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DEVELOPMENTS IN ANTI-COMBINES ADMINISTRATION

A. A. FATOUROST

The Canadian legislation on combines and monopolies is now almost seventy-five years old. The first Act "for the prevention and suppression of combinations formed in restraint of trade" was passed in 1889 but its amended language is still to be found in the central provisions of the Combines Investigation Act presently in force.\(^1\) Over the years, there have been no doubt several changes in the structure and language of the Act, but the original policies are still very much alive. The Act's enforcement has been, at best, spotty; it is only since 1952 that the public has become aware of the Act and its exact role in the Canadian economy is still uncertain and undefined. As a contribution to a future appraisal and clarification, the present article attempts to examine and interpret some of the more recent developments in the administration of the Act.

The Combines Investigation Act in the 'Fifties

The administration of the Act in the Nineteen Fifties has been the subject of a valuable recent study by Professors Rosenbluth and Thorburn.\(^2\) After a penetrating description of the economic and political background of the 1952 amendments to the Act, the authors devote the central part of their study to an examination of the actual results of these amendments. How effective has the Act been in achieving its aims? It is the impression of many students in this field that the Act's real effectiveness is very limited.\(^{2A}\) Rosenbluth and Thorburn now provide some concrete data to confirm these impressions.

They first point at the low level of governmental appropriations devoted to the anti-combines administration as a clear indication of its low level of priority. After 1952, the expenditures of the Combines

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\(^1\) CAN. REV. STAT. c. 314 (1952), as amended, especially by STAT. CAN. c. 45 (1960).


Branch increased considerably, but there has been no significant increase, in absolute or in relative terms, since 1954. In fact, the proportion of the total non-military budget allotted to anti-combines activity has been declining rather than increasing most of the time. The actual effect of anti-combines legislation on the Canadian economy is difficult to determine with precision. Close analysis of the activities of the Combines Branch has convinced Professors Rosenbluth and Thorburn that the Act's effectiveness is very limited. Their argumentation could have been perhaps more detailed and therefore more convincing, but it is difficult to dispute the validity of their conclusion.

What is the reason for this lack of effectiveness? Rosenbluth and Thorburn offer a number of explanations, though they do not pretend to give a final and exhaustive answer. They point out that, in periods of general prosperity, monopolistic situations are not greatly resented by the public and the enforcement of anti-combines legislation tends to be unenthusiastic and ineffective, often limited to a few nominal gestures. Emergencies and crises, however, stimulate public feeling and governmental action against monopolistic situations. The authors show, for instance, that the ban on resale price maintenance in 1951 was intended in major part as a move against inflation. Basically, then, it is the lack of enthusiasm of the government that renders the Combines Investigation Act ineffective.

There is, however, another cause which Rosenbluth and Thorburn particularly stress: the Government and the civil servants administering the Act work on the basis of a "cops and robbers" conception of the law of restrictive trade practices, an approach based on criminal law. Instead of treating the businessmen's tendency toward restricting competition as a natural tendency which needs to be checked, they insist on acting as if only a few criminal elements will ever attempt to attain a monopoly position or to restrict competition. Such a conception leads the Combines Branch to the neglect of research not directed against specific "suspect" situations; it leads

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3 See ROSENBLUTH AND THORBURN 57-83. Table VIIIC, certainly the most important and the one needing most clarification, is commented upon in two pages (78-79). Still, even as an "educated guess", Professor Rosenbluth's findings are authoritative; cf. ROSENBLUTH, CONCENTRATION IN CANADIAN MANUFACTURING INDUSTRIES (1956); ROSENBLUTH, CONCENTRATION AND MONOPOLY IN THE CANADIAN ECONOMY, in SOCIAL PURPOSE FOR CANADA 198 (M. Oliver ed. 1961).

4 ROSENBLUTH AND THORBURN 99.

5 Id. at 29-32, 101-103.

6 Under the present conditions, research undertaken by the Combines Branch is often strongly resented by the business community, despite the Branch's assurance as to the lack of any intention to base prosecutions on it. The reaction to the recent research on mergers is characteristic. See The Globe & Mail, Nov. 27, 1961, p. 26.
the courts to a refusal to convict where there is the slightest "reasonable doubt" and, less openly, to a reluctance to impose criminal penalties on respectable businessmen. Businessmen, too, find that the imposition of criminal penalties for business actions, often done on proper legal advice, is "unfair"; it rankles on their self-respect to be treated as criminals, subject to possible imprisonment (even if no one in Canada has ever gone to prison yet for price-fixing or monopolizing.)

