

In this case, prices were so directly related to wages that the union had to control them in order to control wages.

Similarly, in the garment industry, the courts have upheld union control over contracts between manufacturers and jobbers on the basis that the manufacturer-jobber contract was the direct and immediate source of wages for the employees of jobbers.¹⁰⁸ Without such union control, the fierce competition in the industry would make it impossible to maintain the union wage scale.

5. *Concerted Lobbying*

The courts have uniformly held that whatever other concerted action might be in violation of the *Sherman Act*, concerted lobbying efforts on the part of union and employer are not. This principle was articulated in *Pennington*. There, the companies and the union had jointly and successfully approached the Secretary of Labor to obtain the establishment, under the *Walsh-Healey Act*, of a minimum wage for employees of contractors selling coal to the Tennessee Valley Authority (TVA) project. Such minimum wages were to be much higher than in other industries to make it difficult for small companies to compete in the TVA term contract market. This was part of the overall plan discussed earlier to raise wage levels and drive marginal operators out of the market. In this case, the Court decided that joint efforts to influence public officials did not violate the anti-trust laws, even though intended to and having the result of eliminating competition. The conduct of the union and the operators did not violate the Act, since the action taken to set a minimum wage for government purchases of coal was the act of a public official who was not claimed to be a co-conspirator.¹⁰⁹

The reasoning behind holding that concerted attempts to influence legislation are not within the prohibitions of the *Sherman Act* was likely that any resulting restraint actually arose from government action. And even if such concerted influencing were done with a predatory intent, as part of a greater endeavour to bring economic hardships upon competitors, it could be argued that people may by right seek self-interested legislation, and that the government is in need of the information received from the admittedly biased lobbying conduit.¹¹⁰

C. THE CANADIAN APPROACH

1. *The Historical Background*

Modern trade unionism grew up in England at the end of the eighteenth century when state regulation of wages, hours and working conditions generally had died and been replaced by a belief in the prevailing economic

¹⁰⁸ *Greenstein v. National Skirt and Sportswear Assoc.*, 178 F. Supp. 681 (S.D.N.Y., 1959); *California Sportswear and Dress Assoc.*, 54 F.T.C. 835 (1957).

¹⁰⁹ *Supra*, note 96 at 671.

¹¹⁰ *Labor and Anti-Trust: "So Deceptive and Opaque are the Elements of These Problems"* (1966), Duke Law J. 191.

doctrine of *laissez-faire* capitalism.¹¹¹ For hundreds of years following the Black Death of 1348, the state had endeavoured to control wages and hours of work through the agency of the judiciary and by special legislation. However, the factory system of enterprise that emerged as part of the industrial revolution in the eighteenth century centralized production by moving people from the countryside into the towns to become wage earners. Growing out of the industrial revolution, the doctrine of *laissez-faire* preached that competition not regulation, should be fostered on every level of economic activity to promote the greatest prosperity. Thus, the earlier controls on economic activity were abandoned, as economists proclaimed that the best of all possible worlds was one where the owners of enterprise were left free to pay as little as they had to for wages and materials.¹¹²

In the world of trade, competition often resulted in traders' combining in order to compete more effectively. In such cases, the combination was deemed by the courts to be in the legitimate pursuit of self-interest. It was considered to be simply competition on a broader scale.¹¹³ In a sense, traders were being allowed to move away from pure economic individualist principles in order to allow them to amalgamate and consolidate their economic power. This process created what has been referred to as a twentieth century industrial revolution,¹¹⁴ as gigantic firms engaged in mass production techniques. Friedmann comments on this process of development:

The *Harris Tweed* case not only shows more clearly than any previous decision the elusiveness of the ideal of freedom of trade, it demonstrates also the evolution which economic individualism has undergone in the last fifty years — the development from an almost pure Benthamism to a position where economic groups struggle with each other, with authority looking on as an umpire who attempts to interfere little or to be impartial.¹¹⁵

To deal with the growing consolidations of economic power, legislation was enacted (in Canada in 1899, in the United States in 1890) to attempt to prevent monopoly power from interfering with the private enterprise system. Thus, industry has gone through three states — prior to the industrial revolution, it was regulated by statute and by the judiciary, during the nineteenth century all regulation was removed to allow competitive factors complete sway, and, most recently, regulations are again being enacted to prevent industry from asserting monopoly power which is interfering with free competition.

