

A Reappraisal of the Canadian Anti-Combines Act of 1889

*Charles Paul Hoffman**

The 1889 Anti-Combines Act was the world's first modern competition law statute. However, despite its prominent place in history, it has been criticized as a failure and a "political sham". The author argues that while the Act did indeed turn out to be a failure, at its inception, it had potential to succeed. It failed because two later decisions of the House of Lords changed the common law on which the Act was based, making it substantially more difficult to prove that agreements covered by the Act were against the public interest, and thereby undermining the Act's efficacy. Critics of the Act do not appreciate the effect of those two decisions, and mistakenly read their effects back into the time when it was passed.

In particular, the author refutes three main critiques of the Anti-Combines Act: that it extended only to conduct already "unlawful" under the restraint of trade doctrine; that it criminalized only conduct already indictable under the crime of conspiracy; and that it was an intentional failure, a "political sham". He concludes that the Act should be remembered not as the failure it became as a victim of circumstance, but for the potential it had at its inception.

* DCL Candidate, Faculty of Law, McGill University; Visiting Scholar, Robert H. McKinney School of Law, Indiana University. My sincerest thanks to Mark Antaki, Elsbeth Heaman and Pierre-Emmanuel Moysse for their comments on an earlier draft. This research was supported in part by a grant from the McGill Faculty of Law, as well as a Richard H. Tomlinson Doctoral Fellowship.

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Introduction

In May 1889, the Canadian Parliament adopted the world’s first modern competition statute,¹ *An Act for the Prevention and Suppression of Combinations Formed in Restraint of Trade*² (*Act*)—better known as the *Anti-Combines Act* or the *Wallace Act*, after its sponsor, Nathaniel Clarke Wallace. Although it preceded the United States’ more famous *Sherman Antitrust Act*³ by a year, the *Anti-Combines Act* has largely been forgotten

1. Law had regulated the functioning of the marketplace since at least the period of the late Roman Republic. See Lord Wilberforce, Alan Campbell & Neil Elles, *The Law of Restrictive Trade Practices and Monopolies*, 2d ed (London, UK: Sweet & Maxwell, 1966) at § 108. Additionally, English statute and common law prohibited a trio of economic crimes—forestalling, engrossing and regrating—until 1844. *Ibid* at § 138. See also William Blackstone, *Commentaries on the Laws of England*, vol 4, Facsimile of First Edition of 1765–69 ed (Chicago: University of Chicago Press, 1979) at 158. The *Anti-Combines Act*, however, was the first statute to attempt to regulate competition in a broader fashion, rather than simply to provide rules for how village markets were to function.

2. SC 1889, c 41.

3. 26 Stat 209 (1890) (codified as amended at 15 USC § 1–7).

because it failed to achieve its purpose of limiting industrial cartels and monopolies (also known as “combines” in the provenance of the time).

Scholars in law, economics and history have raised three principal explanations why the *Act* did not succeed. The first is that it was hindered from the beginning because it merely criminalized behaviour already “unlawful” under the restraint of trade doctrine, which by the late nineteenth century was a dead letter. The second is that it only criminalized conduct already indictable under the crime of conspiracy. The third is that the *Act* was a political sham, never meant to be effective. Each of these three criticisms, however, is based on a flawed understanding of the state of the law in 1889.

This is hardly surprising, as the restraint of trade doctrine was in a generally confused state at the time and judicial decisions in the 1890s—the House of Lords’ judgments in *Mogul Steamship v McGregor, Gow & Co*⁴ and *Nordenfelt v Maxim Nordenfelt Guns & Ammunition*⁵—substantially altered the standard upon which restraint of trade was evaluated.⁶ Contrary to what earlier critics believed, the restraint of trade doctrine remained alive (though perhaps not vibrant) in the years leading up to the passing of the *Act* in 1889.

Prior critiques have also suffered from a failure to consider the *Act* across disciplinary boundaries. Legal scholars and economists have generally failed to engage in a serious historical analysis, instead portraying the *Act* as evidence of the flawed origins of Canadian competition policy before moving on to look at contemporary questions. On the other hand, purely historical treatments of the *Act* have suffered from insufficient legal analysis, often using law as a means to argue other points unrelated to the *Act* itself. A legal historian, addressing the history of the law as a subject of interest in and of itself, avoids both the trap of viewing prior legal norms exclusively through the instrumental lens of subsequent success or failure and the trap of treating the law merely as a manifestation of other social conflicts. Only a study of the history of the law for its own sake

4. (1891), [1892] AC 25, 8 TLR 182 HL (Eng) [*Mogul Steamship* cited to AC].

5. [1894] AC 535, 10 TLR 636 HL (Eng) [*Nordenfelt* cited to AC].

6. See William Letwin, *Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act* (New York: Random House, 1965) (citing the two cases as “among the chief reasons for the subsequent inability of English common law substantially to deter the growth of monopolies” at 49).

can call into question assumptions such as those that have surrounded the *Anti-Combines Act*.

This article reconsiders the narrative on the *Anti-Combines Act* from the perspective of a legal historian, arguing that it was not at its inception the failure that existing scholarship has generally presented it to be, but that it failed only as a result of subsequent revision of the restraint of trade doctrine made by formalistic, laissez-faire judges of late nineteenth-century Britain. Part I briefly describes the restraint of trade doctrine and outlines the events leading up to the passing of the *Act*. Part II reviews the three academic critiques that have been raised against the *Act*, as well as Wallace's own critique after the *Act* was amended by the Senate. Part III examines the true state of the restraint of trade doctrine in 1889 and reviews the judicial decisions concerning combine agreements. Part IV looks more closely at the critiques. It first concludes that the use of the term "unlawfully" did not fatally undermine the *Act* because conduct remained "unlawful" under the doctrine. It then considers the claim that the *Act* only criminalized conduct already indictable under the crime of conspiracy, and concludes that this critique is also flawed, as it conflated enforceability with criminality. Lastly, it rebuts the argument raised by Michael Bliss that the *Act* was a "political sham", and shows that there is in fact no evidence to support this claim. Part V summarizes the conclusions reached in this paper.

I. The Background of the *Anti-Combines Act*

A. *What Is Restraint of Trade?*

The restraint of trade doctrine holds that certain contracts, which limit the free exercise of an individual's "right to work" or restrict competition in the marketplace, are void as against public policy.⁷ The doctrine includes what are now understood as three separate types of agreements: non-compete agreements ancillary to employment or the sale of a business, agreements between business competitors limiting the scope of competition and agreements between employees to form a trade union.

7. See Michael J Trebilcock, *The Common Law of Restraint of Trade: A Legal and Economic Analysis* (Toronto: Carswell, 1986) at 1-2; Wilberforce, Campbell & Elles, *supra* note 1 at § 5.

While the first two categories form the core of modern competition law, nineteenth- and twentieth-century statutes have largely moved the third—formation of employee unions—into the distinct field of labour law. Until the late nineteenth century, the vast majority of restraint of trade cases fell into the first category,⁸ with cases in the second and third categories being relatively rare.⁹ The restraint of trade doctrine originated and was thus developed with ancillary restraints in mind rather than combine agreements.

Understanding the restraint of trade doctrine is complicated by the fact that it has not remained stable over time. According to Lord Wilberforce, Campbell and Elles, “of the many subjects with which the common law has had to deal over the centuries there can be few which have passed through so many, and so radical, processes of evolution as that which is known under the name ‘restraint of trade’”.¹⁰ And because the vast majority of cases involved ancillary restraints, the limited case law on combine agreements was muddled at best, contradictory at worst.¹¹

In Part III, I will consider in greater depth the outlines of the restraint of trade doctrine, including the confused state of the case law in the years leading up to 1889.

B. The Act

Beginning in about the 1860s, Canadian businesses found it prudent to form themselves into a variety of cartels, trade associations and joint ventures, also known as “combines”.¹² Initially, the Canadian public was

8. See *Hilton v Eckersley* (1855), 6 El & Bl 781, Crompton J (“[m]ost of such cases have occurred where one party has sold a trade or profession to another, or where one party has learned the trade and its secrets from the other, and where, on such considerations, stipulations have been entered into whereby the one party undertakes not to exercise the trade or profession within reasonable limits as to time and distance” at para 54).

9. See Frederick Pollock, *Principles of Contract: Being a Treatise on the General Principles Concerning the Validity of Agreements in the Law of England*, 4th ed (London, UK: Stevens & Sons, 1885) at 314.

10. Lord Wilberforce, Campbell & Elles, *supra* note 1 at § 5.

11. See JD Heydon, *The Restraint of Trade Doctrine* (London, UK: Butterworths, 1971) (“[i]n England and America several decisions could be found on each side” at 27).

12. See Jamie Benidickson, “The Combines Problem in Canadian Legal Thought, 1867–1920” (1993) 43:4 UTLJ 799 at 802; Michael Bliss, *A Living Profit: Studies in the Social History of Canadian Business, 1883–1911* (Toronto: McClelland and Stewart, 1974) at 35.

largely indifferent to the trend, whether because the combines in question did not involve consumer goods (as in the Canadian Iron Founders Association's 1865 price-fixing agreement)¹³ or because they were seen as being in some way pro-competitive (as with the Canadian Salt Association's 1871 cartel, formed in response to dumping by an American monopoly).¹⁴ This indifference had, however, largely worn off by the mid-1880s, when the stagnation and deflation of the Long Depression again struck Canada after a brief reprieve earlier in the decade.¹⁵ The combination of low growth, falling prices and the high National Policy tariffs was naturally conducive to cartel formation. It also led to a growing sense among Canadians that they had gotten the short end of the stick, especially as combines entered wholesale and retail markets.

The turning point was the formation of the Dominion Wholesale Grocers' Guild's sugar combination in 1887. The sugar combine was effectively a hub-and-spoke horizontal/vertical cartel, in which wholesalers agreed among themselves to sell sugar to retailers only at a fixed price and sugar refiners agreed to charge a higher price to non-participating wholesalers, under threat of a boycott.¹⁶ After a former member of the combine went public with his story of its inner workings, the "combines problem" rose to the forefront of public discourse.¹⁷ While prior combines had not seriously raised consumer concern, the sugar combine was a naked restraint of trade on a commodity purchased by practically all Canadians.¹⁸ Unfortunately, the common law restraint

13. See Benidickson, *supra* note 12.

14. See *Ontario Salt v Merchants Salt*, 18 Gr 540 (available on QL) (Ch) [*Ontario Salt* cited to Gr]. For the full history of the case, see WE Brett Code, "The Salt Men of Goderich in Ontario's Court of Chancery: *Ontario Salt Co v Merchants Salt Co* and the Judicial Enforcement of Combinations" (1993) 38:3 McGill LJ 517.

15. See Carman D Baggaley, "Tariffs, Combines and Politics: The Beginning of Canadian Competition Policy, 1888-1900" in RS Khemani & WT Stanbury, eds, *Historical Perspectives on Canadian Competition Policy* (Halifax: Institute for Research on Public Policy, 1991) 1 at 2, 4-5.

16. See Michael Bliss, "Another Anti-Trust Tradition: Canadian Anti-Combines Policy, 1889-1910" (1973) 47:2 Business History Review 177 at 180 [Bliss, "Another Anti-Trust Tradition"]; Baggaley, *supra* note 15 at 10-11.

17. See Colin H Goff & Charles E Reasons, *Corporate Crime in Canada: A Critical Analysis of Anti-Combines Legislation* (Scarborough, Ont: Prentice-Hall, 1978) at 41-42.

18. See *ibid* at 41 (noting that sugar sales accounted for forty percent of the grocery trade in 1887).

of trade doctrine provided no mechanism by which third parties could challenge such combines.

Public outcry against the combines reached a fever pitch. By February 1888, Liberal politicians and newspapers had grabbed onto the combines problem as a justification for their latest policy, unrestricted reciprocity (free trade) with the United States.¹⁹ Even some traditionally Conservative papers argued for governmental intervention.²⁰

Action came not from the Macdonald government, however, but from Conservative backbencher Nathaniel Clarke Wallace. On February 29, 1888, Wallace moved for the creation of a House Select Committee “to examine into the nature, extent and effect of certain combinations said to exist with reference to the purchase and sale in Canada of any foreign or Canadian products”.²¹ Over the next two months, Wallace’s Select Committee held twenty-six hearings involving evidence from sixty-three witnesses about possible combines in sugar and groceries, coal, biscuits and confectionery, watch cases, barbed wire, binder twine, agricultural implements, stoves, coffins and funerals, oatmeal milling, eggs, barley, and fire underwriting. On May 16, the Select Committee issued its report, along with over seven hundred pages of testimony and other evidence, detailing the existence and scope of combines in practically all areas investigated, except barley and agricultural implements.²² Two days later, Wallace introduced a private member’s bill to deal with the combines problem, but because it was late in the parliamentary session no further action was taken.²³

19. See e.g. “Rank-and-File Advice about the Dominion Session”, Editorial, *The Toronto Globe* (22 February 1888) 4.

20. See *House of Commons Debates*, 6th Parl, 2nd Sess, vol 25 (29 February 1888) at 31 (James David Edgar), quoting *The Montreal Star* (14 February 1888) (“[w]hile ‘combines’ are protected, the National Policy is in danger”).