The basic validity of this argument cannot be contested, even though it is surely incorrect to say that those in charge of the administration of the Act are not aware of it. Still, the criminal law character of the anti-combines legislation does limit the effectiveness of its enforcement on psychological grounds as well as by limiting the number and kind of measures that can be employed. But there is here a fundamental legal problem which a mere change of attitude (at least if it does not extend to the courts) is not going to solve. As Professor Rosenbluth and Thorburn are aware, anti-combines legislation is at present enacted by the Dominion Parliament by virtue of its criminal law jurisdiction, not its power to regulate trade and commerce. After the abortive legislation of 1919 and 1935, there has been no attempt to found the Act on the federal trade and commerce jurisdiction. The successive Cabinets and their majorities (or minorities) in Parliament have shown a marked reluctance to attack this problem, probably because of lack of awareness of its importance, because of fear of possible political complications and also because of a certain lack of legislative ingenuity. For a certain amount of ingenuity is needed in order to act effectively in this field. It cannot be realistically expected that the Supreme Court of Canada, despite its present more favourable attitude toward the use of the trade and commerce clause, will directly overrule its own and the Privy Council's precedents. A method will have to be devised whereby the anti-combines administrative machinery will be given

7 The only case of imprisonment in connection with anti-combines activity seems to have been Re Singer (1929), 37 Ont. Weekly N. 3. This was a case of commitment for contempt because of persistent refusal to comply with orders of the Commissioner. § Cf. ROSENBHUTH AND THORBURN 3, 6 and 104.


10 Cf. LASKIN, op. cit. supra note 9, at 314-318; GOSSE, op. cit. supra note 9, at 261, 264-266; SMITH, op. cit. supra note 9, at 157-181.
some regulatory power, but a method sufficiently different from those employed in 1919 and 1935 to permit the courts to hold the legislation *intra vires* the Dominion Parliament. The search for such a solution would seem to be a proper subject for interdisciplinary research.

**The 1960 Amendments—Combinations**

The far-reaching amendments to the *Combines Investigation Act* enacted in 1960\(^\text{12}\) changed its whole appearance, and to some extent its substance, but did not show any radical change in Parliament's approach to the problems of restrictive trade practices. The changes to the Act are of many kinds. Some of them are certainly improvements; this is true, for instance, of the consolidation of the legislation and of the new section 41A (Exchequer Court jurisdiction), even if the latter does not go far enough. The changes in the definition of mergers and monopolies (section 2(e) and (f)) also belong to this category. Other amendments do not seem to really change anything, as, for instance, the moving of the definition of "combine" from section 2(a) to section 32(1).\(^\text{13}\) In some cases, new offences (relating to "unfair" rather than "restrictive" trade practices) have been imported; thus, section 33B is directed against discrimination in the granting of promotional allowances and section 33C against some types of misleading advertising.\(^\text{14}\) Finally, some amendments appear to lead to a lessening of the effectiveness of the Act by providing defences to those charged with combining to unduly limit competition (section 32) or with resale price maintenance (section 34).

Section 32 contains, in subsection (1), the Act's best known and most used provision, prohibiting any "combination" or other arrangement calculated to unduly limit or lessen competition. The four subsections added in 1960 provide certain defences against a charge under this section and exempt certain combinations from its application. The exemptions (section 32(4) and (5)) need not concern us at any length. They relate to combinations directed to the export market which are permitted, unless they result in a reduction of exports, injure domestic competitors or restrict entry into the particular industry, or have lessened or are likely to lessen unduly competition in the domestic market. It does not appear that Canadian exporters are hastening to take advantage of the exemption. One

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\(\text{12} \text{STAT. CAN., c. 45, (1960).}\)

\(\text{13} \text{The description of this change in ROSENBLUTH AND THORBURN 92-93 is somewhat misleading; the authors seem to imply that the new § 32 (1) is significantly different from the previous § 32 (which, of course, had to be read in conjunction with § 2 (a)).}\)

\(\text{14 See infra note 45.}\)
combination, relating to the export of fruit and vegetable products, has been reported formed, but there is no way of knowing whether any others have been set up, because the Act imposes no requirement of disclosure or registration. It remains problematical whether, in the long run, the operation of export combinations can leave the domestic market wholly unaffected.

The defences provided by subsection (2) apply to all prosecutions under section 32 and are of far greater importance. It is provided that an accused will not be convicted if it is proven that the combination related to

(a) the exchange of statistics,
(b) the defining of product standards,
(c) the exchange of credit information,
(d) definition of trade terms,
(e) co-operation in research and development,
(f) restriction of advertising, or
(g) some other matter not enumerated in subsection (3).

This subsection is importantly qualified by subsection (3), according to which:

(3) Subsection (2) does not apply if the conspiracy, combination, agreement or arrangement has lessened or is likely to lessen competition unduly in respect of one of the following:
(a) prices,
(b) quantity, or quality of production,
(c) markets or customers, or
(d) channels or methods of distribution, or if the conspiracy, combination, agreement or arrangement has restricted or is likely to restrict any person from entering into or expanding a business in a trade or industry.