It appears that the position of the wage earner has also been affected in similar fashion, although he appears to be moving through the above-discussed stages at a significant time lag behind the industrial sector. Initially, the wage earner was subject to a great deal of regulation from statutes and the judge-

¹¹¹ I. M. Christie, *The Liability of Strikers in the Law of Tort* (Kingston: Ont., Queen's U.: Industrial Relations Centre, 1967) at 2.

¹¹² Alfred W. Carrothers, *Collective Bargaining in Canada* (Toronto: Butterworths, 1965) at 13.

¹¹³ *Supra*, note 111 at 2.

¹¹⁴ See Gregory, *supra*, note 2 at 15.

¹¹⁵ W. Friedmann, *The Harris Tweed Case and Freedom of Trade* (1942), 6 Mod. Law Rev. 1 at 2.

made common law. From the fourteenth century in England, the relationship of master and servant was comprehensively defined by statute. Craft guilds maintained strict controls over journeymen and apprentices. At times the criminal law placed ceilings on wages.¹¹⁶

The changes in condition brought about by the industrial revolution created an unskilled and exploited labour force. Desperate conditions incited workmen to combine to demonstrate collectively against their exploiters. Parliament's response to collective action by wage earners was swift and severe: in 1799, all combinations were penalized,¹¹⁷ and in 1800, in the second *Combination Act*,¹¹⁸ Parliament specifically declared illegal combinations and agreements that related to wages, hours of work and conditions of employment.

The legislative policy behind the *Combination Acts* of 1799 and 1800 has been described as the unqualified embrace of *laissez-faire*. Workers were regarded as individual units of labour power to be priced according to the laws of supply and demand. When workers combined against an employer, they interfered with those laws. Yet it should be noted that in the second stage of *laissez-faire* that industry passed through, companies were not prevented from combining as this was seen as pursuit of their own legitimate self-interest. Thus, it seems that the position of trade-unionists was still back in the first stage of regulation. Collective bargaining eventually passed through to the second stage, and was determined to be legitimate, by similar reasoning — that combinations were in the workers' legitimate self-interest. However, this acceptance of collective bargaining was very slow in coming.

In 1824, the *Combination Acts* were repealed.¹¹⁹ However, the repeal marked a period of industrial unrest, and in 1825, another *Combination Act*¹²⁰ was enacted which permitted some measure of collective bargaining but prohibited acts inducing workmen to join a labour organization, or employers to alter the manner of conducting their business, if those acts amounted to violence, threats, intimidation, molestation or obstruction. Furthermore, Parliament and the courts assumed that combinations to affect terms of employment were criminal conspiracies at common law and that they continued as such except as freed by the Act of 1825.¹²¹

The restraint of trade doctrine was also used by the judiciary to suppress union activities, since by their combination to pursue their economic interests jointly, the courts felt that trade unionists were impeding free intercourse.¹²²

¹¹⁶ See Gregory, *supra*, note 2 at 13.

¹¹⁷ The *Combination Act*, 39 Geo. III, c. 81.

¹¹⁸ 39 and 40 Geo. III, c. 106.

¹¹⁹ 5 Geo. IV, c. 95.

¹²⁰ 6 Geo. IV, c. 129.

¹²¹ *Walsby v. Anley* (1861), 3 E. & E. 516.

¹²² O. Kahn-Freund, *The Illegality of a Trade Union* (1944), 7 Mod. Law Rev. 192; Bernard L. Adell, *The Legal Status of Collective Agreements in England, United States and Canada* (Kingston, Ont., Queen's U.: Industrial Relations Centre, 1970) at 6. See, also, Carrothers, *supra*, note 112 at 14-17.

Due to the prevailing attitudes of courts with respect to union activities, trade unionists directed their efforts to forcing the enactment of statutes which would grant them exemption from the legal doctrines which had evolved to protect employers' rights in the face of trade union challenge. In 1871, the *Criminal Law Amendment Act*¹²³ was passed. It refined the pejorative terms found in the *Combination Act* of 1825, and freed from the law of criminal conspiracy conduct that might amount to restraint of trade. Contemporaneously, the *Trade Unions Act*¹²⁴ declared that members of a trade union were not liable to prosecution for criminal conspiracy merely because the purposes of a trade union were in restraint of trade.

