THE McGILL LAW JOURNAL

VOLUME 5 1959 NUMBER 4

VARIETIES OF APPROACH TO THE PROBLEM OF COMPETITION

*Milton Handler**

Prior to World War II, the United States and Canada stood virtually alone in their devotion to a policy of enforced competition. But today there is substantial recognition of the economic desirability of trade unfettered by private restraints.[1] In 1953 a Report of the United Nations Economic and Social Council[2] advocated that each member take appropriate measures to prevent "business practices affecting international trade which restrain competition, limit access to markets, or foster monopolistic control, whenever such practices have harmful effects on the expansion of production or trade." And I am sure that you are familiar with the recent Restrictive Trade Practices Act[3] in the United Kingdom and are as curious as I am about the effects of the West German Law Against Restraints of Competition[4] which became operative in January of 1958.

Now that many industrial nations either have retreated from tolerance of restrictive business arrangements, or have injected renewed vigor into their antitrust programs,[5] it is particularly appropriate to reexamine the premises underlying the systems of competition to which our two countries are dedicated.

*Of the New York Bar and Professor of Law at Columbia University. This work was originally presented as a paper at the McGill Conferences on "The Future of Competition in Canada" held in November 1958, at Montebello, Quebec. Grateful acknowledgement is made to the valuable assistance of Joshua F. Greenberg in the preparation of this paper.

[1]See U.N. ECOSOC COUNCIL OFF. REC. 16th Sess., Supp. No. 11A, at 12 (E/2379) (1953); ANTITRUST LAWS: A COMPARATIVE SYMPOSIUM *passim* (Friedmann ed. 1956).

[2]*Report of the Ad Hoc Committee on Restrictive Business Practices,* U.N. ECOSOC COUNCIL OFF. REC. 16th Sess., Supp. No. 11, at 12-13 (E/2380) (1953).

[3]Restrictive Trade Practices Act, 1956, 4 & 5 Eliz. 2, c. 68.

[4]Law of July 27, 1957, 1 Bundesgesetzblatt 1081 (Fed. Rep. of Germany).

[5]See *supra* note 1.

The common inspiration for our fundamental antitrust statute in the United States, the Sherman Act of 1890,[6] and for the Canadian Act of 1889 as well,[7] was the English common law of restraint of trade. The impetus for antitrust legislation in our country was the rise of the industrial trusts in the post-Civil War period which caused widespread concern over the preservation of basic economic and political freedom. But, as so often happens, there was to be great disappointment in translating legislation into effective social action. Meagerness of appropriations and spotty enforcement undermined the Sherman Law in its nascent years. There was, too, the inevitable confusion attending the judicial construction of language which evidenced a broad stroke of the legislative brush. The Sherman Act said that "every contract, combination... or conspiracy, in restraint of trade... is hereby declared to be illegal"; it did not speak of "unduly" or "unreasonably" restraining trade, as did the Canadian legislation. It was thus not clear whether the Act prohibited the familiar covenants not to compete ancillary to such lawful transactions as the sale of a business, in addition to proscribing industry wide price-fixing and schemes for controlling production.

In 1911 Chief Justice White mustered the support of all but one of his colleagues on the Supreme Court, in the *Standard Oil*[8] and *American Tobacco*[9] cases, to promulgate a "rule of reason" which has since governed the administration of the Sherman Law. White's exegesis was that at common law the term "restraint of trade" signified only illegal practices or, in other words, only unreasonable restraints; the Sherman Act codified the existing common law and, therefore, outlawed only those arrangements which restrained trade unreasonably. Without the benefit of explicit language, we thus imported a rule of reason into our basic statute to moderate the uncompromising sweep of the legislative condemnation. The Canadian Criminal Code[10] talks of "unduly" lessening competition while the Combines Investigation Act[11] employs the qualification of public injury. A rule of reason is thus built into the Canadian statutes themselves obviating the need for any judicial gloss.

Before considering how we have given content to the rule of reason in the United States, I want to stress that it does not permit our judiciary to "set sail on a sea of doubt," as some suggested it would.[12] It is not a rule where results turn on the length of the Chancellor's foot, or the visceral reactions of the judge. Rather, as formulated by Justice Stone in the *Trenton Potteries*

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[6]26 Stat. 209 (1890), 15 U.S.C. s. 1.

