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BRITISH EXPERIENCE UNDER RESTRICTIVE
PRACTICES LEGISLATION WITH SPECIAL
REFERENCE TO CANADA

SUBMITTED TO THE DEPARTMENT OF ECONOMICS
and
POLITICAL SCIENCE
of the
UNIVERSITY OF WINDSOR
IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR
THE DEGREE OF MASTER OF ARTS

BY

CARL MacKENZIE, B.A.

FACULTY OF GRADUATE STUDIES

1964

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Approved by: W. Phillips
A. E. Kovacs
J. M. Brewster

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ABSTRACT

A modified version of the per se rule has been employed by Canada for several decades to enforce restrictive practices legislation. One frequent criticism of this method of enforcement is its lack of flexibility. Reliance on judges and lawyers with little or no formal training in economics to decide matters which are essentially economic in nature has caused to evolve an enforcement procedure in many respects excessively legalistic. In good part, this has resulted from the Federal Government's necessary reliance on its powers to enact criminal legislation ('property and civil rights' being exclusively provincial under the B.N.A. Act) in order to control combines and restrictive practices, and the inevitable clash between standards of proof, etc. normally expected in criminal proceedings and those appropriate to economic issues.

An attempt has been made in the United Kingdom to avoid this too legalistic approach to restrictive practices by the establishment of a special court to pronounce upon restrictive agreements. Provision has been made for appointment to the court of lay members, qualified by virtue of their experience in industry, commerce or public affairs, to sit with legally qualified judges in the adjudication of restrictive agreements. In arriving at its decision the court must consider all relevant economic factors. Such an economically-oriented approach might be expected, on a priori grounds, to have economic results superior to those emerging from current Canadian practice, under which (despite apparent deference to 'undueness' and public interest in the legislation) interpretation has become strained, legalistic and even somewhat in-

consistent, with virtually no reference to economic causes or effects.

Analysis of cases relating to the public interest which have appeared before this court to the present time fails to uphold such expectations and it is concluded that on the basis of British experience, there is insufficient proof to establish the a priori belief that the economic results of this economically-oriented approach are superior to those resulting from per se rules.

PREFACE

The purpose of this study is to examine the recent developments in restrictive practices legislation in the United Kingdom, almost exclusively related to price agreements, to determine whether the newer British procedure contains worthwhile 'lessons' applicable to the Canadian method of enforcement. The United Kingdom legislation establishes an economically-oriented approach to the subject of restrictive practices enforcement. This differs considerably from the longer-established Canadian method of enforcement wherein economic considerations play at most a minor part as evidence which will be considered by the court.

In making acknowledgements, my foremost gratitude is to the members of my committee; Professor W. G. Phillips, Ph.D., Head of Department of Economics and Political Science and Chairman of my committee, Professor A. E. Kovacs of the Department of Economics and Political Science and Professor J. M. Brownlie of the School of Business Administration. I am deeply indebted to the entire Department of Economics and Political Science for their many helpful suggestions and comments but especially to Dr. W. G. Phillips who aroused my initial interest in the subject and succeeded in maintaining it even beyond completion of the study.

I also wish to extend my thanks to the staff of the University of Windsor Library for the assistance given me, notably to Mr. Albert V. Mate, M.A., A.M.L.S., Reference Librarian, and Mrs. Elizabeth McGaffey, also of the reference department, in locating many of the sources of information used in this study. Miss Mary Dalton was also both cheerful and helpful, providing valuable assistance on innumerable occasions.

I would be forever in error if I did not express gratitude to my wife for her continual encouragement and forbearance in the face of what, at the time, appeared to be major difficulties. Finally, I wish to thank those who have taken the time to assist in the typing of this thesis.

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INTRODUCTION

The purpose of this study is to describe and analyze the British method of enforcing restrictive practices legislation to determine whether this newer approach whereby restrictive agreements are judged by their economic effects is superior to Canadian enforcement procedure whereby restrictive agreements which involve a preponderance of the industry or a substantial part of the market are per se illegal. The Canadian procedure has avoided any refined economic analysis by the courts and has been content to rely on the test that collusive behaviour has reduced competition to a point which is, in the court's opinion, undue. Once this point has been reached the agreement is per se illegal with no regard for the economic consequences which might follow removal of the restrictions.

If the proposition is accepted that a competitive economy is more productive than its noncompetitive counterpart, the need for legislation prohibiting restrictive practices is obvious. It is only in more recent years, however, that this proposition has found wide acceptance outside of North America and even then it has only been accepted with qualifications. The recent United Kingdom legislation establishes a presumption in favour of competition but provides for exceptions to the competitive principle when it can be demonstrated that restrictive practices are not contrary to the public interest. This exemplifies the widely held belief in England that not all restrictions are harmful and that some even may be beneficial.

In North America the benefits of competition have long been extolled.

Even the businessman who would pursue a restrictive policy in the furtherance of his own interests, would prefer to see other businessmen subjected to the rigours of competition. Competition is egalitarian in nature and it is upon such political principles that the North American democracies of the United States and Canada were founded. The desire for political equality and the fear of concentration of economic power were translated into an economic policy where great faith has been placed upon the levelling powers of competition. There is little wonder then that per se rules were adopted in North America as a guarantor of a competitive economy.

It is only in North America that the per se approach to restrictive practices is found. Countries which have become concerned with the anti-trust problem in recent years have adopted an empirical approach to the problem. This raises the question whether the per se approach has become somewhat dated. Why have other countries not seen fit to adopt this method of enforcement which has the benefit of such lengthy experience?

The procedure followed in answering these and other questions which arise will be to describe the economic background and then move on to the legal framework on which the system of enforcement rests. An analysis follows of cases contested before the Restrictive Practices Court to determine whether agreements were contrary to the public interest. The final section of the thesis will evaluate the effects of the British legislation on competition within the country in an attempt to determine whether the economically oriented approach used in the United Kingdom has shown economic results superior to per se rules.

CHAPTER I

LEGAL ATTITUDE TOWARDS RESTRICTIVE PRACTICES IN CANADA

Restrictive practices legislation developed almost simultaneously in Canada (1889) and the United States (1890) as a reaction to the concentration of economic power evidenced by the merger movement of the period. It has been stated that legislation was enacted in both countries "prohibiting comprehensively and in principle all forms of restrictive agreements tending to eliminate competition."¹ Some qualification is required for this statement but it does express the manner in which the "rule of law" operates.

The Sherman Act in the United States did prohibit all restraints of trade;² the Canadian legislation, however, condemned only those restraints which "unduly" limited competition.³ Around the turn of the

1 W. Friedmann, "A Comparative Analysis," in W. Friedmann, editor, Anti Trust Laws, (Toronto: The Carswell Co. Ltd., 1956), p. 525.

2 Section 1 outlaws "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations"; and section 2 makes guilty of a misdemeanour "Every person who shall monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States or with foreign nations." Emphasis supplied. 26 Stat. 209 (1890), as amended, 15 U.S.C. (1958).

3 Section 32 (1) (c) has emerged as the most important paragraph and states "Every one who conspires, combines, agrees or arranges with another person to prevent, or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of an article, or in the price of insurance upon persons or property is guilty of an indictable offence and is liable to imprisonment for two years." Emphasis supplied. Combines Investigation Act, R.S.C., 1952, C314 as amended by 1960, C45.

century, the American courts interpreted the qualitative test of unreasonableness into the Act and Friedmann, in a 1955 article, concluded "that the differences between Canadian and American law have at least theoretically been reduced to insignificance."⁴

It is convenient at this point to clarify the present Canadian legal position on restrictive practices as the object of this study is to judge, in the light of recent British experience, whether the Canadian approach to restrictive practices enforcement might be outdated or inferior to the more recent British approach which will be described below.

A. The Modified Per Se Rule

Friedmann's statement that in Canada "all restrictive agreements tending to eliminate competition"⁵ are prohibited has been criticized and he has been accused of attempting to sum up the Canadian jurisprudence in the statement that "any restriction of competition must be presumed to be per se an offence against the law."⁶ This is an important point to clear up as the opinion is widespread in Canada that any and all restraints upon competition are per se illegal. This belief is "as incorrect as it is influential."⁷

4 W. Friedmann, "Monopoly, Reasonableness and Public Interest", Canadian Bar Review, XXXIII (1955), 145; see also L. C. Reynolds, The Control of Competition in Canada, (Cambridge, Mass.: Harvard University Press, 1940), pp. 169-70 where he states "The process of judicial interpretation has...brought the two statutes into much closer agreement than one would suspect from the wording."

5 In D. G. Kilgour, "Cases and Comments", Canadian Bar Review, XXXV (1957), 1088.

6 Ibid.

7 Ibid.

Two noted authorities lend their weight to the opinion that all restraints upon competition are not per se illegal in Canada. Professor Skeoch has stated:

each and every degree of interference with free competition is not condemned, but only that degree which results from effective control of a substantial part of the market concerned.⁸

Maxwell Cohen, appearing as a witness before the House of Commons Committee on Banking and Commerce, said:

When one talks about the existence in Canada of an attitude by the courts, which is very tough and simple and oversimplified, one must remember that this oversimplification, on the whole, is confined to situations where the preponderance of the industry is involved in such co-operative or collusive behaviour.⁹

The construction most likely to be placed by the courts today upon the wording of the Act appears to be that those restraints upon competition which involve "a substantial part of the market" or "preponderance of the industry" will be judged per se illegal. This is the modification to the strict per se rule which appears in the Canadian legislation.

B. Constitutional Problems

Even the briefest outline of the present Canadian legal attitude towards restrictive practices would be seriously deficient without some mention of the constitutional problems peculiar to Canada, which have played an important role in the framing of the anti-combines legislation.

⁸ L. A. Skeoch, "The Combines Investigation Act: Its Intent and Application", Canadian Journal of Economics and Political Science, XXII (1956), 30-31.

⁹ M. Cohen, to House of Commons Committee on Banking and Commerce, Minutes of Proceedings and Evidence, Combines Investigation Act, 1960, pp. 536-37.

Section 91 of the British North America Act entrusts to the federal government exclusive authority over "the regulation of trade and commerce" and "the criminal law," Section 92 gives authority to the provinces over "property and civil rights in the Provinces." There is an apparent conflict here. Almost any economic regulations will affect both "trade and commerce" and "property and civil rights."

The classical definition of the "trade and commerce" clause was laid down in Citizens' Insurance Company vs. Parsons (1881) where it was stated that the authority of the federal government

to legislate for the regulation of trade and commerce does not comprehend the power to regulate by legislation the contracts of a particular business or trade, such as the business of fire insurance in a single province.¹⁰

As a result of the courts' interpretation of the "trade and commerce" clause, the federal government has been forced to resort to the criminal code to enforce its anti-combines policies. The propriety of this was also questioned but upheld in 1931 on the ground that the primary object of the Combines Investigation Act was "to make the formation of a combine a criminal offence, and that the investigatory powers of the Registrar are reasonably ancillary to this object."¹¹

As recently as 1952, the MacQuarrie Report stated:

The constitutional case for monopoly legislation is narrower in Canada than in either the United Kingdom, which is a unitary state, or the United States, where the commerce clause has received a wide interpretation.¹²

10 See L. C. Reynolds, op. cit., pp. 247-48.

11 Ibid., p. 258.

12 Report of the Committee to Study Combines Legislation, (Ottawa: Queen's Printer, 1952), p. 7.

Because of reliance on the criminal law, publicity and criminal prosecution have been the principal means of enforcement used against restrictive practices in Canada. Civil remedies are very difficult due to the constitutional problems. This has resulted in an unhappy state of affairs as criminal sanctions are inappropriate in all cases. The substitution of civil or administrative remedies in place of criminal prosecution would make it possible to mitigate the harshness of the latter where desirable. In the United States both civil and criminal prosecutions may be brought (concurrently if desired) by the Department of Justice under the Sherman Act and the Federal Trade Commission may apply administrative remedies; in Britain both civil and administrative controls are employed. In Canada the only alternative to the criminal law is a decision by the Minister of Justice not to proceed any further with a case. This is hardly satisfactory as it does not comprehend "the many intermediate situations where...action is required but criminal prosecution may appear too severe."¹³

It would not be difficult to argue the superiority of legislation containing a full arsenal of weapons, i.e., criminal, civil and administrative remedies, to that containing a single blunder buss, criminal sanctions. The authors of the MacQuarrie Report obviously thought likewise.

We are not unaware...that there are sectors of the economy in which effective competition is not maintained, leaving problems which in a unitary state might be met by civil restraint or other remedies. It may be that at some future time it might be possible to extend the scope of the legislation.¹⁴

13 W. Friedmann in Anti-Trust Laws, p. 544.

14 Report of the Committee to Study Combines Legislation, p. 28 at passim.

The answer to whether or not civil controls could be enacted is contingent upon the attitude of the Supreme Court of Canada to the "trade and commerce" clause of the British North America Act. Gosse and Friedmann have expressed optimism that this clause may receive a more favourable interpretation than in the past if it becomes subjected again to court interpretation. Until such time we must consider anti-combine legislation to be bound within the confines of the criminal code.

Due to the criminal nature of proceedings, the standard of proof normally accepted by the court differs from that required in civil prosecutions. The standard of proof required in a criminal case is "beyond a reasonable doubt" while the lesser standard which must be met in a civil case is "the balance of probabilities." The latter is obviously better adapted to cases where the likely economic consequences, which are themselves something less than precise and absolute, must be evaluated. A "reasonable doubt" could be invoked in the majority of situations where often conflicting economic factors must be balanced, especially when judged by parties with no formal training in economics. Canadian courts have attempted, with some success, to avoid problems of this nature. Maxwell Cohen states:

The courts came to the conclusion early that the purpose of the legislation was not to impose upon them the refined economic task of the measurement of many calculations and factors of what was against the public interest, but to confine to them the main task of saying: has competition, as we understand that conception, been reduced, and reduced to such an extent that it becomes worrisome to us, as a court, looking at it...The history of Canadian anti-trust interpretation...has been a history of avoiding refinements of economic analysis by the courts, and they have rested upon the simple fact that collusive behaviour was sufficient.¹⁵

15 M. Cohen, loc. cit., pp. 536-37.

While the Canadian courts have been attempting to skirt the economic issues involved in restrictive practices cases, the British have set up a special court of law, the Restrictive Practices Court, and specifically require this body to examine each restrictive agreement in the light of the likely economic consequences resulting from it so that it can be pronounced either within or without the public interest. Civil remedies are employed by this court in the enforcement of its activities. The lower standard of proof required when civil remedies are used no doubt facilitates the reaching of decisions by the court. This is aptly put by R. L. Sich, Registrar of Restrictive Trading Agreements in the United Kingdom:

It is, of course, true that the kind of matters which have to be considered do not lend themselves to precise and absolute demonstration...But these are civil and not criminal proceedings, and hence, to discharge the onus of proof, a fact does not have to be established beyond reasonable doubt; it is enough that on the balance of probabilities it is more likely to be so than not.¹⁶

An example of the higher standard of proof required in a criminal case can be found in the Canadian Breweries decision where McRuer, C. J. stated:

If I am correct in applying, by analogy, the language of Cartwright, J. in the Howard Smith case to the Combines Act, it must be interpreted as differing from the Clayton Act in this important respect: under the Combines Act it must be demonstrated beyond a reasonable doubt that the merging of competitive corporations is likely to put it within the power of the merger to so extinguish competition as to affect prices by monopolistic control. As long as the evidence shows that there is strong virile competition in the market, notwithstanding the merger, I do not think the merging of competing companies comes within

¹⁶ R. L. Sich, "Progress Under the Restrictive Trade Practices Act, 1956", Yorkshire Bulletin of Economic and Social Research, (1956), p. 119.

the standard of proof required in a criminal case...¹⁷

In Canada, the nature of proof required in criminal cases, the predominant roles played by lawyers and judges and their avoidance of economic considerations, the legalistic requirements for successful prosecution, these factors have influenced the work of other authorities responsible for preparing cases for prosecution and have resulted in a legalistic approach. Rosenbluth and Thorburn claim that combines in Canada are viewed as constituting a police problem and a legal problem rather than economic problem and have accused the enforcement authorities of employing a "cops and robbers" approach to anti-combines enforcement policy.¹⁸

It would appear desirable to bring the economic considerations involved in restrictive practices cases into sharper focus than has been the practice in the past. Under the per se doctrine, as it exists in Canada, any agreement which "in effect restricts trade and involves a predominant section of the industry"¹⁹ is illegal without any inquiry as to "whether these agreements have been good for prices, or have been bad for prices."²⁰ Bladen and Stykolt have argued that all price agreements do

¹⁷ McCruer, C. J.'s statement in Regina v. Canadian Breweries, Ltd., 126 CCC 133, p. 161, quoted in Restrictive Trade Practices Commission, Report Concerning the Manufacture, Distribution and Sale of Paperboard Shipping Containers and Related Products, (Ottawa: Queens Printer, 1962), p. 649.

¹⁸ C. Rosenbluth and H. G. Thorburn, "Canadian Anti-Combines Administration, 1952-1960," in M. H. Watkins and D. F. Forster, editors, Economics: Canada, (Toronto: McGraw-Hill, 1963), p. 93, reprinted from The Canadian Journal of Economic and Political Science, XXVII, (Nov. 1961), 498-508.

¹⁹ H. Cohen, op. cit., p. 556.

²⁰ Ibid.

not create an "undue" degree of price rigidity and that some rigidity may even be necessary in the public interest.²¹ If such be the case, we may enquire whether legislation of the type now found in the United Kingdom, whereby it is possible to retain in force restrictive agreements which are considered to be in the public interest, is likely to result in better industrial performance and more benefits for the people than our modified per se rules by which the good (if there be any good restrictive agreements) are automatically swept out with the bad.

Since the United Kingdom legislation has been in effect for such a short period, it is appropriate to describe events preceding the 1948 and 1956 Acts to ensure that the need for such legislation in Britain is appreciated.

²¹ V. W. Eladen and S. Stykolt in Anti-trust Laws, p. 58; see also J. A. Schumpeter, Capitalism, Socialism and Democracy (third edition, New York and Evanston: Harper and Row, 1962), Chapter VIII, "Monopolistic Practices."