The Canadian *Trade Unions Act*,¹²⁵ copying from the English *Trade Union Act*, declared that the purposes of a trade union were not unlawful because they were in restraint of trade, as did the Canadian *Criminal Law Amendment Act*,¹²⁶ copied from the English Act of the same name. The latter is now found in s. 366(2) of the *Criminal Code* which prohibits violence, intimidation, and coercion but expressly permits peaceful picketing.

The *Conspiracy and Protection of Property Act*,¹²⁷ enacted by the English Parliament in 1875, provided further protection from the common law doctrine of criminal conspiracy. In s. 3 it stated:

An agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute between employers and workmen shall not be indictable as a conspiracy if such act committed by one person would not be punishable as a crime.

In 1876, Canada enacted a similar statute, *An Act to Amend the Criminal Law Relating to Violence, Threats and Molestation*,¹²⁸ which had the effect of reinforcing the *Trade Unions Act* and the Canadian *Criminal Law Amendment Act*.

The courts were not happy with the statutory removal of the application of the doctrine of criminal conspiracy from trade union activities, and attempted to circumvent the legislative enactments through the creation of the doctrine of tortious civil conspiracy.¹²⁹ This doctrine was enunciated in what has become known as the Trilogy of the House of Lords: *Mogul Steamship Co. v. McGregor Gow & Co.*,¹³⁰ *Allen v. Flood*,¹³¹ *Quinn v. Leatham*.¹³²

The reaction to these decisions, and to the decision in *Taff Vale Railway*

¹²³ 34 & 35 Vict., c. 32.

¹²⁴ 34 & 35 Vict., c. 31.

¹²⁵ (1872), 35 Vict., c. 30.

¹²⁶ (1872), 35 Vict., c. 31.

¹²⁷ 38 & 39 Vict., c. 86.

¹²⁸ S.C. 1876, c. 37.

¹²⁹ *Supra*, note 111 at 104.

¹³⁰ [1892] A.C. 25 (H.L.).

¹³¹ [1898] A.C. 1 (H.L.).

¹³² [1901] A.C. 495 (H.L.).

Co. v. Amalgamated Society of Railway Servants,¹³³ which held that under the *Trade Union Act* of 1871, unions were suable in their own names and accountable in damages for the wrongful conduct of their members, was the setting up of a royal commission in England. Its report led to the enactment of the *Trade Disputes Act* of 1906.¹³⁴ This Act abolished the doctrine of civil conspiracy, stating in s. 1 that conspiracy to injure was no longer actionable if done in contemplation of furtherance of a trade dispute. The Act also legalized peaceful picketing and relieved unions from liability in tort actions, whether of a primary or secondary nature, done in relation to trade disputes. Thus, in England, trade unions passed through to the second stage that industries had occupied since the early nineteenth century and were considered legitimate combinations, free to act in the economic market.

In Canada, the sweeping provisions of the *Trade Disputes Act*, 1906, were not generally adopted, probably due to the lesser influence wielded by trade unionists in Canada as compared to England at the beginning of the twentieth century. However, in 1943 and 1944, Saskatchewan and Ontario enacted equivalents of s. 1 of the *Trade Disputes Act* of 1906, abolishing the concept of conspiracy to injure in trade dispute cases.¹³⁵ British Columbia did so in *The Trade Unions Act* of 1902,¹³⁶ as limited by *The Trade Unions Act*, 1959.¹³⁷

With the enactment of labour relations statutes, it appears that what the legislature envisioned was a policy of non-intervention in the bargaining process, beyond guaranteeing its necessary preconditions. The intention of these laws was to "leave labour free to choose its own legitimate objectives without judicial evaluation under the 'lawful objectives' branch of conspiracy".¹³⁸ Despite the fact that Canadian courts have continued to make use of the series of industrial torts, (see, for example, *Fokuhl v. Raymond*,¹³⁹ and *Newall v. Barker*,¹⁴⁰), it has been argued that the labour relations acts are inconsistent with the traditional notion of individual labour transactions at any level and encourage labour activity designed to take wages out of competition.¹⁴¹ Due to the continuing activity of the Canadian courts in applying the civil conspiracy doctrines,¹⁴² it may be a debatable point whether trade unions have advanced to the relatively unfettered second stage of development in Canada.