[7]Act for the Prevention and Suppression of Combinations in Restraint of Trade, 1889, 52 Vict. c. 41 (Canada).

[8]*Standard Oil Co.* v *United States*, 221 U.S. 1 (1911).

[9]*United States* v. *American Tobacco Co.*, 221 U.S. 106 (1911).

[10]Stats. Can. 1953-54, c. 51, s. 411(1).

[11]R.S.C., 1952, c. 314, s. 2(a)(vi).

[12]See Taft, J., in *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271, 284 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

the imposition of a system of licensing. These sovereign powers cannot safely be vested in private groups to be exercised for private purposes.

History has taught us that uncurbed economic power eventually leads to the emolument of individual interests at public expense. Private regulation of economic affairs is but a prelude to the exacting public regnlation which it inevitably invites. Because we can not rely upon the haphazard processes of litigation to protect the interests of the general public, far-reaching administrative supervision becomes inescapable. And, even were we to have administrative regulation of price and other restrictions on business, this logically necessitates a proliferation of controls relating to production, labor and all the other elements of an industrial complex. With increased and permanent governmental responsibility for the most intimate business details of all industry, our private enterprise system would be replaced by an authoritarian regime of either the left or the right. These were the "rival philosophies" from which Congress chose when it enacted the Sherman Law in 1890.[20] Thus, the choice of free competition and rejection of monopoly abuse as a guiding rule for antitrust precludes both voluntary and compulsory cartels.

Thirty years after *Trenton Potteries,* using similar reasoning, the Canadian Supreme Court in its *Fine Papers* decision[21] also has rejected the need for proof of monopoly abuse in a price-fixing case. But there is some indication in the *Fine Papers* opinions that restrictive arrangements by small minority groups may be sanctioned under Canadian law.[22] In the past, American courts also toyed with this doctrine — which I call "concentric circle";[23] that is, looking at the relevant market as the outer circle and the share of that market controlled by the combination as the inner circle, is the perimeter of the inner circle close enough to that of the outer circle to spell illegality?

The rationale of concentric circle is that a combine without any control of the market is not likely to prejudice the public interest. Consequently, if there are important business justifications for the moderation of competition among the members of the group, there is no reason of policy to prevent the formation of a combine of such limited power. This was the view of some of the common law rulings in the United States as well as in Canada. This is not to say that every restraint by a minority group will be upheld under concentric circle. It means that the absence of monopoly power is a factor to be considered in determining the legality of private agreements among competing enterprises.

Those who reject concentric circle do so for various reasons. Administratively, the adoption of this doctrine increases the burden of enforcement. Furthermore, if one minority group is permitted to adopt restrictive practices, what is to prevent other groups from being formed and upheld on the theory that they,

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[20] *Ibid.*

[21] *Howard Smith Paper Mills Ltd.* v. *The Queen,* [1957] S.C.R. 403, 411, 426-27.

[22] See *id.* at 409, 427.

[23] See *Appalachian Coals* v. *United States,* 288 U.S. 344 (1933); *Standard Oil Co. (Indiana)* v. *United States,* 283 U.S. 163 (1931).

too, lack monopoly power? When this occurs, the public is left with limited oligopolistic competition even in those areas where there are many sellers. The view is that while the anticompetitive effects of the first group may be minuscule, the cumulative consequences may prove subversive of our competitive institutions.

We have fluctuated in our adherence to concentric circle. While it appears to receive a warm reception in Canada, the current climate in the United States is extremely frigid where loose-knit restraints are involved.[24] It will be interesting for our two countries to contrast and exchange experiences in regard to your possible toleration and our apparent condemnation of various restrictions by minority groups. Perhaps, through the illumination of your experience, we may shift back to a more favourable attitude toward such arrangements and, conversely, we may induce a change of attitude on your part. For we are in an area of antitrust where there can be no dogma and where, in the present state of our knowledge, variation of judgments is inevitable.

We have evolved doctrines of *per se* illegality for restraints such as price-fixing, territorial division, customer allocation and production limitation. The economic *raison d'etre* for these rules is that such restrictions have so demoralizing an effect on competition as to outweigh by far whatever tenuous long-range good may derive from them. Thus, the approach of *Trenton Potteries* has become the anchor point of modern American antitrust doctrine in respect of price-fixing and similar loose-knit restrictions. But outside this area of *per se* illegality the rule of reason governs. While abuse of economic power need not be proved and minority market sbares are not decisive of legality, the rule of reason is far from sterile. We demand a careful measurement of actual and probable anticompetitive effects to determine whether the challenged practice significantly impairs the vigor of competition.