CHAPTER II

THE UNITED KINGDOM: ECONOMIC BACKGROUND

At the beginning of the Twentieth Century the United Kingdom was "an economy largely regulated by the functioning of the market in the classical economic tradition."¹ Professor G. C. Allen states that on the eve of World War I British industry, on the whole, could claim to be more competitive than German or American industry and that competition was considered to be the general rule governing industrial enterprise.² Important factors which influenced this attitude were the large interests which the major British industries had in the export markets of the world and the adherence of Great Britain to a free trade policy.

A. Post World War I

Opposition to monopolies increased after World War I due to an increase in the cost of living which was attributed in part to monopolistic practices which had been an outgrowth of the war period. In 1918 the British Government appointed the Committee on Trusts to consider actions to safeguard the public interest "in view of the probable extension of trade organizations and combinations after the war."³ The committee report recommended surveillance and the collection of information on

1 G. C. Allen, "Monopoly and Competition in the U.K." in E. H. Chamberlin, ed., Monopoly and Competition and Their Regulation, International Economic Association, (London: MacMillan, 1954), p. 88.

2 Allen, op. cit., p. 100;

3 R. Gosse, "The Enforcement of Competition in the U.K.", Canadian Bar Review, XXXVIII, (1960), 165.

ombination activity in industry.

No legislative activity was taken on this report as opposition to monopolies began to abate with the onset of the post-war depression. The chronic state of depression experienced by many British industries during the 1920's provided a strong inducement for businessmen to engage in restrictive practices.⁴ The major problem facing depressed industries was the presence of excess capacity which gave no indication of being removed by the competitive process.

Rationalization of industry began to find favour as an alternative to the competitive process for the removal of excess capacity and schemes were introduced to implement it in several of the leading industries (e.g. ship-building, coal-mining, wool-combing, cotton and tin-plate production).⁵ The Bank of England was also instrumental in the attempt to rationalize industry; the Lancashire Cotton Corporation Limited was formed with the financial backing of the Bank in 1929.⁶

4 "In periods of prosperity competition seemed to possess the virtues attributed to it. When, however, conditions changed for the worse...co-operation rather than competition, was the life of trade and even the law of self-preservation." in H. Heaton, Economic History of Europe, (revised edition; New York: Harper and Bros., 1948), pp. 603-04.

5 "The term 'rationalization' was invented late in the 1920's to express the idea of semi-compulsory reorganization." E. A. G. Robinson, The Structure of Competitive Industry, (revised edition; University of Chicago Press, 1958), p. 146; and op. cit., p. 154. "A large proportion of the so-called 'rationalization schemes' of the 1930's represented a misguided attempt to exorcise depression by adjusting capacity to the low level of requirements of the bottom of the depression. Compulsory and state-subsidized destruction of valuable equipment in potentially growing industries is the least appropriate measure yet discovered for curing a depression"; also G. C. Allen, op. cit., p. 89.

6 W. Mennell, Takeover: The Growth of Monopoly in Britain 1951-61, (London: Lawrence and Wishart, 1962), p. 15; G. C. Allen, op. cit., p. 102.

By 1929 the Balfour Committee reported that there was no urgent need for legislation dealing with the abuses of monopoly and, further, that England was fortunate in not being hampered by such anti-trust legislation as prevailed in the United States.⁷

During the 1930's international trade declined as the major industrial countries attempted to export their depression by reducing imports and imposing other restrictions. In the United States protectionist forces succeeded in having the Smoot-Hawley Act (1930) passed. This act raised tariffs to an all-time high and led to retaliatory action by many other countries. Steep tariff barriers were raised by one country after another, quotas were set, exports subsidized and discrimination practiced. Mercantilist policies were so closely emulated as to evoke the description "neo-mercantilist."⁸

In England rationalization and cartelization continued to enjoy public and governmental favour. Professor Allen states, "From 1932 onwards government policy became wholeheartedly committed to hastening the retreat from competition."⁹ The British Iron and Steel Federation was formed with government urging, for the purpose of entering into agreements with the European Steel Cartel to fix import quotas and determine prices. The government also initiated protectionist measures with respect to the coal, textile and ship-building industries for the

⁷ Final Report of the Committee on Industry and Trade, (London: H.M.S.O., 1929), p. 191.

⁸ D. A. Snider, Introduction to International Economics, (Homewood, Illinois: Richard D. Irwin, revised edition, 1958), p. 402.

⁹ G. C. Allen, op. cit., p. 90; for a very good contemporary account of the period, see A. P. Lucas, "The British Movement for Industrial Reconstruction and Control of Competitive Activity", Quarterly Journal of Economics, 1935, reprinted in Readings in the Social Control of Industry, The American Economic Association, (Philadelphia, The Blakiston Co., 1949).

purpose of limiting output, eliminating surplus capacity and fixing legal minimum prices.¹⁰

Rationalization schemes were favoured also by the notable increase in the strength of trade associations which occurred during World War II.¹¹ Firms which had previously been independent and competitive became linked through trade associations, the result being a further consolidation of interests and increased facility for the extension of combinations.

B. Post World War II

Towards the end of the war a change was noted in government and public opinion as unfavourable comparisons were being drawn between British and American industrial efficiency.¹² The restrictionist policies, which had been adhered to by British industry, were criticized as a contributing factor to the inferiority and stagnation of the inter-war period.¹³

The British Labour government subsequently took steps to effect a nationalization program. From 1946 to 1948, public control was extended

10 The Bow Group, Monopolies and Mergers, (Conservative Political Centre, No. 270, Sussex: 1963), p. 39.

11 G. C. Allen, op. cit., p. 107; see also Bow Group, op. cit., p. 35. The necessity to co-ordinate and expand production during both World Wars resulted in government encouragement of the formation of trade associations. A similar development occurred in Canada.

12 G. C. Allen, op. cit., p. 107; G. C. Allen, "Economic Progress, Retrospect and Prospect", Economic Journal, LX, (Sept. 1950), 466, where he cites higher capitalization as one reason for higher American productivity; he cites the main reason for lower British productivity as poorer techniques and organization; see also E. Rothbarth, "Causes of the Superior Efficiency of U.S.A. Industry as Compared with British Industry," Economic Journal, LVI, (Sept. 1946).

13 Bow Group, op. cit., p. 37 and p. 41; see also G. C. Allen in Monopoly, Competition and Their Regulation, p. 103.

to many industries in which powerful monopolies had formerly existed. Some other industries which had long been engaged in restrictive practices were nationalized, notably finance (The Bank of England), communications, public utilities, coal and iron and steel.¹⁴

The acceptance by the British government in 1944 of the principles of a full-employment policy¹⁵ was incompatible with monopolistic practices which restricted output and employment, causing such practices to fall further into disrepute. The strength of market demand at this time also contributed to rendering ineffective the time-worn protectionist arguments in favour of restrictive practices.

The change in public opinion which occurred was a change in degree rather than a complete turning away from the tacit acceptance of the monopolistic and restrictive practices which had long prevailed in England to the desire for competition in the North American sense. Stevens expresses this change in these words:

The public is undoubtedly more sensitive to restrictive practices than it used to be...But as a whole it is still not very heavily committed to cutting back restrictive practices.¹⁶

14 C. Wilcox, Public Policies Toward Business, (Homewood, Illinois: 1955), Chapter 27 "Policy in Other Countries".

15 W. H. Beveridge, Full Employment in a Free Society, (New York: W. W. Norton and Co., 1945), p. 260.

16 R. Stevens, "Experience and Experiment in the Legal Control of Competition in the U.K.", Yale Law Journal, LXX, (May, 1961), p. 892.

CHAPTER III

THE MONOPOLIES AND RESTRICTIVE PRACTICES ACT, 1948

The White Paper on Employment Policy (1944), observed:

There has in recent years been a growing tendency towards combines and towards agreements, both national and international, by which manufacturers have sought to control prices and output, to divide markets and fix conditions of sale.¹

This report paved the way for the 1948 Act which received the unanimous support of all political parties.

The Act established an independent tribunal, the Monopolies and Restrictive Practices Commission,² which was empowered to enquire into monopoly conditions upon reference from the Board of Trade.³ Provisions were made for two categories of investigation; (1) investigations into monopoly conditions and practices in particular industries;⁴ (2) investigations into particular practices in industry and trade generally.⁵

A. Definition of Monopoly Conditions

Monopoly conditions were given a wide definition in the 1948 Act. Broadly, such conditions were considered to prevail when at least one-

1 G. Grunfeld and E. S. Yamey, "United Kingdom" in Anti-Trust Laws, p. 361.

2 Referred to hereafter as the Monopolies Commission or the Commission.

3 Monopoly conditions are set out in sections 3, 4 and 5 of the 1948 Act. The Report on Collective Discrimination, (London, H.M.S.O., 1955), Cmd. 9504, p. 3, describes monopoly conditions as generally existing where "a single concern or group of concerns which are parties to restrictive agreements supplies or applies a process to at least one-third of the market for their goods."

4 S (2)

5 S (15)

third of all the goods of the description are supplied or processed, by or to any one person, or two or more persons being inter-connected bodies corporate or who have an overt or covert agreement to limit competition in the particular trade. This definition covers the activities of one-firm monopolies, dominant firms and also trade associations on both the buying and selling sides of the market. It appears to have been all-inclusive as any firm or group of firms which could materially influence the market was likely to handle at least one-third of the goods in question. Professor B. S. Yamey, an authority on the British legislation, states:

The phraseology employed in the definition seems to be wide enough to cover so-called oligopoly conditions in which each of a small number of firms may, in its own interests, eschew the more severe methods of competition (e.g. price competition) without there being any overt or covert agreement or arrangement among the firms. The terminology of the Act seems to avoid the difficulties encountered in American anti-trust activities of having to establish collusion between the oligopolists or to infer collusion from non-collusive parallel or co-ordinated behaviour. In any event, most oligopoly situations would qualify for investigation under the Act because normally at least one of the oligopolists supplies one-third of the market.⁶

A Digression on Conscious Parallelism

The type of oligopoly situation referred to by Yamey has created many problems in the United States in cases where, although there are no agreements, the firms do not consider it in their own interests to compete.

Under the United States law it is difficult to proceed against such situations unless it can be shown that the companies are engaged in, for example, a conspiracy to monopolize or a conspiracy in restraint of trade. It is often very difficult to find any indicia of agreement or conspiracy. There has been some tendency to apply the theory of what is called conscious

⁶ C. Grunfeld and B. S. Yamey, op. cit., p. 366

parallelism, but this requires proof of continuity of identical action to a point that agreement might be inferred.⁷

In 1946 in the second American Tobacco case, the court, relying entirely upon circumstantial evidence, inferred unlawful conspiracy on the part of the respondents. Evidence of identity of behaviour by the three defendant dominant firms was plentiful with regard to price lists, price changes, purchases and general business practices. William Nicholls states "the case was probably unique in that there was not a whit of evidence that a common plan had even been contemplated or proposed."⁸ This decision brought this type of oligopoly situation whereby "a few dominant firms...independently and purely as a matter of self-interest, evolve non-aggressive patterns of behaviour"⁹ within the reach of the conspiracy provisions of the Sherman Act and it was felt that a solution had been found for dealing with such situations.

In more recent years there has been some evidence of a retreat

7 Dean W. Allen Wallis, editor, Proceedings, International Conference on the Control of Restrictive Business Practices, (University of Chicago, The Free Press of Glencoe, Illinois, 1960), pp. 138-39; conscious parallelism "represents a situation where a number of firms are continually and regularly each acting in a manner indicating a knowledge of what the others would do, and in the absence of direct agreement, the actions are such as to support an inference of agreement." op. cit., p. 145; L. G. Reynolds in Economics, A General Introduction, (Homewood, Illinois, Irwin, 1963, at p. 239 states "simple price leadership will not normally be held unlawful. But, if the companies also maintain an elaborate similarity of policy on other terms of sale such as quantity discounts, price differentials between various qualities and types of produce, and freight charges or delivered price arrangements, the courts may find a breach of law. It is unlikely that 'all that much parallelism' could occur without intimate co-operation among the companies."

8 W. Nicholls, "The Tobacco Case of 1946," American Economic Review, XXXIX (1949), 285; see also G. Wilcox, Public Policies Toward Business, pp. 119-21 and G. W. Steeking, Workable Competition and Anti-Trust Policy, (Nashville: Vanderbilt University Press, 1961), p. 249.

9 W. Nicholls, loc. cit.

from the doctrine of conscious parallelism. Justice Clark, in 1954, stated:

This Court has never held that proof of parallel business behaviour conclusively establishes agreement, or phrased differently, that such behaviour itself constitutes a Sherman Act offense. Circumstantial evidence of consciously parallel behaviour may have made heavy inroads into the traditional judicial attitude toward conspiracy; but 'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely.¹⁰

This has led Wilcox to remark that the doctrine of conscious parallelism, although not repudiated, is likely to be used "more sparingly in the near future than in the recent past."¹¹

Clearly if the 1948 Act succeeded in avoiding problems of this nature it would be a significant improvement upon this aspect of American legislation and would have "brought the basic assumption of modern oligopoly theory"¹² into the public spotlight.

Unfortunately, the 1948 Act only supplied the Monopolies Commission with investigatory powers which were to be incorporated into recommendations. This proved to be an invitation to non-enforcement and certainly offered no solution to the restrictive practices problem. The Reports of the Commission were well written, detailed studies of the industries concerned; the recommendations contained therein, however, were for the most part ignored by the Board of Trade. This greatly reduced the influence of the Commission. Without structural changes in the organization of oligopolistic industries, parallel behaviour could be ex-

¹⁰ In Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537, 540, quoted in G. Wilcox, op. cit., p. 121.

¹¹ Ibid.

¹² W. Nicholls, loc. cit.

pected to continue. True, most oligopoly situations did qualify for investigation under the Act but no solution was found to the problem of parallel behaviour.

B. Some Criticisms of the 1948 Act

It was expected that the 1948 Act, being the first British legislation in over 300 years dealing with monopoly and restrictive practices, would come in for its share of abuse. The criticisms to which it was subjected, however, also assisted in making certain weaknesses apparent.

Double Function of the Commission

One criticism of the Act was that the double function of the Commission, of fact-finding and appraisal, should be separated or that the Commission should be changed into some sort of judicial tribunal.¹³

This point has been made particularly by industry and rests to some extent on a misconception.¹⁴ As pointed out in Monopolies, Mergers and Restrictive Practices:

The Commission is not a judicial tribunal concerned with the application of a body of law in which the legislature has laid

¹³ C. Grunfeld and B. S. Yamey, op. cit., p. 388. This criticism was effectively handled in so far as restrictive agreements were concerned by the enactment of the Restrictive Trade Practices Act, 1956 by which a Registrar was appointed to conduct the investigation and a special court was established to appraise the effects of the agreements; vide infra, p. 31-32.

¹⁴ Monopolies, Mergers and Restrictive Practices, (London: H.M.S.O., Cand. 2299), p. 2; see also P. Hutber, Wanted - A Monopoly Policy. The Fabian Society, Research Series 219, (Dartmouth St., S.W.; Dec., 1960), pp. 4-5.

In its White Paper, Monopolies, Mergers and Restrictive Practices, the Government states the objective of its economic policy is "to achieve sustained expansion and steady growth combined with full employment, stable prices and a sound balance of payments...The Government believe that in this respect competition has an essential role to play both in stimulating innovation and efficiency and in enabling some of the benefits of the reduced costs of production and distribution to be passed on to consumers." p. 1, paragraph 1.

down rules for determining whether the particular practices are or are not against the public interest. The Commission is an investigating body, and as such its task is to elicit and examine impartially the relevant facts.¹⁵

Industry has, through trade associations, questioned the findings of the Commission and also alleged that its reports were biased.¹⁶ The government recently gave notice of its intention to remove the grounds for further conflict on this issue by drawing

a clearer distinction between the two stages of an inquiry into a monopoly - the investigation into the facts, i.e. into what is done by the monopoly, and the assessment of their consequences in relation to the public interest.¹⁷

It has proposed that a Registrar of Monopolies be appointed to conduct the investigation into the facts and to assist the Commission in its task of assessing where the public interest lay by making such further investigation and elucidation as the Commission might find necessary.¹⁸

Political Expediency

There has been some evidence of leniency on the part of the Board of Trade in the enforcement of Commission recommendations. Instead of exercising the statutory instrument¹⁹ or the declaration by a "competent

15 Monopolies, Mergers and Restrictive Practices, p. 2, paragraph 10.

16 P. Hutber, op. cit., pp. 4-5; Bow Group, op. cit., pp. 46-7.

17 Monopolies, Mergers and Restrictive Practices, p. 2, paragraph 11.

18 Ibid., paragraph 12.

19 S (10) (7) states "The power to make orders under this section shall be exercisable by statutory instrument, and no order shall be made under this section unless a draft thereof has been laid before each House of Parliament and approved by resolution of each House."

authority" that a practice is illegal,²⁰ the practice was adopted of negotiating with the particular industries in regard to the practices which the Commission found to be contrary to the public interest and the acceptance from industry of voluntary undertakings to refrain from such actions in the future. This resulted in an unsatisfactory state of affairs in at least two instances.²¹ The Commission's recommendations on the supply of dental goods had not been complied with even a year after publication of the report. In the second instance, dealing with the supply of imported timber, the parties to the objectionable agreement voluntarily agreed to give up the undesirable practices. Five years later (Sept. 1958), the Commission found that the former agreements had been replaced by other arrangements which were less formal but which had substantially the same effect. In both cases it was finally necessary to make an order under section (10) of the Act, to force compliance with the Commission's recommendations.

The flouting of these recommendations both by the Board of Trade and by industry did little to enhance the prestige of the Commission. One writer states:

far from having a wide influence in industry, the Commission was finding difficulty in gaining respect for its findings even among those directly concerned. Compliance could in the last resort be forced - the Act provided means for this - but there was no apparent means by which the Commission's influence could be extended.²²

20 S (10) (2).

21 Report on the Supply of Dental Goods, (London, H.M.S.O. Dec. 1950). Report on the Supply of Imported Timber, (London, H.M.S.O. Oct. 1953). See also P. Hutber, op. cit., pp. 10-11.