¹³³ [1901] A.C. 426.

¹³⁴ 6 Edw. VII, c. 47.

¹³⁵ *The Trade Unions Act*, S.S. 1944 (Second Sess.), c. 69, s. 20; see, now R.S.S. 1965, c. 287, s. 25. *The Collective Bargaining Act*, S.O. 1948, c. 4, s. 3. *The Rights of Labour Act*, S.O. 1944, c. 54, s. 3(1); see now, R.S.O. 1960, c. 354, s. 3(1).

¹³⁶ S.B.C. 1902, c. 66.

¹³⁷ S.B.C. 1959, c. 90, s. 5; see now, R.S.B.C. 1960, c. 384, s. 5. See, also, Alfred W. Carrothers, *The British Columbia Trade Unions Act, 1959* (1960), 38 Can. B. Rev. 295.

¹³⁸ H. W. Arthurs, *Tort Liability for Strikers in Canada: Some Problems of Judicial Workmanship* (1960), 38 Can. B. Rev. 346.

¹³⁹ [1949] 4 D.L.R. 145 (Ont. C.A.).

¹⁴⁰ [1950] S.C.R. 385; [1950] 2 D.L.R. 289 (S.C.C.).

¹⁴¹ See Arthurs, *supra*, note 138 at 401-02.

¹⁴² See *id.* and Christie, *supra*, note 111.

The practical realities of labour union power today, however, are reflected in the following statement: "Individualism has given way to corporatism, in both labour and management."¹⁴³ It was seen that problems arose when individual companies were left free to combine in the second stage of development. In fact, these problems necessitated anti-combines legislation and theoretically, a new era of regulation for industry, *i.e.*, the third stage of development. Allowing trade unionists freedom to combine has led to many instances of abuse in modern times, where unions have been exerting a direct impact on the product market in order to lessen competition and raise prices and wages. There are some who argue that the time has come to examine the scope of trade union power to influence competition and to restrict it if necessary, *i.e.*, that it is time that trade unions were moved into the third stage of development.

2. *The Criminal Code and the Combines Investigation Act — Trade Union Exemption*

The cornerstone of Canada's present combines legislation was laid by Parliament in 1889 when it passed *An Act for the Prevention and Suppression of Combines in Restraint of Trade*,¹⁴⁴ which prohibited conspiracies and combinations in restraint of trade. The legislation defined as a misdemeanour any agreement to limit unduly facilities for transporting, producing, storing or selling any article or to restrain commerce in it, or to enhance unreasonably its price.¹⁴⁵ The provisions of the Act of 1889 were transferred in 1892 to the *Criminal Code*, as s. 520.¹⁴⁶ The offence was changed from a 'misdemeanour' to an 'indictable offence'. In 1900, an additional subsection was added which stated that s. 520 would not be construed to apply to combinations of workmen or employees for their own reasonable protection as such workmen or employees.¹⁴⁷

Section 520 of the *Code* of 1892, as amended in 1899 and 1900, was carried forward into R.S.C. 1906, c. 146, and into R.S.C. 1927, c. 36, as s. 498 in each case. With minor changes in wording, it was put into the revision of the *Code* as s. 411:¹⁴⁸

- (1) Everyone who conspires, combines, agrees or arranges with another person
 - (a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing, or dealing in any article,
 - (b) to restrain or injure trade or commerce in relation to any article,
 - (c) to prevent, limit or lessen, unduly, the manufacture or production of an article, or to enhance unreasonably the price thereof, or
 - (d) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, transportation or supply of an article, or in the price of insurance upon persons or property,
- is guilty of an indictable offence and is liable to imprisonment for two years.

¹⁴³ Arthurs, *id.* at 401.

¹⁴⁴ Stat. Can. 1889, c. 41.

¹⁴⁵ *Id.*, s. 1.

¹⁴⁶ Stat. Can. 1892, c. 29.

¹⁴⁷ Stat. Can. 1900, c. 46, s. 520.

¹⁴⁸ Stat. Can. 1953-54, c. 51.

- (2) For the purpose of this section, 'article' means an article or commodity that may be a subject of trade or commerce.
- (3) This section does not apply to combinations of workmen or employees for their own reasonable protection as workmen or employees.

