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Robert W. Torrens Jr.

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An Evaluation of the Enforcement of the Combines Investigation Act

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AN EVALUATION OF THE ENFORCEMENT OF THE COMBINES INVESTIGATION ACT

ROBERT W. TORRENS JR., A.B.*

Substantively, there is considerable similarity between the anti-trust laws of Canada and those of the United States. Canada's first antitrust law,¹ passed in 1889, bears marked resemblance to the Sherman Act of 1890.² Former Section 412 of the Criminal Code, passed in 1935, is almost identical to Section 3 of the Robinson-Patman Act, enacted in 1936.³ In some respects, Canadian antitrust law is even more stringent than that of the United States. Canada has made resale price maintenance unlawful and has outlawed individual refusals to deal with persons who have resold at less than the resale price or who have refused to maintain the resale price.⁴

Despite this substantive similarity, enforcement activity in Canada has been slight in comparison with the vigorous enforcement which the antitrust laws have received in the United States. For example, the average number of reports issued by the Restrictive Trade Practices Commission was less than one per year in the 1930's. This figure rose to only two per year in the late 1940's, and four per year after 1952.⁵ This slight increase in activity did not even keep pace with the growth of the economy and of other government activities.⁶ Between 1889 and 1961 only some thirty anti-combines cases were tried by the courts.⁷

*Mr. Torrens is a graduate of Dartmouth College and is now a second year law student at Osgoode Hall Law School. The author wishes to acknowledge the fact that his article is based on a paper which he wrote jointly with Edward N. Meyer, Columbia University Law School, class of 1963.

¹ Now s. 32(1) of the Combines Investigation Act, R.S.C. 1952, c. 314, as am., by 1953-54, c. 51 and 1960, c. 45.

² Act of July 2, 1890, c. 647, 26 Stat. 209, 15 U.S.C.A. ss. 1-7.

³ 49 Stat. 1526 91936, 15 U.S.C.A. s. 13a.

⁴ *Supra*, footnote 1, s. 34.

⁵ Rosenbluth and Thorburn, *Canadian Anti-Combines Administration, 1952-1960*, 50 (1963).

⁶ *Id.* at 55.

⁷ Kilgour, *Cases and Materials on Unfair and Restrictive Trade Practices*, 373 (1962).

Several reasons for the lack of vigour in anti-combines enforcement have been suggested. At the outset, one must join with Professors Rosenbluth and Thorburn in asking whether anti-combines activity "... represents a serious attempt to influence the structure and functioning of the Canadian economy, (or whether it is) ... essentially a political gesture designed to meet the demands of the voters while leaving the structure and practices of business substantially unaffected."⁸ Rosenbluth and Thorburn reached the conclusion that "... the policy of successive administrations has been to keep anti-combines activity at a low level."⁹ This conclusion, if correct, would explain in large part the dearth of enforcement in Canada. It is lent plausibility by the fact that the budget for the combines branch has always been relatively low. In 1959-60 expenditures totalled only \$500,000. Clearly this could be increased several times without a significant impact on government spending.¹⁰ As one who believes that antitrust is the best method of preserving our free and competitive economy, I can but hope that the conclusion is incorrect. It is at least open to question. Canada has had some form of combines legislation since 1889. The law has been often studied and often amended. More often than not, these amendments have strengthened the law, in what were obvious attempts to increase its effectiveness. It is hard to believe that the legislators intended it to be ineffective.

Another thesis, advanced by Professor Kilgour, is that the enthusiasm with which a statute is enforced depends on whether it is a statute of general application, or one which is selective in its application. Kilgour contends that a general statute, such as the Sherman Act which strikes at "all contracts and combinations in restraint of trade", represents an objective of the first order and will be enforced accordingly. A statute of limited scope, such as the Combines Investigation Act which grants exemptions to such groups as suppliers of services, labour, and export industries, will not have as high a priority of enforcement. Kilgour asserts that such limitations establish a double standard which evokes hostility and criticism, and that this in turn has an adverse effect on the performance of enforcement officials.¹¹ This argument is based on a faulty premise. Although the Sherman Act is phrased in general terms, many exemptions from its operation are carved out by other statutes.¹² Exemptions are granted to labor unions by the Norris-La Guardia Act,¹³ to export associations which do not restrain domestic commerce by the Webb-Pomerene Act,¹⁴ to arrangements which contribute to national defense by the

⁸ Rosenbluth and Thorburn, *supra* footnote 5, at 57.

