Can "Trust-Busting" Preserve Competition?

By Maxwell Cohen

WITH the post-war restoration of "anti-trust" legislation to a "respected" place in the basic social policy of Canada—as a result of the quite enthusiastic parliamentary reception accorded to the 1946 amendments to the Combines Investigation Act—the "controlled," "quasi-corporative" economy of the war symbolically moves to its close, for the time being at least.[1] For the fact that "trust-busting" virtually had been suspended for the "duration" does not seem to have altered the pre-1939 theoretical position, namely, that social and economic policy in Canada still is dedicated to the conception of the "free market," with a "minimum of interference" affecting the mobility of capital and labour operating in response to the requirements of that market.

But almost of the essence of "competition" is the reality of its paradox: that effective, dynamic, competitive activity frequently leads to expansion, collaboration and absorption, with the elimination of the very "individual" decisions or units that provided the competition. To businessmen that phenomenon was clear from the very beginnings of severe competitive activity in the mid-nineteenth century. But not until Alfred Marshall in the 1890's does the problem begin to have real importance for the students of industry and economic organization and not until the 'thirties of the present century does "monopoly" or quasi-monopoly receive definitive treatment in economic theory.

Meanwhile, law and administration in the English-speaking world already reflected the small businessman's feal of the consequences of pure commerciar freedom. In the United States the cry of monopoly and "trusts" had been heard in the 'sixties and 'seventies; by the 'eighties Congress sought to find an answer in legislation that led to the Sherman Act of 1890—a statute that not only provided for fines and penalties where trade was restrained (between the states), but also one that gave the court power to enjoin specific corporate practices where these were in violation of the objects of the Act.

The Sherman Act was an overly-simplified approach to the "trust" problem. For while in the "injunction" it provided a useful device which a Federal court could employ against offending defendents, the Act s simple "conspiracy" and "restraint of trade" provisions could not seriously pretend to police the myriad of business practices that tended to limit competition in interstate commerce. Indeed over twenty years of experience w.th the Act, and the varied interpretations of it by the Supreme Court of the United States —which in the 1911 Standard Oil case finally set a yardstick that measured the offence by the "reasonableness" or "unreasonableness" of the restraints on trade—compelled the adoption in 1914 of new legislative measures in the Clayton Act and the Federal Trade Commission Act. The principal objectives of the Clayton Act were to prevent price discrimination as between buyers and to forbid the acquisition by firms of corporate control of their competitors or of others for purposes of limiting competition or creating a "monopoly." Interlocking directorships also were restricted. But the Act exempted trade unions and agricultural co-operatives, and thereby provided a legal basis for the later monopolistic approach to wage policies in the trade un on movement. The Federal Trade Commission was created

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(1) Since this was first written the effects of the unprecedented United States "dollar" crisis in Canada have led to a new series of control devices affecting external trade as well as the Canadian economy as a whole. But while these will have a deep effect on the economy, to say nothing of living standards, they are not a conscious long-term disavowal of the "free market" objectives of the Governmental policy —See radio address of the Prime Minister, Mr. W. L. Mackenzie King, *Montreal Gazette*, 18 November, 1947.

to enforce the Clayton Act and generally to keep a jaundiced eye over competiitve business practices so as to raise their level and to d scourage the more shabby abuses. For in seeking to preserve competition it was necessary to prevent it from succumbing to its own capacity for excesses.

In Great Britain no such legislative program was attempted. Yet while the absence of specific legislation may suggest that British public opinion was indifferent to the problem of corporate concentration and the lessening of competition, a closer examination reveals factors that account for a much less virulent condition than the developments after 1875 in the United States. The absence of natural monopolies in raw materials, the maintenance of Free Trade, (which may have confined the possibility of extreme monopolistic exertion to those few cases where foreign competition was comparatively slight), the development of a quite vigorous system of company law administered by a unitary government capable of revoking charters as well as granting them, all contributed toward lessening the fertility of the soil out of which spectacular and ever-spreading monopolistic growth was possible. Moreover, while no British "anti-trust" legislation appeared to specifically delimit "monopoly" or industrial collaboration, the English courts, through the established and flexible doctrines of the common law, were pronouncing on these great issues of public policy. For already there were important rules in the law limiting "contracts in restraint of trade," and penalizing "conspiracies" to injure the trade or calling of another and these doctrines were further buttressed by an older common law abhorrence of "monopoly" that dated back to the 16th century. By the close of the 19th century British judges were frequently concerned with problems of economic policy as these problems arose from disputes among traders seeking to protect themselves against the squeezes of competitors, and from trade unions which sought to use their growing group-power to force changes in wages and the conditions of labor. But apart from these judicial decisions there was no orderly administrative approach in Britain to the whole trend toward corporate integration, price-fixing control of supply and of markets, and the general elimination of competition and that condition remains the same to this day—indeed accentuated and "legalized"—by war-time economic control and the incidence of socialist "planning."