Despite the apparent immunity granted in s. 411(3), the question remained whether it applied to combinations of workmen or employees who were not acting for their reasonable protection as such. The whole of s. 411 was removed from the *Criminal Code* in 1960, but was put into the *Combines Investigation Act* as ss. 32(1), 2(a) and 4.¹⁴⁹

Further saving provisions for trade unions still exist in the *Criminal Code* in ss. 424 and 425. Section 424 reads as follows:

- (1) A conspiracy in restraint of trade is an agreement between two or more persons to do or to procure to be done any unlawful act in restraint of trade.
- (2) The purposes of a trade union are not, by reasons only that they are in restraint of trade, unlawful within the meaning of subsection (1).

Section 424, it should be noted, is concerned with an "unlawful" act in restraint of trade, whereas s. 424(2) gives relief only to trade union *purposes* which are in "restraint of trade". Section 424(2) does not protect a union in the case of "unlawful" *acts* in restraint of trade.

Section 425 reads as follows:

- (1) No person shall be convicted of the offence of conspiracy by reason only that he
 - (a) refuses to work with a workman or for an employer, or
 - (b) does any act or causes any act to be done for the purpose of a trade combination, unless such act is an offence expressly punishable by law.
- (2) In this section, trade combination means any combination between masters or workmen and other persons for the purposes of regulating or altering the relations between masters or workmen, or the conduct of a master or workman in or in respect of his business, employment or contract of employment or service.

Section 425(1) gives relief from the offence of conspiracy in cases where there is only a refusal to work with a workman or for an employer, or where a person acts on behalf of a trade combination, unless such act is expressly punishable by law. In s. 425(2), a trade combination is defined. It is to be observed that in s. 425(1) protection is not given to trade combinations as defined in s. 425(2) in the case of an act which is an offence expressly punishable by law.

Thus, although the *Code* exempts trade union activity from conspiracy offences, it seems that the exemption is limited. In s. 424 trade unions are not protected from prosecution for conspiracy in restraint of trade based upon "unlawful acts". In s. 425, unions are not exempt expressly from prosecution for conspiracy in the case of acts which are offences punishable at law.

In 1910, the first *Combines Investigation Act* was passed.¹⁵⁰ Its purpose was to attempt to remedy a weakness in the original legislation of failing to

¹⁴⁹ Stat. Can. 1960, c. 45.

¹⁵⁰ Stat. Can. 1910, c. 9.

provide investigative machinery for inquiring into alleged combines offences.¹⁵¹ The *Combines Investigation Act* of 1923¹⁵² provided that nothing in the Act would be construed to apply to combinations of workmen or employees for their own reasonable protection as such workmen or employees. This provision was carried forward in succeeding enactments,¹⁵³ and appears in the present s. 4. This labour exemption is an exact duplicate of the exemption that was found in s. 411 of the *Criminal Code*. In fact, acting upon the recommendations of the McQuarrie Commission, that the *Criminal Code* provisions relating to combines be brought into the *Combines Investigation Act*, Parliament transferred s. 411 of the *Code* to the 1960 amendments of the *Combines Investigation Act*.¹⁵⁴

The context of s. 4 is remarkably similar to the corresponding labour exemption in the *Clayton Act* that nothing in the American anti-trust laws is to be construed to forbid the existence and operation of labour organizations "from lawfully carrying out the legitimate objectives thereof". Due to the similarity in the legislative provisions, Canadian courts might be guided in the difficult tasks of interpretation by American jurisprudence.

3. *Interpretation of the Legislation*

It was left to the courts and to the Restrictive Trade Practices Commission to determine to what extent trade union activities could be prosecuted under the *Combines Investigation Act* and the provisions of the *Criminal Code* dealing with conspiracy in restraint of trade, *i.e.*, the extent to which the sections allowing some measure of exemption for trade union activities and the exemption of services gave trade unions immunity. The series of court cases and reports of the Restrictive Trade Practices Commission (RTPC) will be discussed in historical sequence.

*R. v. Singer*¹⁵⁵ involved a combine of manufacturers, jobbers and master plumbers to set prices and quotas in the area of plumbing contracts. Initially, an organization called the Canadian Plumbing and Heating Guild was formed, with a membership including manufacturers and jobbers of plumbing supplies and master plumbers. Fearing that such an organization would be illegal, the

¹⁵¹ *Economic Council of Canada, Interim Report on Competition Policy* (Queen's Printer: Ottawa, July, 1969) at 52.