22 P. Hutber, op. cit., p. 11

There is some indication also that the lenience extended by the Board of Trade in the enforcement of Commission recommendations may have been influenced to some unmeasurable extent by political considerations:

No doubt Governments should consider only what it is right to do regardless of considerations of expediency; in fact, considerations of the repercussions of a particular course of action on its own supporters are bound to bulk large in any Government's thinking. Measures directly affecting single industries or firms, are bound to be political embarrassments. In these circumstances the temptation is to delay a decision as long as possible and to reach one that will cause the least disturbance possible.²³

If this statement contains some element of truth, it becomes easier to explain the actions of the Board of Trade in the Tobacco case.²⁴ The Commission found that in 1959 the Imperial Tobacco Company controlled 63.5 percent of the market in cigarettes and tobacco and also owned 37 percent of the shares of Gallahers, its chief competitor. It further found that:

the retention by Imperial of its share holding in Gallaher operates and may be expected to operate against the public interest. The Commission recommend that Imperial should divest itself of any direct or indirect financial interest in Gallaher.²⁵

The President of the Board of Trade, however, accepted an undertaking by Imperial not to interfere in the management of Gallaher.

On all the evidence the President is satisfied that the public interest will be adequately safeguarded by this undertaking and that there is therefore no necessity in present circumstances

23 Ibid., p. 15.

24 Report on the Supply of Cigarettes and Tobacco and of Cigarette and Tobacco Machinery, (London: H.M.S.O. 1961). For a summary of the Commission's findings and a statement of action taken see the Annual Report of the Board of Trade on Monopolies and Restrictive Practices for the year ended Dec. 31, 1961, (London: H.M.S.O.); see also B. S. Yamey, "The Monopolies Commission Report on Cigarettes and Tobacco", Modern Law Review, Vol. 20, (Nov. 1961); W. Meunell, Takeovers, pp. 108-10.

25 Annual Report, op. cit., p. 6.

for the Government to ask the Imperial Tobacco Company to dispose of the shareholding.²⁶

Nutber states that the clearest instance of the government attempting to avoid political embarrassment is to be found in the fate of the Commission's Report on the Supply of Certain Industrial and Medical Gases.²⁷ The Commission found that the British Oxygen Company and its subsidiaries supplied 98 percent of the oxygen and more than 98 percent of the acetylene on the British market. In order to maintain its monopoly, B.O.C. "deliberately sought to control the provision of oxygen plant to others"²⁸ and followed a policy of taking over or buying out other producers. Three companies which competed ostensibly with the B.O.C. were actually owned by the group; one of the three was also used as a "fighting company." The exclusive dealing contracts which the B.O.C. maintained with the majority of its large buyers were found objectionable as was also the price scheme. The Commission stated:

After making full allowance for the seller's market which prevailed during most of the post-war period, B.O.C.'s profits have been unjustifiably high for an almost complete monopoly facing a limited financial risk.²⁹

Two Commission members suggested that "public ownership and management of the industry...be considered" as an alternative to the majority view that an arrangement be made whereby the Board of Trade or some other

²⁶ Ibid., p. 8.

²⁷ Nutber's pamphlet Wanted - A Monopoly Policy was published in Dec. 1960, prior to the publication of the Tobacco report; see also W. Kennell, op. cit., pp. 105-08.

²⁸ Annual Report op. cit. for the year ending Dec. 31, 1956, p. 16

²⁹ Ibid., p. 17.

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competent authority would be able to satisfy itself by periodic review that Commission recommendations were being complied with.³⁰

Over a year later (March, 1958) the government announced that it did not:

propose to take any action on the majority recommendation that steps should be taken to regulate the level of the British Oxygen Company's prices and profits on oxygen and dissolved acetylene.³¹

The B.O.C. however did give an undertaking "not to take over any other producers of the gases with the object of adding to its monopoly position,³² to refrain in future from making use of fighting companies, to amend the exclusive dealing clause in its contracts, to introduce and publish non-discriminatory price scales, and to make a substantial effort in the field of research and development.

Hutber remarks that the outcome represented a victory for the B.O.C. but also threw light on the weakness of the Commission system.³³ Public supervision which the Commission advocated would probably have required special legislation but at any rate all Commission recommendations to become effective required government approval.³⁴ Remedies which the Commission seeks to have applied depend:

on the Government of the day for their implementation and

30 Ibid., p. 18.

31 Annual Report for the year ending Dec. 31, 1958, p. 18.

32 Ibid., p. 8; this undertaking did not appear too onerous in view of the company's almost complete monopoly.

33 P. Hutber, op. cit., pp. 16-17.

34 Annual Report for the year ending Dec. 31, 1958, p. 18 .

must take their chances among the exigencies of politics.³⁵

Few Reports

An early criticism of the Commission was the length of time required to complete a report. By the end of 1952 only five reports had been published. This problem was rectified by an amendment to the Act in 1953 by which the membership of the Commission was increased from ten to a maximum of twenty-five members to enable it to function as a "number of groups" of members each responsible for making the investigation and report on a particular reference.³⁶

The output of the Commission increased considerably after this with five reports being completed in 1955 and seven in 1956.³⁷ In August of 1956, the Restrictive Trade Practices Act was passed into law.³⁸ This Act transferred the responsibility for restrictive agreements from the Monopolies Commission to a new tribunal, the Restrictive Practices Court. Since 1956 the Board of Trade has submitted only a few references to the Commission for investigation and report. No new references were made "for more than three years from April, 1957."³⁹ The marked decline in the activity of the Commission is even more striking in terms of the

35 P. Hutber, op. cit., p. 17; see also A. Hunter, "Competition and the Law", The Manchester School of Economic and Social Studies, XXVII, Jan. 1959, 59, where he states "...the control element had a purely ad hoc application at official discretion and in practice, was exercised only once in twenty cases. Informal approaches to industry were preferred. In sum, the bias of the Act was mainly towards fact-finding.

36 Annual Report for the year ending Dec. 31, 1954, p. 2.

37 See Appendix, Table 1.

38 4 & 5 Eliz 2 Ch. 68. Hereafter referred to as the 1956 Act.

39 P. Hutber, op. cit., p. 12; also see Appendix, Table 1.

cost of its upkeep. The annual cost for both 1954-55 and 1955-56 was in the order of 106,000. This was reduced drastically to 64,000 in 1956-57 and from that time until 1962-63, the average expenditure has been only 61,000.⁴⁰

⁴⁰ See Appendix, Table II

CHAPTER IV

THE RESTRICTIVE PRACTICES ACT, 1956

This Act was the direct result of the findings and recommendations of the Monopolies Commission in its report on Collective Discrimination.¹ The Commission's recommendations are obvious in the legislation. The 1956 Act is in four parts dealing with: (1) the registration and judicial investigation of restrictive trading agreements; (2) enforcement of conditions as to resale prices; (3) amendments to the 1948 and 1953 Acts; (4) supplemental.

A. Main Provisions of the Act

Part III of the Act greatly reduced both the work and membership of the Monopolies Commission. The maximum number of members was reduced from twenty-five to ten and the provision for working as separate groups was repealed.² The scope of reference to the Monopolies Commission was

¹ Report on Collective Discrimination, Cmd. 9504, (London: H.M.S.O., 1955). This was the first reference received by the Commission (Dec. 1952) under section 15 of the 1948 Act. The reference required the Commission to submit to the Board of Trade a report on the general effect on the public interest of exclusive dealing, collective boycotts, aggregated rebates and other discriminatory practices. In the words of the Commission "the reference covers all collective agreements or agreements between traders requiring the parties (or any of them) to discriminate in their dealings with other persons; a separate clause of our reference requires us to consider collective arrangements or agreements between traders requiring the parties to grant aggregated rebates." p. 3.

² S (28) (3) & (4)

likewise reduced³- restrictive practices now came under the aegis of the new Act while monopolies and mergers remained subject to investigation by the Commission upon reference from the Board of Trade. More important, the procedure differed in each. Restrictive practices were to be dealt with by a court of law (the Restrictive Practices Court) while implementation of Commission recommendations concerning mergers and monopolies "must still take their chance among the exigencies of politics."⁴

Part II of the Act prohibits collective enforcement of resale price maintenance by suppliers of goods but legalizes individual enforcement by suppliers if the goods are acquired by the other party with notice of the conditions as to resale price.⁵

Part I of the Act pertaining to the registration and investigation of restrictive agreements is the most important. The office of Registrar of Restrictive Trading Agreements was established with the responsibility of overseeing the registration of restrictive agreements.⁶ The Registrar is empowered to obtain information from any party or trade association if he has reasonable cause to believe that they are parties to a registrable agreement. Finally the Registrar must refer registered agreements for the deliberation of the Restrictive Practices Court.

³ The functions of the Commission were reduced to industries where one firm controls one-third or more of the supply of the goods concerned and to restrictive agreements applying wholly to foreign trade.

⁴ Vide supra, p. 27, n. 35.

⁵ S (24) & (25).

⁶ S (1) (1), (2) and S (14) (1).

The Restrictive Practices Court

The unique feature of this court from the North American viewpoint is that it is composed jointly of lay members and legally qualified judges. The Court consists of five judges and not more than ten other members.⁷ The lay members are appointed on the recommendation of the Lord Chancellor and are presumably qualified by virtue of their knowledge or experience in industry, commerce, or public affairs.⁸ In order to facilitate its work the Court may sit as a single body or in divisions but must consist of a presiding judge and at least two other members. The opinion of the judge or judges sitting prevails on questions of law but majority vote prevails on questions of fact. The former could be appealed to a higher court.⁹

Provision was made for increasing the number of members of the Court.¹⁰ This was an improvement over the 1948 Act which only allowed for ten members on the Monopolies Commission and resulted in the criticism of few reports prior to enlargement of the Commission by a 1953 amendment.

Agreements which are registrable are defined in sections 6 to 8 of the 1956 Act.

Broadly, an agreement is registrable if -

- (1) There are two or more parties to it engaged in business in the United Kingdom in the production, supply or processing of the goods;

7 S (2) (2)

8 S (4) (1)

9 See the Schedule of Supplementary Provisions as to the Proceedings of the Restrictive Practices Court. s (3), (4) and (5), p. 33 of the 1956 Act.

10 S (5) (1) (a) & (b) of the 1956 Act.

- (ii) more than one party to it accepts restrictions, that is some limitation on his freedom to make his own decisions; and
- (iii) the restrictions concern such matters as prices to be charged or paid for goods; conditions of sale; persons to whom goods may be sold; quantities or kinds of goods to be made, sold or bought.¹¹

After registration restrictive agreements are subject to judicial decision by the Court to decide whether or not they conflict with the public interest. The onus is placed upon the parties to the agreement to show why it does not violate the public interest. If no evidence is produced their case must fail.¹²

The Seven "Gateways" and the "Tailpiece"

Restrictions accepted in pursuance of any agreement shall be deemed to be contrary to the public interest unless the Court is satisfied of one or more specified circumstances. Briefly, these are:

- (a) That the restriction is reasonably necessary to protect the public against injury;
- (b) That it confers specific and substantial benefits on the public;
- (c) That it is reasonably necessary to counteract the restrictive measures of other parties;
- (d) That it is reasonably necessary to enable the parties to negotiate on fair terms with strong buyers or sellers;
- (e) That the removal of the restriction would likely cause unemployment of a serious and persistent nature in an area;
- (f) That the removal of the restriction would be likely to cause a substantial reduction in the volume of export earnings;
- (g) That it is reasonably necessary to maintain another agreement which is found by the Court to be not contrary to the public interest.¹³

The circumstances specified above have come to be known as the "seven gateways". Passage through one or more of the gateways, however,

¹¹ Report of the Registrar of Restrictive Trading Agreements, Cmd. 1273, (London: H.M.S.O., 1961), p. 1.

¹² Ibid., p. 15.

¹³ For exact wording of the specified circumstances see section (21) (1) (a), (b), (c), (d), (e), (f) & (g) of the 1956 Act.

is not sufficient to save an agreement. Once through the "gateway" an agreement must also survive a balancing test in which "the detriments resulting or likely to result from the operation of the restrictions...are to be weighed against their beneficial effects."¹⁴ This latter requirement is referred to as the "tailpiece."

The inclusion of the "seven gateways" in the legislation reflects the widely held belief in England that:

The effect of a restrictive practice on the public interest may be different in different industries and what may be harmful in one case may not be harmful, or might even be helpful in another.¹⁵

Thus restrictive practices are condemned in principle but exceptions are allowed through the "gateways" and the "tailpiece" and "by the creation of a judicial process whose purpose is to discover such exceptional cases."¹⁶

B. Some Weaknesses in the 1956 Act

It was not long before it was realized that ways had been found to circumvent the purpose of the Act. Some of the more obvious weaknesses in the legislation may be briefly stated. No attempt is made to cite every fault or weakness in the Act; such an all-inclusive listing would prove extremely difficult, if not impossible, as it can be expected that more sophisticated arrangements will be devised to avoid registration as more experience is gained with the working of the legislation.

¹⁴ Registrar's Report, Cmnd. 1273, p. 13, paragraph 62.

¹⁵ P. Thorneycroft, President, Board of Trade, House of Commons Debates, 23 July, 1952, col. 566.

¹⁶ J. Wiseman, "Symposium on Restrictive Practices Legislation: Economic Analysis and Public Policy", Economic Journal, LXX (Sept. 1960), 461.

Information Agreements

The 1956 Act contains no provisions for examining information agreements. J. B. Heath states the most significant change brought about by the Act has been the substitution of non-registrable agreements to exchange information, chiefly about prices.¹⁷ Lloyd claims this is a consequence of few agreements being defensible under Section 21 of the Act; the emphasis has shifted to Section 6 which defines a registrable agreement, with the aim of formulating non-registrable agreements.¹⁸

Information agreements are often entered into on the ending of a price agreement. Usually parties to such agreements send their price lists or the prices at which they have entered into contracts to their trade association or some other central agency for circulation among the parties. The particulars of such agreements are not registrable under the Act. This offers a means whereby parties may enter into informal price agreements¹⁹ with the effect of extending the area of oligopolistic behaviour by increasing the awareness amongst competitors that reactions are likely to occur to pricing decisions.²⁰ Heath suggests the harmful effects of open-price agreements might be diminished

17 J. B. Heath, "Symposium on Restrictive Practices Legislation: Some Economic Consequences of the Restrictive Trade Practices Act, 1956", Economic Journal LXX, (Sept. 1960), 474.

18 A. Lloyd, "Symposium...: The Lawyer's Point of View", Economic Journal, LXX, (1960), 472.

19 "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices", in Adam Smith, Wealth of Nations, Book 1, Chapter X, Cannan edition, p. 130

20 Heath, op. cit., p. 477.

if sellers' price information were also made available to would-be new competitors and buyers.²¹ It would be desirable to have such agreements subject to registration as are other restrictive agreements so that their impact on the economy might be gauged.²²

When registrable agreements are replaced or converted into information agreements, the Registrar's office receives the new particulars because they operate as variations of the registered agreement and as such remain on the register. Otherwise, the Registrar states,

the agreement is not usually registrable and though we may become aware of its existence...I have no sufficient information to enable me to judge how many of such arrangements there now are.²³

Registration

Gosse points out that parties are not required to file registrable agreements under the Act:

An offence is committed only when a person fails to notify the registrar whether he is a party to a registrable agreement after the registrar has made a request to the person for such information.²⁴

This places the onus on the Registrar to uncover the existence of registrable agreements which are not voluntarily registered.

The parties to a registrable agreement remain free to continue

²¹ Ibid., p. 481.

²² The government recently gave notice of its intention to bring certain types of information agreements within the scope of the 1956 Act; see Monopolies, Mergers and Restrictive Practices, pp. 5-6.

²³ Registrar's Report, Cmd. 1603, for period ending June 30, 1961, p. 6.

²⁴ R. Gosse, "The Enforcement of Competition in the U.K.", Canadian Bar Review XXXVIII (1960), 171; see also S (14) (1) and S (16) (1) of the 1956 Act.

practicing the restrictions until the Restrictive Practices Court declares them contrary to the public interest. This has allowed the parties to benefit from the time-lag between registration and hearing by the Court. As the Court reaches decisions on the back-log of agreements which originally confronted it, this time-lag can be expected to assume less importance. The first agreements to come before the Court were selected as representative of a particular type or category of agreement. Parties to like agreements could then assess their chances of defending them in light of the Court's initial judgement.

No Criminal Sanctions

No penal consequences are attached if the Court finds the restrictions contrary to the public interest. Criminal sanctions are, no doubt, not required in the great majority of cases but situations can well be imagined where the parties to an agreement may willingly and knowingly persist in acting in a manner detrimental to the public interest. For such exceptional cases some stronger punishment would be more desirable than merely declaring the restrictive agreement void.²⁵ The time-lag between registration and hearing may in some cases present sufficient inducement to unscrupulous parties to act in such a manner.

Resale Price Maintenance

Resale price maintenance was ambiguously treated by the 1956 Act. Collective resale price maintenance was prohibited while the individual

²⁵ See A. D. Neale, Anti-Trust Laws of the U.S.A., (Cambridge at the University Press, 1960), where he states "...where a court injunction can do no more than repeat the terms of the original statutory prohibition, the civil proceedings appear out of place and cumbersome compared to a criminal charge." p. 499

supplier was left free to continue the practice. This could compound the difficulties of a monopolies policy.

The literature pertaining to resale price maintenance is extensive and could not be adequately treated within space requirements. It would be difficult to present a strong economic argument in favour of the practice whether collectively or individually enforced; most economists join ranks to condemn the practice. The usual argument given in support of it, though dressed in various guises, is that of protecting the small merchant or retailer.²⁶ Such an argument is more social and political than economic. Restrictive practices legislation is, however, an amalgam of social, political and economic forces with the latter being subordinated in many instances to the social and political factors.

The common economic argument against resale price maintenance is that the consumer is forced to pay a higher price as high-cost outlets are maintained in the industry. Both the price and distributional structure becomes rigidified and there is little incentive to improve marketing methods as price is high enough to provide even high-cost producers and distributors with a profit. The forces of competition become blunted.

Hutber states that resale price maintenance should be discontinued "if only because it would be of great assistance in promoting a greater readiness among manufacturers to engage in vigorous competition."²⁷

²⁶ This argument has acquired a certain degree of superficial sophistication with continued usage and is usually accompanied by claims of better service, higher quality, greater variety, etc.

²⁷ P. Hutber, op. cit., p. 24.