The rule of reason recognizes that some restraints, though foreclosing competition between the parties, strengthen the forces of competition in the market as a whole. Restraints may be used as a technique of waging competition with salutary long run consequences for the economy. Temporary defensive measures against the encroachments of monopoly and the ravages of the business cycle may well preserve the competitive system from extinction. So, too, mergers, exclusive dealing and arrangements for orderly marketing may promote competition. In some instances, of course, they may have a contrary effect, depending on all the facts and circumstances. When that occurs, the restraint is deemed unreasonable and therefore unlawful.[25]

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[24]See *Northern Pacific Railway Co.* v. *United States,* 356 U.S. 1 (1958), discussed in Handler, *Recent Antitrust Developments,* 13 The Record 417 (1958).

[25]As stated by the Supreme Court in *Times-Picayune Pub. Co.* v. *United States,* 345 U.S. 594, 615 (1953), *quoting, United States* v. *Columbia Steel Co.,* 334 U.S. 495, 527 (1948), the reasonableness of a restraint will depend upon

> 'the percentage of business controlled, the strength of the remaining competition [and] whether the action springs from business requirements or purpose to monopolize.'

The rule of reason apparently also is given statutory sanction in the Combines Investigation Act's[26] seeming imposition of the duty upon the Crown to establish detriment to the public over and above proof of the combination to restrain trade. However, Justice Kellock in the *Fine Papers* case[27] interpreted "public injury" as an integral part of the restraint and not as a supplementary and additional legal requirement. He said that

> The statute proceeds upon the footing that the preventing or lessening of competition is in itself an injury to the public. It is not concerned with public injury or public benefit from any other standpoint.[28]

Without the benefit of specific statutory language, American antitrust doctrine has developed to much the same point. We will soon hear again from our Supreme Court on this issue when it decides the *Klor's* case.[29] I think that Canada will be particularly interested in our jurisprudence concerning public injury, in part because of the *Fine Papers* decision and also because of the English Restrictive Trade Practices Act,[30] which accords preeminence in the statutory scheme to the criterion "contrary to the public interest."

In 1956, the United States Court of Appeals for the Ninth Circuit in the *Radovich* case[31] dismissed a complaint by a former professional football player charging a boycott by the teams constituting the National Football League. The court could find no allegation in the complaint showing that " 'the conspiracy was reasonably calculated to prejudice the public interest by unduly restricting the free flow of interstate commerce.' "[32] However, the Supreme Court reversed, holding that the complaint "need only be 'tested under the Sherman Act's general prohibition on unreasonable restraints of trade' ... and meet the requirement that [plaintiff] has thereby suffered injury" because "Congress has, by legislative fiat, determined that such prohibited activities are injurious to the public."[33] The Supreme Court observed that "in the face

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[26]R.S.C., 1952, c. 314, s. 2(a)(vi), ("combine means a combination having relation to any commodity which may be the subject of trade or commerce, of two or more persons by way of actual or tacit contract, agreement or arrangement having or designed to have the effect of... otherwise restraining or injuring trade or commerce, or a merger, trust or monopoly, which combination, merger, trust or monopoly has operated or is likely to operate to the detriment or against the interest of the public, whether consumers, producers or others").

[27]*Howard Smith Paper Mills Ltd.* v. *The Queen*, [1957] S.C.R. 403. While the Supreme Court was specifically concerned with the Criminal Code, its reasoning seems to apply also to the Combines Investigation Act.

[28]*Id.* at 411.

[29]*Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 255 F. 2d 214 (9th Cir. 1958), *cert. granted*, 27 U.S.L. Week 3110 (U.S. Oct. 13, 1958) (No. 76).

[30]Restrictive Trade Practices Act, 1956, 4 & 5 Eliz. 2, c. 68, s. 20(1).

[31]*Radovich* v. *National Football League*, 231 F. 2d 620 (9th Cir. 1956).

[32]*Id.* at 623, *quoting, Feddersen Motors* v. *Ward*, 180 F. 2d 519, 522 (10th Cir. 1950).