21. *House of Commons Debates*, 6th Parl, 2nd Sess, vol 25 (29 February 1888) at 28 (Nathaniel Clarke Wallace).

22. House of Commons, “Report of the Select Committee” in *Journals of the House of Commons*, 6th Parl, 2nd Sess, vol 22 (16 May 1888) at Appendix 3.

23. *House of Commons Debates*, 6th Parl, 2nd Sess, vol 26 (18 May 1888) at 1545 (Nathaniel Clarke Wallace). For the draft bill in its entirety, see “[t]he following is the text of the act for the suppression of combines introduced by Mr. Clarke Wallace”, *The Canadian Journal of Commerce, Finance and Insurance Review* (15 June 1888) 1152.

Wallace then reintroduced his bill at the opening of the parliamentary session on February 6, 1889.²⁴ Although second reading was initially scheduled for the next day, it did not occur until April 8, when Wallace moved to replace his initial bill with an amended version.²⁵ Upon second reading, the bill was referred to the Committee on Banking and Commerce²⁶ where it was opposed by “a great array of lawyers from Montreal and Toronto”.²⁷ Wallace’s bill returned to the floor of the House of Commons on April 22, when, for the first time, it had the support of the Macdonald government. The Minister of Justice (and future Prime Minister), Sir John Sparrow David Thompson, took charge of the bill.²⁸ After some debate over whether it would actually tackle the combines problem, it passed without division.

The bill was then sent to the Senate, which reinserted the terms “unduly” and “unreasonably” previously deleted by Wallace. The Leader of the Government in the Senate (and future Prime Minister), Sir John Joseph Caldwell Abbott, justified the amendment on the grounds that the restraint of trade doctrine included a reasonableness standard which was meant to continue in effect.²⁹ After extensive debate over the reinsertion of “unduly” and “unreasonably”, the Senate passed the amended bill over

24. *House of Commons Debates*, 6th Parl, 3rd Sess, vol 27 (6 February 1889) at 19 (Nathaniel Clark Wallace).

25. *Journals of the House of Commons of the Dominion of Canada*, 6th Parl, 3rd Sess, vol 23 (6 February 1889) at 34 [*Journals of the House of Commons*]; *House of Commons Debates*, 6th Parl, 3rd Sess, vol 28 (8 April 1889) at 1113 (Nathaniel Clarke Wallace). Wallace’s amendments appear to have replaced the qualifying terms “unduly” and “unreasonably” with “unlawfully”, substantially increased fines under the *Act* from \$1,000 to \$4,000 for individuals and \$10,000 for corporations, and deleted a provision permitting the revocation of corporate charters. Unfortunately, the bill was not printed upon second reading, making it difficult to distinguish between changes made by Wallace and any changes made later by the Committee on Banking and Commerce. Most authors, however, have assumed that the changes were made by Wallace himself. See e.g. Baggaley, *supra* note 15 at 25.

26. *House of Commons Debates*, 6th Parl, 3rd Sess, vol 28 (8 April 1889) at 1113–17.

27. *House of Commons Debates*, 6th Parl, 3rd Sess, vol 28 (22 April 1889) at 1440 (Nathaniel Clarke Wallace), 1446 (George Guillet).

28. See *House of Commons Debates*, 6th Parl, 3rd Sess, vol 28 (22 April 1889) at 1437 (John Sparrow David Thompson).

29. *Debates of the Senate*, 6th Parl, 3rd Sess (29 April 1889). “In a suit or prosecution for acts done in restraint of trade, under the common law, the court will not fine or punish a man for an act which is said to be in restraint of trade unless it does unduly restrain trade. I think the word ‘unduly’ is frequently used in the cases.” *Ibid* at 639.

five objections.³⁰ The bill then returned to the House of Commons, where Wallace protested the Senate's amendments. Eventually he consented to them as a tentative first step toward resolving the combines problem, explicitly noting that Parliament could revisit the issue if the bill proved unsuccessful.³¹ Indeed, Wallace would later try several times to have the offending terms deleted, but none of his bills to amend the *Act* were accepted by the Senate.³²

As passed, section 1 of the *Act* provided:

1. Every person who conspires, combines, agrees or arranges with any other person, or with any railway, steamship, steamboat or transportation company, unlawfully
 - (a) to unduly limit the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article or commodity which may be a subject of trade and commerce; or
 - (b) to restrain or injure trade or commerce in relation to any such article or commodity; or
 - (c) to unduly prevent, limit, or lessen the manufacture or production of any such article or commodity, or to unreasonably enhance the price thereof; or
 - (d) to unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply of any such article or commodity, or in the price of insurance upon person or property;

Is guilty of a misdemeanour and liable on conviction, to a penalty not exceeding four thousand dollars and not less than two hundred dollars, or to imprisonment for any term not exceeding two years; and if a corporation, is liable on conviction to a penalty not exceeding ten thousand dollars and not less than one thousand dollars.³³

In essence, the *Act* criminalized a subset of agreements that had previously been unenforceable but not illegal under the restraint of trade doctrine. It contains a number of qualifying terms that would later become the focus of critiques—"unlawfully", "unduly", "unreasonably". In reality, however, each of these terms was already encompassed by the restraint of trade doctrine, which held that contracts that "unreasonably" restrained the free trade of individuals were "unlawful" (in the sense of being "unenforceable at law or equity"). Because the *Act* was built entirely on the restraint of trade doctrine, however, it became susceptible

30. *Ibid* at 654.

31. *House of Commons Debates*, 6th Parl, 2nd Sess, vol 28 (30 April 1889) at 1689 (Nathaniel Clarke Wallace).

32. See Baggaley, *supra* note 15 at 32–39.

33. *Supra* note 2, s 1.

to change when the interpretation of the underlying doctrine shifted in the 1890s. This, more than anything else, was the true cause of the *Act*'s subsequent failure.

Almost immediately, it became clear that the *Anti-Combines Act* had done little to resolve the combines problem. Without a central authority tasked with enforcement, prosecutions were left up to the provincial attorneys general, who brought no indictments for nearly a decade.³⁴ The only case tried under the *Act* before its amendment in 1900, *R v American Tobacco Co of Canada*, ended in an acquittal.³⁵ While it is impossible to know how many combines were not formed due to fear that the *Act* might be enforced,³⁶ the lack of prosecuted cases was particularly troubling given the Select Committee's rich record of existing combines.

II. Critiques of the *Anti-Combines Act*

Later critics have attempted to explain the *Anti-Combines Act*'s failure by demonstrating that it was fatally flawed from the beginning, however they have differed in what they saw as the fatal flaw. I will now identify four separate critiques of the *Act* and briefly explore the weaknesses in each critique.

A. The "Unduly" Critique

As noted above, the first serious critique of the *Act* was made by Wallace himself, who believed it would be weakened by the inclusion of the terms "unduly" and "unreasonably". He repeatedly tried to have those terms removed, in the belief that this would return the *Act* to the baseline of the common law.³⁷ Wallace's view, however, was not shared by Sir

34. See Baggaley, *supra* note 15 at 45.

35. (1897), 3 *Revue de Jurisprudence* 453 (the case involved an exclusive-dealing agreement barring retailers from selling tobacco products sold by American Tobacco's competitors).

36. Baggaley suggests, for instance, that the *Act* may have contributed to the Canadian merger movement that took off after 1890, as mergers were seen as safer than cartels. Baggaley, *supra* note 15 at 46. Wallace himself stated the *Act* would serve as a "terror to evil doers". *House of Commons Debates*, 6th Parl, 2nd Sess, vol 28 (30 April 1889) at 1689 (Nathaniel Clarke Wallace).

37. See Baggaley, *supra* note 15 at 32.

John Abbott or Sir John Thompson, the legal experts in Parliament. In Abbott's view, the terms grounded the *Act* in the common law by explicitly adopting its reasonableness standard.³⁸ In the 1891 debates on removing the terms, Thompson agreed, declaring them to be "only surplusage", which he did not object to removing.³⁹ Abbott and Thompson had the better argument: because a reasonableness standard was built into the restraint of trade doctrine, the inclusion of the terms did little or nothing to affect the *Act*'s efficacy so long as it remained tied to the common law. Nor would amending the *Act* have made it more effective, as restraints of trade were only unlawful if they were unreasonable.

However, because of the general confusion surrounding the restraint of trade doctrine and misunderstandings about the effects of the *Act*, outlined in my treatment of the "unlawfully" and "conspiracy" critiques below, scholars have sometimes misconstrued the effect of the inclusion of the terms "unduly" and "unreasonably". Richard Gosse, for instance, claimed that under the *Act*, "not only did a criminal offense have to be committed, it had to be committed 'unduly'".⁴⁰ More often, though, the critique has been largely ignored because, according to Michael Bliss, "it was well understood that the word 'unlawfully' made [the *Act*] ineffectual".⁴¹ In brief, because the *Act* gained modest teeth after the term "unlawfully" was taken out of it in 1900, scholars have largely assumed that it, rather than the inclusion of the terms "unduly" and "unreasonably", was the cause of its early failure.

But, while the terms "unduly" and "unreasonably" had little effect on the original *Act*, their importance grew after the term "unlawfully" was removed. The *Act* was no longer tied to the common law restraint of trade doctrine, so "unduly" and "unreasonably" became the only

38. See *Debates of the Senate*, 6th Parl, 3rd Sess (29 April 1889) at 639 (John Joseph Caldwell Abbott).

39. *House of Commons Debates*, 7th Parl, 1st Sess, vol 32 (20 July 1891) at 2578–79 (John Sparrow David Thompson).

40. Richard Gosse, *The Law of Competition in Canada* (Toronto: Carswell, 1962) at 73. See also Baggaley, *supra* note 15 at 32.

41. Bliss, "Another Anti-Trust Tradition", *supra* note 16 at 183.

significant limits on the *Act*'s reach.⁴² Indeed, they were carried over to the *Competition Act, 1985*⁴³ and remained there until the Act was amended in March 2010 to make the proscribed conduct per se crimes.⁴⁴ Although the “unduly” critique was initially unfounded, the continued inclusion into the twenty-first century of the terms in a statutory scheme long-since divorced from the common law ultimately made the critique valid, albeit in an entirely different context than that in which it was originally raised. Because the “unduly” critique originally made no difference in the efficacy of the *Anti-Combines Act*, however, it will not be addressed at greater length in the current article.

B. The “Unlawfully” Critique

The second critique, raised initially by Lloyd G. Reynolds in 1940, was that the *Act* was made ineffectual by the inclusion of the term “unlawfully”. Adding that word, he argued, “greatly weakened the effect of the measure, for it carried a clear implication that only acts previously unlawful at common law were to be unlawful under the new [*Act*]”.⁴⁵ As Reynolds argued earlier in the same chapter, “British common law has been and continues to be very lenient toward trade combinations”, not only “allow[ing] combinations to exist with impunity but strengthen[ing] them by enabling them to use legal sanctions against any firm which tried to break away from the group”.⁴⁶ Therefore, the law was a dead letter from the start as it went no further than the common law, which did not prohibit combines in the first place. As will be explored further in this paper, however, Reynolds’ understanding of English common law was imperfect at best. In describing the restraint of trade doctrine, Reynolds relied on a mere four cases, two of which post-dated the *Anti-Combines Act*.

42. See *R v Elliott* (1905), 9 OLR 648, 9 CCC 505 (CA) [cited to OLR] (“it might seem that Parliament had defeated its own object, whatever it may have been, and had made the section unintelligible and innocuous by attaching a penalty only to a conspiracy to do an unlawful act unduly”, but that following the 1900 amendment of the *Act*, “we are no longer thrown back upon the general law” at para 10).