In Canada, these common law doctrines already were part of the judicial folklore of the English-speaking provinces. Here, too, the conception of competitive freedom lay at the bottom of much economic and political thought and policy. But certain of the price and supply results of the "National Policy" under Sir John A. Macdonald, and the echoes of the noisy protests against the "trusts" across the border all led to a mounting Canadian challenge, particularly in rural areas, against monopolies and "trusts" and their high prices and sharp practices. A House of Commons Committee in 1888, after a three-month enquiry, paved the way for the first legislative attempt in 1889 to punish restraints upon trade and the elimination of competition, and by 1892 this statute became part of the Criminal Code and is represented to-day by sections 496 and 498 of the Code.

But the language presented great difficulties of interpretation, and, too, the problem of getting at the facts before a prosecution could be considered, made the bare machinery of the Criminal Code inadequate to meet the subtle and complex requirements of "policing" and maintaining a competitive economy. And finally when it became evident that administrative and investigatory machinery was needed to work up the kind of data required before an industry should be brought into the courts, the Combines Investigation Act of 1910 was passed under Mr. Mackenzie King's leadership as Minister of Labour. But here, too, grave limits on the scope of

the investigations and the manner of their initiation limited the effectiveness of the legislation. For it had been Mr. King's object to have *ad hoc* inquiries by specifically appointed Boards set up after six applicants had convinced a judge that there was a *prima facie* case of a violation of the provisions of the Act; and behind this method lay the belief that the main safeguard against practices designed to destroy competition was *publicity* that exposed the "culprits" to national view and who now would be likely to change their policies in the face of the searching light of public scrutiny.

That hope was scarcely fulfilled. Only *one* case—The United Shoe Machinery Company case—developed in the years during which the Act was operative and it was clear by 1919 that such combersome procedures could not begin to meet the issues in a serious way. And when a later effort, made in 1919, to admix the control of prices with the protection of competition—in The Combines and Fair Prices Act—failed because of constitutional limitations, it was evident that some fresh approach to the whole problem would have to be tried. And with the passage of the Combines Investigation Act of 1923—again under Mr. King—the legislation that is substantially in force to-day came into the books and crystallized government policy in the field.

From the beginning the Combines Act was full of difficulties. The initiation of inquiries was again left to applicants except where otherwise ordered by the Minister. The definition of "Combine" gave the Judge great discretion by permitting him to decide what restraints and practices were "to the detriment or against the interests of the public" and there was little in the case law to guide him except the largely inapplicable British decisions rendered in a social climate where a quite contrary view of corporate integration and collaboration prevailed.

From time to time the 1923 legislation was amended and revised, but the essential quality of the legislation remained the same, and the amendments that were finally passed this last session do not materially affect the spirit or the machinery. For while broader powers to make studies and institute inquiries into possible "combines" and "monopolies" are now available—with particular emphasis on international cartel arrangements—and while the Exchequer Court is to have greater authority to challenge abuses of patents and trade marks that infringe upon the free and fair use of such privileges within the framework of "competition," the difficulties of definition, of policy and its administration, remain unchanged.

Indeed, the fundamental problem of policy remains: how far is Government willing to go in "*policing*" the economy so that the business practices aimed against or calculated to limit "competition" may be prevented? Is there any machinery short of the most complete day-to-day supervision over major aspects of corporate and commercial life that would effectively do the job? And is there reason to believe that such a policy of the widest "policing" to preserve competition is either desired by Government or now fits the economic order of which we are all members? These are all questions that need to be more fully examined before we can adequately understand the problem and the aims of policy and its machinery. And when we have explained them it may be found that the present anti-trust devices are perhaps only a gesture toward an historical position which, though it still has academic support and much administrative and theoretical validity, is yet a position that may not really be tenable—in the policy sense—in the face of the increasing trend toward corporate "bigness", trade union growth, and government participation in the economy.

At the very least however, the Anti-Trust Laws—so long as they are "law" and policy—should be allowed through their administration to keep a running survey of the main competitive char-

acteristics of the Canadian economy and to strike hard in the name of the consumer and the small man, when abuses too thick to bear are brought into view. Even that is a large and perhaps too great a task. For it will require government support on many and perhaps embarrassing occasions. It will mean giving to the Combines Commission a research and investigation staff adequate to do the detailed and difficult job of finding out the main facts of the economy as these bear upon the issue of competition in major industries. It will mean the use of the ablest legal counsel to represent the Commission in its formal hearings and in its work before the courts. For cases that might have led to important judgments and guidance for the future have sometimes been lost through the sheer unfamiliarity with this intricate admixture of legal forms and economic ideas of counsel appointed to represent the Crown-appointments in which the Commission often may have had little or no say.

