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The Development of Competition Policy, 1890-1940: A Re-Evaluation of a Canadian and American Tradition

THE DEVELOPMENT OF COMPETITION POLICY, 1890-1940: A RE-EVALUATION OF A CANADIAN AND AMERICAN TRADITION[©]

BY BRIAN CHEFFINS*

To those familiar with Canadian and American competition policy, the present situation in the two countries may seem puzzling. American antitrust policy is generally understood to be much more activist than its Canadian counterpart.¹ American antitrust policy, however, is now becoming less ambitious as the Chicago school has gained pre-eminence in intellectual circles, enforcement agencies and the courts.² Canada, on the other hand, has recently enacted legislation with the objective of increasing competition law activity, especially in the area of mergers.³

What makes this recent reversal particularly puzzling is that the United States' more active antitrust policy has been attributed

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¹ See, for example, P. Cartensen, "Competition Policy for an Integrated North America" (1981) 44 Law & Contemp. Prob. 81 at 83, 85-87 and 97; M.T. MacCrimmon, "Controlling Anticompetitive Behaviour in Canada: A Contrast to the United States" (1983) 21 Osgoode Hall L.J. 569 at 569-70 and 607-08.

² Thomas Hazlett, "Is Antitrust Competitive" (1986) 9 Harv. J. L. & Pub. Pol'y 277 at 277-79; Frank Easterbrook, "Workable Antitrust Policy" (1986) 84 Mich. L. Rev. 1696 at 1698; and Edwin G. West, "Canada's Competition Act in the Light of U.S. Experience: A Cautionary Tale" in Walter Block, ed., *Reaction: The New Combines Investigation Act* (Vancouver: Fraser Institute, 1986) 187 at 188-89.

³ Bill C-91, *An Act to Establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof*. Two pieces of legislation, the *Competition Act* and the *Competition Tribunal Act*, replace the *Combines Investigation Act*.

to broad attitudinal differences between Americans and Canadians.⁴ Canadians are supposedly not as committed to the concepts of competition and the free market as their American counterparts. For example, it has been said that Canadians have an aptitude for monopoly and that "[c]ompetition, free enterprise, small units of production and the higgling of the market are alien to Canadian history and the Canadian environment."⁵

In contrast, the competitive marketplace reputedly holds a cardinal place among basic American values and Americans supposedly have a deep-seated hostility to monopoly. Concomitantly, America's leading antitrust statute, the *Sherman Act*, is said to be a basic charter of liberty and a peculiarly American institution which expresses a policy which "is one of the great foundations of American civilization."⁶

If these differences have caused Americans to develop a stronger antitrust policy, then it is difficult to see why the United States is now apparently abandoning antitrust law while Canada is embracing competition policy. One possibility is that broad attitudinal and societal differences may not have influenced competition policy in the two countries to the extent that it might appear. This possibility will be examined in this paper, which surveys the development of Canadian and American antitrust policy up to 1940. It will be seen that between 1890 and 1940 American antitrust policy was a mere shadow of what it was to become and

⁴ See, for example, Gary Dyal, "The Canada-United States Memorandum of Understanding Regarding Applications of National Antitrust Law: New Guidelines for Resolution of Multinational Antitrust Enforcement Disputes" (1984-85) 6 Nw. J. Int'l L. & Bus. 1065 at 1069-70.

⁵ H. Ferns & B. Ostry, *The Age of Mackenzie King* (Toronto: J. Lorimer, 1976) at 101. See also Carmen Baggaley, *The Emergence of the Regulatory State in Canada* (Ottawa: Economic Council of Canada, 1981) at 46-46, 275; and Michael Bliss, "Another Anti-Trust Tradition: Canadian Anti-Combines Policy, 1889-1910" (1973) 47 Bus. Hist. Rev. 177 at 186-88; and H. Hardin, *A Nation Unaware: The Canadian Economic Culture* (Vancouver: J.J. Douglas, 1974) at 174.

⁶ William Letwin, *Law and Economic Policy in America: the Evolution of the American Antitrust Act* (New York: Random House, 1965) at 3. See also Julian von Kalinowski, *Business Organizations: Antitrust Laws and Trade Regulations*, vol. 16 (New York, N.Y.: Matthew Bender, 1982) c. 2 at 3; Hans Thorelli, *Federal Antitrust Policy: Origination of American Tradition* (Baltimore: John Hopkins Press, 1956) at 609; Harlan Blake & William Jones, "In Defense of Antitrust" (1965) 65 Columbia L. Rev. 377 at 381-82.

was often scarcely more effective than its Canadian counterpart. It will be seen also that the impulses which drove antitrust policy in the two countries were often similar. Thus it appears that between 1890 and 1940, the greater faith of Americans in the marketplace and their greater fear of monopoly had little tangible impact on antitrust policy.

The paper will proceed along chronological lines and the legislative, administrative and judicial trends in both countries will be surveyed. There will also be a brief discussion of why the United States, unlike Canada, developed an activist antitrust policy after 1940. Finally, there will be some concluding remarks on the role of attitudinal and societal differences in the development of competition policy and legal regulation.

Throughout the period to be examined, businessmen in both countries engaged extensively in anti-competitive activities to escape market forces. A justice of the Supreme Court of Canada observed in 1912 that the whole business fabric of the country was founded upon the restraint of competition.⁷ In 1940, an American observer said that the industrial landscape was a network of constriction.⁸ However, the pressures to engage in anti-competitive activities were probably greater than usual in the 1880s.⁹ In the United States industrialization and rapid technological advances led to increases in production, over-expansion and a fall in prices. Businessmen utilized agreements, pools and later more formal arrangements such as trusts

⁷ Idington J. in *Weidman v. Shragge* (1912), 46 S.C.R. 1 at 21.

⁸ Walton Hamilton & Irene Till, *Antitrust in America* (New York: DaCapa Press, 1974) at 3. The study was originally published in 1940 as *Monograph, No. 16* in the U.S. Temporary National Economic Committee's Investigation of Concentration of Economic Power (Washington: U.S. Government Printing Office, 1940). It has often been observed that the tendency to escape the forces of the market is a universal one among businessmen. See, Thomas McCraw, "Rethinking the Trust Question" in Thomas McCraw, ed., *Regulation in Perspective: Historical Essays* (Boston: Division of Research, Graduate School of Business Administration, Harvard University, 1981) 1 at 4.

⁹ McGraw, *supra*, note 8 at 2-6; Carmen Baggaley, "Tariffs, Combines and politics: The Beginning of Canadian Competition Policy, 1888-1900" (1982) at 8-9 [unpublished].

to try to control these trends.¹⁰ In Canada, similar problems faced businessmen as prices declined and the tariff walls erected under the National Policy in the 1870's caused new firms to enter domestic markets. In response, Canadian business made increased use of trade combinations.¹¹

In the United States, pools, trusts and combinations became the focus of public attention as the 1880s drew to a close. There was significant opposition to trusts from agrarian interests and from businessmen who had difficulty competing with the trusts. Further, these groups, together with press coverage which was often antagonistic to trusts, generated some general concern about the potential social and political ramifications of trusts.¹² The interest in the trust question in the United States helped to generate concern over combines in Canada.¹³ Small businessmen were particularly vocal in their opposition. Agricultural interests and labour also expressed hostility toward combines, as did opponents of

¹⁰ Thorelli, *supra*, note 6 at 68-82; W. Lande, "Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged" (1982-83) 34 *Hast. L.J.* 65 at 98; T. DiLorenzo, "The Origins of Antitrust: An Interest Group Perspective" (1985) 5 *Int'l Rev. L. & Econ.* 73 at 79-81.

¹¹ Baggaley, *supra*, note 9 at 1-4, 9-19, and 49; Canada, House of Commons, *Debates* at 1111-4 (1889), per N. Wallace; Paul Gorecki & W.T. Stanbury, "The Administration and Enforcement of Competition Policy in Canada: 1889-1952" (1977) at 3-6 [unpublished].

¹² There is a tendency to assume that opposition to the trusts was vigorous during this period, but the more common view is that the opposition was unfocused and not particularly aggressive. See, for example, Thorelli, *supra*, note 6 at 155-607 and Letwin, *supra*, note 6 at 55. Consumers, for example, had little cause for complaint, as prices were falling more quickly in trust industries than they were in other sectors of the economy – DiLorenzo, *supra*, note 10 at 77-81. On the nature of the opposition to trusts, see generally Thorelli, *supra*, note 6 at 108-60, 227; Letwin, *supra*, note 6 at 54-70; DiLorenzo, *supra*, note 10 at 75-7, 83; Albert McCormick, "Dominant Class Interests and the Emergence of Antitrust Legislation" (1979) 3 *Contemp. Crises* 399 at 400-2 and George Stigler, "The Origin of the Sherman Act" (1985) 14 *J. Leg. St.* 1 at 5-8.

¹³ Baggaley, *supra*, note 9 at 10; Canada, House of Commons, *Debates* at 1111 (1889), per Wallace; at 1114 (1889), per Guillet; at 1441 (1889), per McMullen; and at 1443 (1889), per Sproule.

the National Policy, who saw combines as a natural outgrowth of tariffs.¹⁴

There can be little doubt that concern over combines was greater in the United States than it was in Canada during this period. Nevertheless Canada had federal legislation relating to combines before the United States. The primary instigator of the legislation was N. Clarke Wallace, a Conservative M.P. After chairing a House of Commons committee set up to investigate combines, Wallace introduced an anti-combines bill in 1888.¹⁵

Wallace's original bill was a reasonably forthright attack on combines. However, by the time the bill had second reading, was sent to committee, passed third reading, and made its way through the Senate, it was a much weaker piece of legislation. It is not entirely clear at what stage the legislation was weakened, but the government's lack of enthusiasm for the bill and business lobbying against the bill were the primary causes of the changes.¹⁶ The end result was legislation clogged with modifiers, as it provided that one committed a misdemeanour if he conspired, combined, agreed or arranged, unlawfully, to unduly lessen competition in the production, sale, or manufacture of any article or commodity.¹⁷

The reference to "unlawfully" reflected the primary stated intention of the 1889 legislation, which was to codify the common

¹⁴ Canada, House of Commons, *Debates* at 1113 (1889), per Wallace; at 1443 (1889), per Sproule; Baggaley, *supra*, note 6 at 11-12, 23-24; Lloyd Reynolds, *The Control of Competition in Canada* (Cambridge, Mass.: Harv. Univ. Press, 1940) at 132; Colin Goff & C. Reasons, *Corporate Crime in Canada: A Critical Analysis of Anti-Combines Legislation* (Scarborough, Ont.: Prentice-Hall of Canada, 1978) at 42; and Russell Smandych, "Marxism and the Creation of Law: Re-Examining the Origins of Canadian Anti-Combines Legislation, 1890-1910" (1983) 6 Can. Crimin. Forum 49 at 55-58.

¹⁵ He actually had to introduce the bill twice. He first introduced it in 1888. When no action was taken, he reintroduced the same bill in 1889. See Baggaley, *supra*, note 9 at 25-26. The Committee's report had concluded that even though the problems arising from combines had not fully developed, there was sufficient evidence to support the passage of legislation.

¹⁶ The process of enactment is well described in Baggaley, *supra*, note 15 at 27-30. See also Canada, House of Commons, *Debates* at 1115 (1889), per Wallace; and at 1437-38 (1889), per Davies; Reynolds, *supra*, note 14 at 133-34; Maxwell Cohen, "The Canadian Anti-Trust Laws - Doctrinal and Legislative Beginnings" (1938) 16 Can Bar Rev. 439 at 455-57.

¹⁷ *An Act for the Prevention and Suppression of Combinations Formed in Restraint of Trade*, S.C. 1889, c. 41, s. 1.

law prohibitions against conspiracies to restrain trade. This was done to provide some protection to consumers and businesses adversely affected by combines.¹⁸ But the fact that the legislation was, in all likelihood, unenforceable has led some observers to conclude that the *Act* was primarily a sham.¹⁹ Others, however, have emphasized that Parliament was not sufficiently versed in the common law to be aware of the *Act's* ineffectiveness.²⁰ Support for both sides is available from contemporary evidence. Still, scepticism about the effectiveness of the *Act* was prevalent in the debates, and many in Parliament supported the legislation, in part, on the basis that it would be prudent to indicate to the people that Parliament was opposed to combines.²¹

A year after the Canadian legislation was enacted, Congress passed the *Sherman Act*.²² The wording of the legislation suggests that Congress was more decisive than Parliament on the antitrust issue, as the provision dealing with combinations in restraint of trade did not contain the qualifying language present in the Canadian legislation. Section 1 of the *Sherman Act* simply provided that every

¹⁸ Canada, House of Commons, *Debates* at 1111-14 (1889), per Wallace and Guillet; at 1440-44 (1889), per Wallace, McMullen and Sproule; and Canada, Senate, *Debates* at 637 (1889), per Reesor.