43. RSC 1985, c C-34, s 45(1).

44. See *Budget Implementation Act, 2009*, RSC 2009, c 2, s 410.

45. Lloyd G Reynolds, *The Control of Competition in Canada* (Cambridge, Mass: Harvard University Press, 1940) at 134.

46. *Ibid* at 131–32.

Critically, the earlier of those two cases, *Nordenfelt*, revised the manner in which courts judged alleged restraints of trade.⁴⁷ Joseph Bridges Matthews, the author of the first treatise on restraint of trade law, made clear just how critical the case was: “The law relating to restraints of trade was for many years in a nebulous and uncertain form. The decision of the House of Lords in the [*Nordenfelt*] case in the year 1894 caused it to emerge as a far more consistent and crystallized doctrine than it had ever theretofore been.”⁴⁸ Thus, while *Nordenfelt* and later cases might have stood for the state of the law when Reynolds was writing in 1940, they did not reflect the doctrine in 1889. Moreover, the two pre-1889 cases cited by Reynolds do not present a complete picture of the state of the law; notably absent were decisions by the Judicial Committee of the Privy Council (JCPC),⁴⁹ the Court of Appeal of England and Wales,⁵⁰ the Court of Exchequer Chamber⁵¹ and the Supreme Court of New Brunswick,⁵² all of which found combine agreements to be in restraint of trade.

Reynolds’ “unlawfully” critique has been quite influential, taken up most famously by historian Michael Bliss, who expanded the critique into a broader argument that the *Act* was a “political sham”.⁵³ While Bliss’ “political sham” argument will be explored below, he contributed to the “unlawfully” critique by emphasizing that term as the reason for the *Act*’s failure. Others have also echoed the critique, including Canadian competition policy experts Paul K. Gorecki and W.T. Stanbury.⁵⁴

C. The “Conspiracy” Critique

The third critique of the *Act* was first raised by Richard Gosse in 1962. He alleged that the inclusion of the terms “unlawfully” and “conspiracy”

47. *Supra* note 5.

48. Joseph Bridges Matthews & Herbert M Adler, *The Law Relating to Covenants in Restraint of Trade*, 2d ed (London, UK: Sweet & Maxwell, 1907) at 1.

49. See *Collins v Locke*, [1879] 4 AC 674, 48 LJPC 68 (PC) [cited to AC].

50. See *Mineral Water Bottle Exchange & Trade Protection Society v Booth* (1887), 36 Ch D 465, 36 WR 274 (CA) [*Mineral Water Bottle Exchange* cited to Ch D].

51. See *Hilton v Eckersley*, *supra* note 8.

52. See *Pratt v Tapley* (1875), 16 NBR 163 (available on WL Can) (SC) [cited to NBR].

53. “Another Anti-Trust Tradition”, *supra* note 16.

54. Paul K Gorecki & WT Stanbury, *The Objectives of Canadian Competition Policy 1888–1983* (Montreal: The Institute for Research on Public Policy, 1984) at 112.

limited the *Act* to conduct already criminal. According to Gosse, “Since there was no conspiracy in restraint of trade at common law along the lines imagined by the legislators, the bill [became] meaningless.”⁵⁵ To a limited degree, Gosse was correct: prosecutions for conspiracies in restraint of trade had been unheard of for the prior century.⁵⁶ But Gosse went too far when he conflated the restraint of trade doctrine with the crime of conspiracy.

Though the terms “unlawful” and “illegal” are often used in connection with the restraint of trade doctrine, this language is deceptive. The doctrine concerns enforceability, not criminality. As nineteenth-century courts made clear, the fact that a contract in restraint of trade was unenforceable did not mean that the agreement rose to the level of a criminal conspiracy.⁵⁷ Thus, an agreement could be simultaneously “illegal” (in the sense that courts would refuse to give it effect) and non-criminal. Unfortunately, Gosse, writing in the mid-twentieth century, either misread the *Act* as requiring proof of conspiracy or failed to appreciate the distinction between enforceability and criminality in late nineteenth-century law. This distinction is critical, as much conduct that was unenforceable was not criminal; by reading the restraint of trade doctrine by the narrower framework of criminality, significant anti-competitive conduct is treated as “legal”, when in fact it was condemned by the courts.

As with Reynolds’ critique, Gosse’s “conspiracy” critique has been taken up by subsequent authors, most notably Gorecki and Stanbury⁵⁸ and Carman Baggaley.⁵⁹

D. The Political Sham Critique

While the first three critiques focused on the language used in the *Anti-Combines Act* and the law on which it was constructed, the final critique, first raised by historian Michael Bliss in 1973, was that the *Act* failed not because of issues with how it was framed, but because it was always meant to be a failure. According to Bliss, the *Act* was a “political sham”, raised by

55. *Supra* note 40 at 72.

56. *Ibid* at 37.

57. See e.g. *Hilton v Eckersley*, *supra* note 8 at 787.

58. *Supra* note 54 at 112.

59. *Supra* note 15 at 30–31.

Nathaniel Clarke Wallace as a means of portraying himself as a populist, and supported by the Macdonald government as a means of looking like it was taking action on the combines problem.⁶⁰

In reaching this conclusion, however, Bliss relied almost exclusively on a flawed legal analysis, rather than on historical documentation. Building on Reynolds' critique, Bliss argued that the *Act's* supporters must have known that few, if any, combinations were illegal at common law. Hence, Wallace's amendment to include the term "unlawfully" must have been intended to undermine the legislation as a whole. Moreover, even if the restraint of trade doctrine did continue to prohibit some combines-related conduct, Bliss alleged the *Anti-Combines Act* decreased the penalty established for the common law crime of conspiracy.⁶¹

As I will demonstrate below, Reynolds and Bliss shared a flawed understanding of the restraint of trade doctrine, which in fact prohibited a much broader range of conduct in 1889 than has been previously understood. Bliss also failed to appreciate that although in theory one might have been able to bring an indictment for conspiracy on a combines agreement, this had become virtually impossible decades before 1889. Thus, rather than minimize the criminal penalties for entering into a combines agreement, the *Act* enabled prosecution and *increased* the fines that could be imposed in lieu of a prison sentence.⁶² Once these misreadings of the law are corrected, Bliss' "political sham" argument falls apart, as he provided no other supporting evidence or arguments. Indeed, once the legal background to the *Act* is properly understood, the need for a "political sham" argument to explain why Parliament passed the *Act* disappears.⁶³

60. "Another Anti-Trust Tradition", *supra* note 16 at 182-83.

61. *Ibid* at 179.

62. Particularly important was the imposition of statutory minimum fines for violations of the *Act*, in contrast with the pre-existing crime of conspiracy, for which nominal fines could be imposed in lieu of a prison term. See *Threats and Other Offences Act*, RSC 1886, c 173, s 26. By contrast, the *Act* imposed minimum fines of \$200 for individuals and \$1,000 for corporations convicted under it. *Supra* note 2, s 1. See also *House of Commons Debates*, 6th Parl, 3rd Sess, vol 28 (22 April 1889) at 1439 (John Thompson). Adjusted into 2012 dollars, the minimum fines under the *Act* would be approximately \$5,000 for individuals and \$25,000 for corporations.

63. Bliss' specific allegation has been largely ignored in subsequent literature, though his article is frequently cited on the legislative history of the *Act*. See e.g. Benidickson, *supra* note 12 at 820. A notable exception is Carman Baggaley's "Tariffs, Combines and Politics:

Having outlined the principal critiques of the *Anti-Combines Act* and provided preliminary explanations as to why these critiques are problematic, I will turn to a broader analysis of the critiques, beginning with an exploration of the restraint of trade doctrine in 1889.

III. The Restraint of Trade Doctrine

The *Anti-Combines Act* was passed during a period of transition for the restraint of trade doctrine. A century earlier, the House of Lords assumed the doctrine had been strong enough to serve as the basis for a criminal indictment.⁶⁴ A few years after 1889, however, two cases defanged it utterly. In *Mogul Steamship* and *Nordenfelt*, the House of Lords revised the rule set out in the landmark case of *Mitchell v Reynolds*.⁶⁵ While the decisions were not surprising, and had, in fact, been predicted by some treatise writers, it would be a mistake to read their effects back in time. Indeed, between 1888 and 1889, “the law relating to restraints of trade [had been] for many years in a nebulous and uncertain form”.⁶⁶

A. Restraint of Trade in 1889

In 1889, *Mitchell v Reynolds*, decided by the Queen’s Bench in 1711, was the definitive statement of the restraint of trade doctrine. Writing for the court, Parker CJ (later raised to the peerage as the Earl of Macclesfield) adopted the rule that “a restraint from using one’s trade in a particular

The Beginning of Canadian Competition Policy, 1888–1900”, which argues that Wallace and other supporters of anti-combines legislation were misinformed about the state of the law, rather than engaged in a political sham. *Supra* note 15 at 32. This is not to say that Bliss’ arguments are not taken seriously by historians; more likely it is reflective of the fact that most scholarship discussing the *Act* since 1973 was written in the context of the extended debates leading ultimately to the passage of the *Competition Act, 1985*. *Supra* note 43. Some literature was published around the *Anti-Combines Act*’s centennial in 1989, but Baggaley’s survey, which was dedicated to the *Act*, was written in 1982 as a working paper for the Institute for Research on Public Policy. Since 1989, literature on the *Anti-Combines Act* or on the combines problem generally has been limited to these texts from 1993. See generally Baggaley, *supra* note 15. See also Benidickson, *supra* note 12; Code, *supra* note 14.

64. See e.g. *Smith v Scott* (1798), 4 Paton 17 HL (Scot).

65. (1711), 10 Mod 130, 24 ER 347 (QB).

66. Matthews & Adler, *supra* note 48 at 1.

place, if done fairly, and upon a good and lawful consideration, and with no [ill] intention, is good”.⁶⁷ Subsequently, this was reduced to a three-part test in which a valid restraint must be: particular or partial (that is, limited to a specific geographic place), reasonable, and given for lawful consideration, even if the promise was made under seal.⁶⁸

The first element distinguished between “general” restraints, which were always invalid, and “partial” restraints, which were generally enforceable. By general restraint, Macclesfield LJ had in mind the geographic extent of the restraint. A general restraint was one that extended over the entirety of England, while a partial restraint covered only a portion of the country.⁶⁹ Under *Mitchell*, all general restraints were unenforceable as they encouraged monopoly, while partial restraints limited to a particular place were not unenforceable “if done fairly, and upon a good and lawful consideration, and with no [ill] intention”.⁷⁰

If a restraint was only “partial”, the court would turn to the second element, reasonableness. Although *Mitchell* did not elaborate on reasonableness, later case law offered some guidance. In *Horner v Graves*,⁷¹ Tindal CJ of the Court of Common Pleas laid out a standard that would be used throughout the nineteenth century. It was endorsed by the JPCPC in *Collins v Locke*:⁷²

[W]e do not see how a better test can be applied to the question whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party, can be no benefit to either, it can only be oppressive; and if oppressive, it is, in the

67. *Supra* note 65 at 133.

68. See e.g. John William Smith, *A Selection of Leading Cases on Various Branches of the Law with Notes*, 7th ed by Richard Henn Collins & Robert George Arbuthnot (London, UK: William Maxwell & Son, 1876) at 421.

69. See *Mitchell v Reynolds*, *supra* note 65 at 131–33. No statement was ever made as to how a general restraint should be interpreted in the Canadian context, though the American William Wetmore Story equated general restraints with “an agreement not to carry on a certain business anywhere”. See William W Story, *A Treatise on the Law of Contracts Not under Seal* (Boston: Charles C Little & James Brown, 1844) at § 190.

70. *Supra* note 65.

71. (1831), 7 Bing 735, 131 ER 284 (CP) [cited to Bing].

72. *Supra* note 49 at 686.

eye of the law, unreasonable. Whatever is injurious to the interests of the public is void, on the grounds of public policy.⁷³

Contracts in partial restraint of trade were presumed unreasonable until proven otherwise,⁷⁴ but it was generally quite easy to prove reasonableness under the *Horner* standard. Indeed, by the late nineteenth century, courts and treatise writers began to favour findings of reasonableness.⁷⁵ Ancillary agreements would generally be sustained as reasonable, barring exceptional circumstances. Combine agreements, however, were more likely to be found unreasonable.