[33]*Radovich* v. *National Football League*, 352 U.S. 445, 453 (1957).

of such a policy, this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws."[34]

Last year, the Ninth Circuit, which had been reversed in *Radovich,* again grappled with the public injury issue in the *Klor's* case.[35] The opinion was written by Judge Stanley Barnes, who had served for several years as the vigorous head of the Antitrust Division of the Department of Justice. Klor's was a retail appliance dealer in San Francisco who contended that a competing retail outlet induced ten manufacturers and eight distributors to refuse jointly to supply Klor's with household appliances. Defendants, on a motion for summary judgment, pointed to the large number of plaintiff's competitors who sold appliances and showed that Klor's was still able to purchase goods from many competing sources. The heart of the defense was that the undisputed evidence established that no injury to the public had resulted, even if defendants had boycotted Klor's in concert. Klor's rested on its complaint and contended that *any* combination in restraint of trade is *always* beyond the pale of legality "no matter in what degree and no matter against whom... directed."[36]

The Court of Appeals disagreed with Klor's and affirmed the award of summary judgment for defendants. After determining that the boycott did not fall within the category of restraints which are illegal *per se* under the Sherman Act, the court grappled with the Supreme Court's ruling in *Radovich* on the issue of public injury. Judge Barnes in *Klor's* construed the *Radovich* decision to mean that there is no *separate* requirement that a private litigant must establish public injury as well as a statutory violation. But this did not mean that in determining what constitutes an unreasonable restraint of trade the impact of the restraint on the public is immaterial. On the contrary, public injury is viewed in Klor's as an integral part of the inquiry demanded by the rule of reason, and therefore inseparable from the issue of violation. Judge Barnes makes clear, as did Justice Kellock in the *Fine Papers* case, that there is no *additional* requirement of proof of injury to the public,[37] but he holds that "where there is no conceivable way in which a substantial segment of the public can be injured by the conduct attacked, the Sherman Act is not violated."[38]

Applying the rule of reason to the facts before it in *Klor's,* the court found that the restraint did "not substantially interfere with either the 'retailing public' or the 'consuming public,' " since "there are literally hundreds of dealers in the San Francisco Bay Area dealing in the same kinds and brands of major appliances" withheld from Klor's and because "there are numerous brands

[34] *Id.* at 454.

[35] *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.,* 255 F. 2d 214 (9th Cir. 1958).

[36] *Id.* at 221.

[37] See *id.* at 231.

[38] *Id.* at 233.

of appliances to which [Klor's] was not denied access and which compete favourably with those he was denied."[39]

Under Judge Barnes' careful analysis in *Klor's,* public injury is a *sine qua non* of proof of an antitrust transgression; public injury and violation are part and parcel of the same thing. Public interest, according to Judge Barnes, is not synonymous with the economic predilections of individual judges, but rather it is rooted in the purposes and traditions of antitrust. Unless the alleged violation entails anticompetitive consequences of such a mature or dimension as to impair the vigour of competition in the appropriate market, the conduct is a non-actionable restraint under the rule of reason.

There has been a trend in the United States to seek an expansion of rules of *per se* illegality and a concomitant narrowing of the area in which the rule of reason may operate. If a similar movement has not yet been evident in Canada, it may not be far off. For example, there are some in the United States who would condemn, out-of-hand, limitations conducive to orderly marketing; they would apparently vitiate exclusive selling arrangements for trademarked products,[40] or territorial limitations[41] or customer restrictions[42] on the resale of branded goods. In short, they would insist upon *intra*-brand competition, in addition to the traditional vying among products of various manufacturers. To me, this is the quintessence of short-sighted thinking.

I perceive in this approach the demise of the small businessman in America. As we forbid practices which prevent marketing chaos among small distributors, we encourage manufacturers to achieve the same ends by integrating vertically and thereby eliminating both their legal problems and their independent distributors.[43]

Clearly, absent monopolistic control, a distributor always must meet the competition of other manufacturers' products. Why, then, demand that a manufacturer compete against himself? Of course, it may increase competition — momentarily — if a multitude of distributors slash prices recklessly as a result of intra-brand warfare. But those of us who feel that the small businessman has an important economic function to perform in the distribution of goods, who are convinced that a social and political good comes from his

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[39] *Id.* at 235.