¹⁹ Bliss, *supra*, note 5 at 182; and Goff & Reasons, *supra*, note 14 at 46. A primary reason that the legislation was unenforceable was that it was probably futile to declare the common law. This is because it is unlikely whether conspiracies in restraint of trade were illegal at common law. At best, some agreements were unenforceable between the parties. See Baggaley, *supra*, note 9 at 36; Richard Gosse, *Law of Competition in Canada* (Toronto: Carswell, 1962) at 17-21, 39-67 and 72-73; Paul Gorecki & W.T. Stanbury, *The Objectives of Canadian Competition Policy 1889-1983* (Montreal: Institute for Research on Public Policy, 1984) at 109-12; and Paul Gorecki & W.T. Stanbury, "Declaring the Common Law" (1981) at 11-12 [unpublished]. Beyond that, inclusion of the word unduly meant that the statutory prohibition was breached only if it was proved that members of a combines were unduly doing something which was already unlawful at common law. Reynolds, *supra*, note 14 at 134-35.

²⁰ This view is supported by Gorecki & Stanbury, "Declaring," *supra*, note 19 at 12, 27; and Gosse, *supra*, note 19 at 68-75. Baggaley, *supra*, note 9, also inclines toward this view. See at 31 and 51-52.

²¹ Canada, House of Commons, *Debates* at 1437-38 (1889), per Davies; at 1440-41 (1889), per Wallace, Mullock and McMullen; at 1444 (1889), per Sproule and Campbell; Senate, *Debates* at 632 (1889), per McCallum; at 634 (1889), per McDonald; at 637 (1889), per Reesor and Abbott.

²² 26 Stat. 209. The full title of the *Act* was *An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies*.

contract, conspiracy, or combination in restraint of trade which related to interstate commerce was illegal. Further, the *Sherman Act* dealt with monopolies while the Canadian legislation did not.²³

Despite the simplicity of the language, the intention of the framers of the *Sherman Act* has been intensely debated.²⁴ Some of the intentions ascribed to Congress resemble those attributed to Parliament in relation to the 1889 *Act*. Others do not. One example is the efficiency thesis, which says that Congress intended to promote economic efficiency when it passed the *Sherman Act*.²⁵ It has also been argued that Congress sought to deal with the social and political, as opposed to economic, ramifications of trusts.²⁶ No attempt has been made to ascribe these intentions to Parliament.

As in Canada, however, members of Congress expressed concern about protecting consumers from high prices and about preserving business opportunities for small firms.²⁷ Further, it was stated that the chosen method was to declare the common law and establish effective sanctions against restraints prohibited at common law.²⁸ Finally, some have argued, as in Canada, that passage of the

²³ Section 2 of the *Sherman Act* provided that anyone who monopolized, attempted to monopolize or combined with another to monopolize a trade or industry committed an offence.

²⁴ Letwin, *supra*, note 6 at 53; Lande, *supra*, note 10 at 68, 80-1; and A.D. Neale & D.G. Goyder, *The Antitrust Laws of the U.S.A.*, 3d ed. (New York: Cambridge University Press, 1980) at 16.

²⁵ The efficiency thesis has gained increased acceptance as the Chicago school has moved into the ascendancy. Lande, *supra*, note 16 at 68. The leading proponent of this view is Robert Bork. See Bork, *The Antitrust Paradox: A Policy at War with Itself* (New York: Basic Books, 1978) cs. 1 and 2. This view has been justifiably criticised as being ahistorical, primarily on the basis that nothing approximating the efficiency rationale was used during the Congressional debates leading to the passage of the Act. See Lande, *supra*, note 10 at 82-93; and DiLorenzo, *supra*, note 10 at 87.

²⁶ Alarm over the potential social and political impact of large corporations pervaded the debate in Congress. See Lande, *ibid.* at 99-101.

²⁷ Views differ on the significance of these impulses. Contrast Lande, *supra*, note 10 at 93-96, 101-3; and DiLorenzo, *supra*, note 10 at 83. See Thorelli, *supra*, note 6 at 225-28.

²⁸ Letwin, *supra*, note 6 at 91, 95-96; and Von Kalinowski, *supra*, note 6, c. 2 at 40-1. This is borne out by the presence of the word "Unlawful" in the full title of the *Act*. Most commentators say that in expressing this intention, American legislators over-estimated the strength of the common law. Thorelli, *supra*, note 6 at 185, 228; and Gorecki & Stanbury, "Declaring," *supra*, note 19 at 12-16.

legislation was cynically motivated rather than being a serious attempt to deal with the problems attributed to trusts. It is said that the *Act* was passed to get a law on the books to mollify public opinion and to divert attention from plans to raise the tariff.²⁹

Those who take a sceptical view of the intention of Parliament and Congress gain support from the early history of the enforcement of the legislation. In Canada, there was only one prosecution, resulting in an acquittal, up to 1900. The problem was not a lack of anti-competitive activity, because Canadian businessmen continued their massive flight from competition in the 1890s.³⁰ Some attempted to blame the provincial attorneys-general for failing to enforce the law. Prosecutions under the 1889 legislation, however, would have been costly and likely futile given the wording of the legislation.³¹ Instead, primary responsibility for the failure of the legislation has to be borne by those in power in Ottawa. The Conservatives were in power when the 1889 legislation was passed and remained the governing party until 1896. During this time, a number of attempts to remove some of the modifying language from the prohibition against combines were allowed to be defeated in the House or Senate. More pressing political problems, unstable leadership and close connections between the government and the business community all played an important role in this process.³²

There was improvement when the Liberals came to power in 1896. The Liberals were certainly not enthusiastic about attacking combines. They did little to dismantle the existing tariff barriers, which were seen by many to be the true cause of combines, and

²⁹ DiLorenzo, *supra*, note 10 at 82-83, 87; Louis Galambos, *The Public Image of Big Business in America, 1880-1940: A Quantitative Study in Social Change* (Baltimore: John Hopkins University Press, 1975) at 78, 257; McCormick, *supra*, note 12 at 402-10; V. Mund, *Government and Business*, 2d ed. (New York: Harper, 1955) at 200. Thorelli, *supra*, note 6 at 179, 189 and 205, also notes the impact of the tariff and the fact that many Congressmen wanted to get a measure on the books. Thorelli, however, says that the Act was more than a tactical, cynical measure (at 216-21, 588), as does Letwin (*supra*, note 6 at 95-99).

³⁰ Michael Bliss, *A Living Profit: Studies in the Social History of Canadian Business* (Toronto: McClelland & Stewart, 1974) at 43-50; and Reynolds, *supra*, note 14 at 135.

³¹ Baggaley, *supra*, note 9 at 38, 52; Reynolds, *supra*, note 14 at 135; and Canada, House of Commons, *Debates* at 6883 (1910), per Sproule.

³² On the attempts to amend the legislation between 1889 and 1896, see Baggaley, *supra*, note 9 at 37-43.

they remained highly sympathetic to the business community.³³ Nevertheless, it was under the Liberals that the anti-combines provision became workable. After a number of further attempts to amend the relevant provisions, which were now contained in the Criminal code, the word "unlawfully" was removed in 1900.³⁴ As a result, combines which restrained competition unduly were prohibited. This change made possible convictions under the legislation, while this was probably not possible before.³⁵

Prosecutions were marginally more frequent in the U.S. during the same period. There was an average of about 1.5 prosecutions a year up to 1901, and more than a quarter of those were against labour unions.³⁶ Again, there was no shortage of behaviour that potentially could have been prosecuted. Most large trusts were formed or achieved full power after the passage of the *Sherman Act*. Further, an amalgamation movement began which significantly reoriented a number of important sectors of the American economy.³⁷ The *Sherman Act* did nothing to alter these developments.³⁸ Indeed, businesses ignored the *Sherman Act*, and one deputy attorney-general referred to it as an almost forgotten law.³⁹

³³ Baggaley, *supra*, note 9 at 44; and Ferns & Ostry, *supra*, note 5 at 102. In 1897, legislation was passed which allowed the dropping of tariffs as a sanction to combines. This legislation, however, contained much of the same modifying language as the anticom combines provision and was only used once - Baggaley, *supra*, note 9 at 44.

³⁴ *The Criminal Code Amendment Act, 1900*, S.C. 1900, c. 46. The anti-combines provision was incorporated into the *Criminal Code* in 1892 - S.C. 1892, c. 29, s. 520. The exact process of amendment in 1900 is the matter of some contention. See Bliss, *supra*, note 5 at 183; Baggaley, *supra*, note 9 at 46-48 and Gorecki & Stanbury, "Declaring," *supra*, note 19 at 22-23.

³⁵ Gorecki & Stanbury, *Objectives*, *supra*, note 19 at 112.

³⁶ Compiled from information set out in Hamilton & Till, *supra*, note 8 at 135.

³⁷ Thorelli, *supra*, note 6 at 306; and Lande, *supra*, note 10 at 98.

³⁸ In fact, as Gabriel Kolko has pointed out, the biggest threat facing trusts was competition. The American economy was too diverse and the resources and opportunities were too decentralized to allow consolidation of the economy into a few hands. See *The Triumph of Conservatism: A Reinterpretation of American History, 1900-1916* (New York: Free Press of Glencoe, 1963) at 27-55.

³⁹ See Letwin, *supra*, note 6 at 129; and Thorelli, *supra*, note 6 at 285-86.

A number of factors contributed to the lack of prosecutions. Procedural problems played a part. Prosecutions under the *Sherman Act* at the time were, and most often still are, undertaken by the federal Justice Department, which is supervised by the Attorney-General. In the early years of the *Sherman Act*, responsibility for prosecution was delegated to local District Attorneys, who often were difficult to supervise and usually preferred to avoid difficult and time-consuming antitrust suits.⁴⁰ Another factor limiting prosecutions was *U.S. v. E.C. Knight*.⁴¹ The *Sherman Act* only dealt with transactions involving interstate commerce. The Supreme Court's judgment in *E.C. Knight* indicated that manufacturing was not interstate commerce. Thus, after the case, it appeared that the *Sherman Act* did not apply to restraints of trade involving manufacturing.

Congressional indifference to enforcement of the *Act* also played a role. Until 1903 Congress did not specifically earmark any funds for antitrust enforcement. This was the case even though the Attorney General told Congress in 1896:

If the Department of Justice is expected to conduct investigations of alleged violations ... it must be provided with a liberal appropriation and a force properly selected and organized.⁴²

While all of these factors played a role, primary blame for the failure to enforce the *Sherman Act* must rest with the executive branch of government.⁴³ Up to 1901, American presidents were extremely indifferent towards antitrust. Attorneys-General during the same period most often had the same attitude or were actively hostile. For example, when Attorneys-General tried to influence local district attorneys regarding antitrust prosecutions, such actions were as much discouraged as encouraged. Also, adverse judicial interpretation of the *Sherman Act* was not met with the opposition

⁴⁰ See Letwin, *supra*, note 6 at 103-5.

⁴¹ (1895), 156 U.S. 1 [hereinafter *E.C. Knight*].

⁴² Quoted in Letwin, *supra*, note 6 at 136.

⁴³ The following is based on Thorelli, *supra*, note 6 at 370-71, 374-77, 380, 385-89, 394-98, 405-10 and 586-99; and Letwin, *supra*, note 6 at 106-42. Letwin is less critical than Thorelli.

that one might have expected. Richard Olney, the Attorney-General when the *E.C. Knight* case was decided, wrote to a friend about the decision:

You will observe that the Government has been defeated in the Supreme Court on the Trust question. I always supposed it would be, and have taken the responsibility of not prosecuting under a law I believed to be no good.⁴⁴

The attitude of the executive branch up to 1901 is not surprising given the close connections between those in office and large business interests.⁴⁵ For instance, Benjamin Harrison, who was President from 1889 to 1893, often represented the legal interests of large corporations before becoming President. Olney successfully defended the Whisky Trust in an action under the *Sherman Act* before becoming Attorney-General. William McKinley, who was President from 1897 to 1901, was referred to by a contemporary, with some justification, as "a very supple and highly paid agent of the crudest capitalism." One of his Attorneys General, John Griggs, later acted as counsel for the accused in one of the most prominent antitrust suits of the early twentieth century.⁴⁶

According to some observers, matters changed drastically in the United States in the first decade of the twentieth century.⁴⁷ This has been referred to as the golden age of American antitrust, as some of America's largest corporations were prosecuted. Further, public opposition to trusts was at its height as the century began, the Antitrust Division of the Justice Department was formed in 1903 and Theodore Roosevelt, who became President in 1901, was labelled a trust-buster.