The precise effect of these amendments is not clear and, at the time of writing, they have not yet been considered by the courts. The express intention of the legislature was to "clarify" the scope of the general prohibition of combinations, but it is very likely that, in so doing, it has weakened it, as well. The uncertainty of the general provision, of which business circles had complained, has been replaced by uncertainty as to the meaning and extent of the defences.¹⁵ There can be little doubt that, when in good faith, the practices enumerated in subsection (2) would not lessen or prevent competition unduly. This in itself would have been a good defence even

¹⁵ The suggestion that specific defences be included in the Act had been expressly rejected by the MacQuarrie Committee; cf. REPORT OF THE COMMITTEE TO STUDY COMBINES LEGISLATION 45-46 (1952), and cf. ROSENBLOTH AND THORBURN 93; M. COHEN, TOWARDS RECONSIDERATION IN ANTI-COMBINES LAW AND POLICY, 9 McGill L. J. 81, 94 (1963).
before 1960. On the other hand, many of these practices can be used in bad faith to cover transactions which in reality tend to limit competition. No doubt, subsection (3) would apply in such a case, but it seems that a heavier burden of proof is now laid on the prosecution.16

An indication to this effect may also be gathered by comparing the language of subsection (3) to that of subsection (1). The latter refers to an agreement or conspiracy to lessen competition unduly and it has been established by the courts that if the existence and the content of the agreement itself are proved, there is no need to prove further that the agreement has been carried into effect successfully.17 The Crown has then a choice of either proving the intent of the parties directly, by producing the agreement, or proving it indirectly, by showing that a course of action has been followed which constitutes evidence of the parties' intent. The 1960 amendments may have changed this situation. Once subsection (2) has been invoked and subsection (3) called upon to defeat it, the latter would be controlling. And there is no reference in it to intent per se; a more objective standard is used instead, namely whether the arrangement "has lessened or is likely to lessen competition unduly." Where, therefore, an agreement has been concluded under colour of one of the permitted arrangements, the Crown will have to prove either actual undue lessening of competition or likelihood of such lessening. Whereas, before the inclusion of the defences, the agreement itself, as evidence of the intent to unduly lessen competition, would probably have been sufficient, now, the agreement is only partial evidence of the likelihood of undue lessening. And it is significant that, in the two recent merger cases, the courts refused to consider evidence of the intent of the accused in order to determine the likelihood of a lessening of competition.18 It is quite possible that a similar view may be adopted in combination cases, as well.

On the other hand, subsection (3) places special emphasis on one aspect of competition, namely, freedom of entry into an industry, which is not stressed in the main provision on combinations. Emphasis on this aspect (which is also indicated by the omission of "unduly" with respect to it) was certainly needed. Still, the effect of this provision is not very far reaching. If subsection (2) is not

16 Note that by virtue of the last head of §§ (2), any agreement in a form not explicitly mentioned in §§ (3) is taken out of the general provision of §§ (1). See, on this point, Brecher, supra note 2A, at 590.
invoked or is not applicable, subsection (3) cannot be invoked or applied, either. Therefore, the reference to freedom of entry in subsection (3) does not add another head to those in subsection (1).

**The 1960 Amendments—Resale Price Maintenance**

According to section 34 (2) it is a criminal offence for a dealer to “require or induce” any other person to resell an article at a fixed or minimum price, at a fixed or minimum markup, or at a fixed or maximum discount. It is also unlawful for a dealer (section 34 (3)) to refuse to sell or supply an article on the grounds that the prospective buyer has refused to be bound by or has violated a resale price maintenance arrangement. After the 1960 amendments, persons accused under this section can raise certain defences. Where it has been shown that a supplier has refused to sell to another person, “no inference unfavourable to the person charged shall be drawn from such evidence if he satisfies the court that he and any one upon whose report he depended had reasonable cause to believe and did believe” that the retailer was making a practice of using the articles supplied as “loss-leaders” or in order to attract customers to his store, or that he was making a practice of misleading advertising or of not providing to the customers a normal level of servicing (section 34 (5)).

The new defences are limited in extent and are available only under certain conditions. The existence of the practices listed does not justify the accused in seeking to impose fixed resale prices. That is to say, the defences of subsection (5) do not purport to allow resale price maintenance. They only serve to negative the otherwise clear inference that a refusal to sell, under certain conditions, was an attempt at enforcing resale price maintenance (such refusal being itself an offence under subsection (3)). Moreover, the onus of proof of the defences rests squarely on the accused. He must satisfy the court both that he had “reasonable cause to believe” and that he did believe that the retailer was engaged in predatory practices. Also, he must show that the retailer has been following a certain course of conduct which can be called a “practice”; mere isolated instances are not sufficient.

It is not very easy, therefore, for the accused to take advantage of the defences. On the other hand, he does not have to show that the retailer did in fact engage in the practices in question; only that he, the accused, had reasonable cause to believe and did believe that he did. Moreover, the content of the defences is not very definite.
What constitutes loss-leadering or bait selling is by no means clear. The Act defines loss-leadering as the use of the articles supplied “not for the purpose of making a profit thereon but for purposes of advertising” (section 34(5) (b)), but these terms, too, need much clarification. It should be recalled that one of the main conclusions of the study of loss-leader selling which the Restrictive Trade Practices Commission had published in 1955, was that “loss-leadering” is a term used in a variety of meanings, ranging from sale below cost to any sale at a price not approved by the particular person using the term. With respect to the practice itself the report’s conclusions were largely negative: it found a relatively low number of instances of loss-leadering, and it considered that in most instances what was involved was simply aggressive price competition. For these and other reasons, the Commission recommended no special remedial measures against loss-leader selling.