If partial and reasonable, the court would consider whether the agreement was made for lawful consideration. Initially, some courts also evaluated consideration for adequacy, but by the mid-nineteenth century, nominal consideration was deemed sufficient.⁷⁶ The third prong of the *Mitchell* test was thus easily proven and rarely a matter of contention in 1889, coming up primarily in cases involving bonds under seal, which did not require consideration to be valid.⁷⁷

A final point before turning to the case law: because the restraint of trade doctrine originated as a defence against the enforcement of an otherwise valid contract or bond, it could only be raised by the parties themselves. There was no accepted means by which injured third parties could challenge combine agreements. While the tort of conspiracy offered some remote hope, it was available only where the conduct was criminal and hence was difficult to prove.⁷⁸ The only alternative was criminal prosecution for conspiracy. But while such prosecutions were not unheard

73. *Horner v Graves*, *supra* note 71 at 743.

74. See John William Smith, *The Law of Contracts*, 8th ed by Vincent T Thompson (London, UK: Stevens and Sons, 1885) at 216.

75. See e.g. Joseph Chitty, *A Treatise on the Law of Contracts, and upon the Defences to Actions Thereon*, 12th ed by JM Lely & Nevill Geary (London, UK: Sweet & Maxwell, 1890) at 682; Pollock, *supra* note 9 at 316–19.

76. *Ibid* at 315.

77. See e.g. *Hilton v Eckersley*, *supra* note 8 (the Court of King's Bench found that the mutual agreement of mill owners to be bound by the agreement and by the £500 liquidated damages clause constituted consideration).

78. See CBS Dobson, *A Comparative & Historical Study of Judicial & Legislative Attitudes towards Monopoly in England and Canada* (MCL Thesis, McGill University Department of Law, 1959) [unpublished] at 109–27.

of in the eighteenth century,⁷⁹ they had long since fallen out of favour. Indeed, criminal conspiracy charges remained theoretically possible, but successful prosecutions were highly unlikely.⁸⁰ Thus neither third parties nor the Crown could challenge combine agreements in 1889 as these agreements could only be contested by the parties themselves. This had a significant impact on how judges saw restraint of trade cases—without the participation of third parties, it was easy for judges to overlook the interests of the public and focus solely on the interests of the parties.

B. Nineteenth-Century Combine Cases

To determine the outlines of the restraint of trade doctrine as it existed in 1889, I surveyed the case law from the nineteenth century and identified thirteen “combines-type” restraint of trade cases in Canadian courts, English and Welsh courts, and the JCPC. Of the 13 cases, 4 arose in Canada, 8 in England and Wales and 1 from the colony of Victoria. Contrary to the claim that few combine agreements were found invalid, five of the thirteen cases held that the agreement was unreasonable or partially unreasonable. Ten of the cases were decided between 1850 and 1889, four of which resulted in the agreement being found in restraint of trade. The last of these, *Mineral Water Bottle Exchange & Trade Protection Society v Booth*, was decided in 1887.⁸¹ Of the four Canadian cases, all of which were decided between 1850 and 1889, only one, *Pratt v Tapley*, resulted in the agreement being found unreasonable.⁸² Based solely on the numbers, the restraint of trade doctrine remained viable in 1889 as a substantial number of combine agreements were found to be at least partially unenforceable.

79. See e.g. *R v Eccles* (1783), 1 Leach 274, 168 ER 240 (KB) [cited to Leach]; *Smith v Scott*, *supra* note 64 (noting that the defendant’s conduct would have been indictable under English law).

80. See *House of Commons Debates*, 6th Parl, 3rd Sess, vol 28 (22 April 1889) at 1441 (William Mulock), 1446 (John Sparrow David Thompson). See also Gosse, *supra* note 40 at 37–39.

81. *Supra* note 50.

82. *Supra* note 52.

(i) Appellate Cases Involving Combine Agreements⁸³

Under imperial law at the time, decisions of the JCPC and of the House of Lords were binding in Canada and the other dominions and colonies.⁸⁴ Although the decisions of other English courts were binding on Canadian courts, in *Trimble v Hill*—a case unrelated to restraint of trade—the JCPC admonished colonial courts to defer also to decisions of the English Court of Appeal, even though the English Court of Appeal was not binding.⁸⁵ Although *Trimble* permitted significant wiggle room on the part of colonial judges, Canadian judges tended to be highly deferential. According to Bora Laskin J, Canadian courts technically applied *Trimble* in a narrow sense, but in practice “accepted and applied” English Court of Appeal decisions with deference and “without any consciousness of obligation but because they reflected agreeable propositions of law. In the end . . . deference did not differ very much from duty”.⁸⁶ Thus, Canadian case law on combine agreements had only minimal precedential effect, and was overshadowed by three imperial cases decided by the JCPC, the English Court of Appeal and its predecessor, the Court of Exchequer Chamber.

While the first decision, *Collins v Locke*, did not establish new law, it reiterated the rules governing combines in restraint of trade. More importantly, it held that some aspects of such an agreement were unreasonable. As a decision from the JCPC, the highest legal authority of the empire (from the Canadian perspective), *Collins* was the starting point for any jurist seeking to understand the legality or illegality of combine agreements.

The second case, *Mineral Water Bottle Exchange*, was the only one of the eight English combines cases to be decided by the English Court of Appeal.⁸⁷ This was a function of timing as the Court had not existed before 1875. The third case, *Hilton v Eckersley*, was decided by the Court of Exchequer Chamber, which heard appeals prior to the creation of the

83. See appendix for a full list of cases discussed.

84. See Bora Laskin, *The British Tradition in Canadian Law* (London, UK: Stevens & Sons, 1969) at 60.

85. [1879] 5 AC 342 at 345, 49 LJPC 49 (PC).

86. Laskin, *supra* note 84 at 60–61.

87. *Supra* note 50.

English Court of Appeal.⁸⁸ Though the JCPC in *Trimble* had not explicitly stated that its deferential standard applied to the Exchequer Chamber (the question did not arise), Canadian jurists would likely have deferred to it as well given its position as the second highest court of England and Wales. Therefore, like *Collins*, both *Mineral Water Bottle Exchange* and *Hilton* would have been viewed as having strong precedential authority, even though they were not explicitly binding.

Because they were of greater precedential value than the other ten cases, I begin with these three. Intriguingly, in all three cases the agreement at issue was found to be unreasonable at least in part. Defendants whose restraint of trade defences failed at the trial level had less incentive to appeal than plaintiffs whose claims were invalidated under the doctrine, but it is nevertheless notable that in *Collins*, the JCPC reversed the trial court's decision to find the agreement at issue partially unreasonable. Taken together, the three decisions demonstrate the continued vitality of the restraint of trade doctrine in 1889, at least in regard to combine agreements. Indeed, the latest of the decisions, *Mineral Water Bottle Exchange*, was decided in 1887, a mere two years prior to passage of the *Anti-Combines Act*.

Collins arose out of an agreement between the stevedores of the Port of Melbourne to fix prices and allocate customers. According to the agreement, the stevedores assigned existing customers between them, with new business taken in turn based on order of arrival. If a shipper refused service from the assigned firm upon arrival, others might provide stevedoring services, but any profits were to be allocated to the assigned firm. For departing ships, however, no other firms could offer services, even if the ship refused the assigned firm.⁸⁹ Inevitably, the agreement broke down when one of the stevedoring firms provided service to an unassigned ship and refused to make the required payment to the assigned firm, who then brought suit to enforce the payment. On initial hearing before the Supreme Court of Victoria, Stawell CJ refused the defendant's restraint of trade defence, holding instead that the agreement was reasonable.

On appeal, the JCPC reversed in part. Writing for the Court, Sir Montague Smith distinguished between purpose and means. He stated that

88. *Supra* note 8.

89. *Collins v Locke*, *supra* note 49 at 675.

whether restraints of trade were reasonable turned not on the intentions of the parties, but on the means by which they sought to implement them:

The objects which this agreement has in view are to parcel out the stevedoring business of the port amongst the parties to it, and so to prevent competition, at least amongst themselves, and also, it may be, to keep up the price to be paid for the work. Their Lordships are not prepared to say that an agreement, having these objects, is invalid if carried into effect by proper means, that is, by provisions reasonably necessary for the purpose, though the effect of them might be to create a partial restraint upon the power of the parties to exercise their trade.⁹⁰

While the parties' intentions might not be sufficient to declare the agreement per se illegal (as would be the case under contemporary competition law), a court still needed to consider whether the means chosen to achieve those intentions were reasonable. Here, the JCPC dithered; it upheld most of the agreement, but found unreasonable the provision barring service to outgoing ships assigned to other firms, as it deprived the shipowners of service by any firm except the one assigned to it (by the stevedores):

Such a restriction cannot be justified upon any of the grounds on which partial restraints of trade have been supported. It is entirely beyond anything the legitimate interests of the parties required, and is utterly unprofitable and unnecessary, at least for any purpose that can be avowed.⁹¹

Although the JCPC might have overlooked most of the stevedores' actions, it was willing to intervene when the stevedores' agreement eliminated the free choice of third parties.

The second of the three cases, *Hilton*, arose out of a labour dispute in the cotton spinning mills of Lancaster County, England.⁹² In a collective response to striking workers, eighteen mill owners entered into a bond agreeing that key business decisions (including wages, hours, "general discipline and management of their said works and establishments" and even the total suspension of manufacturing) were to be decided by a majority vote of the owners for a period of twelve months.⁹³ When

90. *Ibid* at 685.

91. *Ibid* at 687–88.

92. *Supra* note 8.

93. *Ibid* at 783.

the deal broke down, the remaining owners brought suit to collect £500 in liquidated damages from the defendant, who demurred, claiming the bond was an illegal restraint of trade. The three judges of King's Bench divided on the issue, with Campbell LCJ and Crompton J finding the bond unenforceable, and Erle J dissenting. On appeal, the Court of Exchequer Chamber affirmed.

Speaking for the Court, Baron Alderson emphasized that the agreement was so far-reaching that the parties were deprived of the ability to run their businesses according to their own best judgment, something which "no power short of the general law ought to [do]".⁹⁴ Baron Alderson also worried about the policy implications of enforcing the agreement: if such a bond between employers was valid, then so must be similar agreements between employees—permitting legal actions to enforce strikes and other labour actions.⁹⁵ Intriguingly, with the lone exception of Erle J, all of the judges who considered the case distinguished between the questions of enforceability and criminality.⁹⁶

The third case, *Mineral Water Bottle Exchange*, was decided a mere two years prior to the *Anti-Combines Act*. It centred on a non-poaching provision in the Mineral Water Bottle Exchange & Trade Protection Society's articles of association. When a member violated the agreement by seeking to hire a former employee of another member, the Society promptly filed for an injunction and the defendant argued that the provision was an unreasonable restraint of trade.⁹⁷ Justice Chitty of the Chancery Division found that the provision was unreasonably broad, especially given that the Society had 179 members worldwide and the article encompassed all employees, regardless of length of service or possession of insider knowledge.⁹⁸ The Court of Appeal affirmed Chitty J's decision, largely on the same grounds. Lord Justice Cotton, for instance, suggested that the article might be reasonable were it limited to employees with sensitive knowledge of operations, but that it was too

94. *Ibid* at 792.

95. *Ibid* at 793. Here, Baron Alderson echoed concerns raised below by Campbell LJ that "a decision in favour of this bond would establish a principle upon which the fantastic and mischievous notion of a 'Labour Parliament' might be realized for regulating the wages and hours of labour in every branch of trade all over the empire". *Ibid* at 789.

96. *Ibid* at 792.

97. *Mineral Water Bottle Exchange*, *supra* note 50 at 466–67.

98. *Ibid* at 469.

broad as written.⁹⁹ Lord Justice Fry expressed a more general fear that the article would restrain employment, saying that the restraint of trade was “far in excess of any legitimate purpose of the contracting parties”.¹⁰⁰ None of the decisions in the case, however, attacked the existence of the Society more broadly; all assumed it was an otherwise legitimate trade organization.

To summarize, *Collins* provides a framework for assessing other potential restraints of trade: leaving aside the question of objective, were the means used by the parties reasonable vis-à-vis the parties themselves and vis-à-vis third parties? Unfortunately, the Court did little to explain what would and would not be reasonable. Both *Hilton* and *Collins* suggest that completely removing the ability of the parties or third parties to make key business decisions was unreasonable, while (at least in *Collins*) less encompassing agreements, such as those to allocate profits to certain assigned firms, were reasonable. On the other hand, *Mineral Water Bottle Exchange* suggests the importance of scale and proportionality: as the number of firms involved in an agreement increased, the court became more concerned with how narrowly tailored the provision was, with a wholly disproportionate provision being unreasonable.