The need to change the typical English businessman's complacent attitude towards competition is one of the major problems facing the British legislator to-day. This line of thought has become particularly apparent in the English literature in recent years.²⁸

Consistency in the disposal of restrictive practices would be maintained if individual resale price maintenance were made subject to the same provisions as other restrictive practices, i.e., "the presumption that such practices are against the public interest unless shown otherwise."²⁹

Bilateral Agreements

It was discovered early that the Act could be circumvented "by means of a series of bilateral agreements which are apparently unconnected."³⁰ Section 8 (3) of the 1956 Act excepts agreements for the supply of goods between two persons, neither of whom is a trade association. In the *Austin Motor Company Limited, Agreements*, the company had a system of multipartite agreements between itself and its distributors and dealers. To avoid registration under the Act, the company entered into bipartite agreements with a distributor and a dealer and proposed to enter into similar agreements with all their

²⁸ See J. B. Heath, Still Not Enough Competition, Hobart Paper 11, (Second edition revised, Institute of Economic Affairs, London: 1963), pp. 42-43; see also the Bow Group, Monopolies and Mergers, p. 70 et passim.

²⁹ Monopolies, Mergers and Restrictive Practices, Cmd. 2299 p. 5.

³⁰ Ibid., p. 6; the reference is to In Re Austin Motor Company Ltds. Agreements, LRIRP 1 (The letters LR and RP indicate that the reference is to the Reports of Restrictive Practices cases published by the Incorporated Council of Law Reporting for England and Wales).

dealers, distributors and retailers. The new agreement little affected the relationship between the company and the dealer and the company and the distributor but "there was no longer any legal nexus between the distributor and dealer";³¹ the dealer was now the only party accepting restrictions under the new agreement. The Registrar

conceded that prima facie the new agreements were excepted from registration by Section 8 (3) of the Act, but contended that, read in the light of their history, and the company's unaltered general trading pattern throughout the country, the new agreements depended for their efficacy upon and amounted to mutual agreements or arrangements between company, distributor and dealer and were therefore in reality multipartite agreements and as such registrable under the Act.³²

The Chancery Division of the court did not accept the Registrar's contention and stated "the surrounding circumstances could not be invoked for the purpose of their construction."³³ Thus the new agreements were excepted by Section 8 (3) and were not subject to registration under the Act.

To eliminate this method of circumventing the Act in the future it would be desirable to subject to registration agreements in which only one party accepts a registrable restriction as defined in Section 6 (1) of the Act.³⁴

31 LR I RP I

32 Ibid.

33 Ibid.

34 In Monopolies, Mergers and Restrictive Practices, at p. 6, paragraphs 35 and 36, the government has expressed intention to make such agreements registrable. It realizes also that "the present safeguards in the Act, which prevent ordinary commercial transactions, i.e. ordinary contracts for sale, sole agencies, etc., being brought within the Act, would have to be suitably extended."

Services

Neither the 1948 nor 1956 Acts apply to restrictive practices engaged in by service industries. Yamey remarks that "a large area of economic activity ranging from entertainment to interment is outside the reach of present arrangements";³⁵ further there is no need to exempt all services in order to exempt the activities of professional bodies and trade unions.

The Government has noted the increasing importance of the service sector in the modern economy and has expressed the desirability of increasing its knowledge

about the operation of restrictive practices in the supply of services to make it possible to say whether it would be appropriate to bring services within the scope of the restrictive practices legislation.³⁶

It is appropriate that this area of inquiry should initially fall within the jurisdiction of the Monopolies Commission until sufficient information is obtained to permit formulation of a more definite policy towards the service industries. If the seriousness of restrictive practices "in the field of commercial services"³⁷ is of a magnitude to require stricter enforcement than would likely be possible under the powers of the Monopolies Commission, it might prove desirable to transfer jurisdiction to the Restrictive Practices Court.

³⁵ B. S. Yamey, "Some Issues In Our Monopolies Legislation", The Three Banks, No. 54, (June, 1962), p. 6.

³⁶ Monopolies, Mergers and Restrictive Practices, p. 7, paragraph 43.

³⁷ Ibid., p. 7, paragraph 43.

CHAPTER V

THE 1956 ACT AT WORK

A period of gestation was required to prepare the Register and to select the first agreements to be heard by the Restrictive Practices Court. Initially "there was a feeling that many agreements would get through the net; or else...that cases would drag on interminably without conclusive result."¹ This illusion was quickly dispelled. In its first major price-fixing case the Court struck quickly and forcibly in finding the restrictions contrary to the public interest.²

By June 30, 1963, some 2430 agreements had been registered of which some 1610 had been abandoned, revised to remove the restrictions, or ended by the passage of time.³ Twenty-six agreements had been tried by the Court;⁴ in five cases the Court found that "specific and substantial benefits" had accrued to the public and were not outweighed by any detriments subject to consideration under the "tailpiece." A sixth agreement (Watertube Boilermakers) passed through the export gateway and a seventh (National Sulphuric Acid Association) was accepted as

1 In J. W. Grove, Government and Industry in Britain, (Great Britain: Longman's, 1961), p. 195.

2 In re Yarn Spinners Agreement, LRI RP 118; see also B. S. Yamey, "The Yarn Spinners' Agreement: Economics in Court", The Modern Law Review, XXII (July, 1959).

3 Registrar's Report, for the period ending June, 1963. London: H.M.S.O., Jan. 1964.

4 For a brief analysis of cases contested before the Restrictive Practices Court deciding whether agreements were contrary to the public interest, see "Appendix", infra, pp. 80-114.

or for tendering purposes. It is usually claimed that the price-fixing restrictions are necessary to confer the "specific and substantial benefits" on the public.

Price Stability

Stability of prices was claimed as a benefit in the Yarn Spinners' Agreement, one of the earlier cases to face the Court.⁶ There is merit in discussing some earlier agreements before the Court as these were chosen as representative of other types of agreements on the Register and as such provided opportunity for parties to similar arrangements to gauge how their schemes would fare under the new Act.

In the Spinners' case the respondents contended that the maintenance of a "floor" price preserved capacity in the industry making it possible to "accumulate stocks to meet revived demand."⁷ Larger stocks would supposedly prevent prices from rising too rapidly in a sellers' market.

The Court recognized that an element of price stability inevitably accompanies a price restriction and stated that the question to be considered was "whether price stabilization as an alternative to a free market is a benefit to the purchasing public in the circumstances of this particular case."⁸ The Court found that the loss of free competition and the concomitant denial of the opportunity of lower prices outweighed the benefits of price stability.

Although the decision of the Court corresponds with the general presumption of the Act that price restrictions are contrary to the public

6 LR 1 RP. pp. 188-89.

7 Ibid., p. 188.

8 Ibid., p. 188.

reasonably necessary to enable the parties to negotiate on fair terms with a strong seller. Sixty-six agreements were called but not defended before the Court. This is indicative of the apprehension with which businessmen now attempt to pass their restrictive agreements through what they consider to be tightly drawn "gateways".

A. Some Standard Arguments

At least five of the arguments put forth in attempting to justify restrictions "have been shown to have much less in them so far as the public interest is concerned than their advocates believed."⁵ These arguments have generally been used by trade associations when attempting to qualify their agreements under Section 21 (1) (b) of the Act, although they have also been used in justification under the other "gateways". Section 21 (1) (b) shifts the emphasis from the advantages of the restriction to the consequences of its removal, i.e., if the agreement were removed the public would be denied "specific and substantial benefits" which have been conferred on it by the agreement.

The "specific and substantial benefits" claimed by trade associations have usually been price stability, protection of quality, preservation of adequate capacity, the encouragement of capital investment and research, and the prevention of monopoly. Generally the central purpose of the schemes defended before the Court has related to some aspect of price-fixing, usually to set minimum, maximum, or common prices or to recommend prices, draw up selling lists and conditions of sale,

⁵ S. R. Dennison, "The Restrictive Trade Practices Court in Action," Yorkshire Bulletin of Economic and Social Research, (Dec. 1959), 103.

interest, Heath justifiably criticizes the Court for its statement that:

If price stability could be obtained without the sacrifice of a free market, it would undoubtedly be a benefit; if it can be looked at in isolation, it is no doubt a benefit.⁹

Heath remarks that there is no economic reason why benefits will result from price stability of individual commodities or groups of commodities; "indeed, a changing ratio of prices between commodities is a crucial part of the allocation mechanism."¹⁰

Quality

The Yarn Spinners also argued that the price agreement simply diverted competition into the area of quality and service.¹¹ The Court considered competition in quality to be a benefit but considered the removal of the agreement as unlikely to affect it. It was held by the Court that a spinner should be free to choose whether to offer better quality at the same price or the same quality at a lower price and the removal of the restriction would return to the spinner his freedom of choice.

Surplus Capacity

The benefit of maintaining surplus capacity was argued in three of the early cases.¹² The Court, with different reasons in each, refused to accept the contention that a price restriction was necessary to

9 Ibid., p. 188.

10 J. B. Heath, "The Restrictive Practices Court on Competition and Price Restriction," Manchester School of Economic and Social Studies, XXVIII, (Jan. 1960), 11.

11 LR 1 RP. p. 188.

12 Yarn Spinners., LR 1 RP. pp. 184-86; Blankets, LR 1 RP 255; Watertube Boilermakers, LR 1 RP, pp. 336-37.

maintain capacity in a temporary recession.¹³

The Yarn Spinners claimed that the maintenance of surplus capacity enabled the industry to meet fluctuations in demand and provided the public with a wider variety of goods "in times of national emergency or when particular sources of supply are scarce."¹⁴ The Court agreed that "adequate reserve capacity is desirable"¹⁵ but did not believe that concerted action was needed to attain it in an industry troubled with excess capacity. Furthermore, the agreement enabled high-cost producers to be perpetuated in the industry. The Court concluded

Nevertheless, subject to the initial dislocation which must inevitably follow on the abandonment of the scheme, we see no reason to believe that the industry will be left without sufficient capacity to meet all ordinary demands of the home market, and to maintain, if not increase, its share of the export market.¹⁶

The contention failed because in the judgment of the Court industry fluctuations were not "so severe as to call for exceptional measures to create and maintain reserve capacity."¹⁷

In the Blanket Manufacturers case the Court found "no evidence of any unreasonable excess capacity among members" and also that the industry was "extremely competitive both in quality and price."¹⁸ The price scheme was accepted as a "stop loss minimum price" which

13 J. B. Heath, op. cit., p. 5.

14 LR 1 RP. 185.

15 Ibid., p. 186.

16 Ibid., p. 185.

17 Ibid., p. 186.

18 Quotations from the Blanket Manufacturers' case refer to LR 1 RP 250-55.

was extremely low and even uneconomic; industry prices never fell so low as to reach it. The Blanket Manufacturers contended that removal of the scheme would in depressed times lead to the debasement of quality and the reduction of capacity. From the Court's point of view, the important question to be answered was

whether there is likely to be a depression so deep that apart from the minimum price scheme there would be cut-throat competition and a virtual disruption of the industry (for the disappearance of some of the weaker members would not be a disadvantage).

The Court stated that evidence showed that industry fluctuations were greater than before the war but also that they were not so prolonged. At any rate the minimum price was hardly ever reached and it was not believed likely another depression would be severe enough to "bring the scheme into operation."¹⁹

The Court conceded that the price scheme was in this case inoffensive on the whole but stated that this was insufficient grounds to uphold the agreement. To meet the requirements of the 1956 Act, agreements must conform to the public interest requirements found in Section 21 (1); it is not enough that the agreement merely does no harm. The Blanket Manufacturers' contention that the scheme was necessary to maintain adequate capacity in the industry was therefore not upheld.

The Watertube Boilermakers contended their scheme was necessary to preserve capacity which "meant really retention within the industry of key personnel."²⁰ This argument was rejected, the Court stating that self-interest dictated that "directors would not take the risk of

¹⁹ J. B. Heath, op. cit., p. 4.

²⁰ Quotations from the Watertube Boilermakers' case refer to IR 1 RP, 336-37.

dismissing their key personnel" if they wished to remain in business. Members of the agreement were "long-established boilermakers" and "financially well-placed". "The directors realize perfectly well that if they are to remain in business, they must retain these personnel; they will do so." Thus the agreement was considered unnecessary to maintain capacity.

Investment and Research

The Watertube Boilermakers maintained that in the absence of their scheme, both their collective and individual research departments would have to close. The Court found that the amount spent on collective research was negligible in relation to overhead expenditures; further, if the group did not consider it worth their while "they will no doubt reduce or close down the research department." As to individual research departments, the Court considered "the companies well able to maintain" them over the expected short recession.

The Scottish Bakers claimed a relationship between their minimum price agreement and "an increase in both research and the rate of technical progress."²¹ The Court was unconvinced of any "specific and substantial benefits" accruing to the public from the stabilization of prices and thought that the minimum price scheme might well be against the public interest as it could "prevent or retard the introduction of progressive methods in industry."²²

In the Yarn Spinners case, the Court recognized that the minimum price floor was likely to provide a measure of confidence and security

²¹ J. B. Heath, op. cit., p. 8; LR 1 RP 377.

²² LR 1 RP 377.

in the future thereby encouraging modernization of plant. This benefit was not considered "substantial" as the effects on prices were expected to be small and uncertain as to when, if ever, they would be passed on to the consumer.

The "specific and substantial" requirement increases the difficulties inherent in the balancing operation. Even short-run static analysis may fail to show where the public interest lies. Long un-dynamic analysis compounds the problems of the Court by increasing the number of variable factors. The relationship of investment to the public interest is a long-run problem which may be expected to produce some questionable decisions by the Court. The Court accepts that a price restriction may encourage investment; the main problem arises when attempting to judge whether, on the balance of probabilities, some benefit which is uncertain as to time, is to be found "specific and substantial". Heath states:

...The conditions in which a price restriction might have a marked impact on research and investment do not exist unless the restriction is effective, but if it is effective then the public may simultaneously be prevented or inhibited from receiving some of the consequent benefits. To base prices on the costs of the more efficient producers and to change them frequently with those costs, so that the public benefits without delay, would give the argument a greater chance of success.²³

Prevention of Monopoly

The Scottish Bakers claimed their restrictions benefitted the public through avoidance of "undue concentration of production" and monopolistic control in regional markets while permitting sufficient

23 J. B. Heath, op. cit., pp. 8-9.

concentration for scale purposes.²⁴ The Court adduced from the evidence that concentration was increasing in the industry anyway and would continue to do so with the removal of the restriction; it was able then to bypass the difficult question, at what point does concentration of production become undue? The dangers of monopolistic control were recognized by the Court but the question with which the Court was concerned was:

Whether the respondents can show that, by virtue of the restrictions propounded by them, the disadvantages of monopolistic control in particular districts...are checked so as to confer a specific and substantial advantage on the consumer.

This was answered negatively by the Court which found the risk of undue concentration was not reduced as the recommended price system was operated by the large producers.

In the Spinners case the Court disposed of the contention that the scheme "prevents the establishment of monopoly or near-monopoly conditions" in one brief paragraph.²⁵ Even in the unlikely event that "the industry were reduced to the five large combines" this was no guarantee that competition would be reduced. In the Court's view "competition could be as severe with a small number as with a large number of firms".²⁶

B. Successful Arguments under Section 21 (1) (b)

Clause (b) of Section 21 (1) has clearly emerged as the most important of the "gateways" through which businessmen and trade associations attempt to justify their agreements. What then are the "specific and

²⁴ LR 1 RP, 363.

²⁵ Quotations from the Yarn Spinners' case refer to LR 1 RP, 188.

²⁶ J. B. Heath, op. cit., p. 11.

substantial benefits" which the Court has been willing to accept as outweighing any detriments to the public interest? These are to be found in the decisions handed down by the Court in the five cases in which the agreements were successfully defended under Section 21 (1) (b).²⁷

Black Bolts and Nuts

The Association was made up of forty-four members supplying about 90 percent of the goods under consideration. The respondents placed greatest emphasis on the alleged advantages of price stability, claiming it resulted in : (1) a uniform price for each product sold by Association members; (2) a variation in the uniform prices based upon changes in production and distribution costs; (3) a reasonable uniform price. It was claimed the user benefitted by the avoidance of having to "go shopping."²⁸

The Court accepted the claim that prices were "reasonable in the absence of any complaints from users or contention by the Registrar that prices were other than "reasonable". A price-fixing scheme had been in force in the industry since the mid 1930's; industrial users (who purchased about three-quarters of all supplies direct from the manufacturers) and stockholding merchants (who handled the remaining one-quarter) expressed their satisfaction with prices under the scheme. The Court also accepted that the scheme contributed to the exchange of technical

²⁷ Black Bolt and Nut Association Agreement, LR 2 RP 50;
Cement Makers' Federation Agreement, LR 2 RP 241;
Permanent Magnet Association Agreement, LR 3 RP 119 & 392;
Standard Metal Windows Group Agreement, LR 3 RP 198;
Net Book Agreement, LR 3 RP 246; agreements which were unsuccessfully defended are explained in the "Appendix", pp. 85-114.

²⁸ LR 2 RP, pp. 88-89.

knowledge and helped smaller members to improve efficiency; the industry as a whole was found to operate efficiently and with a moderate average rate of profit.

Stockholding merchants and industrial users were the two main customers for the industry's product. The average stockholder operated on a profit margin of 7.5 percent; this the Court found inadequate

to cover the additional cost involved in 'going shopping' while the profit margin available on the present fixed prices leaves little room for any appreciable overall reduction in prices under free competition.²⁹

The only way in which the stockholding merchant or industrial user could recoup "his additional expenses of 'going shopping'" was by raising his own prices to his purchasers.³⁰ The Court found that in the absence of the price-fixing scheme, stockholders and industrial users would be unable "to operate on a margin of 7.5 percent, let alone 5 percent."³¹ and their prices would have to rise. It concluded:

We do not think that overall prices would have been lower had there been free competition in price; nor do we think, if prices in the future are fixed in the same way as they have been fixed in recent years, they will be higher than they would be under free competition."³²

On balance it was found that the "specific and substantial benefits" of the avoidance of the need to "go shopping" outweighed the possibilities of price reductions with the restoration of free competition. The "specific and substantial" benefits of not having to "go shopping" were a saving in money, time and effort from not having to ascertain prices from competing sources of supply before placing

29 Ibid., p. 89.

30 Ibid., p. 90.

31 Ibid., p. 94.

32 Ibid., p. 95.

orders.

All price-fixing agreements eliminate the need to "go shopping" for price bargains and to that extent confer a benefit on the purchaser;³³ they also eliminate price competition at the retail level and maintain higher cost distributors in business.