At the time of writing, only three cases of resale price maintenance had reached the courts (after 1960) and none of them is yet reported. Two of these cases have resulted in acquittals, and in at least one case the acquittal does not seem to have been founded on section 34 (5). The other acquittal has been appealed by the Crown. In the one case that led to a conviction, an unsuccessful attempt to raise the defences of section 34(5) may have been made by the accused. A number of other cases will be probably reaching the courts soon and in these the legal effect of the defences may be tested. In one instance, the report of the Restrictive Trade Practices Commission provides some interesting data on the interpretation of the defences by some manufacturers as well as an indication of the Commission’s own construction.

Immediately after the enactment of the 1960 amendments, several leading manufacturers of small electric appliances initiated a program designed to induce distributors and retailers to observe minimum “profitable” prices suggested by the manufacturers. In the case of the Sunbeam Corporation (Canada) Ltd., the theory behind the


22 Cf. Henry, ibid.

23 See The Globe & Mail, Mar. 13, 1961, p. 1 and Mar. 14, 1961, p. 1. More than one manufacturer was mentioned in the newspaper reports, but at the time of writing only one company has been the subject of a R.T.P.C. report; infra, note 24.
program was that, if the retailers did not observe these minimum prices (which were so calculated as to include a "reasonable" profit), they were, "in the opinion" of the manufacturer, using the goods as loss leaders. The Restrictive Trade Practices Commission did not accept this construction of the Act. According to the Commission, the Act requires that the manufacturer refusing to supply a retailer must be convinced of the retailer's purpose in selling the goods at the lower price (i.e., that he is selling not in order to make a profit but for purposes of advertising.) Furthermore, since the specific conditions of each enterprise differ considerably, it is not possible for the manufacturer to establish one "minimum profitable resale price" for all his retailers, on the basis of an "average cost of doing business" and to maintain that any sale at a lower price is a sale below cost. Finally, a "reasonable profit" cannot be determined in the abstract for all retailers, since profit is a function of turnover as well as markup and again there is no uniformity among retailers on this score. The Commission also found that Sunbeam Corp. was imposing a fixed resale price to its distributors as well as its retailers. The Commission recommended that a court order be sought to restrain Sunbeam from engaging in such practices. It will be very interesting to see whether the courts will accept the Commission's restrictive interpretation of the defences in section 34(5). If they do, the ban on resale price maintenance will have lost very little effect by the inclusion of these defences.

In the other reports of the Commission as well as the discontinued inquiries of the Director of Investigation and Research, the defences do not seem to be playing too important a role, although, as is to be expected, they are often raised by the firms under investigation.

Recent Developments in the Administration of the Act

The enforcement of the Combines Investigation Act depends on the effective coordination of governmental activities at three distinct levels: first, at the "administrative" level, i.e., that of the Combines

24A According to the newspaper reports, supra note 23, another manufacturer of electrical appliances, Canadian General Electric, had instituted a programme similar to that of Sunbeam, but, at the same time, it had "urged" any retailer who thought that he could sell at a profit at prices lower than those suggested by the manufacturer to approach the latter and discuss with it "his cost of operation and normal return of investment as shown by financial reports, income tax statements etc., so that we may reach a mutual understanding that the proposed lower prices are not, in fact, examples of loss leading." This arrangement might have met the last two requirements of the Restrictive Trade Practices Commission, if it did not place the "onus of proof" wholly on the retailer, while the Act seems to place the onus as to his "belief" on the manufacturer.
Branch and the Restrictive Trade Practices Commission;\textsuperscript{25} second, at the political level, that of the Minister of Justice, the Cabinet and Parliament; and third, at the judicial level, that of the courts which may impose fines or jail sentences, and issue restraining or dissolution orders. Ultimately, of course, the political level is the most important, since it has the power to set the rules which the administration and the courts will have to follow.\textsuperscript{26} For present purposes, however, in order to study the specific function of each of these levels, we may take as given the existence of the Act and its approximate contents. Seen in this context, the pattern of application of the Act up to now is clear: the officials at the administrative level are charged with the initial investigations and with preparing the cases for the Crown, those at the political level play a marginal (and very obscure) role in bringing the cases before the courts, while the final decision on each case is left to the courts, which are thus the only organs charged with the direct enforcement of the Act.