⁹ *Id.* at 63-64.

¹⁰ *Id.* at 44.

¹¹ Kilgour, *supra* footnote 7, at 385, reprinted from 1961 Can. B. J. 116, 116-119.

¹² Massel, *Competition and Monopoly*, 46-7 (1962).

¹³ 29 U.S.C. 105.

¹⁴ 15 U.S.C. 61-65.

Defense Production Act,¹⁵ to farm marketing co-operatives by the Capper-Volstead Act,¹⁶ to small business organizations by the Small Business Act,¹⁷ to farm marketing agreements by the Agricultural Marketing Agreement Act,¹⁸ to co-operatives of fishermen by the Fisherman's Collective Marketing Act,¹⁹ to associations of marine insurance companies by the Ship Mortgage Act,²⁰ and to lessees of federal oil and coal lands by the Mineral Leasing Act.²¹ Even if Professor Kilgour's premise were sound, however, it would be difficult to understand why the fact that a statute is selective in its operation should dull the zeal of enforcement officials. It is the statute which is discriminatory, not the enforcement. Parliament has decided which groups shall fall within the ambit of the statute, and it is to Parliament that dissatisfied groups undoubtedly turn to vent their criticism. Enforcement officials should feel no embarrassment in carrying out the dictates of the legislature.

Professor Kilgour has suggested another more compelling explanation for the lack of vigour in combines enforcement. Canada relies chiefly on one method of enforcement, the criminal prosecution. In the United States there are several alternative methods: criminal prosecution, government equity suit, private treble damage suit, private suit for injunctive relief, and use of an antitrust violation by the plaintiff as a defense to a private suit. One defect of the criminal prosecution is that it is a blunt instrument, and thus will be used against only the most flagrant violations. It is an inappropriate method of dealing with some types of violations, such as, for example, price discrimination; here equitable relief would be more desirable. Another defect of the criminal prosecution is that it provides only one policeman. The American system provides many policemen, thus multiplying the effectiveness of the law.²²

The Combines Investigation Act was probably made a criminal statute for constitutional reasons. Antitrust legislation has been upheld²³ under the federal government's power to pass criminal statutes,²⁴ but a civil antitrust law was held *ultra vires*²⁵ as infringing on the power of the provinces over property and civil rights,²⁶ rather than falling within the federal government's power over trade and commerce.²⁷

¹⁵ 50 U.S.C. App., s. 2158.

¹⁶ 7 U.S.C. 291, 292.

¹⁷ 15 U.S.C. 636.

¹⁸ 7 U.S.C. 671.

¹⁹ 15 U.S.C. 521, 522.

²⁰ 46 U.S.C. 885.

²¹ 30 U.S.C. 184.

²² Kilgour, *supra* footnote 7, at 372-3, reprinted from 1961 Can. B. J. 120, 120-122.

²³ *Proprietary Articles Trade Association v. Atty.-Gen. of Can.*, [1931] A.C. 310, 100 L.J.P.C. 84, [1931] 1 W.W.R. 552, 55 C.C.C. 241, [1931] 2 D.L.R. 1.

²⁴ The British North America Act, 1867, 30 & 31 Victoria, c. 3, s. 91(27).

²⁵ *In re the Board of Commerce Act, 1919, and the Combines and Fair Prices Act, 1919*, [1922] 1 A.C. 191, [1922] 1 W.W.R. 20, 60 D.L.R. 513.

²⁶ *Supra*, footnote 13, s. 92(13).

²⁷ *Supra*, footnote 13, s. 91(2).