[40] But see *e.g., Schwing Motor Co.* v. *Hudson Sales Corp.,* 138 F. Supp. 899 (D.Md. 1956), *aff'd per curiam,* 239 F. 2d 176 (4th Cir. 1956), *cert. denied,* 355 U.S. 823 (1957); *Packard Motor Car Co.* v. *Webster Motor Car Co.,* 243 F. 2d 418 (D.C. Cir. 1957), *cert. denied,* 355 U.S. 822 (1957).

[41] *E.g., United States* v. *Volkswagen of America, Inc.,* Civ. 1232-57 (D.N.J. Dec. 4, 1957) (complaint). But see *Columbus Coated Fabrics Corp.,* FTC Dkt. 6677, p. 4 (July 8, 1958) (initial decision).

[42] *Cf. United States* v. *Arnold, Schwinn & Co.,* Civ. 58C272(3) (E.D. Mo. June 30, 1958) (complaint). But see *Roux Distributing Co., Inc.,* FTC Dkt. 6636 (Feb. 17, 1958) (initial decision).

[43] See *Standard Oil Co. of California* v. *United States,* 337 U.S. 293, 320 (1949) (dissent).

preservation, deplore such quixotic condemnation of limitations which bring about orderly marketing.

Zeal for antitrust should not be permitted to result in overreaching which may cause an unfavorable reaction to its salutary purpose. It is possible that the recent English and German statutues may have just such an unfortunate result. For example, in England, restricting the persons to whom or the areas in which goods may be resold is a practice which is apparently subject to invalidation.[44] And in Germany, there are general declarations of invalidity,[45] which if interpreted without full recognition of competitive necessities, may impair efforts to develop orderly marketing. Of course, there are exceptions under both statutory schemes — the most noteworthy being the exemption in the German statute for agreements which rationalize economic processes.[46]

Now let us consider the so-called close-knit arrangements. While the Combines Investigation Act[47] outlaws a "merger, trust or monopoly" which "has operated or is likely to operate to the detriment or against the interest of the public," it appears that such arrangements have been attacked only rarely in Canada. Similarly, mergers and monopolies are accorded but peripheral attention in the English statutory scheme,[48] and it is only the abuses by so-called "market-dominating enterprises" that are condemned in Germany.[49]

The American experience with close-knit restraints provides a sharp contrast. Because of dissatisfaction with the paucity of results from the application of the Sherman Act to corporate mergers, in 1950 our Congress passed the Celler-Kefauver Amendment to the Clayton Act.[50] This was designed to strengthen the prohibitions against concentration by imposing more exacting standards of illegality. There was substituted for the phraseology of restraint of trade and monopolization, the criterion of whether the acquisition would probably substantially lessen competition in any line of commerce in any section of the country. Since the 1950 enactment, there have been 43 suits instituted by the Government of which 10 have been settled and about 7 have been resolved at the lower levels of our decisional structure and are now pending on appeal. The new statute has not yet been construed by our Supreme Court. The closest that that Court has come to interpreting our antimerger legislation

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[44]Restrictive Trade Practices Act, 1956, 4 & 5 Eliz. 2, c. 68, s. 6(1)(e). *But cf. id.* at 8(3).

[45]Law of July 27, 1957, 1 Bundesgesetzblatt 1081, 1(1),15,18 (Fed. Rep. of Germany).

[46]*Id.* at s. 5(2).

[47]R.S.C., 1952, c. 314, s. 2(a)(vi).

[48]See Monopolies and Restrictive Practices (Inquiry and Control) Act, 1948, 11 & 12 Geo. 6, c. 66, *amended,* 1 & 2 Eliz. 2, c. 51 (1953), *amended,* 4 & 5 Eliz. 2, c. 68 (1956).

[49]Law of July 27, 1957, 1 Bundesgesetzblatt 1081, ss. 22-24 (Fed. Rep. of Germany).

[50]64 Stat. 1125 (1950), 15 U.S.C. s. 18.

was the *duPont-General Motors* case,[51] which arose under the original version of the Clayton Act before its 1950 amendment.

There are two central questions in every merger litigation. First, there must be a delineation of the relevant markets, *i.e.*, the line of commerce and the section of the country to which we must look for the requisite anticompetitive effects. Then, there is the question of whether illegality is to flow solely from the quantitative substantiality of the competition eliminated by a corporate fusion, or whether there must be an impairment of the vigour of competition in the appropriate market as a whole.