Great weight was placed by the Court on the "reasonableness" of the prices fixed by the Association and it was influenced, possibly unduly, by the evidence of buyers as to their satisfaction with prices under the scheme. G. D. N. Werswick comments:

I do not think that the absence of specific complaints establishes the reasonableness of prices...The ordinary man's usage of the notion of being overcharged simply does not apply where there is, and has been for some time, only one price at any moment for all the alternative fastenings.³⁴

The Court's findings of "reasonable" prices was bulwarked by the fact that "the average rate of profit earned by members of the association was not high."³⁵ The inference drawn from this by the Court was that "on balance there is very little room for any decrease in prices." The "average" rate of profit in the industry, however, is not the relevant criterion upon which to base such an inference. Evidence produced before the Court showed that a wide spread of profits of member firms occurred in various years³⁶ suggesting that, under conditions of

³³ J. P. Cairns, "Benefits From Restrictive Agreements", Canadian Journal of Economics and Political Science, XXI, (May, 1964), 231.

³⁴ G. D. N. Werswick, "On the Benefits of Being Denied the Opportunity to 'Go Shopping'", Bulletin of the Oxford University Institute of Statistics, XXIII, (Aug. 1961), 274.

³⁵ B. S. Yamey, "The High Costs of Buying a Trivial Element," Modern Law Review, XXIV, (July, 1961), 489.

³⁶ LR 2 RP., 72.

free competition, higher-cost firms would eventually be eliminated from the industry. Firms with higher than "average profits" would be able to reduce prices, survive and, indeed, expand. There is no reason why price competition...could not lead to significantly lower prices.³⁷

In relation to the uniform prices resulting from the agreement and the central part which such prices play in doing away with the need to "go shopping", J. P. Cairns asks whether the price-fixing agreement is necessary for uniform prices.³⁸ It can be argued that competition for sales of a standardized commodity would tend to result in a uniform price, negating the need to "go shopping" except insofar as different services are provided by different sellers. If competitive forces did not bring about uniform price,

might not the profits of particular firms or on individual items be large enough to permit substantial price reductions, and price variations to make shopping a worthwhile activity?³⁹

If prices did remain uniform, buyers would soon find that it did not pay to shop for non-existent bargains and, assuming rational behaviour on their part, would soon give it up.

Cement

The Cement Makers' Federation consisted of four groups of companies and five single companies of which the largest member produced "62 per cent of the total quantity of cement delivered in the United Kingdom."⁴⁰ The Federation effectively controlled the home market producing "all but a negligible proportion of the total annual output...of Portland

37 B. S. Yamey, loc. cit.

38 J. P. Cairns, op. cit., p. 232

39 Loc. cit.

40 LR 2 RP, 248.

cement manufactured in the United Kingdom."⁴¹

It was contended by the Federation that the common price agreement resulted in lower cement prices "taking purchasers throughout the country as a whole"⁴² and that it afforded security to producers' investments making it possible to accept a lower return (under 10 percent) on capital invested in new works.⁴³ Free competition, it was claimed, would result in a higher investment risk requiring a higher return and higher prices.

A sellers' market had existed since the war and was expected to continue into the future. In this atmosphere, the court found that capacity had been expanded in proper relationship to demand and plant locations were economically justifiable.⁴⁴ Manufacturers' profit margins were considered modest in relation to other industries and the Court was satisfied

that under the federation's common price scheme the cement industry as a whole has operated efficiently, both as respects cost of production and costs of delivery, and that the prices overall have, in fact, been reasonable.⁴⁵

The lower-than-competitive price which the public had enjoyed and would continue to enjoy under the scheme was considered a "specific and substantial benefit" which outweighed any detriments arising from the agreement.

Cairns points out that the Federation's claim (which was accepted by the Court), that in the absence of the agreement, a return on in-

⁴¹ Ibid., 244.

⁴² Ibid., 275.

⁴³ Ibid., 282.

⁴⁴ Ibid., p. 277.

⁴⁵ Ibid., p. 278.

vestment of around 15 percent would have been required and could have been obtained if investment was to be maintained, is not valid. Only the

possibility of a higher return would have been necessary to induce investment. But this possibility need not have been realized; the amount of investment might well have been enough to keep the rate of return at the 10 percent level on the average.⁴⁶

Cairns continues that a "goodness of heart" or "benevolent dictatorship" theory would be required to explain why the Federation would accept 10 percent, if in fact, it could get 15 percent. Even if such a line of action were followed the public benefits received would be

the result of a privately imposed scheme of income redistribution from cement company profits to cement purchasers. It would be of interest to know how shareholders in cement companies (widows and orphans included?) reacted to the defence the federation offered in support of the agreement.⁴⁷

The Court, in this case, failed to examine the most likely consequences of abandoning the agreement.⁴⁸ In the absence of the agreement, the market structure of the industry (the largest firm produced 62 percent of total home sales) would likely have resulted in price leadership accompanied by information agreements relating to costs, prices, profits, etc. Heath observes that "these activities would have affected the degree of risk in the market, which was the main point at issue."⁴⁹ If such were the case, it is likely that a situation would

⁴⁶ J. P. Cairns, op. cit., p. 238; see also A. Beacham, "Some Thoughts on the Cement Judgement", Economic Journal, LXXII, (June, 1962) and J. R. Gould, "The Cement Makers' Agreement: Risk and Prices", The Modern Law Review, XXIV, (Sept. 1961).

⁴⁷ Op. cit., p. 239.

⁴⁸ J. B. Heath, "The Per Se Rule in the Light of British Experience", Northwestern University Law Review, LVII, (1962), 170.

⁴⁹ Ibid.

exist where producers would be satisfied with a rate of return on investment of under 10 percent and their argument that the degree of risk would increase in the absence of the agreement is false. In this particular industry, conditions are not likely to be markedly altered whether the agreement exists or not and there appears to be little justification for the scheme.

Magnets

The Permanent Magnet Association was comprised of twelve manufacturers of permanent magnets and two non-association members who participated in the pricing scheme. Together they produced some 75 percent of domestic production.

The Association contended that its research and technical pooling agreements conferred "specific and substantial benefits to the public as purchasers or users of magnets",⁵⁰ that the above agreements resulted from price restrictions imposed by the Association, the removal of which would bring to an end the research and technical pooling agreements, thereby denying benefits to the public.

The Court was highly impressed with the research carried out by the Association, the speed with which such information was diffused amongst members of the group and the improved products made available to the public. It discarded the Registrar's contention that technical collaboration and research were not direct results of the price-fixing agreement, finding that they resulted "by virtue of arrangements or operations resulting from that agreement."⁵¹ Prices were found to be "reasonable" and the "specific and substantial benefits" resulting from

⁵⁰ IR 3 RP 157.

⁵¹ Ibid., p. 163.

the agreement were judged to outweigh any detriments in the balancing process.

In view of the fact that the Association relied on the benefits resulting from its research agreements, the complex problem facing the Court was that of determining under what conditions research was likely to be maximized, i.e., individually and competitively or collectively.

The Court reasoned that the technical pooling agreements stimulated increased research activity by the individual firms:

The technical pooling agreements enable individual members to know that if they spend time and money on a line of research which is fruitless, they will be able to benefit from more fortunate experiments by one or other of their members or by the central research laboratory.⁵²

The Court's reasoning failed to gain universal acceptance.

It is not easy to understand, however, why a firm should be induced to expand research expenditure by a system in which one's own research findings are immediately competitively neutralized by compulsory sharing, and in which benefits from the research of other firms comes one's way in any case.⁵³

It is obviously difficult to evaluate with any preciseness whether the added security which each firm derives from participation in the collective research agreement will lead to more or less research and of a higher or lower quality than would occur in free competition, i.e., in the absence of the agreement. It is quite proper to ask the question, as does Yamey, would technical collaboration and collective research actually cease on the ending of the price-fixing agreements?⁵⁴ The

52 Ibid., p. 163.

53 J. P. Cairns, op. cit., p. 234.

54 B. S. Yamey, "Notes of Cases: Re Permanent Magnet Association's Agreement," Modern Law Review, XXVI, (March, 1963), 187.

history of the scheme had shown it to be highly successful and productive. " Big gains from technical collaboration are not likely to be sacrificed unless there is great provocation (in the form, here, of intense price competition)." The Court did not consider in any detail how price competition would be affected by termination of the agreement. If price competition were not intense, the termination of technical collaboration would be unlikely. Yamey continues:

Collaboration on technical matters may also lay the foundation for non-registrable arrangements such as price-reporting or open-price agreements which would moderate competition, especially where the number of competitors is small.⁵⁶

The 1956 Act set the Court "the task of forecasting the future."⁵⁷

The ability to predict successfully the course which an industry is likely to follow is an important part of the Court's work which is made more difficult by the requirement that the benefit must be "specific and substantial" to pass through the "gateway." The relationship of investment and research to the public interest is certainly a long-run problem and is not simplified when attempting to judge whether, on the balance of probabilities, some benefit which is uncertain as to time, is to be found "specific and substantial."⁵⁸

In defence of the Court's decision in the Magnet case, it would be possible to argue the unlikelihood that the agreement would have remained in force if, in fact, all or some member firms were acting in the manner suggested by Cairns, i.e. receiving a unilateral benefit of the other

⁵⁶ Op. Cit., p. 188.

⁵⁷ IR 3 RP, 168.

⁵⁸ Vide supra, pp. 47-48.

firms' research. It is quite possible that individual firms realize that research, both individually and collectively, can widen the market for the products of the industry and may also, if demand is elastic, make possible a higher return if prices can be lowered. Then, by maintaining their relative positions within the industry, the individual firms would still benefit by receiving the same relative share from the now larger pie.

Metal Windows

The industry structure was considered to consist of three parts. Crittall's was an independent manufacturer with by far the largest part of the market (approximately 43 percent). The Standard Metal Window Group was comprised of 21 members of which 15 manufactured standard metal windows only occasionally or in small quantities. These 15 members were concerned with the provision in the agreement for inter-trading between members. For most practical purposes the members of the Group consisted of six manufacturing members who supplied approximately 42 percent of the standard metal window market. The remaining 15 percent of the market was supplied by a number of other independent manufacturers.

The Group collaborated in the exchange of costing and technical information and contended that the effect of the agreement was to maintain manufacturing costs of the Group at a level substantially lower than they otherwise would have been. As a consequence, the prices of standard metal windows, on the whole, were claimed to be lower, quality higher and service better.

The Court was not satisfied that the Group had established higher quality and better service as "specific and substantial benefits" and

decided that the case must stand or fall by reference to the first point, i.e., lower prices, on the whole, for standard metal windows.⁵⁹

The agreement, the Court found, did result in lower member costs and a low average profit margin for the Group. It stated:

Without the greater efficiency, reflected in lower costs, which the group scheme promotes, member firms could not have offered the prices they have done and the tendency would have been for prices of all windows (wood and metal) to be higher.⁶⁰

In its forecasting role the Court concurred with the Group that a material lessening of co-operation "with a resulting reduction in the future savings of costs among members" would occur if the fixed-price agreement was abandoned.⁶¹ The Court found that the benefits of lower prices received by the public as purchasers of windows (both wood and metal) outweighed any detriments resulting from the agreement.

The main problem confronting the Court in this case was the structure of the standard metal window industry. Crittalls, which was not a member of the Group, held 43 percent of the market while the six manufacturing members of the Group supplied 42 percent.⁶² The Court saw that in the absence of the agreement Crittalls would automatically become the dominant firm and possess sufficient power to exercise price leadership. In fact, the agreement reduced the number of competitors but resulted in more effective competition.

Cairns has criticized the Court's decision, perhaps unfairly, because "an increase in competitive effectiveness was not the specific

59 LR 3 RP 234.

60 Ibid., p. 237.

61 Ibid., p. 238.

62 Ibid., p. 239.

benefit claimed" by the Group.⁶³ In fact, the Court linked the "specific and substantial benefits" of lower prices to the maintenance of effective competition. In the Court's decision, Megaw, J. stated:

We hold, then, that no specific or substantial benefit or advantage has been shown on balance of probability, to be lost to the public as purchasers or users, except the vital one which we have already accepted, namely, the benefit of lower prices from the maintenance of strong and effective competition.⁶⁴

Yamey's criticism of the Court's decision is more penetrating and to the point.⁶⁵ It had been agreed by the Court that keen price competition existed in the industry and was affected by the availability of substitutes (wooden windows) which were also competitively priced. It is difficult to understand, then, why the prices of metal windows should increase in the absence of the agreement "given the availability of alternative (and unaffected) sources of supply of metal windows and of close substitutes."⁶⁶ It is more reasonable that the reduction in efficiency and consequent higher costs, which the Group claimed would follow termination of the agreement, would be reflected in smaller profits.

Net Book Agreement

Parties to the agreement were 360 members of the Publishers' Association representing "virtually the whole of the publishing trade."⁶⁷ The publishers agreed not to sell their net books to the public at less

63 J. P. Cairns, op. cit., p. 236.

64 LR 3 RP.

65 B. S. Yamey, "Notes on Cases: Re Standard Metal Window Groups' Agreement," Modern Law Review, XXVI, (March, 1963), 189-91.

66 Ibid., p. 189.

67 LR 3 RP 246.

than their net prices and any books which the publisher wished to designate as "net" books fell into this category. Net books, however, accounted for three-quarters of members' turnover.

The respondents claimed that the agreement resulted in lower unit costs which were passed on to the public in the form of lower prices and also in a greater variety and number of books being published. A third benefit claimed to result from the agreement was that it prevented price-cutting of the loss-leader type which would be likely to drive "legitimate" booksellers who performed valuable public services from the trade.

The Court was satisfied that termination of the agreement would reduce the number of "legitimate" or stockholding booksellers because of the combined effect of price-cutting competition and the loss or reduction of library business... Those so affected would not by any means necessarily be businesses which are inefficiently managed.⁶⁸

The Court further found, in accordance with the publishers' contentions, that the remaining stockholding booksellers would in all probability stock fewer titles which could be expected to

result in a marked reduction in the number of subscription and stock orders received by publishers... This would tend to produce a more cautious policy on the part of the publishers, resulting in smaller printing orders which would...tend to increase list prices further.⁶⁹

In considering the probability of fewer titles being published, the Court leaned heavily on the denial of a benefit of little direct economic significance but to which it attached great cultural and political importance, namely that "works of probable literary or scholastic value" would experience difficulty in finding a publisher.⁷⁰

68 Ibid., p. 316.

69 Ibid., p. 317.

70 Ibid., p. 322.

The Court acceded to the claims of the publishers, finding that termination of the agreement would result in "(1) fewer and less-well-equipped stockholding bookshops, (2) more expensive books and (3) fewer published titles."⁷¹ The avoidance of each was considered "specific" and of sufficient degree to qualify as a "substantial" benefit.

Earlier the Registrar had contended that there was

no a priori reason for supposing the present system of distributing books to be the best...The existence of the agreement is an obstacle in the way of innovation and improvement in the means of distributing books.⁷²

This is a most important point as it has been in the field of distribution that some of the most significant improvements have been made in recent years. The difficulties inherent in the forecasting role which the Court is required to assume become obvious in a case such as this. Some indication of the trepidation with which the role was accepted may be found in the Court's explanation of the effects on book prices which determination of the agreement would likely have.

We have found this the most difficult part of the case, depending as it does on the commercial policies that would be adopted by publishers and booksellers in a state of affairs of which there has been no experience of parallel in this country in recent times. We are conscious that others might make a different assessment of what is likely. But whether we are right or wrong in our view that retail prices generally would rise, the evidence has certainly not satisfied us that on the balance of probabilities retail prices generally would fall.⁷³

It would appear that the Court did not wish to upset the status quo within the industry as it was uncertain, "on the balance of probability" that the public interest would benefit from determination of the agreement. It accepted the publishers' contention that prices were

⁷¹ Ibid., p. 323.

⁷² Ibid., p. 307.

⁷³ Ibid., p. 323.

competitive and that profits at all levels were not excessive.⁷⁴

The argument as to the difficulties which works of "literary or scholastic value" would experience in finding publishers undoubtedly influenced the Court. This argument was contingent, of course, upon the more cautious attitude which it was expected publishers would adopt if the number of stockholding booksellers was reduced. This line of indirection led the Court to the decision that "a certain class of retailer, the stockholding bookseller, deserved to be preserved rather than subjected to price competition."⁷⁵

The economic aspects of this case were admittedly complex and cloudy as to future events and were considerably muddled by non-economic value judgements of the Court. Cairns asks:

Did the Court go beyond its proper sphere in being impressed by the type of book less likely to find a publisher, that is, books of 'literary and scholastic' value, a type of book it presumably felt 'superior' to the type of book likely to have its price reduced and thereby receive wider distribution? Would there be general acceptance of its implicit value judgement, that the publishing of books of a certain quality was more worthy of protection than the wider dissemination, at lower prices, of books of a different quality?⁷⁶

The appropriate means to encourage such a policy is legislative rather than judicial and would presumably take the form of a subsidy rather than a restrictive agreement whereby the subsidizing is done by only particular members of the public.⁷⁷

The difficulties faced by the Court in its forecasting role were increased in this case by the lack of past experience of a parallel nature.

74 Ibid., p. 312.

75 J. P. Cairns, op. cit., p. 237.

76 Loc. cit.

77 Loc. cit.

In judging the effects on price and volume which termination of the agreement was likely to have, the Court found that this would be dependent on

the commercial policies that would be adopted by publishers and booksellers in a state of affairs of which there has been no experience of parallel in this country in recent times.⁷⁸

Heath elaborates this point, not in the context of the Net Book Agreement in particular, but of the British economy in general. He has been dissatisfied with the economic analysis of the Court and "with its expectations concerning events in the absence of the agreement."⁷⁹ He attributes this to the necessity of the Court to engage in "economic prediction of a particularly difficult kind."⁸⁰ A parallel experience of what would happen under conditions of free competition in the British market is confined usually to the pre-war depression years "when conditions were very different."⁸¹ Under these circumstances the Court has been forced to construct its own "model" to which, it is hoped, economic performance and behaviour will conform.

Heath states:

This is the area in which most peculiarities are found. The Court constructs hypothetical situations which it expects will follow the cancellation of the agreement, but these situations do not always seem plausible in the particular circumstances...It is little wonder that, if the Court compares the actual situation with a hypothetical one which is unrealistic, odd conclusions will emerge.⁸²

The questions could be asked in each of the preceding cases which were successfully defended, (a) is an enforcement agency of this type capable

⁷⁸ Vide supra, p. 63, n. 73.

⁷⁹ J. B. Heath, op. cit., p. 169.

⁸⁰ Loc. cit.

⁸¹ Loc. cit.