Thus, three appellate court decisions—*Hilton*, *Collins* and *Mineral Water Bottle Exchange*—reaffirmed that combine agreements were unenforceable when they unreasonably restricted the rights of the parties to the agreement or the rights of third parties. The restraint of trade doctrine may have been circumscribed, but it remained in force. While these cases provide a framework for the restraint of trade doctrine as applied to combine agreements, the lower court decisions provide a fuller understanding.

(ii) Lower Court Decisions Involving Combine Agreements

In addition to the appellate decisions, there were at least 10 lower court cases—6 from England and 4 from Canada. Because there are not significant differences between the English and Canadian cases, I will consider them together.

99. *Ibid* at 471.

100. *Ibid* at 472.

Let us begin with a trio of railway cases—*Shrewsbury & Birmingham Ry v London & North-Western Ry*,¹⁰¹ *Hare v London & North-Western Ry*¹⁰² and *Great Western Ry v Grand Trunk Ry*.¹⁰³ In each of these cases, the contracting railway companies entered into agreements to share track, set common prices and divide profits along shared lines; in each case, the court found that the agreements were not unreasonable restraints of trade (though the agreements in *Shrewsbury* and *Great Western* were invalidated as *ultra vires* the powers delegated to the officers under the respective corporate charters). While some treatise writers have described the cases as supporting broader price-fixing or non-compete agreements,¹⁰⁴ this is an improper reading. Instead, all three cases dealt with legitimate joint ventures intended to permit traffic over sections of track owned by two or more railway companies, with profits divided according to a pre-established formula. In essence, the cases involved railway companies trying to connect their patchwork pieces of track into something usable at a time when formal corporate mergers would have required special legislation.

But while the facts of these cases are easily distinguishable from those of combines cases under contemporary competition law theories, at the time they were not seen as belonging to a distinct class. Thus, in *Shrewsbury*, Campbell LCJ went well beyond the facts, stating that

the effect of the agreement is only that the one company shall not compete or interfere with the other upon the particular line mentioned in the agreement. This is no more illegal than it would be for two persons engaged in a trade to agree that one shall not exercise his trade nor compete with the other within a particular district.¹⁰⁵

Although there is some ambiguity, Campbell LCJ seemed to apply the rule for restraint of trade cases to non-compete agreements and suggesting that they are *per se* legal.

Lord Chief Justice Campbell was not the only nineteenth-century judge to hold the view that such agreements were *per se* legal. Two earlier

101. [1851] 17 QB 652, 117 ER 1431 [*Shrewsbury* cited to QB].

102. (1861), 2 J & H 80, 70 ER 978 (Ch).

103. 25 UCR 37 (available on QL)(QB).

104. See e.g. CG Addison, *Addison on Contracts: A Treatise on the Law of Contracts*, 8th ed by Horace Smith (London, UK: Stevens & Sons, 1883) at 1152–53.

105. *Supra* note 101 at 668–69.

decisions, while based on quite different facts, had reached a similar conclusion. In *Hearn v Griffin*, Ellenborough CJ of the Court of King's Bench argued that an agreement between two coach operators to fix prices and to operate on alternate days, so as not to compete with each other, was reasonable, stating: "This is merely a convenient mode of arranging two concerns which might otherwise ruin each other."¹⁰⁶ Moreover, in his view, the potential harm to the public was minimized because the "agreement does not preclude a third or more persons from starting in opposition to plaintiff and defendant."¹⁰⁷ However, while the case has been cited in several later decisions and treatises,¹⁰⁸ no formal decision was ever rendered. A brief note states that the matter was subsequently settled by the parties. The "decision" was not reprinted in the *English Reports* series. Indeed, Ellenborough CJ's comments, which appear to have been made during oral arguments on the case, may not even reflect the opinions of the other judges of the court. The only other judge to speak, Bayley J, suggested that further evidence was needed.¹⁰⁹

The second earlier decision is more certain. In *Wickens v Evans*, the Exchequer of Pleas upheld an agreement between three Oxford box makers under which they divided the national market between them, established maximum prices to be paid for boxes and chests from third parties and agreed to provide mutual assistance against any rivals who might enter the trade.¹¹⁰ The judges found the agreement reasonable, emphasizing the nature of the business, especially the great cost and inconvenience in carrying wares across the countryside. More important, however, was their belief that the agreement did not rise to the level of monopoly and that the parties faced competition from potential entrants. In the words of Hullock B, "many other persons would soon be found to prevent the result anticipated; and the consequence would, perhaps, be that the public would obtain the articles they deal in at a cheaper rate."¹¹¹

106. (1815), 2 Chit 407 at 408.

107. *Ibid* at 409.

108. *Hearn* was one of four cases cited by Reynolds in his summary of restraint of trade doctrine. See Reynolds, *supra* note 45 at 132.

109. *Hearn v Griffin*, *supra* note 106 ("if you do not perform your part of the contract you should shew your excuse" at 408).

110. (1829), 3 Y & J 318, 148 ER 1201 (Ex), Hullock B [cited to Y & J].

111. *Ibid* at 330.

Unlike *Hearn* and *Shrewsbury*, however, *Wickens* did not suggest a per se rule but instead turned on the facts before the court.

Judicial flirtation with the view that non-compete agreements are per se legal continued in *Jones v North*, in which four Birmingham-area quarries agreed to rig their bids for a contract with the borough for 40,000 tons of stone for macadamizing causeways.¹¹² According to their agreement, the plaintiff was to submit the lowest bid at an agreed-upon rate, while two of the other firms were to submit higher bids; the defendant agreed not to submit a bid. The plaintiff was also to purchase a total of 26,000 tons of stone from the other three firms—their “cut” of the contract. The defendant violated the agreement, however, and submitted a lower bid which was accepted by the borough. Having already purchased the 26,000 tons of stone from its competitors (including the defendant), the plaintiff brought suit in the Court of Chancery to enjoin the defendant from performing the contract. Vice-Chancellor Bacon found the case to be fairly easy to decide, likely because he saw the defendant’s actions as underhanded.¹¹³ According to Bacon VC,

It is perfectly lawful for the owners of three quarries to agree that they will sell their commodities upon terms suitable to themselves, and which they approve of; and although they know that the purchaser is going to supply, or offer to supply the Corporation of *Birmingham* with the commodity, that does not in the least restrict their right to deal *inter se*, nor does such dealing deserve to be characterised as a conspiracy. There is nothing illegal in the owners of commodities agreeing that they will sell as between themselves at a certain price, leaving one of them to make any other profit that he can.¹¹⁴

Perplexingly, Bacon VC all but ignored the underlying fraud, briefly noting that the borough was not harmed because it was free to sue the defendant at law for expectation damages.¹¹⁵ Because of this, *Jones* is difficult to reconcile with appellate cases, such as *Collins* and *Mineral Water Bottle Exchange*, which considered the harm caused to third parties when determining reasonableness.

Similarly, two Ontario cases from the same period flirted with per se legality—though with more circumspect language. In *Ontario*

112. (1875), LR 19 Eq 426 at 426–28, 44 LJ Ch 388 (ChD).

113. *Ibid* at 429 (noting that “[t]he case is very plain, and, on one side at least, a very honest one” at 429).

114. *Ibid* at 430.

115. *Ibid* at 429.

Salt v Merchants Salt, Strong VC upheld an agreement between the salt manufacturers whereby they agreed to make all sales through a single agent at a set price. Vice-Chancellor Strong began his discussion of the restraint of trade issue by questioning the appropriateness of relying on public policy to invalidate an agreement. Echoing critiques made by English judges and treatise writers, he argued that the confused state of the law was an invitation for judges to impose their own policy preferences:¹¹⁶ “I can conceive of no more objectionable instance of what is called Judge-made law, than a decision by a single Judge in a new and doubtful case that a contract is not to bind on the ground of public policy.”¹¹⁷ He then distinguished the case from *Hilton*: “That the particular contract there in question was void on [public policy grounds], in no way assists to prove that the totally dissimilar contract in question here is also to be held bad.”¹¹⁸ Instead, Strong VC compared the Canadian Salt Association to the agreement in *Hearn*, which he cited for the proposition that “a contract to charge the same price is not an improper restraint of trade.”¹¹⁹

Fifteen years later, Proudfoot J of the Ontario High Court of Justice, Chancery Division, adopted Strong VC’s logic in *Schrader v Lillis*.¹²⁰ There, cigar manufacturers engaged in a labour dispute with the cigar makers’ union entered into a bond whereby they agreed not to buy or sell cigars marked with the union’s label or to establish closed union shops. When one of the parties violated the bond by making an agreement with the union, the other parties filed suit for the five hundred dollars liquidated damages. Although the agreement was quite similar to that in *Hilton*, Proudfoot J instead cited Strong VC’s statement in *Ontario Salt* that the decision in *Hilton* was limited to its peculiar facts. In his mind, the key difference was that the parties in *Hilton* gave up their ability to operate their business at all, while in *Schrader* they could continue to operate by hiring non-union employees.¹²¹ He also distinguished *Collins* because the agreement there had established a complete boycott, which

116. See *Ontario Salt*, *supra* note 14 at 546–47, citing John William Smith, *A Selection of Leading Cases on Various Branches of the Law with Notes*, 4th ed (New York: Halsted and Voorhies).

117. *Ibid* at 549.

118. *Ibid* at 547.

119. *Ibid* at 548.

120. (1886), 10 OR 358, (available on QL) (Ont HC) [cited to OR].

121. *Ibid* at 368–69.

“was obviously detrimental to the public, and beyond anything the legitimate interests of the parties required, and utterly unprofitable and unnecessary, at least for any purpose that could be avowed”.¹²² Finally, he suggested that agreements between manufacturers to stand together against the unreasonable demands of workmen could not be unreasonable, while arguing that agreements between labourers were indictable.¹²³

The two Ontario decisions indicate a judiciary highly reticent to find agreements to be in restraint of trade. But where Strong VC questioned the public policy foundation of the doctrine, Proudfoot J seemed to accept its legitimacy, even though he believed it should be narrowly applied:¹²⁴ where Strong VC’s critique was existential, Proudfoot J’s was practical.

These were not, however, the only Canadian combine cases. Four years prior to the JCPC’s decision in *Collins*, Ritchie CJ of the Supreme Court of New Brunswick faced a case involving similar facts. In *Pratt v Tapley*, the pilots operating in the Port of Saint John entered into an agreement whereby business was allocated on a turn-by-turn basis and uniform prices were fixed. Decisions regarding the adequacy of a tugboat to pilot a ship were to be made by the master of the tug and, unless he declared it unworthy, other parties to the agreement could not offer their services to the ship in question. If a tug operated out of turn, it was liable to the next-in-line for the fees collected. The case came before Ritchie CJ when one of the parties received an offer too good to pass up—towing a newly-built ship 120 miles into Saint John at a fee of \$842.50. The business was assigned by the master of the tug to the next-in-line, but the ship’s owner rejected the assigned tugboat and offered it to the defendant, who accepted the business and refused to pay over the fee to the assigned firm.¹²⁵

122. *Ibid* at 369.

123. *Ibid* at 368–69. Here, Proudfoot J perplexingly relied on the decision in *Hornby v Close* (1867), LR 2 QB 153, which had been overturned by the *Trade Union Act 1871*, adopted in Canada with minor amendments the following year. See Eric Tucker, “The Faces of Coercion: The Legal Regulation of Labor Conflict in Ontario, 1880–1889” (1994) 12:2 LHR 277 at 281–82.

124. Specific examples are that he endorsed the holding in *Collins* and suggested that labour unions were themselves illegal restraints of trade (an argument otherwise outside the realm of this article). For the enforceability of agreements involving labour unions, see e.g. Tucker, *supra* note 123; Paul Craven, “Workers’ Conspiracies in Toronto, 1854–72” (1984) 14 Labour / Le Travail 49.

125. *Pratt v Tapley*, *supra* note 52 at 164–67.

In Ritchie CJ's eyes, the agreement was patently contrary to the public interest. He was particularly concerned about the ripple effects it could have beyond the harbour, given Saint John's important position in the provincial economy. As he saw it, the issue affected

alike foreign and domestic shipping, consignors and consignees of goods, insured and insurers, and generally mercantile interests, the extent of which it is impossible to estimate.