This constitutional dilemma explains why civil remedies are not employed in Canadian antitrust, but it does not explain why private actions and defences based on anti-combines violations could not be allowed. This would require an amendment to the Combines Investigation Act, since the courts have held that the act does not at present give a civil cause of action for damages resulting from its breach.²⁸ Such an amendment would have the effect of providing more policemen, and thus efficient enforcement, at no cost to the government. Other criminal statutes have been held to give a civil cause of action to persons injured by their breach. For instance, in *Direct Transport Co. Ltd. v. Cornell*,²⁹ the Highway Improvement Act³⁰ was held to found a cause of action in persons injured by its breach, despite the fact that on its face it merely made it an offence to allow cattle to stray onto a highway. The only objection to such an amendment of the Combines Investigation Act would be that it might be thought to infringe the power of the provinces over property and civil rights. I do not believe that such an objection would be well founded. There is precedent for the inclusion in a federal statute of provision for the compensation of persons injured by breach of the statute. Section 40(2) of the Industrial Relations and Disputes Investigation Act,³¹ in addition to imposing a fine on an employer who has suspended, transferred, laid off, or discharged an employee contrary to the provisions of the act, provides that the employer may be directed to compensate the employee for the losses he has suffered because of the wrongful act of the employer. It is interesting to note in passing that there may be the possibility of a treble damage suit for monopoly under an Ontario statute, the Act Concerning Monopolies.³² No suit has been pursued to judgment under this enactment, although a suit was commenced under it in 1960.³³

Parliament has attempted to make the Combines Investigation Act more flexible and effective by supplementing the usual criminal penalties of fine and imprisonment with a group of special remedies. Under section 29, the governor in council may, on the basis of an inquiry under the act, and with or without a trial having taken place, reduce or eliminate the customs duties on articles which have been involved in a conspiracy, merger or monopoly. Under section 30, the Exchequer Court may, on information from the Attorney General, expunge or regulate the use of patents or trade marks which have been used to restrain or injure trade. Section 31 permits the court, after conviction, to prohibit the continuation or repetition of the offence. This is a very effective weapon. In *R. v. Electrical Contrac-*

²⁸ *Direct Lumber Co. Ltd. v. Western Plywood Co. Ltd.*, [1962] S.C.R. 646, (1962) 35 D.L.R. (2d) 1, 39 W.W.R. 43.

²⁹ [1938] O.R. 365, [1938] 3 D.L.R. 456.

³⁰ R.S.O. 1937, c. 56, s. 74(3).

³¹ R.S.C. 1952, c. 152.

³² R.S.O. 1897, c. 323 (unconsolidated but unrepealed).

³³ This case did not proceed to trial.

tors Assn. of Ont. and Dent,³⁴ the court prohibited repetition or continuation of an offence not only by the officers and servants of the Association, but also by any of its 800 members.

Under section 31 the court can dissolve a merger or monopoly. The court may also, on information of the Attorney General, prohibit the commission of an offence. Under section 31A, a person convicted of an offence may be required to submit periodic returns, disclosing the details of his business activities. While these special remedies give promise of a more varied and effective approach to the problem of antitrust, they have unfortunately remained virtually unused. The courts have relied almost exclusively on fines.

Another possible reason for the low level of enforcement is that Canadian anti-trust law was designed to rely heavily on publicity rather than prosecution for its effectiveness. Section 19(3) of the Combines Investigation Act requires that all reports of the Restrictive Trade Practices Commission be published within thirty days after their receipt by the Minister of Justice. It was thought that this would concentrate publicity on activities which the Restrictive Trade Practices Commission deemed to violate the Combines Investigation Act, and that such publicity would have the effect of deterring other businessmen from engaging in similar activities. The practice of publishing Commission reports has received intense criticism on the grounds that it brands the accused as a criminal without a trial, and that it might influence the result of a later criminal prosecution.³⁵ Evidently these criticisms have had their effect. Rosenbluth and Thorburn believe that the use of publicity as a deterrent "... has been quietly abandoned in favor of a policy of minimizing embarrassment to the parties concerned."³⁶ It does not seem that publicity ever was much of a deterrent in any case. It is unrealistic to expect the public to rise up in righteous indignation on learning that a firm has engaged in anti-competitive activity. Even if this could be expected, the amount of publicity has not been very great. The mailing list for Restrictive Trade Practices Commission Reports includes only some 800 names, and the press release accompanying the report consists only of an announcement that the report has been published, with no summary of the report's contents. Reports receive little notice in the press.³⁷ Even if the reports were more widely publicized it is doubtful that their deterrent effect would be very great since they are not authoritative expositions of the law, and since the law is infrequently enforced in the courts.

Some reasons for Canada's anaemic enforcement record have been suggested. One very important topic remains to be examined. In the

³⁴ 127 C.C.C. 273, 33 C.R. 221, [1960] O.W.N. 380, aff'd [1961] O.R. 265, 27 D.L.R. (2d) 193.

³⁵ See, for example, Hansard, *The Antitrust Laws of Canada*, 17 A.B.A. Sect. of Antitrust Law 447, 455 (1960).