There certainly was no golden age of Canadian antitrust during the same period. The differences, however, between American and Canadian competition policy in the early twentieth century should not be overstated. Given the size of the Canadian and American economies, the prosecution rate in the two countries

⁴⁴ Quoted in Walter Adams, "The Sherman Act and its Enforcement" (1952-3) 14 U. Pitt. L. Rev. 319 at 323.

⁴⁵ The following is based on Thorelli, *supra*, note 6 at 371, 383, 401-3.

⁴⁶ The case was *U.S. v. Northern Securities* (1904), 193 U.S. 197.

⁴⁷ Thorelli tends toward this view. See *supra*, note 6 at 411-32.

was similar.⁴⁸ Further, the view that American antitrust was in a golden age needs to be substantially qualified. For example, while the establishment of the Antitrust Division undoubtedly helped enforcement, "The facilities of the Antitrust Division ... were limited to five attorneys working with a budget of about \$100,000 a year." By definition only a handful of suits could be undertaken each year.⁴⁹ Most important, Theodore Roosevelt was no trust-buster.⁵⁰ He gained this reputation by using some antitrust rhetoric and by authorizing a few timely attacks against large corporations. In reality, as Roosevelt stressed numerous times, he was hostile to any form of rigorous trust-busting. For him, the proper approach to large corporations was to expose them to publicity and impose punishment if they were bad. In this way, the benefits of industrial organization could be preserved while the incidental abuses would be eliminated. This view was part of a larger theory subscribed to by Roosevelt and many contemporaries. They held that large corporations were inevitable and desirable in a modern society because such corporations were highly efficient.

Roosevelt's thinking on antitrust was borne out in practice. Most corporations were left alone, and Roosevelt even granted informal antitrust exemptions to companies like International Harvester and U.S. Steel. A small number of "bad" trusts, such as Standard Oil and American Tobacco, were prosecuted, but the economic impact of these cases was minimal. Overall, the greatest impact of Roosevelt's antitrust policy was psychological. The

⁴⁸ In the United States fifty-five prosecutions were made between 1900 and 1910. In the same period, there were seven prosecutions in Canada. Comparisons of the prosecution rates are more valid for this period than they are after the Second World War. This is because, as will be discussed *infra*, private actions did not become a significant method of enforcement in the United States until after the war.

⁴⁹ R. Hofstadter, *The Age of Reform: From Bryan to F.D.R.* (New York: Vintage Books, 1959) at 245.

⁵⁰ The following analysis of Roosevelt's antitrust policy is based on Hofstadter, *ibid.* at 244-45; Letwin, *supra*, note 6 at 196-200, 244-48; Mund, *supra*, note 29 at 209-10; Adams, *supra*, note 44 at 324; Galambos, *supra*, note 29 at 130, 259-60; Kolko, *supra*, note 38 at 128-30; S. Piott, *The Anti-Monopoly Persuasion: Popular Resistance to the Rise of Big Business in the Midwest* (Westport, Conn.: Greenwood Press, 1985) at 132-33 and B. Bringham, *Antitrust and the Oil Monopoly: The Standard Oil Cases, 1890-1911* (Westport, Conn.: Greenwood Press, 1979) at 8-9.

bringing of the suits helped to diffuse opposition to large corporations. This was because some indication had been given that the American government could take action against big business.

Roosevelt's views on antitrust were to have a significant impact on Canadian anti-combines policy. A rise in prices, together with the beginning of a merger wave, led to a considerable outcry against combines in the latter part of the first decade of the twentieth century.⁵¹ As one MP observed in 1910: "There is no doubt that the people of this country are very much worked up in regard to the abuses of combines."⁵²

The Liberal government of Wilfrid Laurier decided to reduce the public clamour by introducing anti-combines legislation.⁵³ The task of doing so was given to the Minister of Justice, Mackenzie King. In defending the resulting legislation, the 1910 *Combines Investigation Act*, King borrowed heavily from the point of view espoused by Roosevelt, and indeed quoted Roosevelt and like minded academics extensively.⁵⁴ King emphasised that "(t)he advantages of large combinations ... are obvious," but acknowledged that large corporations did not always act consistently with the public interest.⁵⁵ This meant that the government should step in and take action so that the benefits of big companies could be retained while their abuses could be curbed. As King said:

I would like the House to understand that in introducing this legislation no attempt is being made to legislate against combines, mergers and trusts as such; the whole intention is to place some restraint on these large aggregations of capital so that

⁵¹ Reynolds, *supra*, note 14 at 136-37; Goff & Reasons, *supra*, note 14 at 51; Thomas Traves, *The State and Enterprise: Manufacturers and the Federal Government, 1917-1931* (Toronto: University of Toronto Press, 1979) at 79; and Canada, House of Commons, *Debates* at 6829 (1910), per King. Much of the outcry came from newspapers and agricultural interests.

⁵² Canada, House of Commons, *Debates* at 6862 (1910), per Lewis.

⁵³ Mackenzie King predicted that the legislation would have this effect. He said:
I feel that when the legislation which the government is offering at the present time in regard to ... industrial concerns is put upon the statute book, a good deal of the agitation which we have been having in this country will cease altogether.
See Canada, House of Commons, *Debates* at 6810 (1910).

⁵⁴ S.C. 1910, c. 9; and Canada, House of Commons, *Debates* at 6826-35 (1910).

⁵⁵ See, for example, *ibid.* at 6827.

the advantages which may come from large combinations of wealth may in some measure be secured to the public....⁵⁶

Even though the Criminal Code anti-combines provision remained in force, King thought the focus on criminal prosecutions was misplaced. Borrowing again from Roosevelt, he thought the emphasis should instead be on publicity.⁵⁷ As a result, the *Combines Investigation Act* [hereinafter the *Combines Act*] provided that six persons could apply for the establishment of a board to investigate a combine or merger. The board was to report whether the *Combines Act* had been violated. Only if the report concluded that there had been a violation and that the combine had not yet been forced by publicity to cease its activities was the combine was to face fines or other sanctions.⁵⁸

The substantive provisions in the *Combines Act* also were different from the *Criminal Code*. It was provided that mergers and monopolies, in addition to combinations in restraint of trade, could violate the *Act*. Further, the substantive provisions were based on the premise of good and bad combines, rather than on undue limitation of competition, as combines, mergers or monopolies which operated to the detriment of the public were prohibited.⁵⁹

The success of the 1910 *Combines Act* was mixed. The *Act* reduced the public clamour about combines.⁶⁰ The legislation was also praised by some academic observers.⁶¹ The *Act*, was, however,

⁵⁶ *Ibid.* at 6802-803.

⁵⁷ Canada, House of Commons, *Debates* at 6843, 6858 (1910), per King.

⁵⁸ Gorecki & Stanbury, *supra*, note 11 at 13-16.

⁵⁹ Roosevelt supported similar wording for American antitrust legislation. See Kolko, *supra*, note 38 at 129-30. As it turned out, for the most part the courts treated undue limitation of competition and public detriment as being synonymous. See Gosse, *supra*, note 26 at 182-90.

⁶⁰ Ferns & Ostry, *supra*, note 5 at 105; "To Regulate the Combines" Grain Growers Guide, April 20, 1910 at 4; "Combines Legislation," *Monetary Times*, April 16, 1910 at 1-2; "Anti-Combine Legislation" *Financial Post*, April 16, 1910; and Canada, House of Commons, *Debates* 1910 at 6860, per King.

⁶¹ J.E. Boyle, "Canada's Combines Investigation Act, A Lesson for the United States" (1913) 3 Q.J.U.N. Dak. 164 at 168; and Francis Walker, "Policies of Germany, England, Canada and the United States Toward Combinations" (1912) 42 *Annals*. 183 at 196-201. Walker observed that Canada and the United States were pursuing practically the same policy

a practical failure, as the procedure established was only utilized once before it was repealed in 1919.⁶²

At the same time the 1910 legislation was being enacted, the idea that not all combinations should be prohibited was gaining acceptance in the courts of the United States. By this time, the constitutional difficulties imposed by the *E.C. Knight* case had been overcome, so the most important interpretative problem facing the courts was the meaning of every restraint of trade.⁶³ In the first few years after the *Sherman Act* was passed, the courts did not interpret it to mean that every contract which restrained trade was illegal. Instead, it was held that the *Sherman Act* merely declared the common law, meaning that only restraints which were unreasonable, taking into account the interests of the parties and the public, were illegal.⁶⁴

In 1897, however, the majority judgment of the U.S. Supreme Court in *U.S. v. Trans-Missouri Freight Association* indicated that the *Sherman Act* went beyond the common law and that indeed every contract in restraint of trade or commerce among the states was illegal.⁶⁵ This literal interpretation remained the controlling one for the next thirteen years, even though it was subsequently modified so that only contracts directly and immediately restricting competition were illegal.⁶⁶

The literal interpretation of the *Sherman Act* was to be overturned by the U.S. Supreme Court in 1911. In the two cases

towards combines (at 201).

⁶² Gorecki & Stanbury, *supra*, note 11 at 17. The reasons that the procedure was not utilised were that the six individuals had to bear much of the expense, the individuals did not have the benefit of anonymity and there was no permanent supervisory body, as a new board was to be established every time the procedure was commenced. *Ibid.* at 18.

⁶³ The restrictive view of interstate commerce was relaxed in *U.S. v. Addyston Pipe and Steel* (1898), 85 Fed. 271, *aff'd* 175 U.S. 211; and interstate commerce was interpreted broadly in *U.S. v. Swift* (1905), 196 U.S. 375.

⁶⁴ Letwin, *supra*, note 6 at 144-55; and Thorelli, *supra*, note 6 at 437-39.

⁶⁵ (1897), 166 U.S. 290.

⁶⁶ This occurred in *U.S. v. Joint Traffic Association* (1898), 171 U.S. 505. See Letwin, *supra*, note 6 at 167-69, 172-81; Thorelli, *supra*, note 6 at 456-64 and 468-70, at 159-65; and Earl Kinter, *Federal Antitrust Law* (Cincinnati: Anderson Publishing Ltd., 1980) at 350-54.

involved, *U.S. v. Standard Oil* and *U.S. v. American Tobacco*, the defendants were convicted under sections 1 and 2 of the *Sherman Act*.⁶⁷ The crucial point in the cases, however, was that the majority applied a rule of reason approach rather than the literal approach. The majority judgments in the two cases were written by Chief Justice Edward White. His view was that all contracts, theoretically, restrained competition and that the *Sherman Act* was only aimed at those contracts which unduly limited competition and were thus unreasonable. Discretion or reason was to be used in determining whether the activities of the defendant were an undue limitation on the rights of others to compete. If it was determined that such an undue limitation existed, then the *Sherman Act* was breached. The court was not to consider whether the limitation on competition was reasonable in other senses. Seen in this light, White's rule of reason strongly resembled the interpretation placed on the *Criminal Code* anti-combines provisions by the Canadian courts.

In 1912, the Supreme Court of Canada held in *Weidman v. Shragge* that the purpose of the anti-combines provisions was to protect the interest of the public in having free competition. From this, it was concluded that once a contract or agreement inordinately interfered with competition it was illegal. The fact that the agreement may have been reasonable in any other sense was irrelevant.⁶⁸

The *Standard Oil* and *American Tobacco* cases generated a great deal of controversy. Though White indicated otherwise in his judgments, most interpreted the cases as giving the courts the discretion to allow reasonable trusts and condemn unreasonable ones. The decisions were criticized on the basis that they constituted unwarranted judicial legislation, emasculated the *Sherman*

⁶⁷ The cites for the two cases are, respectively, (1911), 221 U.S. 1 and (1911), 221 U.S. 106. The summary of the cases presented here is based primarily on Letwin, *supra*, note 6 at 253-65; and Kinter, *supra*, note 66 at 350-54.

