

The trade union involvement in this case occurred as follows. The drivers and delivery men of Producers and Borden were members of Local 647, Milk Drivers and Dairy Employees and Allied Workers of the International Brotherhood of Teamsters. The plant workers were represented by Local 440, Retail and Wholesale and Department Store Union. On Friday, November 17, George Barron, business agent for Local 440's plant workers, and Stewart Powers, President of Local 647's drivers contacted the President of Producers Dairy Co. to advise him that the union membership was concerned with and opposed to the price war. The company undertook to protect the take-home pay of the delivery men who were members of the union by allowing them the same weekly payment as they had received the preceding week or the week preceding that one, whichever was the higher amount. The company initially understood this to be acceptable to the union.

At a meeting of all the milk distributors on November 18, the Producers Dairy Co. indicated that it intended to continue the price war and to broaden it to include the retail trade. The company was then under the impression that the union members would accept the protection agreement. When officers of Local 647 appeared at the meeting, they advised the milk distributors that the union was not satisfied with this arrangement and that the membership might go out on a wild-cat strike on Monday morning. Producers then agreed to end the price war, and, effective November 20, there was an automatic return to previously current prices.

Allegations were made against the Producers Dairy Co. and the Borden Co. Ltd. that they had engaged in a policy of selling milk at prices unreasonably low and had substantially lessened competition, and against several officers and members of Local 647 that they had conspired, combined, agreed or arranged with Producers and Borden to prevent or lessen unduly competition in the sale and supply of milk in the Ottawa area.

The Commission found Producers to be guilty of the offences described, but found that Borden had participated solely as a defence and self-protection device. Regarding the allegations against the union, the Commission stated:

The union had requested protection of drivers' take-home pay not only during the week of November 13, 1961, but for the sake of future security, for the full period of the price war and the time during which its effects on sales would be felt. Later this provision was considered inadequate by members of the union. Only the end of the price war could ensure pay and job security. In the circumstances, the pressure by the union on Producers and Borden to end the price war is quite understandable and is not considered by the Commission as being related to prices or to any lessening of competition.<sup>165</sup>

It is difficult to see how the Commission can distinguish this case from the Winnipeg Bread case. In both cases, certain business practices of suppliers and distributors were affecting drivers' take-home pay adversely. In Winnipeg Bread, the union actually did strike and refused to supply retail stores with bread. In this case, the union threatened to walk out and stop all supplies. In both cases, the motives of the union were essentially based on the issue of

---

<sup>165</sup> RTPC Report No. 30 at 2.

wages, but their actions were intended to have an effect on the product market. The only distinction that might be made is that in this case the Commission found evidence to indicate that before the price war normal price competition existed. Therefore, the purpose of the agreement to end the price war was not to set a fixed or definite price for milk, but to return to the normal competitive price system. The union acted to force an end to the price war. The union was acting effectively in the product market but its effect was to produce competition, rather than to eliminate it. This distinction may serve to explain the different results in the two cases. However, the question remains whether the same union action to end *bona fide* price cuts would be illegal.

The RTPC Report No. 36, in the matter of an inquiry into the production, purchase, sale, and supply of plumbing, heating and air conditioning equipment and related products in Metropolitan Toronto and elsewhere in the province of Ontario, released in 1965, investigated restrictive trade practices that occurred in connection with a tender sent out from the Executive Committee of the Municipality of Metropolitan Toronto, on October 23, 1962, for a contract involving construction and discharge headers and rehabilitation work at the John Street Pumping Station.

Dynamic Construction and Pressure Concrete Services were the joint low bidders for the contract. In order to obtain the contract, Dynamic was required to have its contract approved by the Fair Wage Officer, who would obtain proof that the contractor would maintain fair wages and working conditions, conforming to Metropolitan Toronto by-laws. In this case, before clearing Dynamic, the Fair Wage Officer, as a practical means of ensuring that Dynamic would live up to the Fair Wage Schedule and Regulations, made his approval conditional upon Dynamic's obtaining a union agreement.