³⁶ Rosenbluth and Thorburn, *supra* footnote 5, at 100.

³⁷ *Id.* at 39.

final analysis, no law can be effectively enforced unless the machinery provided for its enforcement efficiently investigates suspected violations and rapidly brings them to a binding determination. Some insights into the strengths and weaknesses of procedures under the Combines Investigation Act can be gained by comparing them with the procedures of the Federal Trade Commission in the United States. The responsibility for enforcing the anti-trust laws in the United States is divided between the Federal Trade Commission and the Department of Justice. I have limited my comparison to the procedures of the F.T.C. since these are more closely analogous to the Canadian machinery. Comparison can best be made by dividing the subject into two parts: investigation and hearing.

INVESTIGATION

In Canada the investigative power is lodged exclusively in the Director of Investigation and Research. He is empowered to initiate and conduct an inquiry whenever he himself believes that a violation of the Combines Investigation Act has occurred, whenever application is made to him by six citizens,³⁸ or whenever he is so directed by the Minister of Justice.³⁹ In practice inquiries are mainly the result of informal complaints or newspaper reports. Of 815 complaints between fiscal 1951/2 and 1958/9, there were only three formal complaints of six citizens, and no cases of formal direction by the minister.⁴⁰

In conducting his investigation, the Director is endowed with very broad powers. He can, on notice, require a sworn statement in writing showing in detail all business information of the person under investigation which the Director considers pertinent.⁴¹ The Director may, on obtaining a certificate from the Commission, enter upon any premises on which he believes there may be evidence relevant to the matter under inquiry. He may examine anything he finds, and may copy or take away any document which he believes affords such evidence.⁴² Any document found in the possession of a "participant" or on premises used or occupied by a "participant" will be *prima facie* evidence, in a later criminal prosecution under the act, that anything recorded in the document as having been done, said or agreed upon by the "participant" or his agent was in fact so done, said or agreed upon.⁴³ A "participant" is made such simply by being named as such in an indictment.⁴⁴ In *R. v. Crown Zellerbach Canada Ltd. and Bart-ram Paper Products Co.*,⁴⁵ "documents" was held to include not only corporate books and records, but also papers of every kind and

³⁸ *Supra*, footnote 1, s. 7.

³⁹ *Supra*, footnote 1, s. 8.

⁴⁰ Rosenbluth and Thorburn, *supra* footnote 5, at 34.

⁴¹ *Supra*, footnote 1, s. 9.

⁴² *Supra*, footnote 1, s. 10.

⁴³ *Supra*, footnote 1, s. 41(2)(c)(ii).

⁴⁴ *Supra*, footnote 1, s. 41(1)(c).

⁴⁵ 111 C.C.C. 54, (1955), 14 W.W.R. 433, 21 C.R. 100, *affd.* 25 C.R. 217, 20 W.W.R. 523, 7 D.L.R. (2d) 515.

description. In *Howard Smith Paper Mills Ltd. et al. v. The Queen*,⁴⁶ "documents" was held to include even inter-office memoranda. The Director is also empowered to require evidence on affidavit.⁴⁷ At any stage in the investigation, the Director may, if he is of the opinion that the evidence obtained discloses a violation, prepare a statement of such evidence and submit it to the Restrictive Trade Practices Commission. Whenever such a statement is submitted, the Restrictive Trade Practices Commission is required to hold a hearing.⁴⁸ If, on the other hand, the Director decides that the matter does not justify further inquiry, he may discontinue the inquiry.⁴⁹ These are the statutory formalities. In practice there is an informal preliminary investigation consisting of the collection of generally available facts from trade journals and other public sources. On the basis of these facts the Director decides whether or not further inquiry is warranted. Rosenbluth and Thorburn suggest that a practice is made of keeping down the number of investigations by dropping cases after this preliminary stage where the results are conflicting or inconclusive.⁵⁰

In the United States, the Federal Trade Commission may initiate an investigation upon its own motion, on the request of the President, Congress, governmental agencies, or the courts, or on the application of private parties. The overwhelming majority of investigations are the result of applications by private parties. The application is first screened to determine whether or not the alleged conduct constitutes a violation of the anti-trust laws. If it does, then an investigation is launched. The investigator for the Federal Trade Commission may require a company to open all of its records for examination, and, by *subpoena*, may require the production of any material deemed relevant.⁵¹ In *F.T.C. v. American Tobacco Co.*,⁵² Mr. Justice Holmes condemned the use of the statutory access power for the purpose of conducting a "fishing expedition" through the files of the company, and stated that some relevance to the investigation must be shown. Under Federal Trade Commission practice, all cases must be disposed of by written ruling.⁵³