⁶⁸ The case is cited *supra*, note 7. On the case, see Gorecki & Stanbury, *Objectives*, *supra*, note 19 at 53-55 and Gosse, *supra*, note 19 at 79-80, 112-15, 119, 124-25 and 142-43. The idea that an agreement had to be unreasonable to violate the *Act* had been accepted in *R. v. Beckett* (1910), 20 O.L.R. 401; and *R. v. Gage* (1907), 13 C.C.C. 415, which was upheld on appeal, (1907), 13 C.C.C. 428.

Act and created uncertainty in the law.⁶⁹ Viewed in this way, the cases were used by supporters of antitrust reform as evidence that the existing laws were outmoded and needed reform.⁷⁰ Ironically, this was occurring at the same time that prosecutions under the *Sherman Act* reached a level which was not matched again until after 1940.⁷¹

The ferment over the antitrust laws was given a forum in the 1912 presidential campaign, where the issue of regulation of business was discussed at length. In the election, Woodrow Wilson, the Democratic candidate, defeated Roosevelt, who was running for the Progressives, and William Taft, the Republican candidate, who had been President since 1909. During the campaign Wilson tried to portray Roosevelt as being too lenient towards big business, but their views were, in facts, similar in most respects.⁷²

At Wilson's prompting, Congress in 1914 passed two pieces of antitrust legislation, the *Clayton Act* and the *Federal Trade Commission Act*. Those advocating the passage of new antitrust laws could all draw some comfort from the legislation.⁷³ Some had called

⁶⁹ Bringham, *supra*, note 50 at 173-75; von Kalinowski, *supra*, note 6, c. 2 at 53-54; and Merle Fainsod, *Government and the American Economy*, 3d ed. (New York: Norton, 1959) at 429-30. Some still interpret the rule of reason as allowing trusts which the judge considers reasonable. Bringham, for example, says

The rule of reason modified the sweeping provisions of the Sherman Act.... Under the rule, judges determined what contracts and combinations were reasonable and what constituted the public interest according to the circumstances of the case at hand. This expansion of judicial discretion allowed the courts to declare legal monopolies that they considered socially beneficial.

See, *supra*, note 50 at 157-58.

⁷⁰ Letwin, *supra*, note 6 at 265-70.

⁷¹ Seventy two prosecutions occurred under the *Act* between 1911 and 1913. See Hamilton and Till, *supra*, note 8 at 136-37. The accelerated rate of prosecution arose in large part because President William Taft had more faith in the *Sherman Act* than most contemporaries. See Letwin, *supra*, note 6 at 250-53; and Piott, *supra*, note 50 at 133-35.

⁷² Morton Keller, "The Pluralist State: American Economic Regulation in Comparative Perspective, 1900-1930" in McCraw, *supra*, note 8 at 68-69; Hofstadter, *supra*, note 49 at 247-48; and Kolko, *supra*, note 38 at 209-11.

⁷³ The cites for the *Clayton Act* and *F.T.C. Act* respectively are 38 Stat. 730 and 38 Stat. 717. A good summary of the views put forward and the legislative history of the two *Acts* is provided by Alan Stone, *Economic Regulation and the Public Interest: The Federal Trade Commission in Theory and Practice* (Ithaca, N.Y.: Cornell University Press, 1977) at 26-27, 32-

for tighter control of big business on the basis of social and political considerations. They could gain satisfaction from the fact that the practices of price discrimination and exclusive dealing were prohibited in certain circumstances. These practices had been cited as methods by which trusts had destroyed smaller competitors. Also, mergers by way of stock acquisition were prohibited where the effect was to substantially lessen competition or to tend to create a monopoly. Further, any other monopolistic practices could be prevented by virtue of a prohibition on unfair methods of competition in the *Federal Trade Commission Act*.

Ironically, another group advocating antitrust reform, businesses which wanted limits on the excesses of competition, could draw comfort from the same provisions. Price discrimination, exclusive dealing, and other methods of competition could be very successful business tactics, and thus for many businessmen, were unreasonable or excessive competitive techniques.⁷⁴ Prohibitions on these could have the effect of stabilizing and thus civilizing the market.

The final group urging antitrust reform were larger business organizations. They wanted relief from the uncertainty brought by the administration and interpretation of the antitrust laws. They could draw comfort from the establishment of the Federal Trade Commission (FTC) and Wilson's statement that the purpose of the Commission was to provide "information and publicity, as a clearing house for the facts by which both the public mind and managers of great business undertakings should be guided, and as an instrumentality for doing justice into business."⁷⁵

51. The following is based on Stone's work, as well as Letwin, *supra*, note 6 at 267-78; Robert Wiebe, "Business Disunity and the Progressive Movement, 1910-14" (1958) 44 *Miss. Valley Hist. Rev.* 664 at 682-5; G. Cullom Davis, "The Transformation of the Federal Trade Commission, 1914-1929" (1963) 49 *Miss. Valley Hist. Rev.* 437 at 437-40.

⁷⁴ The fact that these practices are often pro-competitive is a point stressed by the Chicago school. See, for example, Bork, *supra*, note 25 at cs. 14-20.

⁷⁵ Quoted in Stone, *supra*, note 73 at 37-38.

Wilson remained President until 1921. Overall, antitrust had a low profile during his administration.⁷⁶ Antitrust was not a top priority for Wilson, and after the passage of the 1914 legislation his interest declined further. As a result, the rate of antitrust prosecutions dropped to less than half that during the 1911 to 1913 period. Further, the First World War diverted the attention of the administration and postponed the commencement of operations by the FTC.

In Canada the war and its aftermath set the stage for creation of a body analogous to the Federal Trade Commission. This was the Board of Commerce.⁷⁷ On the face of it, the Board was a significant step forward in the regulation of competition law. The Board had the power to restrain and prohibit the formation of any combine, which was defined as any merger, trust, monopoly, or anti-competitive agreement, tacit or otherwise, which the Board deemed to not be in the public interest. The Board also had the authority to initiate investigations and impose sanctions if a combine was found.⁷⁸

The Board, however, had little impact on combines.⁷⁹ This is not surprising, given the origin and history of the Board. As the First World War came to an end, Canada was struck with inflation. In a volatile postwar atmosphere, there were numerous complaints about unreasonable profits being made. Also, certain segments of the business community wanted the federal government to intervene

⁷⁶ The following summary of Wilson's administration is based on Hofstadter, *supra*, note 49 at 249; Kolko, *supra*, note 38 at 256-57; Davis, *supra*, note 73 at 440-41; and Theodore Kovaleff, *Business and Government During the Eisenhower Administration: A Study of the Antitrust Division of the Justice Department* (Athens: Ohio University Press, 1980) at 6. On the number of prosecutions, see Hamilton & Till, *supra*, note 8 at 137-38.

⁷⁷ The F.T.C. was clearly a model for the Board of Commerce. See Reynolds, *supra*, note 14 at 141-42; Canada, House of Commons, *Debates* at 4526 (1919), per Meighen; and W.T. Jackman, "Should the Board of Commerce be Retained?" *Monetary Times*, June 4, 1920, 5 at 5. The Board was established under the *Board of Commerce Act*, S.C. 1919, c. 37. Its powers were granted, for the most part, under the *Combines and Fair Prices Act*, S.C. 1919, c. 45.

⁷⁸ *Combines and Fair Prices Act*, *ibid.* ss 2, 4, 5, 7 and 11-13.

⁷⁹ On the Board's anticombiner activities see Reynolds, *supra*, note 14 at 143-44; Traves, *supra*, note 51 at 80-81; and J. Castell Hopkins, *The Canadian Annual Review of Public Affairs, 1920* (Toronto: Canadian Review Co., 1921) at 44-45, 487.

and help regulate fluctuating prices.⁸⁰ The response of the government was the establishment of the Board of Commerce. The Board had jurisdiction not only over combines but also over ensuring fair prices for necessities. This was the activity the board focused on during its short career. Its efforts infuriated retailers and agricultural producers, who were the subject of most of the Board's scrutiny.⁸¹ This opposition, together with public discontent over the Board's efforts to stabilize prices on behalf of sugar manufacturers, made the Board a political liability. As a result, the government was happy to suspend the operations of the Board after the Board's jurisdiction over fair prices was successfully challenged in the courts.⁸²

The Board's status left Canadian anti-combines policy in a state of limbo. This was because no prosecutions for combines violations under the *Criminal Code* or the *Combines and Fair Prices Act* could occur without the written authority of the Board of Commerce. Acknowledging this, Mackenzie King, who had become Prime Minister in 1921, introduced new combines legislation in 1923. King conceded that neither the 1910 nor the 1919 legislation had met the case fully. Thus, he said that an Act should be passed which borrowed effective features from the past legislation and which incorporated additional devices necessary to protect the public from the detrimental effects of combines. The result was the 1923 *Combines Investigation Act*.⁸³

The new *Act* essentially restored the provision in the 1910 *Act* which made combines, mergers, and monopolies, which operated to the public detriment illegal. The 1923 *Act* also stipulated that

⁸⁰ A primary example was sugar refiners. See Traves, *supra*, note 51 at 60.

⁸¹ *Canadian Annual Review, 1920, supra*, note 79 at 484-90; and Reynolds, *supra*, note 14 at 144; R.J. McFall, "Regulation of Business in Canada" (1922) 37 Pol. Sci. Q. 177 at 206-207; J. Castell Hopkins, *The Canadian Annual Review of Public Affairs, 1919* (Toronto: Canadian Review Co., 1920) at 335-36, 427-28.

⁸² Traves, *supra*, note 51 at 63-67; *Canadian Annual Review, 1920, supra*, note 79 at 490-92; and Reynolds, *supra*, note 14 at 144. The case involved was *Re Board of Commerce Act* (1920), 60 S.C.R. 456; *Re Board of Commerce Act, 1919 & Combines and Fair Prices Act*, [1922] 1 A.C. 191.

⁸³ S.C. 1923, c. 9. On the views of King set out here, see Canada, House of Commons, *Debates*, at 988-92, 2521 (1923).

there was to be a permanent official, the Registrar, in charge of administering the *Act*. The Registrar was authorized to conduct a preliminary inquiry on his own initiative, upon receiving a formal complaint from six citizens, or on the Minister's request. It was then open to the Registrar to order a formal inquiry by himself or by a Special Commissioner. If the formal inquiry indicated that an offence had been committed, then the Registrar could remit the report to the relevant provincial Attorney-General so that charges could be brought under the *Act* or the *Criminal Code* provisions.⁸⁴

The rhetoric used by King to describe the *Act* was very similar to that used in 1910. Publicity again was to play a central role. Also, after noting that large combinations of capital were essential, King said "The legislation does not seek in any way to restrict just combinations or agreements between business and industrial houses and firms; but it does seek to protect the public against the possible ill effects of these combinations."⁸⁵

The 1923 *Combines Act* was a success compared to its predecessors. Hundreds of files were opened. Further, up to 1935, when the 1923 *Act* was repealed, there were nineteen formal investigations. Combines were found in fourteen of these, resulting in ten prosecutions and eight convictions.⁸⁶ Also, the Proprietary Articles Trade Association (PATA) was dissolved as a result of a formal investigation. The PATA was the most notable attempt at industry wide organization in Canada at the time. The PATA attempted to establish price and profit levels for wholesale and retail druggists and its dissolution caused similar schemes in other industries to be abandoned.⁸⁷

⁸⁴ For a more detailed summary of the legislation, see Gorecki & Stanbury, *supra*, note 11 at 46-47. The Board of Commerce was abolished, so its approval was no longer needed for prosecutions.

⁸⁵ Canada, House of Commons, *Debates* at 2520 (1923). On publicity, see Canada, House of Commons, *Debates* at 988, 2604 (1923).

⁸⁶ Two of the reports gave rise to five of the prosecutions and one prosecution and conviction occurred without an investigation or report. The statistical information comes from Gorecki & Stanbury, *supra*, note 11 at 84, 90-91 and 96.

⁸⁷ On the P.A.T.A. and the impact of its dissolution, see Reynolds, *supra*, note 14 at 123-24; and Gorecki & Stanbury, *supra*, note 11 at 69-70, quoting the Registrar's Annual Report for 1929/30.