The effect of the combination denuded ship owners of control over their vessels arriving and departing from the port, handing it over to the proprietors of the tug boats. This had an immediate effect on the prosperity of the trade and commerce of the largest commercial emporium of the Province.¹²⁶

Presaging the JPC's decision in *Collins*, Ritchie CJ was particularly concerned with taking away choice from the owners or masters of ships and placing it instead in the hands of tugboat owners "until death releases him, or a majority of the parties choose to revoke the agreement".¹²⁷ Given his intense scepticism of the agreement and his concern with its significant effects on Saint John and on the province as a whole, he held it to be an unreasonable restraint of trade.

Similar concerns were raised in the earliest of the nineteenth-century combine cases, *Cousins v Smith*,¹²⁸ which concerned a group known as "the Fruit Club" that monopolized imports of fruit to the United Kingdom during the Napoleonic Wars. The Fruit Club entered into an agreement with a potential competitor, a wholesaler intent on breaking the monopoly, whereby it would resell a portion of a ship's cargo to the wholesaler at "prime cost". In reality, the Fruit Club charged the normal monopoly price, leading to actions at law and equity. Intriguingly, the Fruit Club raised restraint of trade as a defence to the wholesaler's plea for injunction, marking perhaps the only time a cartel has used its own illegality as a defence. Surprisingly, Lord Chancellor Eldon allowed the defence, holding that parties had agreed to engage "in a transaction, in which they know they are acting illegally", and accordingly held against the wholesaler, concluding that "the transaction, though right among the parties, was wrong with reference to the public".¹²⁹ (Given the early date

126. *Ibid* at 170-71.

127. *Ibid* at 171.

128. (1807), 13 Ves Jr 542, 33 ER 397 (Ch).

129. *Ibid* at 545.

of the case and volume of cases decided in the subsequent eighty years, however, *Cousins* was of only limited precedential value by 1889.)

(iii) The Effect of *Mogul Steamship* and *Nordenfelt*

Having now considered the ten lower court combine cases in turn, it is possible to draw some conclusions. While Matthews' claim that the law during the period was confused is accurate,¹³⁰ the situation was not entirely hopeless. The state of the law in 1889 is perhaps best summarized by Esher LJ's dissent in *Mogul Steamship* (discussed below). According to Esher LJ,

These cases decide that there is still, according to law, a restraint of trade which is contrary to law. They decide that an agreement whereby traders bind themselves not to carry on their trade according to their own judgment, but according to the judgment of others, is an agreement in restraint of trade. They decide that if such an agreement is made out, it is not made legal because it is entered into as a counter-move against another similar agreement.¹³¹

Though Esher LJ wrote in dissent, this point was not contested by the majority, who instead viewed the doctrine as irrelevant because it concerned enforceability rather than criminality (which formed the basis of the tort at issue).¹³²

Thus, contrary to the claims of later critics, the restraint of trade doctrine remained alive, if perhaps not vibrant, in 1889. While it by no means had the teeth of contemporary competition regimes, it was not yet a hollow shell. True, much conduct now treated as per se illegal was effectively per se legal at the time, but combines with severe potential impacts on commerce were invalidated with some regularity. Indeed, a surprising four of ten combine cases decided between 1850 and 1889 resulted in a finding that the agreement at issue was unreasonable, a startling fact given the wide swaths of conduct treated as reasonable.

The legal status quo in 1889 was short lived, however. Within five years, the House of Lords decided two cases, *Mogul Steamship* and

130. Matthews & Adler, *supra* note 48.

131. *Mogul Steamship v McGregor, Gow* (1889), 23 QB 598 at 604-05 (CA), Esher MR, dissenting [*Mogul Steamship* CA].

132. *Ibid* at 627-28.

Nordenfelt, severely limiting the restraint of trade doctrine and indirectly undermining the *Anti-Combines Act*.

While technically not a restraint of trade case, the doctrine infused the decisions in *Mogul Steamship*. The case arose out of an arrangement by a conference of shippers to monopolize tea shipments from China to England. The conference offered a five percent rebate to customers who shipped exclusively with conference members for a six-month period; a single shipment on a non-conference vessel made one ineligible for the rebate. Later, when a competing shipowner sought to enter the market, the conference engaged in predatory pricing, offering shipments at one-half of the typical rate. The new entrant filed suit for damages and sought an injunction against the conference. Though not explicitly framed as such, the plaintiff's cause of action was effectively for the tort of conspiracy; the plaintiff alleged the agreement between the conference members was an indictable conspiracy, and so it was actionable by third parties.¹³³

Although the Queen's Bench Division denied the plaintiff's request for an injunction in 1885,¹³⁴ the case dragged out for seven years. (Much of the delay is attributable to Coleridge LCJ, who took over three years from the oral arguments to issue his decision.)¹³⁵ Ultimately, the Court held that the defendants' agreement was not criminal and thus was not tortious. The Court of Appeal affirmed the judgment the following year. Lord Esher, Master of the Rolls, dissented, arguing that the case was analogous to *Hilton* and that restraints of trade were indictable conspiracies.¹³⁶ Although both Bowen and Fry LLJ found that restraints of trade were not inherently criminal, neither addressed whether the agreement at issue was an unreasonable restraint of trade.¹³⁷

133. *Mogul Steamship v McGregor, Gow* (1888), 21 QB 544 at 548 [*Mogul Steamship* QB]; *Mogul Steamship CA*, *supra* note 131 at 603.

134. *Mogul Steamship v McGregor, Gow* (1885), 15 QB 476 (the denial of a preliminary injunction was ultimately irrelevant, as the conference agreement broke down that same month). See *Mogul Steamship CA*, *supra* note 131 at 628.

135. Lord Chief Justice Coleridge's decision actually begins with an apology for the delay. *Mogul Steamship* QB, *supra* note 133 "[t]his case has stood over from causes not under my control for much longer than I could have desired, but at last I am able to give my opinion in it" at 547).

136. *Mogul Steamship CA*, *supra* note 131 at 605–06.

137. *Ibid* at 619, 627.

On appeal, the House of Lords affirmed that the defendants' conduct was not criminal, but rather simply designed to maintain the business for themselves. Lord Chancellor Halsbury, for instance, emphasized that the defendants had not engaged in "[i]ntimidation, violence, molestation, or the procuring of people to break their contracts".¹³⁸ Picking up an argument made by the Court of Appeal, he further reasoned that because the conduct at issue would not have been illegal if done by a single firm, it similarly could not have been a conspiracy for multiple firms to do the same thing.¹³⁹ None of the Law Lords ruled specifically on the restraint of trade question, though Bramwell LJ and Hannen LJ assumed that the conference agreement was unenforceable¹⁴⁰ and Morris LJ implied that it was enforceable.¹⁴¹ The Lord Chancellor did discuss the doctrine, noting that a contract in restraint of trade had never been held to be criminal. He did not state whether he believed that the agreement was in restraint of trade, but he did note the ambiguity of the term "unlawful", and while he endorsed a definition that implied only criminality, he recognized the term was "not uncommonly" used in reference to enforceability.¹⁴²

On its face, *Mogul Steamship* did not concern restraints of trade as it dealt with the tort of conspiracy. Nonetheless, the decision indirectly affected the restraint of trade doctrine in two ways. The first is that it eliminated any doubt as to whether third parties could challenge restraints of trade. The second is that despite some language from Bramwell LJ and Hannen LJ suggesting the agreement was a restraint of trade, the House of Lords demonstrated a marked hostility to judicial intervention into commercial dealings absent clear legislative directive. Particularly harmful was the proposition raised by Halsbury LC and adopted by most of the Law Lords that collective conduct should be evaluated by

138. *Mogul Steamship*, *supra* note 4 at 37.

139. *Ibid* ("if no legal right has been interfered with, and no legal injury inflicted, it is vain to say that the thing might have been done by an individual, but cannot be done by a combination of persons" at 38). But see *ibid* at 45 (justifying criminal culpability for conspiracy, but not for solitary action, because "a man may encounter the acts of a single person, yet not be fairly matched against several" and because the act, when done by several in tandem, "is sufficiently important to be treated as a crime," while when done by an individual is not).

140. *Ibid* at 46, 58.

141. *Ibid* at 50–51.

142. *Ibid* at 39.

the same standards as unilateral conduct. Without this distinction, the restraint of trade doctrine would be entirely meaningless, as the common law recognized the right of traders to set their own prices and decide how, where and with whom they would do business. Thus, while *Mogul Steamship* did not directly challenge the restraint of trade status quo, it severely undermined it.

Nordenfelt had a more direct, sustained impact on the restraint of trade doctrine. The case arose out of the sale of Nordenfelt's eponymous arms manufacturing business. The contract included a non-compete clause, under which Nordenfelt agreed not to engage in the business of arms manufacturing anywhere in the world for a period of twenty-five years.¹⁴³ The purchasers filed suit after Nordenfelt violated the non-compete agreement, which he claimed was unenforceable as a general restraint of trade. Nordenfelt won before the Chancery Division, but the decision was overturned by a very confused Court of Appeal.¹⁴⁴ Indeed, in the first edition of his treatise on the restraint of trade doctrine (published after the Court of Appeal decision, but prior to the decision of the House of Lords), Matthews noted, "[t]he peculiar nature of the *Maxim Nordenfelt* case renders it extremely difficult to estimate with any degree of accuracy the precise effect of the decision."¹⁴⁵

On appeal, the Law Lords unanimously upheld the Court of Appeal decision, fatally undermining the distinction between general and partial restraints of trade. In its place, the Lords imposed a single reasonableness standard, borrowed from earlier partial restraint decisions. According to Macnaghten LJ, whose framing would come to dominate later law:

The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular

143. The facts are slightly more complicated, but are ultimately irrelevant for present purposes. See *Nordenfelt*, *supra* note 5 at 538–41.

144. The problem was that the agreement in the case was clearly a general restraint under the general restraint/partial restraint rule set forth in *Mitchell v Reynolds*. As such, it should have been *per se* illegal. The judges of the Court of Appeal wanted to replace the general/partial restraint distinction, but were uncertain on how to do so.

145. Joseph Bridges Matthews, *The Law Relating to Covenants in Restraint of Trade* (London, UK: Sweet & Maxwell, 1893) at 38.

case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favor it is imposed, while at the same time it is in no way injurious to the public.¹⁴⁶

On its face, Macnaghten’s framework did not appear to alter the doctrine significantly. Instead, it merely clarified that restraints of trade will be judged according to their reasonableness vis-à-vis the parties and the general public. However, Macnaghten’s framework must be qualified by the statements of the other Law Lords, especially the claim—best articulated by Herschell LC—that the validity of a restraint of trade was “determined by the consideration whether it exceeds what is necessary for the protection of the covenantee”.¹⁴⁷ Lord Chancellor Herschell acknowledged that the unforeseen circumstances might render a restraint unreasonable on public policy grounds, though the window was “relatively narrow”:

I must, however, guard myself against being supposed to lay down that if this can be shewn the covenant will in all cases be held to be valid. It may be . . . that in particular circumstances the covenant might nevertheless be held void on the ground that it was injurious to the public interest.¹⁴⁸

Neither the Lord Chancellor nor any of the other Law Lords suggested what those “particular circumstances” might be.

Following *Nordenfelt*, Macnaghten LC’s framework was routinely cited to explain the state of the law, but Herschell LC’s stricter formulation was applied in reality, such that “a contract in restraint of trade was reasonable if it did no more than protect the interests of the covenantee”.¹⁴⁹ The public interest was effectively dropped out.

146. *Nordenfelt*, *supra* note 5 at 565. See also Wilberforce, Campbell & Elles, *supra* note 1 at § 205.

147. *Nordenfelt*, *supra* note 5 at 548. Very similar language was also used by Ashbourne LJ. *Ibid* (“the inquiry as to the validity of all covenants in restraint of trade must, I am disposed to think, now ultimately turn upon whether they are reasonable and whether they exceed what is necessary for the fair protection of the covenantees” at 558).

148. *Ibid* at 549.

149. Heydon, *supra* note 11 at 23.

Nordenfelt and *Mogul Steamship* severely limited the reach of the restraint of trade doctrine. Indeed, William Letwin characterized the two cases as “among the chief reasons for the subsequent inability of English common law substantially to deter the growth of monopolies”.¹⁵⁰ Because House of Lords’ decisions were binding in Canada, the two decisions fatally undermined attempts to rein in anticompetitive conduct well into the twentieth century. Had it not been for these two decisions, the *Anti-Combines Act* may have had a more significant impact.