It appears from this that Canadian and American investigators have virtually the same powers. If anything, the powers of the Director are slightly greater than those of the Federal Trade Commission investigator since the Director can embark on a "fishing expedition" and can search business premises without warning. This cannot be done by the Federal Trade Commission.⁵⁴ It is evident that the

⁴⁶ 8 D.L.R. (2d) 449, 118 C.C.C. 321, 26 C.R. 1, [1957] S.C.R. 403, affg. [1955] O.R. 713, 4 D.L.R. 225, O.W.N. 673, 112 C.C.C. 108, 25 C.P.R. 27, 22 C.R. 205, affg. [1954] O.R. 543, 4 D.L.R. 161, O.W.N. 579, 109 C.C.C. 65, 22 C.P.R. 10, 19 C.R. 1.

⁴⁷ *Supra*, footnote 1, s. 12.

⁴⁸ *Supra*, footnote 1, s. 18.

⁴⁹ *Supra*, footnote 1, s. 14.

⁵⁰ Rosenbluth and Thorburn, *supra*, footnote 5, at 34-5.

⁵¹ 16 C.F.R. s. 1.11 (1960).

⁵² 264 U.S. 298 (1924).

⁵³ F.T.C. Rules of Practice and Procedure, May 1955, pp. 25-6.

⁵⁴ Rosenbluth and Thorburn, *supra*, footnote 5, at 35-36.

absence of energetic anti-combines enforcement in Canada is not attributable to any deficiency in the powers of investigation.

The only practice of the Director which is inimical to effective enforcement is that of dropping investigations after the preliminary stage. This must permit countless violations to slip by undetected, since violations usually can not be discovered by any means short of examining the company's records. Furthermore it lessens the deterrent effect of the act since neither the firm itself nor the public is aware that any investigation is being conducted.

HEARING

On receipt of the Director's report, the Restrictive Trade Practices Commission holds a hearing at which a member of the staff of the Director acts as counsel in support of the allegations contained in the Director's report, and the parties against whom allegations are made may appear and be represented by counsel.⁵⁵ The Commission has very broad powers for compelling the attendance and testimony of witnesses and the production of documents. There is, for instance, no privilege against self-incrimination.⁵⁶ The hearing before the Commission is required to be held in private unless the Chairman of the Commission orders that it be held in public.⁵⁷ It was held in *Canadian Fishing Co. v. Smith et al.*⁵⁸ that the decision to hold a hearing in public is completely within the discretion of the Chairman. It was held in *British Columbia Packers Ltd. et al. v. Smith et al.*⁵⁹ that if the hearing is held in private, then no information disclosed at the hearing can be made public by the Commission except as provided by the Act. The Act provides only for the giving of a statement of evidence to persons against whom allegations are made, and for a report by the Commission to the Minister of Justice. Any other disclosure may be enjoined.

As soon as possible after the hearing, the Restrictive Trade Practices Commission is required to prepare a report for the Minister of Justice.⁶⁰ This report reviews the evidence, appraises the effect of the disclosed practices on the public interest, and recommends remedies. The Minister of Justice is required to publish this report within thirty days of its receipt.⁶¹ If the Commission is unable to reach a conclusion as to the effect of the disclosed practices, on the public interest, it may maintain continued surveillance of the firms involved by requiring them to submit periodic reports of their business dealings.⁶²

The conclusions of the Restrictive Trade Practices Commission as to the existence of a violation can not be appealed to a higher

⁵⁵ *Supra*, footnote 1, s. 19(3).

⁵⁶ *Supra*, footnote 1, s. 20(2).

⁵⁷ *Supra*, footnote 1, s. 28.

⁵⁸ 30 D.L.R. (2d) 587.

⁵⁹ [1961] O.R. 596, (1960) 22 D.L.R. (2d) 156.

⁶⁰ *Supra*, footnote 1, s. 19.

⁶¹ *Supra*, footnote 1, s. 19(3).