Despite these modest successes, overall Canadian anticombiners policy remained narrowly focused and generally weak up to 1935. The formal investigations focused largely on price-fixing arrangements and because most prosecutions arose from formal investigations, the prosecutions did likewise. This was the case even though Canada experienced a merger wave in the 1920s. Further, numerous potentially anti-competitive arrangements went uninvestigated.⁸⁸

The unambitious nature of Canada's anti-combines policy can be attributed largely to the attitude of the government.⁸⁹ Neither the Liberals, who were in power until 1930, nor the Conservatives, who formed the government between 1930 to 1935, were enthusiastic about the legislation. Peter Heenan, who was the Minister responsible for the *Combines Investigation Act* between 1926 and 1930, said in 1933: "...the *Combines Investigation Act* is probably one of the most unpopular acts on the statute books, and one of the most unpopular to administer. I can say that from experience."⁹⁰ The Conservatives were, if anything, less enthusiastic about combines policy than the Liberals.⁹¹

The unsympathetic attitude of government had a direct impact on the funding and nature of anti-combines enforcement. The Minister responsible for the *Combines Investigation Act* said in 1924: "We want to economize; we want to carry on with as little

⁸⁸ It was said in Canada, Report of the Royal Commission on Price Spreads (1935) that hundreds of trade associations and agreements had never been questioned under the Act (at 476). On the nature of formal investigations see Gorecki & Stanbury, *supra*, note 11 at 86, 90-92; and L.A. Skeoch, *Restrictive Trade Practices in Canada* (Toronto: McClelland & Stewart, 1980) at 97-106. On mergers, see Traves, *supra*, note 51 at 82-84. Many contemporaries thought that Canada's competition policy was weak during this period. See, for example, "To Tighten Combines Act To Meet Abuses Alleged and Being Investigated," *Financial Times*, 9 February 1934 at 1; and "Where the Commission Went Astray," *Financial Post*, 18 May 1935 at 3.

⁸⁹ The importance of the government's approach was not lost on those involved. Mackenzie King, then leader of the opposition, said in 1934: "No matter what the laws may be, unless the government that administers them is wholly sympathetic with the objective in view, the legislation will serve little purpose." (Canada, House of Commons, *Debates* at 191 (1934)).

⁹⁰ Canada, House of Commons, *Debates* at 1938 (1933).

⁹¹ On the approach of the two parties, see Reynolds, *supra*, note 14 at 146-47, 168-71.

expense as possible."⁹² The federal government succeeded in doing this. The average expenditure on the administration of the *Act* was about forty-five thousand dollars between 1923 and 1935. Given that the average cost of a formal investigation was about twenty thousand dollars, this necessarily limited the number of formal investigations that could be undertaken.⁹³ Further, the low budget meant that the Registrar had a small staff, which in turn precluded ambitious enforcement efforts.⁹⁴

During the same period, the scope of antitrust activities in the United States was not much broader than it was in Canada. This, in part, was due to the courts.⁹⁵ Two decisions of the U.S. Supreme Court caused the virtual abandonment of attacks on mergers and amalgamations under the *Sherman Act*.⁹⁶ Applying the rule of reason, the court stated that mere size was not an offence and held that in order for corporate amalgamations to violate the provisions of the *Sherman Act*, there would have to be an intent to monopolize the industry, predatory activities, and control of an overwhelming percentage of the industry. The Supreme Court further insulated mergers from attack by confirming that section 7 of the *Clayton Act* could only be used to attack mergers by way of

⁹² Canada, House of Commons, *Debates* at 2362 (1924), per Murdoch.

⁹³ Compiled from figures set out in J.A. Ball, *Canadian Anti-Trust Legislation* (Baltimore: Williams & Wilkins, 1934) at 100.

⁹⁴ On the small size of the staff, see *ibid.* at 99. The small staff forced the Registrar to rely on complaints as a source of activities to investigate. Almost invariably complaints to anticombiners officials came from businessmen and related to some form of price or production control as opposed to mergers or monopolies. See Gorecki & Stanbury, *supra*, note 11 at 29, 79; and Reynolds, *supra*, note 14 at 153-54.

⁹⁵ The permissive attitude of the courts during this period was clearly perceived by contemporaries. See, for example, Emerson Schmidt, "The Changing Economics of the Supreme Court" (1930) 147 *Annals*, 61, where the author said:

... the Supreme Court has by a process of inclusion and exclusion changed the original rigid interpretation of the Sherman Law so that today mergers, combines and perhaps even monopolies are permitted and welcomed.

Ibid. at 61.

⁹⁶ The two cases were *U.S. v. United Shoe Machinery* (1918), 247 U.S. 32; and *U.S. v. U.S. Steel Corp.* (1920), 251 U.S. 417. The principles involved were affirmed in *U.S. v. International Harvester* (1927), 274 U.S. 693. On the cases and their impact see Fainsod, *supra*, note 69 at 460-66; Adams, *supra*, note 44 at 325-28; Bringham, *supra*, note 50 at 176-79; and Mund, *supra*, note 29 at 212-15.

acquisition of stock, as opposed to the purchasing of assets.⁹⁷ Finally, after initially taking a sceptical view of trade association activities, the Supreme Court held that the exchange of all types of information among association members, save probably prices to be charged in the future, was not an unreasonable restraint of trade and thus not a violation of the *Sherman Act*. In affirming what were most likely thinly veiled attempts to control competition, the Supreme Court praised the fairer price levels and the stabilization of trade which resulted from association activities.⁹⁸

Another important cause of the limited focus of antitrust in the 1920s and early 1930s was great enthusiasm for the business community in the executive branch of government.⁹⁹ In the early 1920s, the Commerce Department was supportive of trade association activities and the Secretary of the Department, Herbert Hoover, was able to blunt planned Justice Department attacks on association activities. During the Coolidge administration, which lasted from 1923 to 1929, the Justice Department gave up its attacks on trade associations. In fact, it encouraged co-operative activity between businessmen, used advance approval to sanction highly questionable practices, and oriented its policies so as to encourage the Supreme Court to accept more extensive co-operation between businesses.

By the mid-1920s, the Federal Trade Commission had adopted a similar posture. The FTC actively encouraged businesses to attend trade practice conferences, where those attending could draft codes of fair practice. The codes obtained the force of law when approved by the FTC. The purpose and effect of these codes,

⁹⁷ *F.T.C. v. Western Meat Co.* (1926), 272 U.S. 554.

⁹⁸ The Supreme Court found violations of the *Sherman Act* in *American Column & Lumber Co. v. U.S.* (1921), 257 U.S. 377; and *U.S. v. American Linseed Oil Co.* (1923), U.S. 371. The defendants were acquitted in *Maple Flooring Manufacturers Association v. U.S.* (1925), 268 U.S. 563; and *Cement Manufacturers Protective Association v. U.S.* (1925), 268 U.S. 588. On these cases, see Fainsod, *supra*, note 69 at 478-85; Mund, *supra*, note 29 at 220-24; Robert Himmelberg, *The Origins of the National Recovery Administration: Business, Government and the Trade Association Issue, 1921-1933* (New York: Fordham University Press, 1976) at 17-21 and 46-47; and George Stocking, "The Rule of Reason, Workable Competition, and the Legality of Trade Association Activities" (1954) 21 U. Chi. L. Rev. 527.

⁹⁹ Himmelberg, *ibid.* at 26-27, 33-38, 44-48 and 54-62.

as the FTC most certainly knew, was to control competition between members of trades and industries.¹⁰⁰

The *Sherman Act* did not fall into complete disuse in the 1920s. The rate of prosecution, about fifteen cases a year, was roughly the same as in the previous decade. Often, though, the prosecutions were used more as springboards for informal negotiation between the government and the defendants than as a way to attack business practices. Only about one-fifth of the prosecutions brought were fully litigated in the courts. The rest were resolved by a consent decree, or a guilty plea, or were simply dropped.¹⁰¹ Further, for most of the 1920s, explicit price fixing arrangements were the only business activity that was impugned with any regularity.¹⁰²

Explicit price fixing was one area where the U.S. Supreme Court did not restrict the operation of the *Sherman Act* in the 1920s. In *U.S. v. Trenton Potteries*, the Supreme Court held that an arrangement to fix prices was not a reasonable restraint merely because the prices charged were reasonable. The court held instead that where control of price was established the agreement was a *per se* offence; that is, an unreasonable restraint in and of itself.¹⁰³

In the early 1930s, however, the Supreme Court even relaxed its view toward price control arrangements. After the onset of the Depression in 1929, many American trades and industries experienced falling prices, chaotic conditions, and vigorous competition. In *Appalachian Coals v. U.S.*, the Supreme Court allowed the economic conditions of the depression to influence the

¹⁰⁰ *Ibid.* at 49, 51 and 63-64. See also Fainsod, *supra*, note 69 at 515-17. The F.T.C. did not develop this stance until the appointment of a number of very pro-business commissioners in 1925. See Davis, *supra*, note 73 at 445-55.

¹⁰¹ See statistics set out in Hamilton & Till, *supra*, note 8 at 126-41 and analysis at 30-31, 90-91.

¹⁰² Himmelberg, *supra*, note 98 at 53-55.

¹⁰³ (1927), 273 U.S. 392. A rather similar position was taken by the Canadian Supreme Court in *Stinson-Reeb Builders v. R.*, [1929] S.C.R. 276. It was held, following *Weidman v. Shragge*, that the anticommon provisions aimed at protecting the public's interest in competition and that the fact that parties obtained benefit from their agreement was irrelevant to whether the restraint was undue. On the case see Reynolds, *supra*, note 14 at 162-63; and Goss, *supra*, note 19 at 162-63.

manner in which it applied the rule of reason.¹⁰⁴ The Court upheld the establishment of an exclusive selling agency by Appalachian coal producers. The case was a rare instance where the social benefits of an anti-competitive arrangement were overtly considered by the Court in applying the rule of reason. It was said that the economic conditions of the industry had to be considered and the fact that the arrangement sought to ameliorate destructive competition was cited with approval.

The Depression also caused the American government to become extensively involved in the utilization of anti-competitive arrangements in American trades and industries. During the administration of Herbert Hoover, who was President from 1929 to 1933, prosecutions fell to their lowest level since the turn of the century.¹⁰⁵ Nevertheless, the more overt efforts undertaken during the Coolidge administration to help businesses escape from competition were abandoned.¹⁰⁶ Abandonment of these efforts increased the desire among many businesses for more active government involvement in the regulation of competition. When Franklin Roosevelt became President in 1933, these businesses got their wish.

By presenting their programme as a way to get industry started and thus get America out of the depression, advocates of government supervision of competition persuaded Roosevelt to secure enactment of the *National Industrial Recovery Act*.¹⁰⁷ Under this *Act*, industries were authorized to establish codes of fair competition which were to be approved and enforced by the National Recovery Administration (NRA). Utilization of the codes was widespread. Some industries were able to have direct price controls placed in the codes. In most industries, however, control of competition was a little less direct, as sales below cost were

¹⁰⁴ (1933), 288 U.S. 344. This summary of the case is based primarily on Kinter, *supra*, note 66 at 358-61.

¹⁰⁵ From 1929 to 1932, the average number of prosecutions was slightly less than ten a year. Hamilton & Till, *supra*, note 8 at 139-41.

¹⁰⁶ Himmelberg, *supra*, note 98 at 89-96, 103-106, 151, 159-61.

¹⁰⁷ 48 Stat. 795. See Himmelberg, *ibid.* at 189, 201, 204 and Fainsod, *supra*, note 69 at 526-31.

prohibited and liberal exchanges of statistical information were allowed.¹⁰⁸

The NRA was a failure. Some businesses were dissatisfied with their treatment under the codes. Others were frustrated with the red tape involved. Faced with this dissatisfaction, as well as public apathy and opposition from other agencies in Government, the NRA became lax in enforcing the codes. In this environment, Roosevelt and the Congress were perfectly content to let the NRA die after its powers were successfully challenged in the U.S. Supreme Court in 1935.¹⁰⁹

Even though the NRA disappeared, some antitrust reforms arising from the 1930s were permanent. Due to greater efficiency and economies of scale, chain and department stores were driving smaller retailers and wholesalers out of business at an increasing rate in the 1920s and 1930s. Retailers and wholesalers sought to reverse this process through legislation. At the federal level, the result was the Robinson-Patman amendment to the *Clayton Act* and the Miller-Tydings amendment to the *Sherman Act*.¹¹⁰ Robinson-Patman strengthened the *Clayton Act*'s prohibition on price discrimination and prohibited other practices by which manufacturers and other sellers might give certain buyers, such as chains, advantages over others. Miller-Tydings gave an antitrust exemption to fair trading laws passed by the states. Under these laws, manufacturers were permitted to require purchasers to sell their goods at the same price. Chain and department stores disliked this practice because it prevented them from using their more efficient distribution methods to sell at lower prices. Neither piece of legislation did much to prevent chain and department stores from

¹⁰⁸ Ellis Hawley, *The New Deal and the Problem of Monopoly: A Study in Economic Ambivalence* (Princeton, N.J.: Princeton University Press, 1966) at 56-61.