⁸² Op. Cit., pp. 169-70.

of assessing all the relevant economic factors which arise in cases of this nature? (b) Has the Court been successful in discovering these few restrictive agreements which are not contrary to the public interest?

The brief analysis of the agreements which have been judged within the public interest by the Court lends little support to an affirmative answer. An attempt has been made to show that, on strictly economic grounds, none of the preceding successful agreements should have been found within the public interest.

CHAPTER VI

EVALUATION OF THE 1956 ACT

A. Effects of the 1956 Act

Since the policy of the 1956 Act is to encourage competition as a stimulus to productive efficiency, its success may be measured by the extent to which it has succeeded in promoting a more competitive economy. With regard for the lengthy history of collusive agreements in British industry, an important consideration to ensure the long-run success of a competitive policy, was the need to promote a favourable climate of public opinion to bolster the legislative sanctions against restrictive practices.

Prior to the 1956 Act requiring registration of specified restrictive agreements, restrictive practices had been commonplace in British industry and in many quarters they were considered conducive to efficiency. The effect of such agreements was to remove large areas of industry from the competitive sphere. The need to restore a competitive atmosphere was well recognized and the government in 1948 enacted legislation directed towards this end.

The publication of the reports of the Monopolies Commission made available to the public information on the extent and effects of restrictive practices in the industries investigated. This information-performing service was improved by the 1953 amendment to the 1948 Act by which the membership of the Commission was enlarged and the number of reports increased. Public awareness was further increased with the

publication of the Commission's Report on Collective Discrimination.

This was a study of restrictive arrangements which had long been prevalent in British industry and set the stage for the 1956 Act which required certain agreements to be entered on a register open to the public. The principle of official registration has been commended as

perhaps the most significant constructive contribution made by those countries which, since the last World War, have seriously tackled the anti-trust problem.¹

The task of creating a climate of public opinion which is conducive to the acceptance of more competitive principles is obviously a long-run problem and remains far from completed. British industry took many years to reach the moribund state in which it found itself in the mid 1940's and it would be unrealistic to expect legislation in a democratic country to result in any overnight changes in industrial organization and business moves. The main importance of the 1956 Act may be in disturbing the complacency of the British businessman and making competition respectable. Heath states:

I do not believe that amendment to the 1956 Act would be likely to result in any really important contributions to the progressiveness of the British economy, or would greatly accelerate its rate of growth, although undoubtedly some benefits to the public would result...Amending the "rules of the game", whether or not this involves the Restrictive Trade Practices Act, can improve business performance; but the effect would be much greater if attitudes changed, if there were a greater sense of enterprise and enthusiasm. A firmer commitment to promote competition may help to change these attitudes, but the real problem is much deeper.

Attitudes toward business enterprise are in part a product of our educational system... If there were less wastage of talent in our schools, if managers were drawn from a wider social base and were better trained in business schools or elsewhere, competition would be a much more effective stimulus to efficiency than it is. Competition is a necessary but no sufficient condition for progressiveness. There must be a sufficient number of managers

1 W. Friedmann in Anti-Trust Laws, p. 548.

who know how to be progressive... Those in which enterprise can be developed must not be inhibited by the out-of-date ideas of the rest.²

This lengthy quotation clearly emphasizes that legislation alone is unlikely to succeed in making competition respectable; a change in the attitude of businessmen and possibly in the social structure of the country may be required. It may not be until a younger generation of businessmen with fresh ideas and a greater appreciation of competitive principles infiltrate the boardrooms of British industry that any great changes in competitive ability become apparent.

Although the long run effects of the 1956 Act are likely to be of greater importance than any immediate gains, some short run benefits, though likely of a minor nature, have been realized already. In an article as early as May, 1961, Heath was able to state on the basis of a questionnaire-type study:

It is certain that some consumers have benefitted already, and may continue to benefit, principally through lower prices; in the long run greater stimulus to efficiency which increased competition, will bring further benefits. On the whole, the disadvantages to the public in the short run seem rather small.³

Thus to the present time, the effect of the 1956 Act on both public opinion and competition appears to have been rather small.⁴ The longer run changes, however, which are hoped for in public opinion, should result in a greater acceptance of competitive principles which in turn may be expected to stimulate productive efficiency.

2 J. B. Heath in Still Not Enough Competition, pp. 42-43.

3 J. B. Heath, "Restrictive Practices and After", Manchester School of Economic and Social Studies, XXIX, (May, 1961), 202.

4 See R. Stevens in the Yale Law Journal, LXX, (1961), 888-89.

B. A Middle Way

In North America and particularly in Canada, the modified per se approach to restrictive practices enforcement has resulted in an excessively legalistic attitude to a problem which is essentially economic in nature. In this vein, Friedmann remarks:

The Canadian courts, with far greater unanimity than the American courts, have refused to consider the economic implications of their judgements, or even the issues underlying them, on the ground that it is not the judges task "to adjudicate between conflicting theories of political economy."⁵

It will be recalled that Canadian combines legislation requires the Court to determine at what point competition becomes "unduly" lessened. When this point has been reached the combine is per se illegal with no consideration of the economic consequences. Earlier it was stated that the "undue" point was reached when a "substantial part of the market" or a "preponderance of the industry" was involved. This point appears to have been shifted somewhat further by Cartwright, J. of the Supreme Court of Canada in Howard Smith Paper Mills Ltd. et al v. The Queen, 1957, S.C.R. 403 where he states:

...An agreement to prevent or lessen competition...becomes criminal when the prevention or lessening agreed upon reaches the point at which the participants in the agreement become free to carry on those activities virtually unaffected by the influence of competition...⁶

⁵ W. Friedmann, Canadian Bar Review, XXXIII, (1955), 136; see also in relation to excessive legalism in Canada, V. W. Bladen and S. Stykolt in Anti-Trust Laws where the Canadian authorities are accused of being overly concerned with the form of competition rather than the effects; see also "The Law and Mergers" in Economics: Canada, at p. 90 where McRuer, C. J. quotes Cartwright, J.'s words in Howard Smith Paper Mills, Ltd., et al v. The Queen, 1957, S.C.R. 403. "The relevant question thus becomes the extent to which the prevention and limitation of competition are agreed to be carried and not the economic effect of the carrying out of the agreement."

⁶ Pp. 426-27.

McRuer, C. J. in Regina v. Canadian Breweries Ltd., 126, C.C.C. 133,

interpreted Cartwright, J's language to mean:

If the agreement in question, when carried into effect, would give the parties to it the power to carry on their business virtually without competition, the agreement would be an agreement to unduly lessen competition.⁷

The above views of Cartwright, J. and McRuer, C. J. were not agreed with by Batshaw, J. in Regina v. Abitibi Power and Paper Co. Ltd. et al (1960), 131 C.C.C. 201, who did not believe that a virtual elimination of competition was necessary to constitute an undue preventing or lessening of competition. Cartwright, J's words, quoted above, cannot be considered as necessarily binding as they were contained in a minority judgement. Thus, our earlier interpretation that an agreement will be construed as an "undue" preventing or lessening of competition when a "substantial part of the market" or a preponderance of the industry" is involved still appears the most reasonable.

The subjection of registrable agreements to adjudication by a court of law brings the United Kingdom system of enforcement somewhat closer to the North American per se approach.

If the first cases taken to the Restrictive Practices C court were difficult to distinguish from a large number of other cases, the Court's decision would have the effect of something approaching the development of a per se rule. If the cases depended on their peculiar facts, the decision would be special and not of general application.⁸

In fact, the first cases selected by the Registrar for presentation to the Court were chosen because of their likeness to a large number of similar

7 P. 139

8 Proceedings, International Conference on the Control of Restrictive Business Practices, p. 196; see also W. Friedmann in Anti-Trust Laws, p. 549.

agreements.⁹

Heath states that " t he 1956 Act...marked a significant shift in opinion towards a per se rule" with the presumption that registrable agreements were contrary to the public interest unless certain specified conditions were met and by placing the onus on the parties to the agreement to prove that the conditions were met.¹⁰

Aside from a movement towards a per se approach in the structure of the Court itself, Cairns claims that something remarkably similar to a per se approach has developed in the thinking of the Court. From the Court's decisions in the Permanent Magnets and Linoleum cases, he draws the implication that

it is per se contrary to the public interest to operate a restrictive agreement that produces unreasonably high prices, in that the finding of such unreasonable features is sufficient to condemn the agreement as contrary to the public interest.¹¹

It is significant in this respect that in all cases where agreements were found to be not contrary to the public interest the reasonableness of prices and profits was always emphasized and the stipulation was made by the Court that if prices in the future became unreasonable, this would constitute a material change in the relevant circumstances entitling the Registrar to apply to the Court under Section 22 of the Act whereby the Court's previous declaration in respect of the restriction could be changed.

It would appear that the British legislators have attempted, in the

9 Vide supra, p. 36.

10 J. B. Heath in Northwestern University Law Review, LVII (1962), 162-3.

11 J. P. Cairns, "The Restrictive Practices Court and Reasonable Prices", Journal of Industrial Economics, XII, (Mar. 1964), 135.

1956 Act, to combine the desirable features of a per se approach with the flexibility which is ordinarily found in the ad hoc determinations of an administrative tribunal. The legalistic approach which is evident in Canada and derives from the major roles played by the judge and lawyer in our system of enforcement has been subjected to moderating influences in the United Kingdom. As Professor Gosse has pointed out, these derive in part from conscious policies set down by the Court and in part from the legislation itself:

The court has consciously adopted certain attributes of a tribunal with regard to evidence and proceedings. There is less formality in these respects. Also, the Act requires that the Court include more lay members than judges. This should help to avoid a too legalistic approach.¹²

It is likely also that the lower standard of proof required in civil proceedings, i.e. the balance of probability rather than beyond a reasonable doubt, results in less rigidity.

In principle, this approach would appear superior to either per se rules or ad hoc administrative procedure, combining as it does the better points of both methods of enforcement. The question remains, how has it worked in practice? Has it proven inferior or superior to the longer established North American means of enforcement?

C. Conclusion

In each case which was successfully defended before the Restrictive Practices Court, there can be little doubt that a "substantial part of the market" or a "preponderance of the industry" was involved. In Black Bolts and Nuts, association members supplied about 90 percent of the goods under

¹² R. Gosse in The Canadian Bar Review, XXXVIII, (1960), 194.

consideration;¹³ in the Cement Makers' agreement, the federation effectively controlled the home market "producing all but a negligible proportion of the total annual output...of Portland cement manufactured in the United Kingdom";¹⁴ the respondents in the Permanent Magnet agreement produced some 75 percent of domestic production;¹⁵ the Standard Metal Window Group supplied approximately 42 percent of the standard metal window market;¹⁶ members of the Net Book agreement represented "virtually the whole of the publishing trade."¹⁷

Only in the Metal Windows case was less than "a preponderance of the industry" involved in the agreement and here there can be little doubt that 42 percent of the relevant market represents a "substantial part." It would be likely, then, were a Canadian court adjudicating these cases subject to the provisions of the combines legislation, that each agreement which was found not contrary to the public interest by the Restrictive Practices Court would have been found per se illegal by the Canadian court.

The economic cost of this would have been the value of the benefits which would be denied the public in the absence of the agreement. However, in each case we have seen that the economic analysis provided by the Court has been questionable; "a ll too often, their analysis seemed just plain wrong."¹⁸ Thus it is doubtful that a per se rule, applied in these cases,

13 Vide supra, p. 50.

14 Vide supra, p. 53-54.

15 Vide supra, p. 56.

16 Vide supra, p. 59.

17 Vide supra, p. 61.

18 J. B. Heath, op. cit., p. 169.

would have involved any loss at all. In three of the cases (Cement; Magnets; Metal Windows) it was shown that termination of the agreements would be unlikely to affect significantly long established industry practices. In Black Bolts and Nuts the public as purchasers were denied the opportunity of lower prices which might be expected from competition in exchange for the doubtful benefits of not having to "go shopping". In Net Books the public was denied the possibility of purchasing certain books at lower prices. Purchasers of books which would fall in this category, in effect, were made to subsidize books of certain literary and political value which, in the Court's opinion, would only with difficulty find publishers.

Analysis of the above cases leads to the conclusion that the economically oriented approach adopted by the United Kingdom, which on theoretical grounds appears superior to the per se approach, does not lead to economic results of a superior nature. This conclusion does not constitute a condemnation of the British method of enforcing restrictive practices legislation. On the contrary, considering the lengthy history of collaboration in British industry, the approach adopted by the government of gradually trying to inculcate the merits of competition upon the British businessman seems that most likely of success. In Canada, however, such an approach might be to a large extent unnecessary as a policy of free competition has been in existence for seventy-five years; here also the medium of publicity has been used to foster a favourable climate of public opinion.¹⁹ The typical North American businessman, while desirous of

¹⁹ Restrictive practices, when uncovered, usually receive adverse press coverage. Such practices are also publicized by House of Commons debates and reports of the Restrictive Trade Practices Commission.

protection for his own interests, is nevertheless aware of the principles of competition and the esteem in which they are held by the public. The "rules of the game" as expressed by Heath are much different in Canada from what they are in the United Kingdom. The British need to create a favourable climate of public opinion to assist in the enforcement of restrictive practices legislation is not a factor of paramount importance in Canada. There is little doubt in the writer's mind that this is the most important problem confronting British legislators at this time; it is also in the area of public awareness that the 1956 Act has thus far been most successful. Certainly any economic triumphs have been negligible.

The laws of a country must be made to conform to the cultural and political traditions of where they are to be applied.²⁰ Registration of restrictive agreements is no doubt of greater value in a country such as the United Kingdom where anti-trust policies are in their infancy than would be the case in Canada which has a lengthy history of restrictive practices enforcement. Similarly a body such as the Restrictive Practices Court which provides an opportunity for airing the economic aspects of cases may be the most efficacious means available in that country to enlighten the public on the detrimental effects of restrictive practices.

The economic results, however, of this Court which has been assigned the specific task of evaluating the economic significance of restrictive agreements are far from overwhelming and by no means provides convincing proof that such an economically oriented approach to restrictive practices enforcement is superior to the per se method of enforcement employed in Canada. On the basis of British experience to date, there is little reason

²⁰ Proceedings, International Conference on the Control of Restrictive Business Practices, p. 181.

to suggest any drastic changes in the present Canadian method of enforcement.

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APPENDIX

TABLE I

MONOPOLIES COMMISSION: Reports completed and new references submitted by the Board of Trade.

For the Year Ended	Reports Completed	New References
Dec. 31, 1954	2	1
1955	5	6
1956	4 reports completed prior to Aug. 2, 1956, at which date the 1956 Act came into force. 3 more reports completed before year's end. These had been referred prior to 1956 Act.	3
1957	0	2
1958	1	0
1959	1	0
1960	0	1
1961	1	1
1962	0	0
1963	1	2

Source: Annual Reports by the Board of Trade
London: Her Majesty's Stationery Office

TABLE II

TOTAL EXPENDITURES OF MONOPOLIES COMMISSION
(excluding costs of certain common services
such as accommodations and stationery)

<u>Year</u>	
1952-53	59,639
1953-54	76,354
1954-55	106,751
1955-56	106,363
1956-57	63,894
1957-58	59,624
1958-59	61,686
1959-60	56,474
1960-61	57,114
1961-62	64,615
1962-63	67,544

Source: Annual Reports by the Board of Trade
London: Her Majesty's Stationery Office.

TABLE III

**Cases Contested Before the Restrictive Practices Court
To Determine Whether Agreements were Contrary to the Public Interest**

Name of Agreement	Type of Restriction	Gateway Used	Judgement as to Public Interest
Chemists' Federation Agreement. LR 1 RP 75	Scheme to restrict the sale of proprietary medicines manufactured by members to qualified chemists.	S (21) (1) (a) (b)	Contrary Nov. 3, 1958
Yarn Spinners' Agreement. LR 1 RP 118	Minimum prices Conditions of sale.	S (21) (1) (b) (e)	Contrary Jan. 26, 1959
Blanket Manufacturers' Agreement. LR 1 RP 208	Minimum prices Conditions of Sale Minimum quality.	S (21) (1) (b) (g)	Contrary Mar. 23, 1959 The minimum quality restriction was found not contrary to the public interest.
Scottish Bakers' Agreement. LR 1 RP 347	Recommended prices and wholesale discounts.	S (21) (1) (b) (g)	Contrary July 23, 1959
Watertube Boilermakers' Agreement. LR 1 RP 285	Price Tendering.	S (21) (1) (b) (d) (f)	Not Contrary July 31, 1959
Federation of Wholesale and Multiple Bakers Agreement. LR 1 RP 387	Maximum prices.	S (21) (1) (b)	Contrary Dec. 16, 1959

For a more detailed account of the "specific and substantial benefits" claimed by the respondents under Section (21) (1) (b) and the Court's disposition of them, see Appendix 2.

Sources: Various Reports of the Registrar of Restrictive Trading Agreements and LR, RP's.