⁶² *Supra*, footnote 1, s. 22.

authority. Neither its findings of fact nor its conclusions of law, however, have any binding effect on the individual reported against. The only function of the report, with the exception of the publicity function discussed earlier, is to assist the Minister of Justice in deciding whether or not to prosecute.

On receipt of the report of the Restrictive Trade Practices Commission, the Minister of Justice must decide whether or not to prosecute. This determination is completely within his discretion, and he has, in fact, decided not to prosecute in cases where the Commission's report has indicated the belief of that body that a clear cut violation was present. For example, in the Restrictive Trade Practices Commission Report Concerning the Production, Distribution and Sale of Zinc Oxide,⁶³ the Commission found that one firm had engaged in secret discriminatory rebates, predatory price cutting, and price wars, culminating in the elimination of competitors, with the offending firm finally controlling 80% of the market for zinc oxide and accounting for 86% of the production of zinc oxide in Canada. The Restrictive Trade Practices Commission recommended court orders restraining future discriminatory practices. The Minister of Justice, "for reasons which remain obscure,"⁶⁴ decided not to prosecute. Unfortunately, the Minister of Justice is not required to give any reasons for his failure not to prosecute. One factor which weighs against prosecution is the belief that the main purpose of the act is not prosecution, but publicity, which has already been provided by the Commission's report. Another factor which undoubtedly receives consideration, is, whether or not the violator desists from his objectionable practices following the adverse decision of the Commission.

If the Minister of Justice decides in favour of prosecution, he brings an action in the ordinary courts, or in the Exchequer Court. The action can only be tried in the Exchequer Court with the consent of the accused.⁶⁵ In either court the whole matter must be heard *de novo*. The findings of the Restrictive Trade Practices Commission are not even *prima facie* evidence. It has been the custom for the Minister of Justice to appoint outside counsel to conduct the case in the courts, rather than employing the personnel of the Department of Justice or of the Director of Investigation and Research. Rosenbluth and Thorburn state that the lawyer selected is invariably a supporter of the party in power.⁶⁶

If the accused is convicted, the penalty imposed will almost certainly be a fine. The sanction of imprisonment has never been used, and use of the special remedies discussed earlier is a rarity. Prior to 1952, fines were limited to \$25,000, and were frequently treated as license fees by the violators, who continued the objectionable practices.

⁶³ Dept. of Justice, Ottawa, 1958.

⁶⁴ Brecher, *Combines and Competition: A Reappraisal of Canadian Public Policy*, 38 Can. B. Rev. 523, 535 n. 37.

⁶⁵ *Supra*, footnote 1, s. 41A(4).

⁶⁶ Rosenbluth and Thorburn, *supra* footnote 5, at 40.

Since 1952, fines have been discretionary in amount, but the fines actually imposed by the courts have remained low.

The post-investigative procedures used by the Federal Trade Commission differ drastically from those used in Canada. Upon reaching the decision to issue a complaint, the Federal Trade Commission sends the respondent a notice of complaint, a copy of the proposed complaint, and a copy of a proposed consent order.⁶⁷ The respondent has ten days to agree to the proposed consent order. If he does so, the matter is referred to the Office of Consent Orders. In this way, 85% of the investigations undertaken by the Federal Trade Commission are terminated. If the respondent fails to comply with the consent order, the Federal Trade Commission may prosecute the respondent for such failure,⁶⁸ or may prosecute the violation itself, using the consent order as proof of prior bad acts.⁶⁹

As an alternative to the consent order, the Federal Trade Commission may drop the case against a corporation and allow it to take part in a trade practice conference. The conference is an attempt by the Commission, in concert with the firms in an industry, to draw up a series of rules as to what constitutes unfair competition in that industry.⁷⁰ These rules have been held not to have the force of law,⁷¹ but they do have great weight in a proceeding under Section 5 of the Federal Trade Commission Act.⁷²

If the respondent refuses to sign a consent order, a complaint issues. On receipt of the complaint, the respondent must file an answer either admitting or denying the charges. There is no motion to dismiss for failure to state a case of action.⁷³ Issue being joined, a pre-trial conference is mandatory.⁷⁴ The case then goes to trial before a hearing examiner. On termination of the hearing, both parties submit conclusions of fact to the hearing examiner. The examiner then files an initial decision, which becomes final in thirty days if neither party petitions for review within fifteen days, or unless the Commission decides to review the case *ex mero motu*.⁷⁵ Appeals are discretionary, but in practice the Commission almost never denies them. The Federal Commission may affirm, reverse or modify the decision of the hearing examiner. Appeal lies from the decision of the Commission to the Circuit Court of Appeals, which in turn may affirm, reverse or modify the decision of the Commission. The decisions of the Federal Trade Commission constitute a body of precedent which

⁶⁷ 16 C.F.R. s. 3.1 (1960).