¹⁰⁹ *Ibid.* at 66-72, 114-17, 122-26 and 130; and Fainsod, *supra*, note 69 at 536-41. The case involved was *Schechter v. U.S.* (1935), 295 U.S. 495.

¹¹⁰ The cites for the Robinson-Patman and Miller-Tydings amendments are, respectively, 49 Stat. 1526 and 50 Stat. 693. On Robinson-Patman, see Stone, *supra*, note 73 at c. 5; Hawley, *supra*, note 108 at 247-54; and Fainsod, *supra*, note 69 at 548-51. On Miller-Tydings, see Fainsod, *ibid.* at 559-62; and Hawley, *ibid.* at 256-58.

continuing to displace their smaller competitors.¹¹¹ As will be seen, however, the Robinson-Patman amendment was to have a significant and much criticized impact on American antitrust.

The Depression led to similar reform pressures in Canada, though the legislative results were not as significant. As in the United States, many smaller businessmen felt victimized by chain and department stores and sought legislation to remedy the situation.¹¹² Further, declining prices led businessmen in trades and industries which were having difficulty controlling competition to call for the relaxation of the *Combines Investigation Act* and for government supervision of price control arrangements.¹¹³

These calls for reform led to the establishment of the Royal Commission on Price Spreads in 1934. Neither the Commission nor the Conservative government, however, was prepared to support fully these calls for reform, especially in relation to government supervision of the market.¹¹⁴ This, in part, was because of

¹¹¹ Hawley, *ibid.* at 266-68.

¹¹² J.R.H. Wilbur & H.H. Stevens, 1898-1973 (Toronto: University of Toronto Press, 1977) at 103-107, 121-23 and 128-29; "Mass Buying Enquiry," *Financial Post* (17 March 1934) 8; "Codes-Role of Big Business" *Financial Post* (28 April 1934) 8; and "Large Scale Merchandising Goes on Trial," *Financial Post* (17 February 1934). On why retailers and small manufacturers felt pressure from the chains, see Price Spreads Report, *supra*, note 88 at 200-33.

¹¹³ "Regulation or Regimentation," *Financial Post* (2 June 1934) 1; "A Clear Field for Big Trusts," *Financial Post*, (30 June 1934) 2; evidence given before the Price Spreads Commission by the following: George Hougham, secretary-manager of the Ontario Retail Merchants Association, cited in *Financial Post* (17 March 1934) 8, and in Wilbur, *supra*, note 112 at 122; Warren Cook, president of Canadian Association of Garment Manufacturers, cited in *Financial Post* (17 March 1934) 8, and in Wilbur, *supra*, note 112 at 121-22; C.H. Carlisle, cited in the *Financial Post* (2 June 1934) 8; and Mark Bredin, president of the Canadian Bakers Association, cited in the *Financial Post* (12 May 1934) 3. The Depression hit much harder in trades in industries where price control did not exist - Reynolds, *supra*, note 14 at 72-73.

¹¹⁴ The efforts for reform were led by H.H. Stevens, who was chairman of the Price Spreads Commission. Despite Stevens' efforts, he could not get the Commission to fully accept his proposals. On this, see "Price Spreads Final Report's Progress Slow," *Financial Post* (2 March 1935); "Stevens Ideas Now Unlikely to Dominate New Legislation," *Financial Times* (26 April 1935) 1 and "More Commissions to Rule Business," *Financial Post* (27 April 1935) 1. The commonly held view was that the government further watered down the Commission's recommendations when it brought in legislation. See, for example, "Ottawa Reforms Still Further Modified," *Financial Times* (7 June 1935) 1, 6. The government argued that it was faithfully enacting the recommendations of the report. See Canada, House of Commons,

awareness of the failure of the NRA.¹¹⁵ Nevertheless, some notable legislative changes were made. For example, there was an amendment made to the *Criminal Code* to prohibit price discrimination and predatory pricing. These provisions, however, were too vague to be utilized extensively.¹¹⁶

The major addition was the *Dominion Trade and Industry Commission Act*.¹¹⁷ It was in this *Act* that proposals relating to the control of competition found expression. Here, the Tariff Board, acting under the name of the Dominion Trade and Industry Commission, was vested with significant new powers. One of these was taking over administration of the *Combines Investigation Act*. Other powers related to helping businesses control competition. The Board was authorized to hold trade practice conferences for particular industries, much as the FTC had done in the 1920s. The Board was also given the power to investigate unfair trade practices and recommend that they be prosecuted. Most significantly, the Board was empowered to authorize agreements between members in a trade or industry where competition was wasteful or demoralizing. Such agreements, if approved by the Governor-in-Council, were to be immune from prosecution.

Those defending the legislation in Parliament stressed that the provisions in the *Dominion Trade and Commerce Act* did not go

Debates at 3506-12 (1935), per Hanson. On Stevens, the Royal Commission and the approach of the government, see more generally Wilbur, *supra*, note 112 at cs. 3 to 5; Alvin Finkel, *Business and Social Reform in the Thirties* (Toronto: J. Lorimer, 1979) at 29-42; Ernest Watkins, *R.B. Bennett: A Biography* (Toronto: Kingswood, 1963) at 198-214 and D.F. Forster, "The Politics of Combines Policy: Liberals and the Stevens Commission" (1962) 38 C.J.E.P.S. 511.

¹¹⁵ *Price Spreads Report*, *supra*, note 88 at 261, 263; "Regulation," *supra*, note 113; "The Blue Eagle - A Sick Bird" *Financial Times* (5 October 1934); and "Probe Can Learn from U.S. Codes" *Financial Post* (17 March 1934) 1.

¹¹⁶ Bruce Dunlop, "Price Discrimination, Predatory Pricing and Systematic Delivered Pricing," in J.R.S. Prichard *et al.* eds, *Canadian Competition Policy: Essays in Law and Economics* (Toronto: Butterworths, 1979) at 405. The difficulties involved with the section were not lost on contemporaries. See Canada, House of Commons, *Debates* at 3479 (1935), per Ralston; *Debates* at 3488-89 (1935), per Isley; and Lloyd Reynolds, "The Distributive Trades in Canada" (1938) 4 C.J.E.P.S. 533 at 546-47.

¹¹⁷ S.C. 1935, c. 59. The legislation is well summarized in Canada, Dept. of Justice, Committee to Study Combines Legislation, *Report* (Ottawa: E. Cloutier, 1952) (Chair: J.H. MacQuarrie) at 12-13.

as far as the NRA had.¹¹⁸ Nevertheless, the legislation met a similar fate. The Conservative government was defeated in 1935, and the Liberals immediately referred the *Dominion Trade and Industry Commission Act* to the Supreme Court of Canada. The court held the provision authorizing price and production agreements to be *ultra vires*. The other provisions were upheld, but were never used by the Tariff Board and were abolished in 1946.¹¹⁹

The Liberals replaced the *Dominion Trade and Industry Commission Act* with the 1937 *Combines Investigation Act*. In so doing, the Liberals relied on the same approach that had been used before the 1935 legislation was passed. Norman Rogers, the government spokesperson on the issue, acknowledged that the provisions of the *Act* were borrowed from previous legislation. Further, his description of the philosophy of the *Act* strongly resembled that used by King in 1910 and 1923. Thus, the *Act* was again to be administered by a single official, now called the Commissioner, and formal investigations were very similar to those in the 1923 legislation.¹²⁰

After the passage of the 1937 *Act*, anti-combines activity was essentially restored to its pre-1935 level. Funding for anticom combines enforcement reached its highest level since the beginning of the 1930s. Further, between 1937 and 1941, seven formal investigations were undertaken, resulting in four prosecutions and three convictions in the early 1940s. Anti-combines operations were then suspended for the duration of the Second World War.¹²¹

Despite the resumption of anti-combines activity in 1937, overall Canadian anti-combines policy up to 1940 was unambitious

¹¹⁸ Canada, House of Commons, *Debates* at 3484-85 (1935), per Kennedy.

¹¹⁹ The case was *A.G. Ont. v. A.G. Can. (Ref. re Dominion Trade and Industry Commission Act)*, [1936] S.C.R. 379. See also *Report*, *supra*, note 117 at 13; and Reynolds, *supra*, note 14 at 149-50.

¹²⁰ Canada, House of Commons, *Debates* at 1346-53 (1937); and Reynolds, *supra*, note 14 at 150-151.

¹²¹ See Ball, *supra*, note 93 at 100; Gorecki & Stanbury, *supra*, note 11 at 86, 91-92; Canada, House of Commons, *Debates* at 2201 (1941), per McLarty; G. Rosenbluth & H.G. Thorburn, *Canadian Anti-Combines Administration 1952-1960* (Toronto: University of Toronto Press, 1963) at 53; and Maxwell Cohen, "Towards Reconsideration in Anti-Combines Law and Policy" (1963) 9 McGill L.J. 81 at 88.

and inconsequential. One MP said in 1938 "These combines are flourishing in Canada like a green bay tree; they are unmolested by the government of the day...."¹²² Even Rogers was prepared to acknowledge that Canadian anti-combines legislation had not been achieving the results that had been intended. He agreed with a comment made by King in 1933 that Canada was "enmeshed by secret understandings and by artificial priced agreements and other methods of price control."¹²³ The situation had not improved by 1946, as a number of M.P.'s said that the country was paying tribute to cartels and needed an anti-combines law with teeth.¹²⁴

There has, subsequently, been little disagreement with the sentiments expressed by these contemporaries. It has been noted that some valuable work was done under the *Combines Investigation Act*, especially after 1923.¹²⁵ Nevertheless, few dispute that Canadian anti-combines policy was unambitious and had little impact on the economy in the years between 1889 and 1940.¹²⁶ The result was that by 1940 one had to be "impressed with the extent to which competition has been attenuated through Canadian industry."¹²⁷

Responsibility for Canada's weak competition policy up to 1940 cannot be placed with the courts or administrative staff; indeed,

¹²² Canada, House of Commons, *Debates* at 1175 (1938), per Church.

¹²³ See Canada, House of Commons, *Debates* at 1346, 1352 (1937).

¹²⁴ Canada, House of Commons, *Debates* at 3057-58 (1946), per MacInnis; 3065-68, per Croll; and 3068-72, per Diefenbaker.

¹²⁵ Gorecki & Stanbury, *supra*, note 11 at 53-70; and Reynolds, *supra*, note 14 at 168-171, 264-81.

¹²⁶ *Ibid.* See also Rosenbluth & Thorburn, *supra*, note 121, c. 1; and Christopher Green, "Canadian Competition Policy Past and Present" in Ton Zijldwijk, ed., *The Competition Policies of the European Economic Community and Canada* (Montreal: Centre de Droit Prive et compare, Faculte de Droit, Univ. McGill, 1983) 39 at 40-41. One commentator who took a favourable view of Canadian anti-combines policy during this period was Ball, *supra*, note 93. Ball's work was persuasively criticized in a review of his book in the *Financial Post* (1 December 1934).

¹²⁷ Reynolds, *supra*, note 14 at 11.

their work was generally praised.¹²⁸ The problem instead was the ambivalent or unsympathetic attitude of Parliament and Cabinet.¹²⁹ For example, some legislation, such as that passed in 1919 and 1935, aimed as much at reducing as promoting competition. Further, the deferent tone used by King and others defending anti-combines legislation indicated that the business community had little to fear. The 1889 and 1910 legislation was also left on the books for significant periods of time when the legislation was clearly not being utilized. Finally, the machinery set up to administer anti-combines legislation was so poorly funded and understaffed that it was impossible to carry out any form of rigorous enforcement.