It is not unfair to say that, chiefly because of the Act’s criminal character, the Canadian courts have been very strict in their construction and application of its provisions; in the final result, their case law has limited the effectiveness of the Act. Apart from cases where procedural difficulties were involved,\textsuperscript{27} and without disregarding the instances where some understanding of the purposes and problems of the Act has been shown, it is true that the courts have in several instances so construed the Act as to deprive it of any real effect; the most recent examples are the \textit{Regina v. Morrey} case\textsuperscript{28} and the two mergers decisions.\textsuperscript{29} In another recent case, the Supreme Court of Canada held that the violation of the Act’s provisions against price discrimination is not in itself a sufficient cause of (civil) action on the part of the aggrieved party, and that furthermore the presence of price discrimination does not render unenforceable a previously concluded contract.\textsuperscript{30}

\textsuperscript{25} It is true that, in establishing the present administrative arrangements, Parliament (which was on this point implementing the MacQuarrie Committee’s report) intended that the Combines Branch and the Commission should exercise distinct functions and keep distinct personalities. In fact, the two have operated very closely together and are indistinguishable as far as policy issues are concerned. And cf. Friedmann, \textit{Monopoly, Reasonableness and the Public Interest in the Canadian Anti-Combines Law}, 33 CAN. B. REV. 133, 154-162 (1955); Cohen, supra note 15, at 89-90, 93.

\textsuperscript{26} Cf. ROSENBLUTH AND THORBURN 66-67.

\textsuperscript{27} Cf., e.g., Rex v. Ash-Temple Co., [1949] Ont. 315.


According to the same "traditional" pattern of action, those charged with the administration of the Act have little or no power of direct enforcement. In fact, they possess some power to exercise psychological pressure; the initiation of an investigation, the publication of a report and the threat of prosecution under the Act can be, and no doubt have been, used to induce compliance. Even toward the courts, the administrators of the Act are not totally helpless. Like all law enforcement officials, they have a margin of discretion: they may choose for further investigation and eventually prosecution or appeal the cases which appear most likely to result in convictions or in establishing that construction of the Act which is most helpful for its enforcement. Accordingly, an outside observer may well disagree with their decisions in particular matters, criticize them for not prosecuting or not appealing in a particular case. On the whole, the anti-combines administration seems to have been rather cautious in its relationship with the courts, perhaps because of an exaggerated "legalistic" respect for their authority. However, it should be kept in mind that, first, there is in such matters considerable ground for disagreement, even between experts, and, second, that these problems arise only within a narrow margin of discretion. Once a final decision has been rendered by the courts, the administrators of the Act are bound to treat it as an authoritative formulation of the law.  

This pattern of application of the Combines Investigation Act is the one that has been followed in the 'fifties and it is probably still dominant. It is not, however, the only possible pattern under the Act, and today one may discern the beginning of a movement away from it, toward the adoption of a new and more complicated pattern, where the direct enforcement of the Act is undertaken at the administrative and political levels, as well, not only the judicial. It is probably too early for an examination of the reasons for this change of approach. It should be noted, however, that the emergence of this new pattern may be due in part to the shock caused by the 1960 decisions on mergers, which made necessary a reappraisal of policies and means.

31 ROSENBLUTH AND THORNBURN, at 38-39, rightly point out that, for some years now, the Reports' publication entails little publicity, i.e. no effort is made to attract the attention of the public at large. Even so, one may wonder whether the value of publicity is not overrated. The existing evidence seems to indicate that only in a few cases (and then generally, in order to avoid further Government action) the publication of a report has led to a change in the conduct of the persons under investigation. It certainly has not in most of the highly publicized cases that have reached the courts. Compare, e.g., the situation in the match industry as reviewed id. at 68-69 (situation unchanged after conviction) and that in the beer industry, id. at 71 (further merger after acquittal).

32 The surprise expressed by ROSENBLUTH AND THORNBURN, at 70, on the Director's "change of opinion" after the Regina v. Morrey case, supra note 28, seems therefore unjustified. It was the Director's duty to describe in his report the state of the law on the matter and he did so. The question of the wisdom of the decision not to ask for a new trial is a distinct issue.
A first reaction to these decisions may be found in the annual report of the Director of Investigation and Research for the fiscal year 1961. It was stated, in somewhat cryptic terms, that "the Director's position concerning mergers generally has been reconsidered in the light of" the two decisions, and that it was "considered" that the inquiries in progress should be completed and new ones undertaken where necessary. In subsequent public statements, the Director made clear that he considered the two cases decided on their special facts, namely, a finding of fact as to the existence of competition in the *B.C. Sugar* case and, in the *Beer* case, a holding that, in view of the existence of a provincial board charged with the regulation of the brewing industry, price behavior has been removed from the area of competition in that industry. This position was confirmed by the Restrictive Trade Practices Commission in its *Meat Packing* report of August 1961. The Commission further described the decisions as resting on the "underlying assumption ... that the remedies provided in the legislation ... could only be applied where the merger being questioned resulted in the merged companies obtaining a virtual monopoly of the trade or industry, or being put in a position to exercise virtually complete control over the trade or industry." The Commission then suggested that the new definition of "merger" in the 1960 amendments removed any possible contention that such virtual monopoly was necessary before an offence under the mergers provision could be found.

