

a custom of trade which has become sanctified not only by long usage but also by well established jurisprudence, particularly in my own province of Quebec.

To understand the changes which will result from the legislation which we are now considering, I think it is necessary for me to summarize the origin of our laws against combines.

In 1889, honourable senators, by a statute known as 52 Victoria, Chapter 41, the Canadian Parliament enacted for the first time that it was a misdemeanour to combine to unduly prevent or lessen competition. These original provisions were reproduced in the Criminal Code of 1892, section 520. The provisions concerning combines are now found at sections 496-7-8 of the Criminal Code as revised in 1906. I would add at once that in 1935 section 498A was added to cover unfair practices such, for instance, as discriminatory rebates.

The first Combines Investigation Act dates back to 1910, 9-10 Edward VII, Chapter 9. As honourable senators know, in 1919 two new Acts were adopted; firstly, the Board of Commerce Act, 9-10 George V, Chapter 37, which created a court of record for the investigation of combines; and secondly, the Combines and Fair Prices Act of 1919, Chapter 45, which was intended to regulate profits on necessities of life, such as food, clothing and fuel.

These two measures enacted in 1919 gave to the Commissioner of the Board of Commerce wide powers; powers so wide, honourable gentlemen, that in 1922 both Acts were declared *ultra vires* by the Privy Council. (Board of Commerce Act 1919 (1922), 1 A.C. at 191).

I would at once point out that the constitutionality of the present bill also is open to serious doubt for the reason that it too encroaches upon property and civil rights. I am not the only one who entertains this opinion, and I regret that the question of the validity of the bill has not been submitted to the Supreme Court of Canada. It is very clear that it will be contested by means of a test case before the courts in the near future, if and when it is adopted.

Let us for a brief moment return to the two Acts adopted in 1919 and declared by the Privy Council in 1922 to be unconstitutional. In 1923 these two measures were repealed and a new Combines Investigation Act was adopted, 13-14 George V, chapter 9. As revised, that Act is found in the Revised Statutes of Canada (1927), chapter 26. It was again amended in 1935, 1937, 1946, 1949 and 1950.

I wish to add at once that the Privy Council has upheld the validity of the Combines Investigation Act in its present form—that is, without the amendment now submitted to us—in case of Proprietary Articles Trade Association *versus* Attorney-General (1931) A.C., 310.

The bill before us, honourable gentlemen, differs fundamentally from the legislation which was upheld by the Privy Council. I shall now try within a minute or two to sum up our jurisprudence, in order to show that the essential characteristic of an illegal combine is that it operates to the detriment of the public,—a condition which, under the terms of the present bill, is no longer requisite. Here is the summarized definition, given by the Privy Council in the Proprietary Articles case:

“Combine” as defined by section 2, that is, shortly stated, a combine which is to the detriment of the public and restrains or injures trade or commerce.

That quotation, which is absolutely vital to my argument, occurs in the decision of the court which was then the highest tribunal to which our cases could be appealed. The characteristic of a legal combine is that it operates to the detriment of the public.

I now quote the brief corresponding definition in the Criminal Code, section 496:

A conspiracy in restraint of trade is an agreement between two or more persons to do or procure to be done any unlawful act in restraint of trade.

Again, in section 498 of the Criminal Code certain combines or agreements in restraint of trade are declared to be indictable offences when such agreements, for instance: (a) unduly limit the facilities for dealing in any article or commodity which may be a subject of trade or commerce; or (b) restrain or injure trade or commerce in relation to any such article or commodity; or (c) unduly prevent or lessen the manufacture or production of any such article or commodity, or unreasonably enhance the price thereof; or (d) unduly prevent or lessen competition; and so on.

I call to your attention the words “unduly” and “unreasonably” injure or prevent or lessen. The basic idea is that such a combine is illegal because it is detrimental to the public interest. Under our Combines Investigation Act an agreement or combine in restraint of trade is condemned only when it thus operates or is likely to operate to the detriment of the public interest. Under our Criminal Code such acts constitute offences only when they unduly limit the distribution or production of an article or unreasonably enhance the price of any commodity. Therefore, under our Criminal Code an agreement in restraint of trade is not in