Name of Agreement	Type of Restriction	Gateway Used	Judgement as to Public Interest
Federation of British Carpet Manufacturers' Agreement and the common form agreement between the Federation and numerous carpet wholesalers. LR 1 RP 472	Fixed prices. Selling lists. Conditions of Sale.	S (21) (1) (b) (f)	Contrary
Phenol Producers' Agreement. LR 2 RP 1	Fixed prices. Conditions of sale	S (21) (1) (b)	Contrary Apr. 7, 1960
Black Bolt and Nut Association Agreement. LR 2 RP 50.	Fixed prices. Conditions of sale.	S (21) (1) (b) (g)	Not Contrary July 15, 1960
Doncaster and Retford Co-operative Societies Agreement. LR 2 RP 105	Market limitations.	S (21) (1) (b)	Contrary Oct. 31, 1960
Wholesale Confectioners' Alliance Agreement. LR 2 RP 135 & 231	Fixed prices.	S (21) (1) (b)	Contrary Dec. 9, 1960
Motor Vehicle Distribution Scheme Agreement LR 2 RP 173	Distribution scheme	S (21) (1) (a) (b)	Contrary Dec. 21, 1960

Name of Agreement	Type of Restriction	Gateway Used	Judgement as to Public Interest
Associated Transformer Manufacturers' Agreement. LR 2 RP 295	Minimum prices.	S (21) (1) (b) (d) (f) (g)	Contrary Mar. 24, 1961
Cement Makers' Federation Agreement. LR 2 RP 241	Fixed prices.	S (21) (1) (b) (g)	Not Contrary Mar. 16, 1961
Glass Bottle Manufacturers' Agreement. LR 2 RP 345	Minimum prices. Conditions of sale.	S (21) (1) (b)	Contrary Mar. 24, 1961
Linoleum Manufacturers' Association Agreement LR 2 RP 395	Minimum prices.	S (21) (1) (b) (f) (g)	Contrary June 22, 1961
Agreement between Newspaper Proprietors' Association, Ltd., and National Federation of Retail Newsagents, Booksellers and Stationers. LR 2 RP 453	Restriction of Entry	S (21) (1) (b)	Contrary July 27, 1961

Name of Agreement	Type of Restriction	Gateway Used	Judgement as to Public Interest
Permanent Magnet Association Agreement IR 3 RP 119 & 392	Minimum prices.	S (21) (1) (b) (f) (g)	Not Contrary June 7, 1962
Standard Metal Windows Group Agreement IR 3 RP 198	Delivered prices.	S (21) (1) (b)	Not Contrary July 17, 1962
Net Book Agreement IR 3 RP 246	Retail price maintenance	S (21) (1) (b) (f)	Not Contrary Oct. 30, 1962
Agreement of the Birmingham Association of Building Trades Employers. IR 4 RP 54	Standard contracts. Tendering procedures. Pricing schedules. Daywork tendering.	S (21) (1) (b)	Contrary Apr. 10, 1963 Provisions for daywork tendering were considered ultra vires the Court's jurisdiction under S (6).
Jute Goods Agreement (Not yet reported in IR, RP's.)	Fixed prices. Conditions of sale	S (21) (1) (e)	Contrary Mar. 26, 1963
Tyre Trade Register Agreement; Staffordshire Motor Tyre Co. Ltd. Agreement. IR 3 RP 404	Restriction of entry	S (21) (1) (a) (g)	Contrary Mar. 15, 1963

Name of Agreement	Type of Restriction	Gateway Used	Judgement as to Public Interest
British Paper and Board Makers' Association Agreement. LR 4 RP 1	Minimum prices.	S (21) (1) (b)	Contrary Apr. 29, 1963
British Waste Paper Association Agreement LR 4 RP 29	Minimum and maximum prices; standard descriptions.	S (21) (1) (b) S (6) (1) (b)	Contrary Apr. 29, 1963 No restrictions within S (6) (1) of Act.
National Sulphuric Acid Association Agreement. LR 4 RP 169	Common prices. Common conditions of purchase	S (21) (1) (d)	Not Contrary July 12, 1963

Chemists' Federation Agreement

S (21) (1) (a)

The paramount purpose of the restrictions was to restrict the sale of proprietary medicines manufactured by members to retail chemists or pharmacists. The Federation claimed the restrictions were reasonably necessary to protect the public from injury.

The restrictions were found by the court to be unnecessarily wide in scope; many of the products could not possibly have resulted in injury to the public even if vended without the benefit of professional advice. If the risk of injury was greater than the court believed it to be, the restrictions were likely to afford the public little protection.

S (21) (1) (b)

Specific and substantial benefits claimed:-

- (1) the restrictions afforded chemists the opportunity of giving beneficial advice to the public as purchasers;
- (2) in the absence of the agreement exaggerated claims were likely to be made for some medicines; the restrictions enabled the standards committee of the Federation the opportunity to prevent this;
- (3) termination of the agreement would force many chemists in country districts out of business, thereby denying to those residents benefits of the National Health Service;
- (4) retail chemists possess better facilities than other tradesmen for the storage of medicines.

The court found:-

- (1) that the general benefits of chemists' advice was negligible and had been dealt with under Section (21) (1) (a).
- (2) that the public received no substantial benefits from the work of the standards committee. Other bodies existed which satisfactorily controlled

the advertisement of medicines without imposing restrictions on their sale.

(3) that there was no satisfactory evidence as to the number of chemists whom it would be in the public interest to preserve in business. The Federation failed to lift this point from the realm of speculation.

(4) that there was nothing in this point.

The court declared the restrictions contrary to the public interest.

Yarn Spinners' Agreement

§ (21) (1) (b)

Specific and substantial benefits claimed:-

(1) the scheme guarded against cut-throat competition which through its long-run effects in reducing capacity was detrimental to the public interest. The capacity reduction would result in an excess of demand over supply and consequent higher prices when demand returned to normal. In the long run the public benefits from the steady supply and stable prices which are assured by the minimum price scheme.

(2) the scheme encouraged research and plant modernization, thus benefitting the public in the form of cheaper or better goods.

(3) quality and service were better in the absence of price competition.

(4) the scheme prevented the establishment of monopoly or near-monopoly conditions as in its absence many producers would be eliminated.

(5) price stability resulting from the minimum price scheme was claimed as a benefit.

The court found:-

(1) the scheme retarded the elimination of excess capacity by maintaining higher than competitive prices which permitted less efficient enterprises

to continue operations. The industry could and ought to be made smaller and more compact.

(2) that the scheme did instill confidence and induce modernization but concluded that price and quality benefits to the public were uncertain and unlikely to be substantial.

(3) that competition in quality and service would be maintained in the absence of the restrictions.

(4) that a reduction in capacity and industry size did not lead inevitably to less competition.

(5) that any minimum price scheme contributes to price stability. Price stabilization was, in isolation, a benefit but here it had to be judged against the alternative of a free market. In this case, the opportunity for price reductions under conditions of free competition was a greater benefit than price stability.

S (21) (1) (e)

The Spinners claimed that removal of the restrictions would likely have a serious and persistent adverse effect on the general level of unemployment in the area in which a substantial part of the trade or industry was situated. This contention was accepted by the court necessitating the balancing process to come into operation.

The court observed that yarn prices were higher under the scheme than would be the case under free competition. Also, export business was lost because spinners were unable to make price concessions and national resources, in the form of excess capacity, were wasted. On balance the court found that the wastage of national resources outweighed the avoidance of localized unemployment and the scheme was declared contrary to the public interest.

Blanket Manufacturers' Agreement

S (21) (1) (b)

Specific and substantial benefits claimed:-

- (1) the agreement promoted confidence within the industry thus encouraging modernization; this resulted in the long-run benefits of lower prices and higher quality.
- (2) the minimum substance requirement prevented debasement of quality.
- (3) the terms of trade restrictions discouraged unreasonable consumer demands which would cause increased costs and higher prices.

The court found that:-

- (1) no detriment resulted from the minimum price scheme since virtually no sales were made at that price. It was insufficient, however, to show that a restriction was harmless to succeed under S (21) (1) (b). Any benefits which might result from promoting confidence within the industry were unlikely to be "specific and substantial."
- (2) the minimum substance restriction conferred specific and substantial benefits on the public which outweighed any detriments which might result from the restriction. The minimum substance restriction, however, could continue in the absence of the price restrictions.
- (3) the terms of trade were, on the whole, reasonable and fair but conferred no specific and substantial benefits on the public.

S (21) (1) (g)

It was unnecessary to consider any restrictions under paragraph (g), i.e., as being reasonably necessary to support the main restrictions, as the minimum price scheme was unable to qualify under "gateway" (b).

All the restrictions, with the exception of the minimum substance arrangement, were declared contrary to the public interest.

Scottish Bakers' Agreement

S (21) (1) (b)

Specific and substantial benefits claimed:-

- (1) price stability for standard bread.
- (2) the sale of bread at the lowest prices economically possible.
- (3) avoidance of the danger of undue concentration and monopolistic control.
- (4) better quality and service.
- (5) higher volume of research and rate of technical progress.

The court found:-

- (1) that the industry structure made for natural stability of prices; also price stability by itself was not a benefit.
- (2) that it was not proved that recommended prices were lower than they would be under free competition.
- (3) that the risk of undue concentration was not reduced as the recommended price system was operated by the large producers.
- (4) that price competition does not necessarily reduce quality and service.
- (5) the respondents conceded that the claim in respect of research could not be substantiated. They then claimed that the restriction fostered a degree of co-operation in the industry which resulted in substantial benefits. This claim was both nebulous and speculative and there was no reason why a lesser degree of co-operation should take place in the absence of the agreement.

S (21) (1) (g)

As the restrictions did not qualify under S (21) (1) (b) it was unnecessary for the court to consider any restrictions which were claimed to be ancillary to the central scheme.

Watertube Boilermakers' Agreement

S (21) (1) (b)

Specific and substantial benefits claimed:-

- (1) the agreement maintained capacity in the industry which would be needed when the temporary recession ended.
- (2) in the absence of the agreement, research expenditures would decrease and
- (3) quality would deteriorate.
- (4) that the agreement tended to keep sub-contracting among members.

The court found that:-

- (1) boilermakers who wished to remain in business would preserve capacity.
- (2) research would be maintained as the respondents were all financially well-placed.
- (3) the argument on quality was invalid as expert advice was readily available to purchasers.
- (4) the tendency to keep sub-contracting among members was a detriment to the public.

S (21) (1) (d)

The Association claimed that the arrangements were necessary to protect themselves against a preponderant buyer, the Central Electricity Generating Board. The court agreed but disallowed the restriction as being too wide as it applied also to all other customers of the members.

S (21) (1) (f)

The court upheld the Association's claim that removal of the arrangements would likely result in a reduction in the volume or earnings of the export business which could be considered substantial. In the balancing process the national benefit resulting from the maintenance of exports was deemed to outweigh any detriments resulting from the

agreement. The restrictions were declared not contrary to the public interest.

Federation of Wholesale and Multiple Bakers' Agreement

S (21) (1) (b)

Specific and substantial benefits claimed:-

(1) removal of the maximum price recommendations would likely result in price increases both by members and non-members.

The court found:-

(1) that since virtually no sales took place below the recommended maximum price, the agreement operated as a fixed price. Removal of the restrictions were unlikely to lead to higher prices; rather in an industry where demand was declining and productive capacity was both efficient and ample, free competition could be expected to lead to price reductions. The restrictions were declared contrary to the public interest.

Federation of British Carpet Manufacturers' Agreement

S (21) (1) (b)

Specific and substantial benefits claimed:-

- (1) public confidence in standard quality at proper and reasonable prices.
- (2) price stability.
- (3) cheap and efficient system of distribution.
- (4) maintenance of promotional costs at a low level.

The court found that:-

(1) the general public was not aware of the existence or significance of the quality standards. It was not believed that quality would be debased in the absence of the agreement. The fixed prices were criticized as arbitrary, not being based on any recognized costings system.

(2) price stability was not in itself a benefit and it was unlikely that undue instability would follow removal of the restrictions.

(3) the approved list of wholesalers deprived the public and retailers of an adequate wholesale service; further removal of wholesalers' fixed discounts would not necessarily result in higher prices.

(4) the joint advertising arrangements were not dependent on the other restrictions and could continue in their absence.

S (21) (1) (f)

As the export trade had been steadily declining despite the restrictions, the court found that termination of the scheme was unlikely to result in a substantial reduction in the export trade. The restrictions were declared contrary to the public interest.

Phenol Producers' Agreement

S (21) (1) (b)

Specific and substantial benefits claimed:-

(1) the maintenance of adequate capacity and lower prices when demand was high. The Association contended that supply exceeded demand and removal of the restrictions would cause a severe decrease in prices. This would divert resources away from the industry. When demand increased, as expected, supplies would be short and the agreement would hold prices below the free market level.

The court found that:-

(1) the fixed price was substantially above the competitive price, the fixed price was arbitrary and not related to any costings formula. The rigidity introduced by the scheme was also criticized as lower prices might generate new demand in both foreign and domestic markets.

The restrictions were declared contrary to the public interest.

Black Bolt and Nut Associations' Agreement

S (21) (1) (b)

Specific and substantial benefits claimed:-

- (1) the avoidance of the necessity for buyers to "go shopping"; "shopping" would increase administrative costs.
- (2) greater capital investment in the industry.
- (3) the maintenance of high quality.
- (4) the exchange of technical information and research.
- (5) inter-trading maintained small manufacturers in business.

The court found that:-

- (1) the administrative savings resulting from not having to "go shopping" were specific and substantial and would be lost in the absence of the agreement. This satisfied the requirements of S (21) (1) (b).
- (2) it was doubtful that capital investment would decrease in the absence of the agreement.
- (3) it was unlikely that quality would decrease substantially in its absence.
- (4) it was unlikely that research and technical collaboration would be significantly reduced in its absence.
- (5) the advantages of inter-trading, aside from the benefits of not having to "go shopping", were too vague and speculative to qualify as specific.

S (21) (1) (g)

The standard conditions of sale were found reasonably necessary for the maintenance of the price scheme and their removal would result in having to "go shopping".

In the balancing procedure, the court judged the benefits result-

ing from not having to "go shopping" greater than the detriments of higher prices resulting from the fixed price scheme. The price restrictions and standard conditions of sale were declared not contrary to the public interest.

Doncaster and Retford Co-Operative Societies Agreement

S (21) (1) (b)

Specific and substantial benefits claimed:-

- (1) in the absence of the agreement uneconomic competition would cause lower trading profits and dividends, meaning a higher real price to members.
- (2) in the absence of the agreement unprofitable services to members in boundary areas could not be maintained.

The court found that:-

- (1) it was unlikely that such uneconomic competition would take place as both Societies were members of the Co-operative Union which arbitrated such boundary disputes.
- (2) the impairment of services to marginal areas would not be significant and lacked a factual basis.

The restrictions were declared contrary to the public interest.

Wholesale Confectioners' Alliance Agreement

S (21) (1) (b)

Specific and substantial benefits claimed:-

- (1) in the absence of the agreement distribution costs would be higher causing higher prices to customers in sparsely populated areas.
- (2) without the scale of reselling prices matched against buying prices manufacturers would be unable to make more than trivial increases in wholesale prices without increasing retail prices.

(3) price lists made it unnecessary for small retailers to "go shopping" and assured them of reasonable prices.

(4) the price lists stopped disputes between retailers and wholesalers over the division of the difference between manufacturers' price and retail price.

The court found that:-

(1) there was sufficient elasticity in the profits of manufacturers, wholesalers and retailers to ensure the supply of confectionery at ticketed prices in sparsely populated areas. Too many wholesalers existed and the system of distribution would be improved by the elimination of inefficient ones.

(2) ticketed prices to consumers would increase only if wholesalers increased their reselling prices to retailers by the same amount as the manufacturers' increase plus a percentage profit upon the increase.

This was considered unlikely in a buyers' market.

(3) small retailers were capable of comparing prices to find themselves bargains, the benefit of not having to "go shopping" was not substantial in this case.

(4) the avoidance of bargaining disputes between wholesalers and retailers was not a benefit as bargaining was likely to increase the profits of one or the other.

Motor Vehicle Distribution Scheme Agreement

S (21) (1) (b)

Specific and substantial benefits claimed:-

(1) the restrictions ensured a nationwide distribution network of capable dealers from whom the public could purchase cars of any make, whether or

not the dealer held a franchise for the make chosen.

The court found that:-

(1) the restrictions made it difficult to put a new car on the market unless the maker created his own distribution network of franchised dealers. The court was not satisfied that the "Big Five" manufacturers would refuse to allow their franchised dealers to sell any make of car. The evidence failed to satisfy the court that removal of the restrictions would result in the denial of specific and substantial benefits to the public.

S (21) (1) (a)

The payment of a 5 percent commission to registered repairers on the sale of a vehicle to a purchaser introduced by the repairer was sought to be justified as an inducement to repairers to meet the standards necessary to qualify for registration. These standards were claimed to be reasonably necessary to protect the public against injury from inefficient repairs. The court was not satisfied that the restrictions improved efficiency in repairs and the restrictions, having failed under both (a) and (b) were declared contrary to the public interest.

Associated Transformer Manufacturers' Agreement

S (21) (1) (b)

Specific and substantial benefits claimed:-

(1) removal of the restrictions would cause lower prices and profits resulting in a reduction in research expenditure which would retard technical advances.

(2) quality would deteriorate.

(3) collaboration on technical matters and costings would cease in the absence of the agreement; such collaboration had resulted in lower costs.

The court found that:-

(1) the evidence failed to show that in the absence of the agreement research expenditures would decrease and

(2) quality deteriorate. Purchasers were well qualified to recognise quality and keen competition would make it essential that it be maintained.

(3) the lack of collaboration likely to occur with the termination of the scheme was not substantial as only limited collaboration took place with the agreement in operation. Idle capacity existed and lower prices were likely in the absence of the restrictions.

S (21) (1) (d)

The Association claimed the restriction was necessary to secure fair prices from a large buyer, the Central Electricity Generating Board. The court was not satisfied that removal of the restriction would result in other than fair terms. (Fair terms were those at which efficient manufacturers could supply the goods at a reasonable profit).

S (21) (1) (f)

The Association also claimed that removal of the restrictions would result in lower prices, profits, research expenditures and quality and would thus have an adverse effect on exports. The court did not expect research expenditures or quality to fall far enough to significantly effect export earnings. The exchange of technical and commercial information which took place under the export agreement failed to impress the court which was of the opinion that the level tendering which resulted from the export agreement tended in itself to reduce export earnings.

The restrictions, having failed under (b), (d) and (f) were declared

contrary to the public interest.

Cement Workers' Federation Agreement

S (21) (1) (b)

Specific and substantial benefits claimed:-

- (1) prices throughout the country as a whole were lower-than-competitive.
- (2) capacity was expanded in step with demand.
- (3) capacity was efficiently used.
- (4) transportation was efficiently used.

The court found that:-

- (1) the industry was efficiently operated and enjoyed only a modest profit margin; the public enjoyed and would likely continue to enjoy the specific and substantial benefit of lower prices resulting from the restrictions.
- (2) capacity had been expanded in proper relationship to demand.
- (3) capacity was efficiently employed.
- (4) the transport subsidy element in the price structure reduced the uneconomical use of transport.

In its balancing procedure the court found that the benefits of overall lower cement prices outweighed the doubtful possibility of lower prices which might occur under free competition in delivery areas close to cement works. The court did not pronounce on the general question whether or not freight averaging schemes involving transport subsidies were detrimental to the public.

S (21) (1) (g)

The provisions for merchants' margins were found to be a necessary adjunct to the price-fixing scheme while terms and conditions of sale were also considered ancillary to the main restrictions. As such, they successfully passed through (g).

Aggregated rebates on purchases from Federation members during the course of the year were held to have no economic justification and created a privileged class of purchaser. They also discouraged buying from non-Federation members and impeded entry to the industry. The aggregated rebates were declared contrary to the public interest; the main price-fixing agreement together with ancillary arrangements accepted by the court under (g) were declared not contrary to the public interest.