⁶⁸ 16 C.F.R. s. 1.57 (1960).

⁶⁹ 16 C.F.R. s. 1.55 (1960).

⁷⁰ 16 C.F.R. s. 2.22 (1960).

⁷¹ *Arnold Constable Corp.*, Dkt. No. 7657 (1/12/61).

⁷² 16 C.F.R. ss. 2.21-2.31 (1960).

⁷³ *Chamber of Commerce of Minneapolis v. F.T.C.*, 280 F. 45 (7th Cir., 1920).

⁷⁴ 16 C.F.R. s. 4.8 (1960).

⁷⁵ 16 C.F.R. ss. 4.17, 4.19 (1960).

is binding on it, but not binding in a proceeding in the District Court.⁷⁶

If the respondent is found to have violated the law, the Federal Trade Commission will issue an order directing the respondent to cease and desist from the objectionable practices. The Commission may prescribe the means by which the cessation is to be accomplished, and in doing so they are allowed much leeway by the Supreme Court. "The courts will not interfere except where the remedy selected bears no reasonable relation to the unlawful practices found to exist."⁷⁷ The respondent is required to file a written report within sixty days showing compliance with the terms of the cease and desist order.⁷⁸ The Federal Trade Commission may order the respondent to file periodic reports concerning its business activity, containing specific information as to its conduct.⁷⁹ It may seek enforcement of its cease and desist orders and production of the required reports through the Circuit Courts.⁸⁰ The Finality Act⁸¹ imposes a penalty of \$5,000 per day for violation of any cease and desist order.

What conclusions can be drawn as to the comparative efficiency of the post-investigative procedures of the Federal Trade Commission and the Restrictive Trade Practices Commission? The first major difference which emerges from the comparison is that 85% of all Federal Trade Commission cases are disposed of by consent orders without the necessity of hearing or trial, whereas there is no comparable method of disposing of cases in Canada. The saving of time and expense which such a procedure affords is obvious. It allows a limited staff with a limited budget to deal with many more cases than would otherwise be possible. Savings of time and money also enure to the accused if he is willing to desist from the objectionable practice. There is no reason why a system similar to that of the consent order could not be used in Canada. Under section 31(2) of the Combines Investigation Act a superior court has the power, in proceedings commenced by information of the Attorney General of Canada or the attorney general of a province, to prohibit the doing or continuing of any act directed towards the commission of an offence. There would be nothing to prevent the Restrictive Trade Practices Commission from adopting a procedure under which an accused is given the option, in proper cases, of avoiding the process of hearing and trial if he is willing to agree to the issuance of a prohibition under 31(2). Such imaginative use of the existing machinery could greatly improve the efficiency of enforcement.

There is no practice in Canada analogous to the trade practice conference used by the Federal Trade Commission. The trade prac-

⁷⁶ Compare, for example, the promulgation of the "indirect purchaser" doctrine by the F.T.C. in *Bissell Carpet Sweeper Co.*, Dkt. 4636 (complaint) (1941), with its disavowal by the courts in *Klein v. Lionel Corp.*, 237 F. 2d 13 (3rd Cir. 1956).

⁷⁷ *Siegel Co. v. F.T.C.*, 327 U.S. 608, 612-13 (1945).

⁷⁸ 16 C.F.R. s. 1.57 (1960).

⁷⁹ *Federal Trade Commission Act*, 15 U.S.C. 46(b).

⁸⁰ *Id.*, s. 10.

⁸¹ P.L. 86-107 s. (1)(1) (1959).

tice conference is useful because it helps to foster understanding of the antitrust laws and the desire to comply with them. It casts the enforcement agency in the role of an adviser rather than that of a policeman, thereby reducing antagonism. Firms are naturally more prone to obey a code of behavior that they and their fellow firms have agreed to and helped to set up. This is another area where more imaginative use of the powers granted by the Act would improve enforcement. The power granted to the Director by section 42(1) to carry out general investigations into the conditions and practices in an industry could be used to hold trade practice conferences.