But most of all the Canadian community must believe that the "free market" is capable of being preserved in a large measure, and is worth preserving. That belief must be transmitted into a public opinion that impresses itself on government, and government then must be prepared to examine the machinery of this publicly supported policy to make sure that it is adequate. The present legislation by most tests is assuredly not equal to the challenges of the policy. For what are needed are a large group of interlocking measures each supplementing the other and co-ordinated by some higher organization that takes the widest view of the policy. The following measures are some indication of the kind of multilateral attack that might be made on a broad front:

1. Amend the Combines Investigation Act to narrow down the area of judicial discretion to find what is or is not to the "detriment of the public." Many judges are not equipped too well for the task of subtle economic analysis; and "combines" in the Act already is very loosely defined with qualifying adverbs and adjectives without the increasing the margin of doubt raised by the problem of "detriment".
2. Give the Commissioner the widest powers of enquiry either of a formal or informal kind—always protecting, however, the right of the individuals affected by his enquiries to have the fullest hearing and timely notice of his investigations.
3. Re-organize the Patent Office so that efficient simple machinery can be applied to punish the abuse of patents or trade marks where the patentee or licensee goes beyond the intended limits of his privilege and actually engages in policies that restrain trade or otherwise affect desirable competitive activity.
4. Explore the possibility of discrimatory and penalizing federal taxation methods where monopolistic or quasi-monopolistic practices are found. This device presents many difficulties but is worth examining.
5. Grant the Commissioner power to make "cease and desist" orders comparable to those exercised by United States Federal Trade Commission or, if the constitutional position would render this impossible, explore the possibility of injunctions by a criminal court after a finding of an offense under the Act.
6. "Avoid" having Canadian Courts too much influenced by contemporary British decisions on these problems because the whole legal approach toward collaborative corporate and business conduct in the United Kingdom differs materially from Canada and the United States.
7. Provide the Commission with a fully equipped organization staffed with lawyers, economists and accountants whose researches, reports and occasional prosecutions will yield a continuous commentary on the state of "competition." Only then will it be possible to know whether the whole idea of policing the economy to preserve competition makes sense; or if, instead, it is a cry echoing into the past but with no meaning for present realities.

Without a many-pronged administrative attack is there really much use in pretending that anything important can emerge even out of the sincerity and purpose of high-minded civil servants? At the same time, when the size of the

appropriation and the usual apathy of most ministers and governments over the years towards the duties of the Commission are considered, it is remarkable to find that a good deal of initial constructive work was accomplished, particularly after 1930—hundreds of informal enquiries and studies; eighteen major cases with printed reports, many of which are very useful contributions to Canadian economic and industrial research; about nine convictions with two acquittals; net fines received, $507,400.00.[2] Yet these accomplishments are clearly modest and undramatic when compared with the magnitude of the issues as well as with the years that have passed since the Commission was established. But perhaps of even greater importance are the effects of the several reported judicial decisions in helping shape the limits of business practices that may infringe upon the Act or the Criminal Code. These opinions were the result of prosecutions instituted under the Code or the Act.

Thus the ground-work now may have been prepared for a more earnest generation to pursue the preservation of as much as may be possible of a "free economy." The task, indeed, may prove to be an almost quixotic one.

To begin with there is the almost three generations of experience in the United States which now suggests that the ambitions of trust busters are perhaps beyond their grasp. The Congressional T.N.E.C.[3] reports and studies had begun to disclose in 1939 how intensively the movement toward con-concentration and monopoly had continued since 1914, despite the anti-trust laws. How far that trend was accentuated or interrupted in the United States as well as in Canada by the economic pressures and organization of war-time will only be known when definitive studies in the field become available. But the present conditions of hyper-employment and "inflation" doubtless have postponed for the time being the ready, technical concern with, if not the appearance of, such accentuated monopolistic conditions and this lessened sense of urgency may postpone in turn any foreseeable popular demand for large-scale action.

Then too, there are the natural monopolies and near monopolies which public opinion in Canada, at least, is yet loath to nationalize. What shall be done here? There are the rise of provincially sponsored and approved restrictions on production, price, supply and the "market" itself. There are the needs of federal fiscal and monetary policy and the intrusion of the Federal government into quasi-commercial operations, all of which may lead to semi-permanent price-fixing areas and other restrictive activities with their consequent influences on private business. There is the view —now subject perhaps to some debate— that modern technology makes large-scale enterprise often more "efficient" and that it would be against the social interest to prevent such large-scale integration or to unscramble integration where it has taken place; and where such large-scale enterprise develops competition generally disappears with the elimination of the now integrated smaller units. And, then, finally there is the thought, yet to be fully examined, that perhaps the "free market" is a mechanism that a society seeking long-term, high levels of employment and social "security" can only afford in a certain degree, a degree that this generation of Canadians soon may spell out in terms of specific policies and action along with South Africa and the United States, perhaps the only remaining fully capitalist "free enterprise" states of the English-speaking world. Meanwhile, Canadian policy is committed, on paper, to the belief that the "free market" can be preserved in large part. That being the case, the very least government can do is to be serious about the machinery it employs in so crucial and ambitious an undertaking.

(2) These statistics do not include the various inquiries undertaken since the end of 1946.
(3) Temporary National Economic Committee.