A year later, in its August 1962 *Shipping Containers* report, the Restrictive Trade Practices Commission again dealt with the two mergers decisions. It emphasized that they had imposed a requirement of virtual monopoly and pointed out that this test is much stricter than that laid down in the earlier judgments of the Supreme Court of Canada with respect to combinations and agreements to lessen competition. It went on to state that under such conditions, "it will be very difficult indeed for the Crown ever to secure a conviction in a merger case, unless, as a result of and flowing from the transaction, the merger constitutes a complete or virtually complete monopoly in the industry," and it expressed the hope that "in the near future the questions raised by these decisions will be reviewed by appellate tri-

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bunals, more particularly by the Supreme Court of Canada, so that they may be definitely settled." Partly because of this state of the law and partly because of the complexity of the situation in the shipping container industry, the Commission did not recommend action before the courts for the dissolution of the mergers involved, though it stated that this might be one solution of the problem. It suggested instead, that the best long-range solution, in order to strengthen competition in the industry, would be the elimination of tariff protection.

The Shipping Containers report was not the first in which the Restrictive Trade Practices Commission recommended that action be taken under the, until recently in disuse, section of the Act which provides for lowering or elimination of tariffs as a remedy against a monopolistic situation. In its February 1959 report on the manufacture, distribution and sale of ammunition, the Commission had pointed out that in the absence of tariff protection, the sole Canadian manufacturer of ammunition would not be able to engage in the restrictive distribution policies which he had been following. Since, however, that manufacturer argued that the elimination of protective tariff would put him out of business completely (given the size of the Canadian market), the Commission suggested that the continuance of the tariff be made conditional on his adopting non-restrictive practices. The proposal was referred to the Ministers of Finance and of Trade and Commerce for consideration, but no action was taken because the manufacturer submitted proposals for the modification of his policies in accordance with the Commission's recommendations and they were accepted.

Another provision of the Combines Investigation Act which has received no application as yet is that of section 30, according to which, where patents or trade marks are being used in a manner unduly restrictive of competition, the Attorney General of Canada may request the Exchequer Court to declare void any related agreements, restrain any person from implementing them, direct the grant of compulsory licenses or even revoke the patent, or have the trade mark expunged from the register. In no case has the Commission suggested the use of these remedies in connection with an investiga-

37 Id., at 658-661. For a strong criticism, apparently made without benefit of reading § 19 (3) and 29 of the Act, see The Toronto Globe & Mail, Aug. 31, 1962, p. 6, and Sept. 7, 1962, p. B-2.
38 Measures under this provision have been taken only once, at the turn of the century, when following an investigation of the paper manufacturing industry by Mr. Justice Taschereau, a combination detrimental to the public was found to exist.
tion relating to a specific offence under the Act. Recently, however, the question of the revocation or abolition of patents was raised in a major report on the drug industry, undertaken under section 42 of the Act, i.e., as a research inquiry into situations which, though possibly not constituting offences under the Act, have restrictive features which may affect the public interest. After suggesting various improvements of the existing control of drugs by the Food and Drug Directorate, the Commission states that the compulsory licensing provisions of the Patent Act have proven insufficient to assure the supply of low priced drugs and that the existence of patents on drugs has made it possible to keep prices at a high level and has produced no benefits to the Canadian public. The Commission therefore recommended the abolition of patents with respect to drugs, holding that this is "the only effective remedy to reduce the price of drugs in Canada." It remains to be seen whether the Commission will be now more prepared to suggest the use of this remedy in connection with specific situations.

In closing this discussion on possible remedies, we should note that the Restrictive Trade Practices Commission is currently attempting to test the attitude of the courts toward section 31(2) of the Act, which provides for the issuance by a court of a restraining order or, in the case of a merger, of an order for its dissolution where a court is satisfied that it is needed, but before any conviction for an offence under the Act and in the absence of any prosecution for such an offence. The constitutionality of this provision has been placed in doubt, since it may be considered as infringing the provincial legislatures' "property and civil rights" jurisdiction. It is interesting to note that most of the cases in which the Commission is seeking an order under section 31(2) are relatively clear-cut cases of resale price maintenance, where, moreover, it was found that the supplier involved had pursued prohibited policies on a small scale because of


42 In another recent report on an inquiry under § 42 of the Act, the Commission recommended amendments to the Act to prohibit certain restrictive practices of wholesale suppliers, such as exclusive dealing and tying arrangements, when they are likely to lessen competition substantially, tend to create a monopoly or impede to a significant degree the entry of competitors into the market. R.T.P.C. REPORT ON AN INQUIRY INTO THE DISTRIBUTION AND SALE OF AUTOMOTIVE OILS, GREASES, ANTI-FREEZE, ADDITIVES, TIRES, BATTERIES, ACCESSORIES, AND RELATED PRODUCTS (March 1962). For a survey of the related legal problems, see KIENGOUR, CASES ON UNFAIR AND RESTRICTIVE TRADE PRACTICES 366-371 (1965).