III. Revisiting Critiques

A. The Collapse of the “Unlawfully” Critique

As noted above, the argument most often raised against the *Anti-Combines Act* is that the *Act* was doomed to fail because it only prohibited conduct that was already unlawful at common law at a time when the restraint of trade doctrine was so weak that almost nothing would qualify as “unlawful”. The nineteenth-century combine cases canvassed above, however, demonstrate that the restraint of trade doctrine remained relevant, with a combine agreement invalidated as late as 1887, two years prior to the *Act*. Thus, the “unlawfully” critique of the *Anti-Combines Act* falls apart. Under the law of 1889, the *Act* would have been of limited efficacy, but could nonetheless be relied upon against the most pernicious combines, such as the Saint John pilot cartel invalidated in *Pratt*. Of course, the *Act* would hardly have been the panacea intended by Wallace—it would most likely have been insufficient to break the infamous Dominion Wholesale Grocers’ Guild’s sugar combine, for instance—but it was not a dead letter at the time of enactment. Instead, the *Act* was crippled by *Mogul Steamship* and *Nordenfelt*, which shifted the restraint of trade doctrine away from the public interest and toward the narrow interests of the parties themselves. Though Wallace, in retrospect, would certainly have done better to leave out the term “unlawfully” given the later shift in the common law, he cannot be blamed for the subsequent decisions of the House of Lords.

150. Letwin, *supra* note 6.

B. The Conspiracy Critique: The Distinction between Unenforceability and Criminality

I turn now to Gosse's "conspiracy" critique. As outlined above, Gosse argued that the *Anti-Combines Act* was ineffective because it only prohibited conduct that was already indictable under the crime of conspiracy. Because such indictments were effectively impossible in 1889, Gosse alleged that the *Act* was a nullity from the beginning. This criticism, however, fails to appreciate the then well-established distinction between criminality and enforceability.

While the *Anti-Combines Act* covered criminal conspiracies in restraint of trade, it went substantially beyond that. Under Section 1, anyone who "conspires, combines, agrees or arranges" one of the specified restraints of trade has committed a misdemeanour.¹⁵¹ Had the *Act* been limited solely to criminal conspiracies, it would have been unnecessary to include the other terms, which are superfluous. This broader reading of the *Act* is also supported by the word "or", which suggests that the other terms were not synonymous with "conspires".

Statements made during the parliamentary debates also support this broader reading of the *Act*. When Liberal critics alleged that violations of the *Act* could already be prosecuted under the crime of conspiracy, Minister of Justice Sir John Thompson fought back, arguing (probably incorrectly) that conspiracies in restraint of trade were criminal at common law, but that this was not widely known outside of the legal profession.¹⁵² He then challenged Liberal critics to name a single instance when such a prosecution had been brought.¹⁵³ Thompson was likely the most knowledgeable on the subject in the House of Commons (in addition to likely researching the matter pursuant to his role as Minister of Justice, he had also heard a restraint of trade case while on the Supreme Court of Nova Scotia).¹⁵⁴ His view—that it was technically possible to bring an indictment based on restraint of trade, but that such indictments

151. *Supra* note 2, s 1.

152. *House of Commons Debates*, 6th Parl, 3rd Sess, vol 28 (22 April 1889) (John Thompson) ("I will venture to say that there are not two persons in Canada outside the legal profession, who knew before this Bill was introduced that unlawful conspiring in respect of trade was conspiring punishable under the *Act*" at 1439).

153. *Ibid* at 1446.

154. See *Irish v Puttner* (1886), 19 NSR 405 (available on WL Can) (SC).

were uncommon, would be difficult to prove, and might prove unpopular without legislative endorsement—should thus be given substantial weight. Further, Thompson was not the only one to take this view. He was surprisingly supported by Liberal MP William Mulock, who defended the *Act* on the basis of the difficulty of obtaining a conspiracy conviction. According to Mulock, “the law of conspiracy is a most abstruse one, and a conviction under it will be no easy matter”.¹⁵⁵ The parliamentary debates thus support a reading of the *Act* not limited strictly to the existing law of conspiracy.

But, were Thompson and Mulock correct about the existing law? Two late eighteenth-century cases suggested that indictment for conspiracy would be possible in a combine case. The more important of the two decisions was that in *R v Eccles*, in which King’s Bench upheld an indictment where the defendant entered into an agreement to prevent a third party from carrying on the trade of tailor, after he had refused to sell at fixed prices.¹⁵⁶ The decision was fairly muddled, however, and did not elaborate on what the conspiracy had involved. As such, later jurists were not always certain what to make of it.¹⁵⁷

The second case, *Smith v Scott* arose out of a Scottish appeal, and was not directly relevant to the English crime of conspiracy. But, in upholding fines issued against a cartel for fixing the price of postal deliveries, Loughborough LC noted that “in this country, the proceeding would have been by presentment to the grand jury and indictment, which would no doubt have been found against the parties in the combination, who would have been punished”.¹⁵⁸ While not a binding statement of English law, coming as it did in a House of Lords appeal, it was highly suggestive of the propriety of such indictments.

After these cases, however, the question of conspiracy indictments for combine agreements did not come up again until *Hilton* where it arose in the context of the *Combinations of Workmen Act 1825*.¹⁵⁹ Justice Erle argued

155. *House of Commons Debates*, 6th Parl, 3rd Sess, vol 28 (22 April 1889) at 1441 (William Mulock).

156. *Supra* note 79.

157. See e.g. Samuel Robinson Clarke & Henry Pigott Sheppard, *A Treatise on the Criminal Law of Canada*, 2d ed (Toronto: Hart & Co, 1882) at 314 (citing the case for the proposition that “a conspiracy to injure a man in his trade or profession” was indictable).

158. *Smith v Scott*, *supra* note 64.

159. 6 Geo IV, c 129.

that the combines in *Hilton* were illegal under the *Combination Act 1799*,¹⁶⁰ having not previously been illegal at common law.¹⁶¹ The claim was rejected by his Queen's Bench colleagues and by the Court of Exchequer Chamber. Justice Crompton of Queen's Bench argued that "combinations like that disclosed in the pleadings of this case were illegal and indictable at common law, as tending directly to impede and interfere with the free course of trade and manufacture", though he noted that they were no longer criminal under the *Combinations of Workmen Act 1825*.¹⁶²

By recent enactments, carefully worded, combinations to raise or lower the rate of wages, and to regulate the hours of labour, are made no longer punishable. But these enactments do not make such combinations legal agreements in the sense that the breach of them can be enforced at law; and still less do they apply to make enforceable at law [agreements such as the one before the court]. . . . The general principle of contracts in restraint of trade being void is perfectly well established: and this case does not appear to me to fall within any of the exceptions and relaxations which have been allowed as to that principle.¹⁶³

Lord Chief Justice Campbell agreed with the distinction between criminality and enforceability, though he was "not prepared to say that the combination . . . would be illegal at common law, so as to render them liable to an indictment for a conspiracy".¹⁶⁴ The Court of Exchequer Chamber also declined to decide whether the agreement was "illegal, in the sense of being criminal and punishable. The case does not require us; and we think we ought not to express any opinion on that point."¹⁶⁵

Despite the judges' conscious decision to avoid the question, *Hilton* remained the most extensive discussion of the difference between criminality and enforceability until *Mogul Steamship*.¹⁶⁶ As noted above, the plaintiff's claim in *Mogul Steamship* required the judges to consider the distinction more closely, as the tort claim relied on the defendants' actions being criminal. There, only a single judge, Esher LMR, of the Court of Appeal panel, argued that restraints of trade were indictable

160. 39 Geo III, c 81.

161. *Hilton v Eckersley*, *supra* note 8 at 787.

162. *Ibid* at 784.

163. *Ibid* at 784-85.

164. *Ibid* at 787.

165. *Ibid* at 792.

166. Other judges did, however, note the distinction from time to time. See e.g. *Pratt v Tapley*, *supra* note 52 at 171.

conspiracies;¹⁶⁷ all other judges considering the case rejected the conflation of the doctrines.

However, while *Mogul Steamship* post-dated the *Anti-Combines Act*, it did little to change the status quo in this particular regard. It had already been largely accepted prior to that decision that the question of enforceability was separate from that of criminality. Eminent judges had called into question the ability to bring indictments while simultaneously declaring individual agreements to be unenforceable restraints of trade. Even the first treatise on Canadian criminal law, written by Samuel Robinson Clarke and Henry Pigott Sheppard, noted the distinction: “Rules in restraint of trade are not criminal, though they may be void as against public policy.”¹⁶⁸ While there was uncertainty as to what agreements were or were not criminal, the vast majority of jurists saw this as a question wholly unrelated to that of enforceability.

Thus, Thompson and Mulock were correct, and with the distinction between enforceability and criminality fully established, the “conspiracy” critique of the *Anti-Combines Act* falls apart. Rather than simply restating existing law, as Gosse alleged, the *Act* created a new criminal penalty for previously non-criminal agreements that were nonetheless “unlawful”. Thus the *Act* would have permitted criminal prosecution in cases like *Hilton* and *Pratt* where judges had held the agreements at issue unenforceable, but had expressed doubt about their criminality.

C. A Political Sham?

I turn now to the final critique of the *Anti-Combines Act*—Michael Bliss’ claim that it was a “political sham”. Though a full rebuttal deserves a separate treatment, I will nonetheless outline the chief problems with Bliss’ argument.

More than anything else, Bliss’ argument is based on Wallace amending his draft bill to include the word “unlawfully”. According to Bliss, “it was well understood that the word ‘unlawfully’ made it ineffectual, and Wallace did not propose to change this”.¹⁶⁹ But, as demonstrated above, the “unlawfully” critique is itself flawed—the restraint of trade doctrine

167. *Mogul Steamship CA*, *supra* note 131 at 605–06.

168. Clarke & Sheppard, *supra* note 157 at 115.

169. “Another Anti-Trust Tradition”, *supra* note 16 at 183.

remained alive, if limited, in 1889. Bliss' arguments about the disingenuous intentions of Wallace and other supporters of the *Act* thus fall apart. If the restraint of trade doctrine still drew breath, then it was not inherently a political sham to use it as the basis for legislation.

Bliss also presented an image of Wallace as a faux populist who used the combines issue to gain public attention.¹⁷⁰ Yet Bliss wholly ignored Wallace's biography and the broader political context inside and outside of Parliament and, most importantly, Wallace's position in the protestant Orange Order. From 1887 until his death in 1901, Wallace served as Grand Master of the Loyal Orange Association of British America¹⁷¹—an important position given the status of Orangemen in Canadian politics and their periodic threats to break with the Conservative Party.

The 1888 to 1889 period when the *Anti-Combines Act* was being considered overlaps with just such a crisis: the controversy over Quebec's *Jesuits' Estates Act*,¹⁷² which had sought to resolve a century-long dispute over lands previously owned by the Jesuits before their suppression in 1774. While Quebec Protestants objected to compensating the Catholic Church (especially as the proceeds of the lands had been earmarked for education), the greater outrage was over the form the legislation took. Because various organs of the Catholic Church claimed to have inherited the right to the estates, Quebec Premier Honoré Mercier asked Pope Leo XIII to arbitrate the dispute and allocate the compensation as he saw fit. Probably unwisely, Mercier attached the papal decision to the preamble to the *Jesuits' Estates Act*, giving rise to protestant fears that English sovereignty had been turned over to the pope.

In the months after the *Jesuits' Estates Act* was passed there was a cross-Canada movement (particularly in Ontario) calling for this Act to be disallowed. The disallowance movement was led by the Orange Order, and threatened to tear the Conservative government of Sir John A. Macdonald apart. Though Macdonald was ultimately able to hold his caucus together, a group of thirteen backbenchers voted for disallowance

170. *Ibid* at 182.

171. See John P Buell, *The Political Career of N Clarke Wallace 1872-1896* (MA Thesis, University of Toronto, 1961) [unpublished] at 43.

172. *An Act respecting the settlement of the Jesuits' Estates*, SQ 1888 (51-52 Vict), c XIII at 43.

of the Quebec *Jesuits' Estates Act*. Wallace was one of these so-called “noble thirteen”.¹⁷³

Peculiarly, given his role in the Orange Order, Wallace played practically no role in the public or parliamentary debates on the *Jesuits' Estates Act*.¹⁷⁴ Instead, he positioned himself as an intermediary between the Macdonald government and the Orange Order. When a petition was made at the meeting of the Grand Lodge of Canada to censure Orangemen who voted against disallowance, Wallace proposed a compromise of petitioning the imperial government to act.¹⁷⁵ Later, during the 1891 election, he campaigned for the Conservatives to help keep skeptical Orangemen on side;¹⁷⁶ in return, the Macdonald government tacitly supported an act incorporating the Orange Order.¹⁷⁷ In 1892, Wallace was appointed to cabinet as Controller of Customs¹⁷⁸ where his “moderate” stance seems to have paid off for both himself and the Orange Order.