With respect to the question of the relevant market, our courts[52] and the Federal Trade Commission[53] have rejected the view that the product market should be limited to goods which are substantially identical with those involved in the merger. They recognize that the market includes the area of effective competition, whether from identical goods or from other products vying for the consumer's patronage. The law is now clear that inter-product competition must be taken into account. But it is still unclear as to the precise formulation of the standard. In the *Cellophane* case,[54] the Supreme Court expressed it in terms of "reasonable interchangeability of products for the purposes for which they are produced," and in the *duPont-General Motors* case,[55] it was put in terms of "sufficient peculiar characteristics and uses to constitute . . . a 'line of commerce.'" While the formulations may differ, the principle is essentially the same.

With respect to the substantive standard of legality, some zealous advocates argue that the test is the amount of competition disappearing by virtue of the merger. However, the United States Court of Appeals for the Second Circuit in the *American Crystal Sugar* case[56] and the Federal Trade Commission in the *Brillo* case[57] refused to follow so unrealistic a rule — despite some language of the Supreme Court in the *duPont-General Motors* case[58] which seems to veer toward the quantitative substantiality of the competition eliminated by an acquisition.

I have stated in numerous articles and lectures that the economic thrust of an acquisition must necessarily vary case by case. This is not to assimilate such qualitative analysis with the Sherman Act rule of reason test, now discarded for close-knit combinations that fall under the terms of the Celler-

[51] *United States* v. *E. I. duPont de Nemours & Co.*, 353 U.S. 586 (1957).

[52] *American Crystal Sugar Co.* v. *Cuban-American Sugar Co.*, 1958 Trade Cases par. 69,155, pp. 74,507-08 (2d Cir. 1958).

[53] *Brillo Mfg. Co.*, FTC Dkt. 6557, CCH Trade Reg. Rep. par. 27,243, p. 36,625 (1958).

[54] *United States* v. *E. I. duPont de Nemours & Co.*, 351 U.S. 377, 404 (1956).

[55] *United States* v. *E. I. duPont de Nemours & Co.*, 353 U.S. 586, 593-94 (1957).

[56] *American Crystal Sugar Co.* v. *Cuban-American Sugar Co.*, 1958 Trade Cases par. 69, 155, p. 74, 506 (2d Cir. 1958).

[57] *Brillo Mfg. Co.*, FTC Dkt. 6557, CCH Trade Reg. Rep. par. 27,243, p. 36,625 (1958).

[58] *United States* v. *E. I. duPont de Nemours & Co.*, 353 U.S. 586, 595 (1957).

Kefauver Amendment. Surely, the scope of permissive merger is narrower under this amendment. Moreover, all that is necessary is to demonstrate probable adverse consequences, rather than actual competitive harm. But only by analyzing all relevant market data can we arrive at a determination which will best maintain workable competition in the market place.

Out of the welter of pending litigation, more precise guides will be formulated. After eight years the principles are beginning to emerge. In time, they will be amplified with case-by-case development. However, this is an area in which there can be no mathematical formulae. We will always have to depend upon a comprehensive investigation of competitive data to ascertain if the structure of the relevant market is so altered by a merger or acquisition that the public is likely to lose the benefits of competition.

I am convinced that a regime of effective competition necessitates statutory tools to cope with such anticompetitive mergers and acquisitions. In the United States we now have those tools in the provisions of the Celler-Kefauver Act. Careful consideration of the American experience in this area of antitrust is merited particularly in Canada, but also by those in other nations who would learn from us.

As you well know, substantive law can only be translated into observance by efficient procedural devices. Unencumbered by the constitutional limitations which beset Canada, the panoply of procedural weapons for enforcement of the antitrust laws in the United States permits of great flexibility and effectiveness.

Criminal prosecutions to our mind are inappropriate for the multitude of borderline business decisions which are challenged under antitrust laws. It appears however that even with the amendments in the aftermath of the MacQuarrie Report,[59] injunctive relief may be awarded in Canada only in criminal suits. On the other hand, indictments in the United States are customarily reserved for violations which are predatory or as free from doubt as price-fixing. We find that our most effective deterrents to future violations are injunctions decreed in civil suits instituted either by the Department of Justice or by private parties injured by the transgressions. Also effective are the cease and desist orders of the Federal Trade Commission, which has coordinate jurisdiction with the Department of Justice to bring civil antitrust enforcement proceedings. The civil nature of the suit facilitates proof and an ultimate finding of illegality, for there is none of the revulsion which naturally attends convicting a businessman for decisions made in good faith.