The impact of government support, increased funding, and a larger staff was to be amply demonstrated in the U.S. between 1937 and 1940. After the collapse of the NRA, antitrust supporters within the Roosevelt administration began to press their case more strongly. They argued that economic concentration and price rigidities had caused the depression and that these problems should be attacked with antitrust laws to improve the performance of the American economy. The antitrust supporters gained intellectual support from economists, who were becoming increasingly critical of monopoly and warned that firms in oligopolistic industries tended to perform as monopolists.¹³⁰

Roosevelt became more receptive to the views of the antitrust supporters in 1937 due to frayed relations with business and the need for a new approach following a new downturn in the

¹²⁸ On the courts, see, for example, Reynolds, *supra*, note 14 at 161, 273; and Irving Brecher, "Combines and Competition: A Re-Appraisal of Canadian Public Policy" (1960) 38 Can. Bar Rev. 523 at 548-49, 574. The most common criticism of the courts up to the 1960s was that their approach was too strict and legalistic. See, for example, Wolfgang Friedmann, "Monopoly, Reasonableness and Public Interest in the Canadian Anti-Combines Law" (1955) 33 Can. Bar Rev. 133 at 145-50. On the administrative staff, see Gorecki & Stanbury, *supra*, note 11 at 57; *Price Spreads Report*, *supra*, note 88 at 305; Reynolds, *supra*, note 14 at 171; and Canada, House of Commons, *Debates* at 3053 (1946), per Merritt; and at 3068, per Croll.

¹²⁹ Gorecki & Stanbury, *supra*, note 11 at 70-70C; and Reynolds, *supra*, note 14 at 171, 281.

¹³⁰ Hawley, *supra*, note 108 at 283-301; and Frederick Rowe, "The Decline of Antitrust and the Delusions of Models: The Faustian Pact of Law and Economics" (1984) 72 Geo. L. Rev. 1511 at 1520-21, 1544-45.

economy.¹³¹ One result was the establishment of the Temporary National Economic Committee [hereinafter TNEC]. Its purpose was to study the problem of industrial concentration and recommend what to do about the problem. The other result was the revitalization of the Antitrust Division.

The revitalization occurred under the leadership of Thurman Arnold, who was named head of the Division in 1938. He felt that Americans had tended to moralize about the trust problem rather than act on it and that antitrust laws could be effectively used to expose business decisions to market forces.¹³²

The revitalized Division did its best to carry out Arnold's views through systematic case selection, industry wide attacks, and aggressive use of prosecutions. Arnold, in turn, ensured increased funding from Congress by using colourful rhetoric and by citing the Division's greater productivity. He also conducted successful recruiting drives, thus significantly increasing the size of the Antitrust Division.¹³³

Arnold's programme, however, ran into problems in the early 1940s. Despite Arnold's protestations, antitrust had little role to play in the atmosphere of co-operation between business and government in the Second World War. Arnold's programme also ran into opposition from many elements in the business community. Finally, Arnold's program failed to develop large-scale public support. Most segments of the American public were either indifferent to or opposed any form of large scale antitrust attack on business. Arnold resigned in 1943 to become a judge.¹³⁴

The burst of activity under Arnold illustrated how under-utilized American antitrust law had been up to 1937. From 1914 to

¹³¹ Hawley, *ibid.* at 378-79, 385; and Gene Gressley, "Thurman Arnold, Antitrust and the New Deal" (1964) 33 Bus. Hist. Rev. 214 at 215-17.

¹³² Hawley, *supra*, note 108 at 420-32. Before his appointment, Arnold had been a caustic critic of antitrust. See Thurman Arnold, *The Folklore of Capitalism* (New Haven: Yale University Press, 1937).

¹³³ Hawley, *supra*, note 108 at 443-41; Gressley, *supra*, note 131 at 223-25; and Fainsod, *supra*, note 69 at 572-73.

¹³⁴ On the decline of Arnold's program, see Hawley, *ibid.* at 443-48; Gressley, *ibid.* at 228; and Galambos, *supra*, note 29 at 222-49, 262-63.

1935 the annual appropriation for the Antitrust Division had fluctuated between \$100,000 and \$300,000 and the number of lawyers in the Division varied between 18 and 33. By 1940 the appropriation was \$1.3 million and the number of lawyers exceeded 140.¹³⁵ The increase in funding simply brought the funding of the Antitrust Division up to the level of a normal government bureau.¹³⁶ Nevertheless, the impact was dramatic. Between 1938 and 1943, the number of prosecutions was similar to the total number undertaken between 1890 and 1938.¹³⁷ Further, the prosecutions under Arnold's tenure were intended to influence the operation of trades and industries. Before that time, prosecutions were largely symbolic in nature and effect, and antitrust was not a factor in most business decisions. The result was that before Arnold's tenure antitrust had little impact on the American economy. At most, antitrust laws prevented the economy from becoming overtly cartelized.¹³⁸

Even though Arnold's program had dissipated by 1943, it set the stage for the unprecedented level of antitrust activity in the United States in the years after the War. For example, Arnold had shown that the *Sherman Act* could be used, and this helped the Antitrust Division to retain the higher level of funding and larger staff size that had been established under Arnold.¹³⁹ Just as important, cases commenced or argued during Arnold's tenure brought a turning point in judicial interpretation of antitrust legislation. First, in *U.S. v. Socony Vacuum*, the Antitrust Division

¹³⁵ Fowler Hamilton, "The Selection of Cases for Major Investigations" (1940) 7 Law & Contem. Prob. 95 at 96-97, notes 1 and 3.

¹³⁶ Hamilton & Till, *supra*, note 8 at 23-25.

¹³⁷ Hawley, *supra*, note 108 at 442.

¹³⁸ Hamilton & Till, *supra*, note 12 at 3-4, 13-15; Adams, *supra*, note 44 at 334; S. Chesterfield Oppenheim, "Federal Antitrust Legislation; Guideposts to a Revised National Antitrust Policy" (1952) 50 Mich. L. Rev. 1139 at 1147; and Thurman Arnold, "Antitrust Law Enforcement, Past and Future" (1940) 7 Law & Contemp. Prob. 5 at 10, 12. Even the modest claim that antitrust prevented the economy from being overtly cartelized can be disputed. It is likely that market forces would have been strong enough to prevent cartelization in many sectors of the American economy. This is indicated by the fact that many of the codes established under the N.R.A. broke down because of competitive forces.

¹³⁹ Kovaleff, *supra*, note 76 at 9; and Richard Hofstadter, "What Happened to the Antitrust Movement: Notes on the Evolution of an American Creed" in Earl Cheit, ed., *The Business Establishment* (New York: Wiley, 1964) 113 at 148.

persuaded the Supreme Court to drop the *Appalachian Coals* approach to market control.¹⁴⁰ Instead, the Court extended the *Trenton Potteries* approach by holding that any tampering with the price structure was illegal *per se*.

Soon after, the courts' permissive view towards size and concentration was reversed. In *U.S. v. Alcoa*, the U.S. Circuit Court of Appeals held that the existence of a monopoly was an offence *per se* under the prohibition against monopolization in the *Sherman Act*.¹⁴¹ The fact that the defendant had achieved its position through skill and efficiency and had not abused its market power was irrelevant. In *U.S. v. American Tobacco*, the Supreme Court followed *Alcoa* and, indeed, went further. In that case, the monopoly was supposedly held by three companies and there was no direct evidence of collusion between the three.¹⁴² Nevertheless, a Supreme Court which now had two judges who were closely identified with the antitrust movement in the Roosevelt administration, held that there had been a violation of the *Sherman Act*.¹⁴³

These decisions were such a sharp reversal that commentators began to refer to the "New" *Sherman Act*.¹⁴⁴ The cases were handed down in an environment of concern in

¹⁴⁰ (1940), 310 U.S. 150.

¹⁴¹ (1945), 148 F. 2d 416. In the case the Circuit Court was the final court of appeal. The basic reason was that four of the nine Supreme Court judges had previously participated in the antitrust actions against *Alcoa*. See Dominick Armentano, *Antitrust and Monopoly: Anatomy of a Policy Failure* (New York; Toronto: Wiley, 1982) at 110. On the case, see *ibid.* at 110-12; Adams, *supra*, note 44 at 329-30; and Donald Dewey, *Monopoly in Economics and Law* (Chicago: Randy McNally, 1959) at 236-39.

¹⁴² (1946), 328 U.S. 781. On the case, see Dewey, *ibid.* at 239-42; and Fainsod, *supra*, note 69 at 582-83. The three companies were a failure as a monopoly. Their combined market share dropped from 90 per cent in 1931 to 68 per cent in 1939.

¹⁴³ Robert Jackson was Attorney General when Arnold's tenure commenced. Before Arnold's appointment, Jackson supervised the Antitrust Division and commenced a number of important prosecutions, including the *Socony Vacuum* and *Alcoa* cases. He was appointed to the Supreme Court in 1941. See Hawley, *supra*, note 108 at 286, 373-76. William Douglas was Chair of the Securities and Exchange Commission and worked closely with Arnold before 1938. He was appointed to the Supreme Court in 1939. See Hawley, *ibid.* at 286, 378, 423.

¹⁴⁴ See, for example, Eugene Rostow, "The New *Sherman Act*: A Positive Instrument of Progress" (1947) 14 U. Chi. L. Rev. 567.

government and intellectual circles about corporate concentration.¹⁴⁵ Studies by the TNEC had cast new light on the extent of concentration and work done by the FTC and others suggested that concentration was increasing.¹⁴⁶ Congress responded by enacting the Celler-Kefauver amendment to the *Clayton Act* in 1950.¹⁴⁷ Before the amendment, those undertaking mergers had been able to avoid conflicts with the *Clayton Act* by utilizing asset acquisitions. Previously the relevant provision in the *Clayton Act*, section 7, only dealt with the purchase of stock. Under the Celler-Kefauver amendment, asset acquisitions could also be attacked under section 7.

The Supreme Court joined the attack on mergers in 1957. The Court held that section 7 could be used to attack acquisitions between companies which were not competitors. Further, it was held that section 7 could be used at any time after the acquisition as long as at the time of the suit there was a reasonable probability of a restraint of trade or a monopoly resulting from the merger.¹⁴⁸ The Court remained hostile to mergers for a significant period of time as the government, up to 1969, won twenty-eight of twenty-nine section 7 cases.¹⁴⁹

The more active posture of the Antitrust Division and expansive judicial interpretation of antitrust laws had a significant

¹⁴⁵ On concern within the government, see, for example, the comments made by the Attorney General in *Study of Monopoly Power: Hearings Before the Subcommittee on the Study of Monopoly Power*, Part I (1949) at 71, 76-77, 88, 91 and 93.

¹⁴⁶ A good summary of the literature is set out in Edward Levi, "The Antitrust Laws and Monopoly" (1947) 14 U. Chi. L. Rev. 153 at 160-72. It has been argued that in fact concentration was decreasing during this period and that the F.T.C. tailored its conclusions in order to mislead Congress. See, for example, Yale Brozen, "The Antitrust Tradition: Entrepreneurial Restraint" (1986) 9 Harv. L. Rev. 337 at 342-49.

¹⁴⁷ 64 Stat. 1125. See Lande, *supra*, note 10 at 130-40; and Rowe, *supra*, note 130 at 1522-24.

¹⁴⁸ *U.S. v. DuPont* (1957), 353 U.S. 586. The case was heard under the old s. 7. On the case, see Martin Shapiro, *Law and Politics in the Supreme Court: New Approaches to Political Jurisprudence* (1964) at 275-83; George Stocking, "The DuPont-General Motors Case and the Sherman Act" (1958) 44 Va. L. Rev. 1; and Joseph Burns, *Antitrust Dilemma: Why Congress Should Modernize the Antitrust Laws* (New York: Free Press of Cleveland, 1969) at 166-69.

¹⁴⁹ In the twenty-ninth case the Court was evenly divided. Robert Golrick, *Public Policy Toward Corporate Growth* (1978) at 26.

impact on another area of American antitrust in the years after Second World War. This was the private suit. Up to 1940, private suits were rarely used.¹⁵⁰ After the war, however, the increased publicity given to antitrust litigation, the broader interpretations of antitrust statutes and the high damage awards encouraged the use of the private antitrust action.¹⁵¹ By the mid-1950s, there were already five times as many private suits as government prosecutions. The growth of private actions was further accelerated by the government's attack on the electrical industry in the early 1960s. After the government's attack, two thousand private actions were brought and the damages awarded totalled six hundred million dollars. These cases, in particular, gave rise to a developed antitrust bar in the United States.¹⁵²

The magnitude of antitrust activity in the U.S. after the Second World War should not be overstated. Taking into account inflation and the growth in the economy, funding for and the number of prosecutions by the Antitrust Division never significantly surpassed the level reached during Arnold's tenure.¹⁵³ Further, the Antitrust Division's attacks on corporate concentration were most often erratic and superficial.¹⁵⁴ Also, the level of antitrust enforcement by the FTC was uneven and most often took place under the *Robinson-Patman Act* until the early 1970s. As a result, the FTC's antitrust policy was heavily criticized for favouring small business and being anti-competitive.¹⁵⁵

¹⁵⁰ Hamilton & Till, *supra*, note 8 at 82-85.

