tempted to say the innocence—of the Canadian juridical approach has probably been acceptable so far only because the practical application of the Canadian anti-combines law has been kept within very modest limits. The situation has now altered. The practical scope of Canadian anti-combines law is about to approach in intensity—though not in quantity—that of American law. Yet Canadian law—at least in its present interpretation—lacks some of the escape valves which have made the American economy less of a model of free competition than is generally admitted.

Two very important groups of exceptions—which constitute a severe stain on the white shirt of pure competition—are given by the Webb-Pomerene Act of 1918-1952, which exempts from anti-trust legislation all "association[s] entered into for the sole purpose of engaging in export trade and actually engaged solely in such export trade" or "agreement[s] made . . . in the course of export trade by such association" (provided that the associations or agreements are not in restraint of trade within the United States) and the Miller-Tydings Act of 1937-1952, which legalizes resale price maintenance agreements in so far as state legislation (in the state of resale) has sanctioned them.[70] Another difference may be of even greater importance. The uncertainties which, perhaps inevitably, surround the application of anti-combines legislation to the infinite variations of practical behaviour have been somewhat mitigated in the United States, partly by the regular Trade Practice Conferences held between the Federal Trade Commission and the industries concerned,[71] preparatory to or as an alternative to the cease and desist orders, and, secondly, by the practice of industries, before major transactions, to consult the Department of Justice about their legality.[72]

[70] Resale price fixing is at present legalized in most American states.

[71] Although the commission primarily deals with unfair competition, its jurisdiction has been held to include conduct in restraint of trade violating the Sherman Act.

[72] The United States Department of Justice has no authority to give advisory opinions. But, in the case of proposed mergers under section 7 of the Clayton Act, both the department and the Federal Trade Com-

Nor should it be forgotten that the relatively recent trend towards stricter enforcement of Canadian anti-combines law has coincided with a period of rapid economic expansion. In such periods, restrictionist schemes are either unnecessary or they are not enforced with great severity. It is in times of depression, of a threatened or shrinking economy, that restrictionist schemes are devised and acquire their main significance. And it is far from certain that in times of national economic crisis public opinion would be willing to support an unmitigated anti-combines policy.[73] Unless the new Restrictive Trade Practices Commission is prepared, more fully than it has been so far, to examine the pros and cons of a particular restrictive scheme, it may well be that a revolt against the present legislation—made more rigid than intended by the interpretation of the courts—will become so powerful as to bring about radical legislative modifications. The pendulum might then swing back too far. In a period of economic stagnation industry and labour would almost certainly combine in their attacks upon the law.

It is not suggested that a different approach by the commission would solve the many theoretical problems at which the present article has only hinted. The realities of economic and social life are infinitely complex. The use of sweeping formulas, such as "right to free competition" or "freedom of enterprise", disguises the necessity for the adjustment of competing values and interests, as much as the use of natural-law formulas cloaks the complexities of the judicial process. The difference is between guiding ideas —which are salutary and necessary—and myths—which are dangerous. If the Restrictive Trade Practices Commission were to imitate the rigid approach by which the Canadian courts have debarred themselves from examining anything but the formal aspects of restrictive trade practices, the result would be, not an indiscriminate application of the law, but discrimination without public control in the hands of the administrative and political

mission have a procedure for giving clearance. In non-merger cases, the department has developed a practice of binding itself not to resort to criminal action under certain conditions. A recent example was a proposed merger between the Bethlehem Steel Co. and the Youngstown Sheet & Tube Co., which, in the opinion of the Department of Justice, as reported, would have been a transaction contrary to the anti-trust legislation.

[73] Characteristic examples of the complex problems which may arise are the Lancashire calico industry—currently the subject of an intensive study by the British Monopolies and Restrictive Practices Commission—or the traditional cartels in the Ruhr area, which are attributable in part no doubt to the cartel-mindedness of European industry, but in larger part to the social needs of a densely settled community that would be severely hit by the full blast of unrestrained competition.

authorities. The reports of the commission are published and subject to public discussion. They are the proper medium for bringing to bear on this complex problem the criteria on which many distinguished economists and lawyers have worked for many years.

Summary of Conclusions

1. By their interpretation of the words "unduly" and "to the detriment or against the interest of the public" the Canadian courts have given the law an unintended and unnecessary rigidity.

2. American cases and writings on anti-trust law are of considerable persuasive authority for Canada, subject, however, to certain important differences in the texts of the statutes.

3. The Canadian law condemns not only monopolistic practices but all restrictive trade practices of the types enumerated in the Criminal Code and in the Combines Investigation Act. Mergers, trusts and monopolies are but one species of restrictive trade practices.

4. As the courts have debarred themselves from examining the public interest, it becomes all the more imperative that the Restrictive Trade Practices Commission should use its statutory power to examine the public interest in more than a formal sense. The guiding lines may lie in the criteria for workable competition.

Man on Trial

We are met in the shadow of Mount Pilatus. Do you know the legend? It is said that the ghost of the Judaean procurator, following upon his suicide, haunts those mountain heights above us; and that the magistracy of Lucerne in days gone by passed more than one order forbidding citizens from breaking in upon his uneasy rest. It is said that when disturbed the figure of the old Judge would appear, accompanied by the fiercest turmoil of the elements — storms, thunder, and lightning — and that with bowed head he would go through the motions of washing his hands, before sinking back into the waters of the lake from which he rose. . . .

For he was a lawyer who preferred his executive interests to his judicial duty when once he had before him a Man in danger. We today are lawyers face to face with Man in danger; will it be said of us that in the crisis of our day we too have been found wanting? Never before have there been such scientific powers for good or evil entrusted to the race of men: never before such need therefore for bringing the unity of the world and the discoveries of human intelligence under the control of eager justice and universal law. (W. Harvey Moore, Q.C., Honorary Secretary General of the International Law Association, Report of the Forty-fifth Conference held at Lucerne, August 31st to September 6th, 1952)