43 Cf. Cohen, supra note 15, at 95; GOSSE, op. cit. supra note 9, at 247. Section 31 (1) of the Act which provides for a similar restraining or dissolution order to be issued after conviction, as an additional penalty, has been found by the courts intra vires the Dominion Parliament, Goodyear Tire Co. of Can. v. The Queen [1956] Can. Sup. Ct. 303, 2 D.L.R. 2d 11.
pressures on the part of some of his dealers. The supplier may therefore be expected not to resist very strongly the Commission's action. Once a restraining order in such a "clear" case is issued, the position of the Commission in seeking a similar order in connection with, for instance, a merger should be considerably strengthened.

Two other observations should be made with regard to the recent activities of the Combines Branch of the Department of Justice. First, there has been an increased emphasis on the investigation and eventual prosecution of offences relating to "unfair" rather than "restrictive" trade practices, such as price discrimination, predatory pricing and misleading advertising. A considerable number of cases have come up under these provisions and the Crown's record of convictions seems somewhat better in these cases than it is in the combinations and mergers cases. Most of the unfair trade cases, however, involve relatively small scale problems and their total effect on the Canadian economy is not very significant. Still, it appears that the unfair trade provisions of the Act have aroused considerable interest in business circles; thus, most of the talks and addresses that the Director of Investigation and Research has been invited to give in the last three years are focused on these provisions rather than on those relating to combinations and mergers.

Another characteristic of the recent activities of the Combines Branch has been its so-called "program of compliance," consisting of increased efforts at informal consultation with business and increased public discussion of the provisions of the Act and of the usefulness of consultation. The Director of Investigation and Research when inviting such consultation has always been very careful to point out that he has no competence to "approve" or "disapprove" a given business arrangement and that therefore any advice he gives is strictly unofficial and non-binding. It would seem, however, that this increased em-

44 See R.T.P.C. REPORT CONCERNING ALLEGED ATTEMPTS AT RESALE PRICE MAINTENANCE IN THE DISTRIBUTION AND SALE OF CAMERAS AND RELATED PRODUCTS (ARROW PHOTOGRAPHIC EQUIPMENT LTD.) 42-43 (1961); R.T.P.C. REPORT CONCERNING ALLEGED ATTEMPTS AT RESALE PRICE MAINTENANCE IN THE DISTRIBUTION AND SALE OF CAMERAS AND RELATED PRODUCTS (GARLICK FILMS LTD.) 43 (1961). According to the latest information available, restraining orders were issued in both cases. At the time of writing, the possibility of seeking similar orders was being considered by counsel in another resale price maintenance case (the Sunbeam case, supra note 24), one case of predatory pricing (under § 33A (1) (b) of the Act) and in a major merger case (the "meat packing" case, supra note 35); ANNUAL REPORT APP. 1, at 61, 57 (1963).

45 While the first two of these offences have often been used as means for restricting competition, misleading advertising appears totally unrelated to the Act's main object, the preservation of free competition. The only reason it was included in the Act must have been the wish to assure stringent enforcement by the Combines Branch.

46 Cf. Henry, supra note 20, 2-5; also in various addresses, such as that of Nov. 6, 1962, before the Canadian Manufacturers of Chemical Specialties Association, and that of Aug. 12, 1963, before the Canadian Pharmaceutical Association Inc.
phasis on consultation is designed to circumvent, legally and within strict limits, the restrictions imposed on the anti-combines administration by the criminal character of the legislation. Although the Combines Branch cannot undertake a regulatory function and its advice to businessmen is therefore not binding either on them or on itself, such advice can be in fact of considerable importance in indicating to businessmen whether their prospective action is likely to be considered as constituting an offence under the Act. While there is no reason in strict law why a businessman should seek the advice of the Combines Branch or, once he has sought it, to follow it, it is obviously to his interest in many cases to do so. There seems to be no way in which the strict legality of the Branch's consultation procedure can be put to the test and it remains to be seen how far this approach can be carried and to what extent it will be capable of increasing the effectiveness of the Act.

Concluding Observations

The recent developments in anti-combines administration make evident that, however limited the present legislation may be, not all of its capabilities have been explored as yet. Enforcement of the Combines Investigation Act, as it now stands, through court action may take the form of (a) criminal prosecution leading to a fine and/or a restraining or dissolution order after conviction, (sections 32(1), 33 and 31(1) of the Act); (b) proceedings for the issuance of a restraining or dissolution order, upon evidence of commission or likelihood of commission of an offence under the Act and without prior conviction (section 31(2)); and (c) request for the issuance by the Exchequer Court of compulsory patent licenses, for the revocation of patents or for other related action as specified in section 30 of the Act. Until recently, only the remedies under (a) had been used or sought to be used. These remedies have proven largely ineffective, in part because of the attitude of the courts, but chiefly because their criminal character deprives them of flexibility and because such remedies generally fail to affect to any significant extent the economic factors behind combinations and monopolies. Today, one may note some attempt at a diversification of remedies. Proceedings under section 31(2) of the Act are being instituted and there is even a faint indication that the

47 The extent of such activities of the Branch cannot, of course, be calculated with any precision. It is noteworthy, for instance, that in a great number of his talks and writings the Director of Investigation and Research has dealt in considerable detail with the problem of identical tenders, a question which has been dealt with only incidentally in Restrictive Trade Practices Commission reports. See, e.g., ANNUAL REPORT at 23-24 (1961); Henry, supra note 20, at 30-32; Henry, Address to Ontario Municipal Purchasing Agents' Association, Aug. 27, 1963.
Restrictive Trade Practices Commission may in the near future attempt to have recourse to the remedies of section 30.