¹⁵² R.S.C. 1923, c. 9.

¹⁵³ R.S.C. 1927, c. 26; Stat. Can. 1935, c. 54; Stat. Can. 1937, c. 230; 1946, c. 44; 1949 (2nd sess.) c. 12; 1951 (2nd sess.) c. 30; 1952, c. 39; 1960, c. 45; 1960-61, c. 42; 1962-63, c. 4; 1964-65, c. 35; 1966-67, c. 23; 1967-68, c. 16.

¹⁵⁴ Stat. Can. 1960, c. 45. An additional labour exemption is found in the *Combines Investigation Act*, providing that nothing in the Act, or s. 411 of the *Code* (when it was still contained in the *Code*) should be construed to apply to any contract, agreement, or arrangement between fishermen or associations of fishermen in British Columbia, and persons or associations of persons engaged in the buying or processing of fish in British Columbia, relating to the prices, remuneration or other conditions under which fish could be caught and supplied to such persons by fishermen. (Stat. Can. 1959, c. 40; 1960, c. 45; 1960-61, c. 42; 1962-63, c. 4; 1964-65, c. 35; 1966-67, c. 23. See, also, H. W. Arthurs, *The Dependent Contractor: A Study of the Legal Problems of Countervailing Power* (1965), 16 U. of T. L. J. 89.)

¹⁵⁵ [1931] O.R. 202 (H.C.).

members split the organization into two, leaving the master plumbers in the Guild, and forming an organization called the Dominion Chamber of Credits Ltd., for the manufacturers and jobbers. These two groups, however, continued to remain in close contact and cooperation with each other. The master plumbers then set up an employers' association, the Amalgamated Builders Council, and made membership in the employers' association conditional upon membership in the Guild and *vice versa*. The three organizations were formed and operated for the express purpose of controlling the plumbing and heating industry.

When discussing the employers' association, the court refers to it as a 'trade union'. While modern collective bargaining legislation and contemporary usage identify a trade union as an organization of employees, the older usage implied no such restrictive identification, and included an employers' association. The definition found in the *Trade Unions Act* reads ". . . such combination, whether temporary or permanent, for regulating the relations between workmen and masters, or for imposing restrictions on the conduct of any trade or business, as would, but for this Act, have been deemed to be an unlawful combination by reason of one or more of its purposes being in restraint of trade".¹⁵⁶ In this case, the Council is being referred to as a trade union in this older usage of the word.

The court stated that had the trade union confined its operations to those authorized by the *Trade Unions Act*, objection could have been taken. However, from its operations it was clearly evident that the purpose of those responsible for the creation and operation of the Council was to avail themselves of any immunity provided by the Act and if possible, to evade the provisions of the *Combines Investigation Act* and the *Criminal Code*.

The court stated that s. 4 of the *Combines Investigation Act* clearly applied to combinations of workmen and employees only and the accused were certainly not in that class. Regarding the *Criminal Code* charges of conspiracy under s. 498,¹⁵⁷ the court discussed s. 497 (now s. 424), the section stating that the purposes of a trade union are not unlawful simply because they are in restraint of trade:

It is quite evident that it was never intended by Parliament that s. 497 should operate as a complete defence to charges of all the offences created by s. 498 of the Code. As already stated, it is not the purposes of the trade union that are attacked in these proceedings, but the acts and operations of some of the members which are entirely outside the ambit of a trade union, and in this view s. 497 cannot avail as a defence.¹⁵⁸

The convictions were affirmed on appeal to the Appellate Division of the court, where the court stated:

The organization and registration by the accused of the Amalgamated Builders Council as a trade union was an attempt to cloak the operations of the Canadian Plumbing and Heating Guild under the protection of section 497 of the Code.

¹⁵⁶ R.S.C. 1952, c. 267, s. 2.

¹⁵⁷ Later s. 411 and finally removed from the *Code* to the *Combines Investigation Act*, s. 32(1).

¹⁵⁸ *Supra*, note 155 at 218.