Another striking difference is that under Federal Trade Commission practice the hearing is conducted by a hearing examiner, whereas under the Canadian system the Commissioners themselves, separately or jointly, must hear the oral evidence, study the voluminous documents, and write the report in each case.⁸² This places an obvious limitation on the number of cases which the Restrictive Trade Practices Commission can hear. There seems to be no reason why part of this workload should not be delegated to some member of the Commission's staff.

Two features of the Canadian enforcement system make it a target for the charge that it is politically rather than legally oriented. The first is the fact that cases in the courts are conducted by outside counsel of the political persuasion of the party in power rather than by members of the staff of the Director. This needlessly increases expenses and takes the conduct of the case out of the hands of those who are experts in the field. It is indefensible to make anti-combines enforcement a vehicle for political patronage. Secondly, it has been asserted that the decision of the Minister of Justice as to whether or not to prosecute is a political decision.⁸³ Since a body of experts has expressed its belief that the law has been violated, prosecution should be mandatory. This would remove the administration of the Act from the realm of politics.

By far the most important difference in the two systems of enforcement is that, unlike the Federal Trade Commission, the Restrictive Trade Practices Commission does not have the power to make binding determinations as to the existence or non-existence of a violation of the antitrust laws. This means that the whole cumbersome procedure of hearing a report accomplishes very little, while it absorbs the time and money both of the combines administration and of the accused. The publicity which the hearing and report are designed to afford is not very effective. The advice which the report gives to the Minister of Justice is unnecessary in the instance of flagrant violations, and of doubtful value in other cases, since it can be, and frequently is, ignored. Where the hearing and report are being used to persuade the accused to desist from the condemned

⁸² Rosenbluth and Thorburn, *supra* footnote 5, at 38.

⁸³ *Id.*, at 40.

practices without trial, no assurance is provided that the practices will not be resumed at a later date. It would be much more effective to prosecute and prohibit continuation or repetition of the offense under Section 31.

There are two possible ways of solving the problem of the virtually useless hearing. The easier method, and one which has found favour with the commentators,⁸⁴ would be to use the machinery already provided by Section 15 of the Combines Investigation Act. Section 15 allows the Director, at any stage in his inquiry, to turn the case over to the Attorney General of Canada for action, thus bypassing the Commission. There can surely be no objection to using this expeditious procedure when the evidence indicates that a clear cut violation has been committed. The increased use of Section 15 would be even more desirable if the Combines Investigation Act were amended to permit the trial of combines cases before the Exchequer Court without the consent of the accused. This would allow one court to develop a much needed expertise in the trial of combines cases.

The second possibility would be to amend the Combines Investigation Act to give the Restrictive Trade Practices Commission the power to make binding decisions, with appeal lying to the Exchequer Court. This alternative would be preferable from the standpoint that the Commission already has expertise in combines cases. In addition, the Commission is willing to consider the economic effects of anti-competitive practices, whereas the courts have been prone to adopt a purely legalistic approach in combines cases. If this second alternative were adopted, some changes would have to be made in the investigative and hearing procedures in order to give the accused the safeguards which he enjoys in other criminal prosecutions.

Some commentators believe that the enforcement record is better than one would conclude from the small number of reports and prosecutions. They argue that any assessment of the effectiveness of the Canadian system must take into account the intangible preventive effect of the enforcement program as a whole.⁸⁵ Other students of the subject believe that this preventive effect has been small.⁸⁶ In any case the record has not been a good one, and this must be attributed at least in part to the combines machinery itself. Professor Richardson, in evaluating the antitrust procedures in use in Canada, the United States and the United Kingdom, concluded that Canada has "... a hybrid mechanism of investigation which no country in its right senses would adopt."⁸⁷ It is difficult to disagree with this evaluation.

⁸⁴ See, for example, Rosenbluth and Thorburn, *supra* footnote 5, at 105. See also MacKeigan in *The MacQuarrie Report and the Reform of Combines Legislation*, 30 Can. B. Rev. 549, n. 605 (1952).

⁸⁵ Brecher, *supra* footnote 64 at 530, n. 16.

⁸⁶ Rosenbluth and Thorburn, *supra* footnote 5, 44-46.

⁸⁷ Richardson, *The Control of Monopolies in the United States of America, Canada, and the United Kingdom*, 35 Austl. L.J. 363, (1962).