Many other nations premise enforcement of their antitrust laws on the principle of registration and publicity.[60] In Canada the statutory requirement of a public report by the Restrictive Trade Practices Commission to the

[59]R.S.C., 1952, c. 314, s. 31.

[60]See U.N. ECOSOC Council Off. Rec. 16th Sess., Supp. No. 11A, at 34 (E/2379) (1953); *Cf.* Restrictive Trade Practices Act, 1956, 4 & 5 Eliz. 2, c. 68; Law of July 27, 1957, 1 Bundesgesetzblatt 1081 (Fed. Rep. of Germany).

Minister of Justice prior to prosecution[61] seems to evidence adherence to this principle to some extent. It may well be that such experience and that of others supports substantial reliance upon publicity as a deterrent to anticompetitive practices. However, we find that the pressures brought to bear on American businessmen to forego competition are such that adverse publicity is wholly inadequate as a remedial device. Official injunctive and criminal processes are crucial for us, as is the private action for enforcement.

The vast hiatus which necessarily results from any governmental regulation of all industry is well-filled by private enforcement of our antitrust laws. More than some abuse has resulted because an award of treble damages, attorneys' fees and costs are mandatory under our law once private damage caused by an antitrust violation is found, whether the violation was predatory and patent or of the borderline variety. Strike suits and harrassment have not been unknown. There is undoubtedly much room for improvement in our system of private suits, but, on balance, it has proved a significant and helpful supplement to official action.

What, in conclusion, are the lessons of our antitrust experience? We have learned that education and publicity are insufficient to bring about widespread compliance with antitrust requirements. The law is not self-executing. We can get only as much observance as we are willing to pay for in the form of the cost of administration. A corporal's guard cannot enforce with vigour and wisdom a law applicable to all of American industry in the conduct of its interstate and foreign trade activities. When enforcement agencies are starved for funds, restraints flourish and the public is denied the benefits of competition. Our antitrust laws are enforceable only if the sinews of war are available to prosecuting officials.

Fair and effective enforcement prevents the growth of monopoly and the subversion of competition by the protean arrangements of businessmen designed to eliminate or control the competition of the market place. But for our antitrust laws, the trusts which induced the passage of the Sherman Act would have proliferated to the point where most basic industries today would be controlled by a single colossus. Had not the philosophy of *Trenton Potteries* prevailed, price-fixing would be rife in this country and judicial regulation would be desultory, anaemic and ineffectual. Our rules of antitrust have maintained the integrity of free enterprise in those areas where it still exists. But it would be naive to believe that the competition in our vast market place is the pure and undefiled variety of the old textbooks. Our industrial landscape runs the gamut from the intense competition of industries characterized by large numbers of sellers to the highly concentrated industries where there are but a few producers. We have neither pure monopoly nor pure competition. Our aim in those fields where the Government has not withdrawn the activity from the regularizing force of free competition, has been to maintain healthy,

[61]R.S.C., 1952, c. 314, s. 19.

vigorous and workable competition, which is not theoretically perfect, but is practically effective. There is no least common denominator to which all of business can be reduced. Our purpose is not to require equality of size or unattainable uniformity of structure. Rather it is to preserve freedom of entry, to protect the small businessman from the aggressions of the large, to elevate the plane of competition to a level of fair dealing, and to safeguard the public from the detriments of collusive business behaviour.

Our accomplishments have not been the maximum obtainable. But neither have they been the minimum. We believe that we have made some progress. We think that in the years ahead we can do even better. We are confident that the aberrations resulting from an excess of zeal will be eliminated by the robust common sense which characterizes a pragmatic society.

While we recognize that there are some economic wastes resulting from our system, we are wedded to the idea of enforced competition. It may well be that history will place its encomium on other systems and other methods, but for us, as Justice Black of the Supreme Court recently stated, our basic premise is that:

> ...the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.[62]

Free and open competition is part of our political credo. Antitrust is our charter of liberty; it is a counterpart of our Bill of Rights, standing as the bulwark of our economic freedom. We are dedicated to it because we can see no alternative which is compatible with our traditions and aspirations as a free people.

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[62]*Northern Pacific Railway Co.* v. *United States,* 356 U.S. 1, 4 (1958).