What was in appearance a real trade union and registration under the Trade Unions Act, distinct from the guild, was in fact a mere sham¹⁵⁹

In *Amalgamated Builders Council v. Herman*, the issue arose again when the trade union was suing for libel and slander over statements that had charged tyrannous and oppressive action on the part of officers of the union. The Court of Appeal stated:

. . . it is very doubtful whether the immunity created by the Criminal Code applies to the undue enhancing of the price of commodities. This is something far beyond that which is validated — agreements which would have been unlawful 'merely because in restraint of trade'.¹⁶⁰

The next case of interest is "Bread and other Bakery Products in the Winnipeg area, Manitoba", a report of the Commissioner empowered to investigate under the *Combines Investigation Act*, made in July, 1952. Although the findings of the Commissioner have no precedent value, and there was no prosecution launched pursuant to the report since the trade union undertook not to commit the offence again, the analysis was interesting. According to the report, a trade union, which had entered into collective agreements with bakeries in Winnipeg, regarded retail prices for bread in retail outlets, which were lower than the retail prices for bread in the home-delivery market, as having an adverse effect upon home-delivery sales and, therefore, upon the income of drivers of bread wagons who were under the collective agreement. The union instructed its driver members not to make bread deliveries to retail outlets which had reduced their retail prices in stores below the prevailing retail prices in house-to-house sales. These instructions were acted upon. The Commissioner was of the opinion that, although the primary motives of the union were related to wages rather than to prices, the arrangements were nevertheless prohibited in s. 411 of the *Code* (now s. 32(1) of the Act). In addition, he considered that they fell outside of the protection afforded by former s. 411(3) of the *Code*, now s. 4 of the Act. The Commissioner seemed to feel that although the primary motives were related to wages and not to prices as such, the arrangement was designed to have the effect of enhancing the price of the commodity. This appears to be analysis along the lines of the product market — labour market distinction. The Commissioner also seemed to feel some concern that if such arrangements were allowed, it would create a new means for avoidance of the *Combines Investigation Act*.¹⁶¹

¹⁵⁹ [1937] O.R. 694 at 703.

¹⁶⁰ 65 O.L.R. 296 at 302 (C.A.).

¹⁶¹ Interestingly enough, very similar union activity was considered in the American case *Adams Dairy Co. v. St. Louis Dairy Co.*, 260 F. 2d 46 (8th Circuit, 1958), and the court found the activity to be legitimate. The Adams Dairy Company had developed a new means of packaging milk which enabled it to be sold through retail stores at prices substantially below what the local drivers charged for home delivery. To counteract the significant competitive advantages made by Adams, the union revised its wage scale for commissions for dairy drivers in a way which drastically increased Adams' wage costs without affecting the cost of the other companies in the market. Since the means employed by the union, e.g., wage bargaining, were within the scope of a Norris-La Guardia labour dispute, this action of forcing up prices and thereby eliminating competition was held to be within the area of exempt activities. It could be argued that *Adams* is different from *Winnipeg Bread* because in *Winnipeg Bread* the drivers did not negotiate *via* collective bargaining for new wage scales but rather refused to deliver to the stores, thus actually imposing a boycott upon them. How a Canadian court would deal with *Winnipeg Bread*, or cases like it, however, remains to be seen.

The next instance of an anti-combines case involving a trade union was reported in the RTPC Report, dated May 1, 1959, concerning the distribution and sale of electrical construction materials and equipment in Ontario. A union and an electrical contractors' association had negotiated a collective agreement which provided that no member of the union would be permitted to work at electrical construction work for anyone who was not a party to the collective agreement. Nor would members of the union install material or equipment unless it was supplied by such a party. There had been instances in which the agreement had had the effect of forcing general contractors, who were not 'recognized' by the accused association, either to refrain from bidding on a contract or to sublet the electrical work to a 'recognized' electrical contractor. The Commission recommended that the collective agreement be amended in a manner that would prevent its being used to further the purpose of the combination or to restrict entry into the electrical contracting business.

The prosecution following the report of the Commissioner is reported in *R. v. Electrical Contractors Assoc. of Ontario and Dent.*¹⁶² While the trade union was not prosecuted, the court made some observations on the effect of the collective agreement. It had placed firms that were not members of the association at a great trade disadvantage because no member of the union was permitted to install their material or equipment. It would appear from the comments made by the court that, while no charge had been made against the union and therefore no conviction was registered against it, the union was a party to transactions which gave rise to convictions of others.¹⁶³ The American case of *Allen-Bradley* can be compared since in that case it was the trade union's combination with a business group that led to a finding of a violation under the *Sherman Act*.