The Act has long provided for the possibility of using the tariffs as a means for inducing compliance with anti-combines policies. But it is only very recently that this provision was effectively used (in the Ammunitions case) and that further use of it has been suggested. This particular development is of special interest: not only does it lead to further diversification of remedies, but it also tends to shift part of the burden of the direct enforcement of the Act from the courts to the officials at the "political" level. Another such shift may ultimately result from the "program of compliance" currently being pursued by the Combines Branch which seems to lead eventually to the undertaking by the Branch itself of part of the responsibility for the direct enforcement of the Act.

A new pattern of enforcement of the Combines Investigation Act appears then to be emerging today. Though still at a very early stage of development, it may eventually lead to greater variety in the remedies, methods and organs of enforcement and thereby to more flexibility and greater effectiveness in anti-combines administration.

It cannot be contested, however, that for a fully effective implementation of the public policy of the protection of free competition, radical changes to the existing legislation are necessary. The Act’s criminal law basis remains a serious obstacle, because it limits the number and kinds of possible means of enforcement and affects adversely the attitude of the courts and the public. Legislative provision for civil law remedies, founded on the “trade and commerce” power of Dominion Parliament, as well as a clear provision on the possibility of civil action by private parties damaged by the restrictive practices involved would constitute a much needed improvement. Moreover, the still unclear language of the Act together with the 1960 amendments of sections 32 and 34 and the courts’ restrictive construction of the mergers provision have seriously limited the scope of possible action under the Act. A clarification of the Act’s language concerning mergers and the amendment or elimination of the defences added to sections 32 and 34 are then indicated.

Another significant obstacle to effective enforcement is the "legalistic" approach of the courts and, to a less extent and mostly in reaction to the courts, of the administrators of the Act. By a "legalistic" approach, we mean one characterized by an exclusive or dominant concern with legislative language and problems of formal evidence
and a corresponding disregard of the public policy issues involved and of the economic aspects of the relevant situations. Now, it is certainly true that, when dealing with legislation which attempts to regulate private economic behaviour to conform with specific public policies, the courts or the executive should be cautious and consistent. Certain well-defined limits have to be set up in order to insure predictability for the private citizens. But predictability is not the sole concern of the law, it is but one of several operative public policy considerations, the disregard for any of which is as reprehensible as the lack of caution or consistency. More emphasis on the substantive aspects of the problems arising out of anti-combines administration is needed.

There has been, since 1952, considerable increase and improvement in the economic content of the reports of the Restrictive Trade Practices Commission, though they are still far from being models of economic analysis. The courts, however, have generally shown themselves unconcerned with the economic aspects of the cases before them. They have tended to disregard economic arguments in favour of a "strict" approach, which is based in fact on "common sense" considerations of doubtful validity. In this field, change is difficult to achieve by legislative action alone; one can only hope that the courts themselves will decide to put an end to their isolation from the facts and figures of modern life.

Finally, the preservation of free competition is not a task that can be delegated to a specific organ of the governmental machine and thereafter ignored by the Government when deciding on other general or specific economic policies. What is most urgently needed, therefore, is a basic commitment of the Canadian Government to a policy of encouraging free competition, a commitment manifested not only in the narrow field of the enforcement of the Combines Investigation Act, but in governmental economic policy as a whole.

48 The treatment by the courts of the concept of "competition" is perhaps the most striking example of a persistent refusal to consider economic issues. This refusal has often led them to a limited and inadequate perception of the problems at hand. While admitting obiter that not only price competition but also competition in quality or in other respects are relevant and important (see e.g., Rex v. McGavin Bakeries Ltd. (No. 6) (1951), [1952] 1 D.L.R. 201, 215; Regina v. No. Electric Co. Ltd., supra note 17, at 443-444), the courts have consistently used price competition as the sole test in determining whether any "undue" lessening of competition has taken place; see, e.g., Rex v. McGavin Bakeries Ltd., supra; Regina v. Can. Breweries Ltd., supra note 18, at 610, 624, 630; Regina v. B.C. Sugar Refining Co. Ltd., supra note 18, at 586, 633. A more realistic approach (and a sounder one, from an economic point of view) would have helped immeasurably in clarifying the issues. And see also Kilgour, Comment, 35 CAN. B. REV. 1087, 1099 (1957).

49 Among many others, see ROSENBLUTH AND THORBURN 105; PAPANDREOU AND WHEELER, COMPETITION AND ITS REGULATION 482-483, 489 (1954); MASSEL, COMPETITION AND MONOPOLY—LEGAL AND ECONOMIC ISSUES 42-82 (1962).