Once Dynamic committed itself to using union labour, it began to encounter difficulties which would not have arisen if it had been able to rely on the services of non-union tradesmen who were easily available at the time. The Commissioner of Works, who had been asked to investigate Dynamic on behalf of the Executive Committee, thought that Dynamic might have difficulty obtaining the services of plumbers from Local 46 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the U.S. and Canada, and the award of the contract was made conditional on Dynamic's satisfactory resolution of its labour problems by December 4, 1962.

The Commissioner's concern was based upon the collective agreement then in force between the Toronto Labour Bureau and Local 46 of the plumbers' union. This agreement included a provision, in clause 7(C), that union members would only work for signatory employers, that non-members of the employer group constituting the Bureau who wished to employ union labour should sign and be subject to the agreement, and that the requests of such employers wishing to sign an agreement should be submitted to a Joint Conference Board for consideration and approval. The Joint Conference Board was made up of five persons from each of the two parties to the labour agreement and its decisions were made by majority vote, each side being entitled to three votes.

The Commissioner of Works felt that Dynamic might encounter some difficulty in getting approval from the Joint Conference Board because some of the contractor members had publicly expressed strong opposition to the awarding of the contract to Dynamic. The Commissioner learned that the contractors intended to oppose the acceptance of Dynamic on this project unless Dynamic would nominate Canadian Mechanical Trades (1957) Ltd. as their mechanical sub-contractor, at the additional cost to Metropolitan Toronto of \$45,909.00. Dynamic refused the proposal that the mechanical work be done by Canadian Mechanical Trades, the second lowest bidder, because their anticipated profit margin was concentrated in their mechanical tender. Since the employer representatives and the union representatives were each entitled to three votes, it would have been impossible for Dynamic to become eligible for union labour against the united opposition of the other contracting firms unless it had the full support of the union, resulting in a deadlock before the Joint Conference Board, and unless an arbitrator subsequently appointed were to find in favour of Dynamic.

When the Dynamic application came before the Joint Conference Board, it was seen to be deficient because the licence numbers of a master plumber and a master heat installer were missing. The Joint Conference Board members unanimously voted to defer the Dynamic application until the next meeting, pending completion of the form. They took immediate action to bring the deficiency in the application to the attention of Dynamic, but when Dynamic found that the next regular meeting would be after its December 4 deadline, it did not proceed further, being discouraged by the apparent collusion between the trade union and the contractors, and lost the tender.

In the statement of evidence by the Director of Investigation and Research, it was alleged that clause 7(C) of the labour agreement constituted an agreement between labour and management capable of being used to prevent or lessen unduly competition, contrary to s. 32(1) of the *Combines Investigation Act*. However, the Commission determined that there was no agreement between Local 46 and the contractor members of the Joint Conference Board to impede Dynamic's application for a labour agreement with a view to preventing the firm from carrying out the John Street contract. It was a common practice of the Board to defer applications that were doubtful or deficient in some way. It was not known whether the Joint Conference Board would have called a special meeting in time to meet the December 4 deadline, because Dynamic did not pursue the matter.

The Commission determined that the labour members on the Joint Conference Board acted independently in voting on the Dynamic application. (Apparently the union was reluctant to provide Dynamic with labour because of its poor record in dealings with labour on past projects.) The Commission decided that technically there was a possibility that an application by a contractor for an agreement with Local 46 might be declined if the employer representatives cast their votes against approval of the agreement, contrary to the wishes of the union, and this was confirmed by an umpire. However, the Commission stated that from the inception of the agreement in 1957 until November, 1962, the contractor members had been guided by the wishes of union officials in regard to applications for labour agreements with Local 46.

Tom Wilson, an official of the union, stated why he felt the union negotiated clause 7(C) into the collective agreement:

. . . We were being caught by men who were claiming to be in business, and it turned out they weren't in business, they didn't have any capital, they took a flying chance on a job and dropped out leaving us with men who didn't get their wages and didn't get their welfare and nowhere to get any money from. On the other hand the employers were not satisfied that we were looking after their interest. They thought we were using one set of employers against another, in order to improve our agreement, and this was a mutually arranged matter in which each side would know with whom agreements were being made under the local agreement. I do not think it was ever used to prevent anyone from coming in, but it was used to give us a knowledge that we were dealing with perfectly bona fide contractors.<sup>166</sup>

Thus, clause 7(C) was intended as a means of ensuring the union that it was granting labour agreements to solvent and responsible contractors, and it was also a means of informing mechanical contractors as to which firms were seeking agreements with Local 46, and provided assurance that the trade union was dealing on equal terms with all contractors.