The RTPC Report No. 11, concerning the manufacture, distribution, supply and sale of belts, issued in 1960, illustrates the impact that the possibility of unionization can have on the formation of a trade association. Although no union was actually involved in this instance, potential unionization had a very direct impact on the formation of an organization that later used its powers to restrict competition. The Report states that the possibility that the workers in the belt industry might be organized as a labour union seemed to have been largely responsible for the formation of the Belt Manufacturers Association of Montreal. Apparently the belt manufacturers felt that the formation of an association would put them in a better bargaining position if a labour union were established. The statement made by Mr. Abe Officer, of Deluxe Belts, to the Commission shows clearly the union's role:

Well, I was invited up to the hotel one night. I do not remember by whom or why, but when I arrived there I saw Mr. Chaine of the I.L.G.W.U., and he laid down a proposition whereby it would be to our mutual benefit — that is, the Belt Manufacturers' Association — if we formed an association and then agreed to unionize our employees as a whole and he pointed out to us that the whole thing of becoming unionized would only increase the cost of belts, the manufacturing cost, a cent or two each. At that time the belt business was in terrible condition. The competition was keen; there was no bottom to the lowness of prices that

¹⁶² [1961] O.R. 265; 24 D.L.R. (2d) 193 (C.A.).

¹⁶³ A. C. Chrysler, *Restraint of Trade and Labour* (Toronto: Butterworths, 1967) at 296.

the belts were offered for . . . I thought it was a wonderful idea of they could get all the belt people together, unionize them, put a ceiling on the amount of hours the manufacturers would work with their employees, and consequently I felt that the belt business would be on a more stable basis.

The initiating role of the union officer in this situation did not provide the basis for further investigation because unionization did not materialize and consequently the original purpose of the Association was soon relegated to the background. Thus the trade union was not involved in the *Combines Investigation Act* prosecution, but if unionization had taken place, it is possible that further attention should have been paid to the union's activities.

In 1961, the Supreme Court of Canada, in *Seafarers' International Union of North America (Canadian District) v. Stern*, made some comments which, although *obiter*, had some bearing on trade union immunity from prosecution for conspiracy in restraint of trade. In this case, a hotel had refused to rent rooms to members of the Seafarers' International. The union forbade members to patronize the services of this hotel, on pain of discipline. One member was caught breaking the union rule, and was fined and suspended. The Supreme Court of Canada reinstated the employee and awarded damages. Fauteux, J., addressed himself to the problem of trade union immunity from competition legislation and conspiracy actions:

The criminal law has been amended to grant immunity to trade unions from prosecution for agreements in restraint of trade. This is a qualified immunity which flows from a policy designed to promote legitimate endeavours of the working classes. It does not follow that this special immunity will operate in cases of combinations absolutely foreign to such endeavours and of which the end or the means are unlawful.¹⁶⁴

It appears that the court was forming some sort of distinction between legitimate and illegitimate endeavours of a trade union. What the contours of these two categories are is not discussed further. All we can really state with assurance from this case is that to enforce a boycott of a hotel for refusing to serve members of the union is not a legitimate endeavour. Perhaps this activity is far enough removed from bargaining for better terms and conditions of employment in matters of wages, hours and other benefits, that the court perceived it as outside the scope of normal union activities.

The RTPC Report No. 30, in the matter of the sale and distribution of milk in the Ottawa area, released in 1964, involved an investigation of a price war in the sale of milk that took place during November, 1961. During this week, the Producers Dairy Co. Ltd. and Borden Co. Ltd. offered their milk products at unreasonably low rates in the chain stores. One effect of the price war was to force a sharp decline in income for the home delivery truck salesmen as people took advantage of the chain store milk bargains. The average pay at that time for a driver was \$96 or \$97 a week. During the price war, drivers' pay cheques dropped to the minimum salary guaranteed by the company, \$70 weekly. Although the price war allowed the public to obtain milk at substantially reduced prices, investigation showed that its actual purpose was to force small producers out of business.

¹⁶⁴ [1961] 29 D.L.R. (2d) at 34.