Had Wallace been a faux populist, as Bliss suggested, it is unfathomable that he would choose to base his populist campaign on the combines problem rather than the *Jesuits' Estates Act* controversy, which dominated public discourse at the time and which better fit Wallace's political base. As Grand Master of the Loyal Orange Association, Wallace could have created genuine trouble for the Macdonald government. Instead, he remained loyal and seems to have worked behind the scenes to hold

173. See Buell, *supra* note 171 at 46–73. For a more detailed background on the *Jesuits' Estates Act* controversy, see JR Miller, *Equal Rights: The Jesuits' Estates Act Controversy* (Montreal: McGill-Queen's University Press, 1979).

174. This is not fully explained by Wallace's absence from Canada when the issue was fomenting (he was in Ireland, where he was elected Vice-President of the Imperial Grand Orange Council). Wallace returned to Canada prior to the 1889 parliamentary session, where his role in the *Jesuits' Estates Act* debate remained minimal. While Wallace's initial silence on the issue may be explained by his absence, his later silence was more likely an attempt to avoid damaging the Conservative party. See Buell, *supra* note 171 at 51, 56, 66 and 124.

175. *Ibid* at 66–68.

176. See Miller, *supra* note 173 at 163–64.

177. See *ibid* at 133–34, 193.

178. Wallace's appointment was largely made to counterbalance the rise of Sir John Sparrow David Thompson to the position of prime minister. Thompson, a convert to Catholicism, inspired significant concern among Ontario's militant Protestants. See PB Waite, *The Man from Halifax: Sir John Thompson Prime Minister* (Toronto: University of Toronto Press, 1985) at 351–52. See also Buell, *supra* note 171 at 110–14, 123–27.

the party together. It would make little sense for him to pass by this opportunity to present himself as a populist, only to then grab hold of the much less engaging combines issue for the same purpose.

Moreover, there is no evidence that Wallace raised the combines problem as a “political ploy to dodge the real issue”,¹⁷⁹ namely, the National Policy tariff. Wallace introduced his motion to create a House Select Committee on February 29,¹⁸⁰ two weeks before Sir Richard Cartwright set off the “Great Free Trade Debate” on March 14.¹⁸¹ While the Macdonald government was by no means blindsided by the debate on unrestricted reciprocity (the issue had been covered in the press for months),¹⁸² the timing of Wallace’s motion militates against any grand conspiracy. The parliamentary session had opened on February 22, a mere week before Wallace’s motion, which was one of the first matters considered. Had Wallace devised the combine problem as a genuine distraction from the free trade debate, he would likely have raised it later, after that debate had started.

Furthermore, while the Macdonald government did not oppose the creation of Wallace’s Select Committee, it did nothing to support it or Wallace’s draft legislation until the 1889 parliamentary session. Indeed, as noted above, his 1889 bill was initially received with disinterest and its second reading was delayed by two months.¹⁸³ It did not become a government bill until April 22, when Minister of Justice Sir John Thompson introduced it for third reading,¹⁸⁴ and it received no formal support while under review by the House Committee on Banking and Commerce. Had the Macdonald government intended Wallace’s bill as a distraction from the reciprocity debate, it would very likely have offered Wallace some formal support earlier in the process. Furthermore, once

179. Bliss, “Another Anti-Trust Tradition”, *supra* note 16 at 182.

180. *House of Commons Debates*, 6th Parl, 2nd Sess, vol 25 (29 February 1888) at 28 (Nathaniel Clarke Wallace).

181. *House of Commons Debates*, 6th Parl, 2nd Sess, vol 25 (14 March 1888) at 144 (Richard Cartwright).

182. See Christopher Pennington, *The Destiny of Canada: Macdonald, Laurier, and the Election of 1891* (Toronto: Allen Lane, 2011).

183. See *Journals of the House of Commons*, *supra* note 25; *House of Commons Debates*, 6th Parl, 3rd Sess, vol 28 (8 April 1889) at 1117.

184. *House of Commons Debates*, 6th Parl, 3rd Sess, vol 28 (22 April 1889) at 1437 (John Sparrow David Thompson).

the *Anti-Combines Act* was passed, the Macdonald government seemed to forget that it existed. Despite the continued debate on free trade, which would dominate the 1891 election, no one in the Macdonald government seems to have cited the *Anti-Combines Act* as an example of how competition could be maintained despite the existence of tariffs.¹⁸⁵ The *Act* was simply never used as a political distraction by the Macdonald government or its successors.

Much more likely is that the Macdonald government, faced with a potential caucus revolt over the *Jesuits' Estates Act*, identified Wallace as a key figure in the Orange Order and made a conscious decision to keep him happy. Given the fact that he had already put forth his anti-combines bill, the easiest thing for Macdonald to do was to offer to support the bill after it came out of committee. This is not to say that there was a formal quid pro quo, merely that Macdonald took advantage of a low cost way to keep Wallace loyal at a critical moment. By contrast, when Wallace later sought to amend the *Act* to remove the terms “unduly” and “unreasonably”, the threat from the *Jesuits' Estates Act* controversy had passed, giving Macdonald and his successors little incentive to offer Wallace further concessions. Of course, the *Anti-Combines Act* was born of politicking, but the mere fact that politics were involved does not mean that the *Act* was a “political sham”. Were this the case, practically all legislation would be worthy of the title.

In hindsight, we might criticize Wallace for relying on the common law restraint of trade doctrine, which was subject to change by the formalist judges of Westminster, instead of developing a more code-like Act that clearly delimited what was and was not prohibited. But, Wallace introduced his bill at a high point in the idolization of the common law, when civil law-style codes had fallen into disfavour, particularly in Ontario.¹⁸⁶ Even with the criminal law, the one area where there was significant consensus in favour of codification (largely because of concerns of notice and fundamental fairness), the common law remained vibrant. The later Canadian *Criminal Code, 1892*, for example, succeeded in large

185. The combines issue is not raised at all in Pennington's study of the 1891 election. See Pennington, *supra* note 182.

186. See G Blaine Baker, “The Reconstitution of Upper Canadian Legal Thought in the Late-Victorian Empire” (1985) 3:2 LHR 219.

part because it explicitly left the common law in place.¹⁸⁷ Moreover, as a first legislative attempt to deal with combines, it made a certain sense to adopt the common law standards; without significant legislative or judicial expertise with modern combine agreements, the common law offered greater flexibility for the unexpected. Finally, Wallace was not alone in basing his legislation on the common law restraint of trade doctrine—the American *Sherman Act* was also built largely upon the doctrine, something it has not generally been criticized for. The difference, then, between the *Anti-Combines Act* and the *Sherman Act* is explained not by their differential reliance on the common law, but on the manner in which the common law came to be interpreted.

The *Anti-Combines Act* was certainly a modest effort, but there is nothing in the record to prove that Wallace or the Macdonald government intentionally passed a meaningless statute as a means of putting one over on the electorate. Given that Bliss' argument was based almost entirely on the “unlawfully” critique, and given that he provided no evidence to support his claims concerning Wallace's or the Macdonald government's intentions, his “political sham” argument must be dismissed.

Conclusion

As demonstrated above, the restraint of trade doctrine was hardly a dead letter in 1889. Instead, it was used by courts in England and Canada with some regularity to invalidate cartel agreements that were unreasonable vis-à-vis the public interest. Indeed, four of the ten combine agreements challenged as restraints of trade in the forty years prior to enactment were invalidated or partially invalidated by the courts. However, while the restraint of trade doctrine remained in force, it was severely hampered by the lack of a third-party enforcement mechanism. Although some jurists believed it was possible to bring an indictment for conspiracy against parties entering into combine agreements, this was a minority view. The tort of conspiracy offered some hope for injured third parties, but it was only available when the agreement was itself criminal. Thus, while the restraint of trade doctrine held at least a subset of combine agreements

187. See Desmond H Brown, *The Genesis of the Canadian Criminal Code of 1892* (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 1989) at 37, 132–33.

unenforceable, the issue could really only be raised by the parties to the agreement themselves. The public and injured third parties were, effectively, out of luck. Nathaniel Clarke Wallace's *Anti-Combines Act* sought to resolve this problem by making it a misdemeanour to enter into certain combine agreements, irrespective of whether the agreement was already criminal.

Unfortunately, the *Anti-Combines Act* was a failure. Without an agency tasked to enforce it, prosecutions were left to the discretion of the provincial attorneys general, who took little notice of the *Act*. The first prosecution, *American Tobacco Co of Canada*, did not occur until 1897, eight years after enactment. By that time, the House of Lords had intervened in *Mogul Steamship* and *Nordenfelt*, making it substantially more difficult to prove that a restraint of trade was unreasonable, fatally undermining the *Act*. The principle critiques of the *Act*—that it criminalized only conduct “unlawful” at common law, that it was redundant of the common law crime of conspiracy and that it was a “political sham”—have failed to appreciate the impact of these decisions. This is not to say that the *Anti-Combines Act*, but for *Mogul Steamship* and *Nordenfelt*, would have been the ultimate solution. Instead, it would only have barred the most extreme combine agreements, such as those in *Pratt* and *Hilton*. But, we should be wary of judging the *Act*'s scope by our own standards.

As the first modern competition statute in the world, the *Act* was a legislative novelty. It is hardly surprising that Wallace adopted a modest approach and hewed close to the existing common law doctrine. More radical legislation can create unforeseen problems, and modest legislation can always be improved later. Indeed, Wallace almost immediately set out to do just that. Given the *Act*'s origins, it would be unfair to ask that it provide an optimal solution to the combines problem.

For over a hundred years, however, the *Anti-Combines Act* has suffered in the shadow of its more famous, if younger, sibling, the *Sherman Act*, which remains the bedrock of American antitrust law. Compared to the *Sherman Act*, the *Anti-Combines Act* appears weak, but only in retrospect. The *Sherman Act* was also ineffective during its early years; it rose to its current prominence only after subsequent amendments and favourable judicial treatment. Without the *Sherman Act* comparison, the

Anti-Combines Act would likely be treated with much greater respect, imperfect though it was.

In the end, the *Anti-Combines Act* was flawed as all first legislative attempts are flawed, but nevertheless, it was a genuine attempt to resolve the combines problem in its incipiency and, but for hostile judicial interpretation, might have had a greater impact. Rather than dismiss the *Act* as a failure because it did not live up to the impossible standard of the *Sherman Act* (a standard not even that *Act* initially lived up to), the *Anti-Combines Act* should be remembered for its place of prominence, as the world's first modern competition statute.

Appendix

Case	Year	Jurisdiction	Court	Reasonable?
<i>Cousins v Smith</i>	1807	England	Court of Chancery	Unreasonable
<i>Hearn v Griffin</i>	1815	England	Court of King's Bench (no final judgment)	Reasonable
<i>Wickens v Evans</i>	1829	England	Court of the Exchequer of Pleas	Reasonable
<i>Shrewsbury & Birmingham Railway v London & North-Western Railway</i>	1850– 1851	England	Court of Chancery; Court of Queen's Bench	Reasonable
<i>Hilton v Eckersley</i>	1855	England	Court of Exchequer Chamber	Unreasonable
<i>Hare v London & North- Western Railway</i>	1861	England	Court of Chancery	Reasonable
<i>Great Western Railway v Grand Trunk Railway</i>	1865	Upper Canada	Court of Queen's Bench	Reasonable
<i>Ontario Salt v Merchants Salt</i>	1871	Ontario	Court of Chancery	Reasonable
<i>Jones v North</i>	1875	England	Court of Chancery	Reasonable
<i>Pratt v Tapley</i>	1875	New Brunswick	Supreme Court of New Brunswick	Unreasonable
<i>Collins v Locke</i>	1879	Victoria	Judicial Committee of the Privy Council	Unreasonable in part
<i>Schrader v Lillis</i>	1886	Ontario	High Court of Justice, Chancery Division	Reasonable
<i>Mineral Water Bottle Exchange & Trade Protection Society v Booth</i>	1887	England	Court of Appeal	Unreasonable