¹⁵¹ Fainsod, *supra*, note 69 at 579; Dewey, *supra*, note 141 at 147; and Mund, *supra*, note 29 at 246-47.

¹⁵² Burns, *supra*, note 148 at 90-93; and Kovaleff, *supra*, note 76 at 124-25, 156.

¹⁵³ See statistics set out in William Baxter, "The Political Economy of Antitrust" in Robert Tollison, ed., *The Political Economy of Antitrust: Principal Paper by William Baxter* (1980) at 24-25; and Mark Green, *The Closed Enterprise System: Ralph Nader's Study Group Report on Antitrust* (New York: Grossman, 1972) at 122-23.

¹⁵⁴ Green, *ibid.* at 68-114, 301-308; Goolrick, *supra*, note 149 at 37-74, 186-88; Kovaleff, *supra*, note 76 at 71-82, 113-18, 157-58; and Rowe, *supra*, note 130 at 1524-35.

¹⁵⁵ On the F.T.C., see Green, *ibid.* at 342-39, and 409-10; Stone, *supra*, note 73 at cs. 4-6; and Robert Katzmann, *Regulatory Bureaucracy: The Federal Trade Commission and Antitrust Policy* (Cambridge, Mass.: MIT Press, 1980). In the early 1970s, the F.T.C. abandoned its reliance on Robinson-Patman and took a more aggressive posture towards

Nevertheless, the making of some attacks on mergers and large corporations, the enthusiasm of the judiciary for antitrust and the heavy use of the private action served to effectively distinguish American antitrust from its Canadian counterpart. The rate of prosecution especially after 1960 was similar in Canada and the U.S., given the size of the two countries.¹⁵⁶ However, the range of Canadian anti-combines activity was much more limited. The vast majority of prosecutions in Canada related to either anti-competitive agreements or the imposition of resale price maintenance. Very few merger or monopoly cases were prosecuted.

Part of the reason for the lack of merger or monopoly cases was judicial interpretation of the relevant Canadian legislation. In the late 1950s, Canadian anti-combines officials began to question some significant mergers.¹⁵⁷ In the early 1960s, however, the courts dismissed two merger prosecutions in terms which indicated that the existing legislation was unenforceable.¹⁵⁸ When the merger and monopoly provisions were considered by the Supreme Court in the 1970s, they were again very narrowly interpreted.¹⁵⁹ Further, after World War II, while Canadian courts generally interpreted the prohibition of anti-competitive agreements broadly, two decisions by

concentration. See Katzmann, *ibid.* at 5, 31-34. This approach was dropped in the 1980s.

¹⁵⁶ Between 1960 and the mid-1970s, the Antitrust Division prosecuted about seventy cases a year and there was an average of about seven prosecutions a year in Canada. See Hazlett, *supra*, note 2 at 322; and Paul Gorecki & W.T. Stanbury, "Canada's Combines Investigation Act: The Record of Public Law Enforcement, 1889-1976" in Prichard, *supra*, note 116, 135 at 187. The pattern appears to be roughly the same in the 1980s. See Hazlett, *ibid.* and W.T. Stanbury, "Conspiracy and Other Amendments" in Continuing Legal Education Society of British Columbia, *Competition Act*, c. 4, s. 4.1.02. The count is less favourable to Canada when F.T.C. prosecutions are included. See Gorecki & Stanbury, "Record," *supra*, at 159-60. Still, this factor was not as significant in the 1960s and 1970s, as Antitrust Division prosecutions outnumbered F.T.C. prosecutions by almost three to one. See Baxter, *supra*, note 153 at 24.

¹⁵⁷ Brecher, *supra*, note 128 at 535-45.

¹⁵⁸ *R. v. B.C. Sugar Refining* (1960), 32 W.W.R. 577; and *R. v. Can. Breweries*, [1960] O.R. 601. See Gosse, *supra*, note 19 at 179; and W.G. Phillips, "Canadian Combines Policy - The Matter of Mergers" (1964) 43 Can. Bar Rev. 78 at 83, 87.

¹⁵⁹ *R. v. K.C. Irving* (1978), 32 C.C.C. (2d) 1. The case has been criticized extensively. See, for example, R.J. Roberts, "The Death of Competition Policy: Monopoly, Merger and *Regina v. K.C. Irving*" (1977) 16 U.W.O.L. Rev. 215.

the Supreme Court also cast doubts on the efficacy of this provision.¹⁶⁰

The unambitious nature of Canadian anti-combines policy cannot be attributed solely to the courts. Primary responsibility is more appropriately placed with Parliament and Cabinet. Most notably, it took twenty-five years for the merger and monopoly provisions to be amended after the courts had indicated the provisions were probably unenforceable. Before the recent enactment of the *Competition Act*, there were a number of attempts to amend the legislation.¹⁶¹ But the government lacked the political acumen and courage necessary to make the required changes in the face of significant opposition from the business community.

It should also be said that any Canadian government which has sought to alter anti-combines legislation has faced significant constitutional obstacles. Federal anti-combines legislation has been upheld by the courts under the federal criminal law power rather than federal jurisdiction over trade and commerce. This has made the enactment and use of civil remedies by competition officials very problematic. By contrast, in the United States, where antitrust legislation is upheld under the trade and commerce power, antitrust officials have been able to freely utilize consent orders, injunctions and divestiture orders.¹⁶²

The criminal law basis of Canadian anti-combines legislation has also made reliance on private actions very problematic. The courts have held that no right of action arises from a breach of anti-

¹⁶⁰ *Aetna Insurance v. R.* (1977), 34 C.C.C. (2d) 157 and *Atlantic Sugar Refineries Co. v. R.* (1980), 54 C.C.C. (2d) 373. These cases have also been criticized. See, for example, MacCrimmon, *supra*, note 1 at 579-84. For a defense of the *Atlantic Sugar* case, see Donald Armstrong, "The Sugar Case as a Reason for 'Strengthening' the Combines Act: An Economic Perspective" in Block, *supra*, note 2 at 71.

¹⁶¹ *Supra*, note 3. On the legislation, see Continuing Legal Education of B.C., *supra*, note 156; and Gordon Kaiser & Ian Nielsen-Jones, "Recent Developments in Canadian Law: Competition Law" (1986) 18 Ott. L. Rev. 401. For short summaries of the previous attempts to amend the legislation, see Green, *supra*, note 126 at 57-58; W.T. Stanbury, "Overview" in Continuing Legal Education, *supra*, note 156, c. 1 at 1.1.03-7; and William MacDonald, "Overview of Competition Law Changes, 1986-Style" in Block, *supra*, note 2, 1 at 4-6.

¹⁶² See, for example, R.J. Roberts, *Anticomines and Antitrust: The Competition Law of Canada and the Antitrust Law of the United States* (Toronto: Butterworths, 1980) at c. 3.

combines provisions.¹⁶³ A provision added to the *Combines Investigation Act* in 1976 allowing a right of action has only been used sparingly, in large part because of still unresolved doubts over its constitutionality.¹⁶⁴

The absence of an effective private right of action has been cited as one of the primary differences between Canadian and American competition law.¹⁶⁵ For example, the lack of a private action has probably hindered the development of competition law expertise in the Canadian bar and judiciary. Further, while there is no sign that private actions are increasing in importance in Canada, in the United States the private action continues to demonstrate vitality.¹⁶⁶

The private action aside, the contrast in the U.S. between antitrust in the 1980s and the rest of the post-Arnold period is striking. The courts have abandoned their expansive interpretations of antitrust laws, mergers are rarely attacked and the Antitrust Division focuses on local price-fixing cases. Further, the intellectual foundations of antitrust have been turned on their heads, with concentration being viewed favourably and practices once thought to be anti-competitive are now seen as competitive.¹⁶⁷

One who is only familiar with the active U.S. antitrust policy in the years following the Second World War might view this enforcement decline as an aberration. When the history of

¹⁶³ *Transport Oil Ltd. v. Imperial Oil Ltd.*, [1935] 2 D.L.R. 500 (Ont. C.A.) and *Direct Lumber Co. v. Western Plywood*, [1962] S.C.R. 646.

¹⁶⁴ Now section 31.1 of the *Competition Act*. The anti-combines provisions in the *Criminal Code* were incorporated into the *Combines Investigation Act* in 1960. There are only a handful of reported cases dealing with s. 31.1, and most deal with the constitutional issue. On these cases see J. Timothy Kennish, "Competition Law and Enforcement in Canada" (1986) 20 Int. Law. 81 at 92-94.

¹⁶⁵ Cartensen, *supra*, note 1 at 100. Even if the constitutionality of s. 31.1 is upheld, a number of other aspects of the provision will likely prevent it from being utilized as widely as occurs in the U.S. See B.C. McDonald, "Private Actions and the Combines Investigation Act" in Prichard, *supra*, note 116 at 195; and J. Robert S. Prichard, "Private Enforcement and Class Actions" in Prichard, *ibid.* at 217.

¹⁶⁶ Hazlett, *supra*, note 2 at 321-29.

¹⁶⁷ See, *supra*, note 2 and the series of articles set out in (1985) 54 Antitrust L.J. under the heading "Antitrust in Transition: Crossing the Threshold of Change" at 3-37.

American antitrust in the years up to 1940 is examined, however, the position is reversed to a significant extent. Between 1890 and the beginning of Thurman Arnold's tenure, antitrust was never used rigorously and did not have a significant impact on the American economy. Thus, the period between 1940 and 1980 seems to be an aberration rather than the normal state of affairs.¹⁶⁸

If indeed the 1940-1980 period was an aberration, then one needs to be very cautious about attributing the differences between American antitrust and Canadian competition policy to broad societal and attitudinal factors. If these ideological factors had been very influential, then American antitrust policy would have been consistently robust and perennially stronger than its Canadian counterpart. This pattern did not exist during the 1890 to 1940 period and, arguably, does not exist at present.

From this, the more interesting question might be why American antitrust grew so rapidly after 1940 while Canadian competition policy did not. It is possible that the traditional American abhorrence of monopoly and faith in the market did play a significant role during this period. For instance, economic theories which were hostile to concentration held currency with many antitrust officials and judges.¹⁶⁹ But one must be careful about reaching such a conclusion about American attitudes between 1940-1980. This is because Americans were evidently far more accepting of big business in the years after the war than at the turn of the century.¹⁷⁰ This suggests that one should look at more specific factors in analyzing the development of American and Canadian competition policy, rather than focusing on broad societal and attitudinal differences.

This conclusion is not an isolated one. The tendency to attribute differences between Canadian and American methods of legal regulation to ideological factors has not been restricted to

¹⁶⁸ Another way to look at matters is to say that the 1920s and 1930s, like the 1980s, are the exception. For this to be correct, one has to see American antitrust as having been active up to 1920. Rowe, for example, takes this view. See, *supra*, note 130 at 1513-18.

¹⁶⁹ Rowe, *ibid.*, sees this as being the driving force behind antitrust in the post-War period. See at 1524-25, 1540-41.

¹⁷⁰ See Hofstadter, *supra*, note 139 at 130-45; and Galambos, *supra*, note 29 at 265-68.

competition law. Public ownership in Canada is a prominent example. Institutions such as the Canadian Broadcasting Corporation and Air Canada are seen as a manifestation of more cautious and state-oriented attitudes in Canada. This view, however, has been challenged in relation to another often cited example of Canadian public ownership, Ontario Hydro.¹⁷¹ Works such as that, together with the conclusions suggested in this paper, should be instructive for those undertaking comparative examinations of the way Canada and the United States have dealt with common legal problems. One, quite simply, should be cautious about relying on broad ideological explanations to explain differences between the two countries. Examinations undertaken with this cautionary note in mind will likely lead not only to a better understanding of the development of legal regulation but also to a more subtle appreciation of the role of ideology in such development.

¹⁷¹ Kenneth Dewar, "Toryism and Public Ownership in Canada: A Comment" (1983) 64 *Can. Hist. Rev.* 406.