Glass Bottle Manufacturers' Agreement

S (21) (1) (b)

Specific and substantial benefits claimed:-

- (1) in the absence of the agreement prices would fluctuate sharply.
- (2) quality would deteriorate in terms of low demand or severe price competition.
- (3) in the absence of the agreement collaboration on research and design would end and with it the benefits of higher quality and lower prices.
- (4) production for stock would be discontinued in terms of low demand in the absence of the agreement.
- (5) large buyers could obtain unreasonably low prices while other buyers would have to pay higher prices in its absence.
- (6) prompt delivery on short notice would no longer be possible after discontinuance of the agreement.
- (7) a monopolistic situation with accompanying higher prices was likely to develop in the absence of the agreement.

The court found that:-

- (1) price uniformity was not a sufficient benefit to outweigh the loss of a free market.

(2) there would be no deterioration in quality as large buyers would insist on maintenance of proper standards and manufacturers could ill-afford to risk losing business by lowering quality.

(3) the loss in co-operative research and design, which might result from the introduction of price competition would not be substantial.

(4) & (6) the industry customs of utilizing capacity for stock production during seasonal low demand and advance ordering by customers to ensure prompt delivery would not be appreciably changed.

(5) purchasers must be considered as a whole. There was no evidence to indicate that the increase in prices to smaller buyers exceeded in the aggregate the savings to larger buyers.

(7) even if the number of manufacturers was reduced by the introduction of price competition, there was no necessity that prices would be higher or that a monopolistic situation would develop.

All the restrictions were declared contrary to the public interest.

Linoleum Manufacturers' Association Agreement

S (21) (1) (b)

Specific and substantial benefits claimed:-

(1) the public was assured of high quality standards and a wider choice of patterns.

(2) price stability ensured the maintenance of adequate stocks by wholesalers and retailers.

(3) prices were lower when demand was high than they would be under conditions of free competition.

The court found that:-

(1) price competition was unlikely to result in quality deterioration.

It was also unlikely to result in a sufficient narrowing of consumer choice to amount to the denial of a substantial benefit.

(2) price competition was unlikely to alter substantially the stock-holding habits of wholesalers and retailers.

(3) the evidence in the past of prices being restrained by the agreement in times of high demand was not strong. The demand for linoleum was steady and there was nothing to suggest that in the present or in the foreseeable future demand was likely to be high.

S (21) (1) (f)

The Association contended that removal of the restrictions would result in termination of their Convention which was an arrangement between the Export Group of the Association and the principal Continental linoleum manufacturers by which common selling prices and terms for all markets outside the United Kingdom, the United States and Germany were observed. Termination of the Convention, it was claimed, would lead to a substantial reduction in the volume and earnings of the export business of members. It was further claimed that prices in Commonwealth markets must be substantially the same as Home Prices. A decline in Home Prices from a price war would result in lower prices in Commonwealth markets and a reduction in export earnings.

The court felt that the Association considered the Convention arrangements to be of great importance and so would take care not to disrupt them. Continental manufacturers also regarded the Convention as important; they would end it only if the price-fixing system could no longer operate because of cut-price exports. The court considered it unlikely that price competition in the Home Market would lead to substantial exports at cut prices. It believed that the Convention

could operate in the absence of the minimum price restrictions in the Home Market and that the volume of earnings of the export business could continue substantially unaffected.

It was unnecessary to consider the remaining restrictions under (g) as the Association failed to make its case under (b) or (f). All restrictions were declared contrary to the public interest.

**Agreement Between Newspaper Proprietors' Association,
Ltd., and National Federation of Retail Newsagents, Book-
sellers and Stationers**

§ (21) (1) (b)

Specific and substantial benefits claimed:-

(1) the Association contended that in the absence of the agreement, the Federation would likely be able to influence wholesalers to restrict entry to the retail trade to fewer than were admitted under the agreement. The result would be fewer outlets and reduced circulation. If, contrary to expectations, the number of outlets increased in the absence of the scheme, the expense and time of delivery would increase; higher distribution costs would raise newspaper prices.

(2) the Federation contended that in the absence of the agreement, unrestricted entry would increase the number of outlets to such an extent that delivery service would in some areas become unprofitable and would be discontinued by newsagents. The risk of unsold goods would also cause newsagents to reduce stocks.

The court found that:-

(1) & (2) an increase in the number of outlets would subject newsagents to the spur of greater competition. It remained unconcerned that delivery service would deteriorate or that stocks would be reduced.

The Association's first contention that entry would be further restricted in the absence of the agreement was unsuccessful. If the present scheme was unable to satisfy the public interest requirements, any agreement which was more restrictive would also fail to qualify under Section 21.

All the restrictions were declared contrary to the public interest.

Permanent Magnet Associations' Agreement

S (21) (1) (b)

Specific and substantial benefits claimed:-

(1) in the absence of the agreement, the research and technical pooling arrangements would be terminated denying to the public the benefits of new and improved products and lower prices.

The court found that:-

(1) the research and technical pooling agreements had benefitted the public in the manner claimed and prevented any member from using monopoly power to obtain higher prices. Collaboration in this industry was found of greater public benefit than individual competitive research. Co-operative research enabled members to be competitive with larger and more powerful overseas competitors. The contention that the research and technical pooling arrangements would not exist without the price restrictions was accepted by the court.

It was common ground that the public would not be denied any of the benefits of past research if the price restrictions were terminated, but further advances were considered likely in this industry in the foreseeable future. In view of the Association's past record of passing these benefits on to the public, they would be likely to enjoy specific

and substantial benefits of the same nature in the future as they had in the past. The agreements thus qualified under paragraph (b).

S (21) (1) (f)

The Association claimed that termination of the agreement would cause a substantial reduction in export earnings as efficiency and competitive ability would be reduced. The court considered it likely that in the long-run exports would be adversely effected, but information was insufficient to find that the effects would amount to a substantial reduction in export earnings.

S (21) (1) (g)

The agreement to withhold new magnetic materials from the market subject to agreed terms and conditions and arrangements for price differentials were not considered by the court to be essential to the maintenance of the minimum price-fixing scheme and were declared contrary to the public interest.

In its balancing procedure, the court noted that prices and profits were not unreasonable and considered the industry efficiently run. The minimum price restrictions and the technical pooling arrangements were declared not contrary to the public interest.

Standard Metal Window Group Agreement

S (21) (1) (b)

Specific and substantial benefits claimed:-

- (1) lower prices for standard metal windows.
- (2) better quality and service.
- (3) a wider choice of supplies.

The court found that:-

- (2) & (3) the benefits of better quality and service and a wider choice of suppliers were not established and the case would stand or fall by

reference to lower prices.

(1) strong competition existed in the industry and tended to keep prices down. The collaboration on the exchange of costs and technical information between members of the Group had resulted in significant cost reductions, greater than would likely have occurred under free competition. Lower costs enabled members to compete more effectively and resulted in lower prices.

The court found that termination of the price-fixing restrictions would end the exchange of costs and "know-how" amongst members and concluded that competition would be lessened, thereby denying the public the benefit of lower costs.

In the balancing procedure, the benefits of lower prices were judged to outweigh any detriments arising from the agreement and the restrictions were declared not contrary to the public interest.

Net Book Agreement

S (21) (1) (b)

Specific and substantial benefits claimed:-

- (1) in the absence of the agreement there would be fewer stockholding booksellers and service would be restricted.
- (2) prices overall would be higher in its absence and
- (3) there would be fewer and less varied titles published.

The court found that:-

- (1) it was unlikely, if the publishers ceased retail price maintenance, that any great proportion of titles would be used as loss-leaders or sold at prices giving the seller less than the normal margin. But, because of the risk of not knowing which types of books would be used

in this manner, booksellers would reduce stocks despite the fact that this would further hurt book sales.

Specialist library suppliers (who generally have lower overhead expenses than bookshops) could, in the absence of the agreement, economically quote lower prices for library requirements than bookshops. The average stockholding bookshop transacted 12.5 percent of its trade with public libraries. The court concluded that the combined effects of price-cutting competition and the loss or reduction of library business would drive many stockholding book sellers out of business.

The likely decrease in the number of stockholding booksellers and the provision of a more restricted service were considered to be the denial of a specific and substantial benefit to the public.

(2) fewer booksellers holding reduced stocks under the circumstances outlined above would likely lead to smaller printing orders and higher production costs. Higher prices would result in fewer sales and still smaller printing orders.

In order to secure attractive business opportunities, remaining booksellers would press for larger discount margins. This would raise the publisher's marked retail price of most titles. The avoidance of higher overall prices was considered to be a specific and substantial benefit.

(3) the reduction in the number of booksellers and the contraction in sales due to higher prices would deter the publishing of marginal works. The effects of fewer titles being published would be more strongly felt in the higher reaches of literature and scholarship. This was considered the denial of a specific and substantial benefit.

S (21) (1) (f)

The court was not satisfied that removal of the restrictions and the expected higher prices would substantially effect the ability of United Kingdom publishers to compete in overseas markets.

In its balancing procedure, the court noted that the publishing trade was very competitive and provided an incentive to keep costs down; profits were also modest. The overall benefits resulting from the agreement were judged to outweigh its detriments and it was declared not contrary to the public interest.

Agreement of the Birmingham Association of
Building Trade Employers

S (21) (1) (b)

Specific and substantial benefits claimed:-

(1) the recommendations or rules relating to ten standard forms of conditions, mainly of building contracts, benefitted the public as building owners because they were fair and well known to builders. This kept tender prices down as builders who tendered under unfamiliar conditions were apt to raise their tenders to cover unknown contractual contingencies. The use of well-known forms saved time and money by lessening the likelihood of disputes which would otherwise arise.

(2) the National Quantities Rule (which forbade members in certain cases to tender in competition for contracts exceeding at the date of reference 4,000 and from May 2, 1962, 8,000 in value, unless Bills of Quantities were provided), provided the builder with an accurate computation of the work involved. This was conducive to lower tenders as the builder did not have to add to his price to protect himself from uncertainties.

Builders would have to provide their own bills of quantities if they were not included. This would increase overheads and raise building prices.

(3) the Federation did not attempt to justify a rule forbidding the submission of priced schedules with tenders without the prior consent of the Federation. It denied that the rule gave rise to any relevant restrictions under Section C of the Act.

(4) the Federation did not attempt to justify its recommendations to members relating to tendering in competition in respect of daywork arising under building contracts and for daywork charges on building work of a jobbing or maintenance character.

Changes were made in these recommendations during the proceedings. The Federation then contended that in their revised form the recommendations did not fall within Section C of the Act. The revised recommendation was to the effect that the National Schedules (which had been the subject of the earlier recommendation) be used in the absence of any agreement between builder and client as to daywork charges for general building work. Members were free, however, to quote such rates as they thought fit if invited to quote. If, contrary to the Federation's belief, the restrictions came within the jurisdiction of the Act, they were to be defended under Section (21) (1) (b).

The court found that:-

(1) neither the usefulness nor the use of the standard forms depended upon the restrictions. Standard forms were not needed to ensure building owners of a suitable contract - building owners such as government departments and local authorities had their own expert advisory staffs

and most private owners relied on the advice of their architects. The public was not denied any benefits by removal of the restrictions.

(2) the restrictions arising from the National Quantities Rule were contrary to the public interest. In most cases, where Bills of quantities were appropriate, they would still be provided in the absence of the Rule.

(3) this rule gave rise to restrictions within Section (6) (1) (e) of the Act. In the absence of any attempt to justify it, the rule was contrary to the public interest.

(4) the revised recommendation did not give rise to any restrictions within Section 6 of the Act. If the recommendations were found by a court of appeal to come within the Act, the restrictions, arising therefrom, would be declared contrary to the public interest.

Recommendations relating to (1), (2) and (3) were declared contrary to the public interest.

Jute Goods Agreement

S (21) (1) (e)

The respondents claimed that removal of the restrictions would have a serious and persistent adverse effect on the general level of employment in the Dundee area, which was the centre of the jute yarn-spinning, cloth-weaving, and bag-sewing industries in the United Kingdom.

The court declared the agreement contrary to the public interest. The industry had long been protected from severe foreign competition by the Board of Trade operating through the Jute Control. The respondents claimed that this method of protection would be ineffective in the absence of their agreement.

The Jute Control imported Indian and Pakistani jute goods, most of which comprised only a small part of Dundee production. There was, thus, only a small area in which the Jute Control and the respondents were engaged in competition. Dundee cloth was sold "ex works Dundee" while the Jute Control's price included delivery. The price differential amounted to only 3 percent of the selling price; the court considered this unlikely to affect the level of activity in the industry.

The respondents also claimed that in the absence of their price-fixing agreement, there would be no prices to which the Jute Control could equate import prices. Then, if any Dundee producer were to undersell the Control, the Control would lower its prices and with it the level of protection afforded. The court also rejected this claim. In the first instance it held that the Control could determine fair prices by having regard to the costs of efficient Dundee products. Secondly, the court considered it unreasonable to infer that isolated or impermanent cases of underselling would result in the level of protection afforded the industry being lowered. Such action would be related to more permanent considerations.

All the restrictions were declared contrary to the public interest.

**Tyre Trade Register Agreement
Staffordshire Motor Tyre Co. Ltd's. Agreement**

S (21) (1) (a)

The restrictions were claimed to be reasonably necessary to protect the public against road accidents. If tyres were wrongly or badly fitted, a serious accident was likely to occur. In the absence of the agreement, unqualified persons could enter the business thereby endangering

the public safety. It was also claimed that the Register provided a valuable channel for the dissemination of technical information amongst members.

It was not established to the court's satisfaction that faulty fitting was a more common cause of tyre failure than poor maintenance by users. The market was highly competitive ensuring free and adequate fitting services to the public in the absence of the agreement. The court considered it unlikely that the public safety would be endangered by the termination of the restrictions.

The dissemination of technical information amongst members had been negligible in the past. At any rate the Register was unnecessary as a means of communication as tyre manufacturers would find it in their own interests to see that such information was made available to the trade.

All the restrictions were declared contrary to the public interest.

British Paper and Board Makers' Association Agreement

S (21) (1) (b)

Specific and substantial benefits claimed:-

(1) the minimum price guaranteed to local authorities who supplied baled mixed waste paper resulted in a lower price to the public as purchasers of those types of paper and board in which the waste paper was an ingredient.

The Association's reasoning was that in the absence of the agreement, local authorities would abandon waste paper salvage in periods of surplus supply as the operation would become uneconomic. When demand increased, the local authorities would be unwilling to incur capital expenditures on an enterprise which they regarded as hazardous. Mills

would then be forced to use more expensive substitutes. The higher manufacturing costs would then cause higher prices for the end products.

The court found that:-

(1) the Association failed to show that abandonment of the agreement would likely lead to a substantial reduction in the quantity of waste paper supplied by local authorities. The court did not consider it necessary to examine other arguments as the Association had failed to establish this essential element in its case. The restriction was declared contrary to the public interest.

British Waste Paper Associations' Agreement

The price restrictions were abandoned following reference of the agreement to the court. Neither Association sought to justify these restrictions under Section (21) (1) (b) and they were declared contrary to the public interest.

The Registrar contended that restrictions were also accepted in relation to the descriptions of waste paper. The court, however, found that they were not restrictions within Section (6) (1) of the Act. The Association had contended that if the restrictions had come within the Act, they would have been justified under Section (21) (1) (b).

S (21) (1) (b)

Specific and substantial benefits claimed:-

(1) the public, as purchasers and users of paper and board containing waste paper, benefitted from lower prices which would no longer exist if the restrictions were removed. The agreement kept manufacturing costs and prices down.

The court found that:-

(1) if the restrictions had come within Section C of the Act they would

have been declared contrary to the public interest. There was some evidence indicating that manufacturing costs would rise in the absence of the agreement, but the extent was unknown. Evidence of any substantial price increase was lacking and it was not shown to the court's satisfaction how many mills would be forced out of business due to fewer sales at higher prices.

National Sulphuric Acid Association Agreement

S (21) (1) (d)

The respondents sought to justify the restrictions as reasonably necessary to enable sulphuric acid manufacturers in the United Kingdom to negotiate fair terms for the acquisition of sulphur from a person not party to the agreement who controls a preponderant part of the trade or business of supplying sulphur. The supplier in question was an American corporation which supplied the whole of the United States exports.

The court found that the foreign corporation did control and would likely continue to control a preponderant part of the supply. This supplier had previously exercised its commercial power to try to obtain more favourable terms than it would command in the absence of this power. If another attempt were to be made in the future it would be more likely to succeed in the absence of a common buying agreement among United Kingdom manufacturers.

Restrictions on the acquisition of sulphur from outside the Sulphur Pool were considered justifiable by the court. Without these restrictions administrative difficulties were likely to arise and the probability of suspicion between members would likely lead to the weakening or disintegration of the Pool.

S (21) (1) (g)

Restrictions on the resale of sulphur to anyone outside the Pool were accepted by the court as reasonably necessary for purposes connected with the maintenance of the main restrictions.

In its balancing procedure, the court observed that prices had been fixed with reasonable regard to costs and was assured that prices would continue to be fixed in that manner in the future.

The restrictions were declared not contrary to the public interest.

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VITA AUCTORIS

- Family** Alexander Carl MacKenzie, son of Mr. and Mrs. A. B. MacKenzie of Niagara Falls, Ontario, born June 24, 1933, at Niagara Falls, Ontario. Married December 12, 1959, to Margaret Sally Booth, daughter of Mr. and Mrs. Daniel Booth of Riverside, Ontario. Daughter Elizabeth Ann born March 31, 1961, and son, John Patrick, born March 12, 1964.
- Education**
- 1939-1952 Elementary and secondary education at Maple Street Public School and Niagara Falls Collegiate Vocational Institute. Senior Matriculation 1952.
- 1956-1957 Registered as an undergraduate in the Faculty of Business Administration, Assumption University of Windsor.
- 1960-1961 Returned to the School of Business Administration, Assumption University of Windsor.
- 1961-1963 Registered as an undergraduate in the Faculty of Arts and Sciences, Assumption University of Windsor. Received Honours Bachelor of Arts degree in June, 1963.
- 1963-1964 Admitted to the Faculty of Graduate Studies and candidate for degree of Master of Arts in Economics, 1963. Paper submitted Septemeber, 1964.