The Commission concluded that it was certainly the right of the union to choose the employers with whom it wished to enter into collective agreements: "If the union officials failed to facilitate Dynamic obtaining an agreement, even though it led directly to Dynamic being refused the contract, that of itself would not infringe the Combines Investigation Act".<sup>167</sup> However, clause 7(C) of the agreement was objectionable on its face because it was capable of being used to prevent competition arising from contractors outside the group and it was also capable of depriving labour of its legitimate right to decide independently with what parties it would make agreements.<sup>168</sup> Since the clause had been deleted from the new collective agreement effective April 30, 1965, the Commission did not make any order regarding it, and since no actual collusion had occurred with respect to Dynamic, the Commission found the charges to be unfounded.

It is interesting to note that the Commission admitted that it was not satisfied that Clause 7(C) had caused no damage in the present case, since it felt that the semblance of collusion had led Dynamic to the conclusion that further attempts to get union labour from Local 46 were futile. Nevertheless, the Commission also noted that Dynamic did not follow up two alternate avenues open to it for getting union labour: first, to call upon the Building and Construction Trades Council, with whom it had signed an agreement in October, which was thus obliged to supply Dynamic with the necessary labour in trades covered by the Council; and, second, to negotiate a national contract with the plumbers' international union, although the Commission recognized that this posed additional problems for Dynamic because such an agreement would have been binding anywhere in Canada. That Dynamic failed to avail itself or either of these opportunities may very likely be the reason why the Commission failed to find the activity of the Joint Conference Board illegal.

---

<sup>166</sup> RTPC Report No. 36 at 13-14.

<sup>167</sup> *Id.* at 27.

<sup>168</sup> *Id.* at 28.

Illustrated in this case is the doctrine spelled out in American cases, 'combination with a non-labour group', and perhaps even some vestiges of the 'most favoured nation clause', since the Commission seemed to be concerned that the union might hand over part of its legitimate rights to determine with whom it would bargain.

#### 4. *The New Combines Investigation Act Amendments*

Although the above cases show the present status of the law regarding trade union immunity from competition legislation, and the service exemption is not clearly defined or applied, it can be seen that Canadian judges and the RTPC are applying some of the American tests such as the product market—labour market distinction and combination with a non-labour group, although they are not articulating that such tests are being used. When the new *Combines Investigation Act* amendments are passed, both trade union immunity and the service exemption will be very much affected.

On June 29, 1971, the Hon. Ron Basford, Minister of Consumer and Corporate Affairs, introduced Bill C-256, "to promote competition, to provide for the general regulation of trade and commerce, to promote honest and fair dealing, to establish a Competitive Practices Tribunal, and the office of Commissioner, to repeal the *Combines Investigation Act*, and to make consequential amendments to the *Bank Act*." It was the intention of the government not to proceed with the passage of the legislation that session, but to invite suggestions which would then review.<sup>169</sup> The Bill was never debated and the session of Parliament ended. At the next session, on November 5, 1973, the Hon. Herb Gray, Minister of Consumer and Corporate Affairs, introduced Bill C-227, to amend the *Combines Investigation Act* and related provisions of other statutes.

Bill C-227 was also not debated, and in the next session of Parliament, on March 11, 1974, Bill C-7 was introduced. Bill C-7 was debated, given second reading, and referred to the Standing Committee on Finance, Trade and Economic Affairs. Bill C-7 was identical with Bill C-227, and its provisions regarding trade union immunity and the service exemption appear to be quite different from the provisions previously found in Canadian competition legislation. Finally, a revised version of the amendments was passed by the House of Commons, on October 16, 1975, as Bill C-2.

Bill C-2 provides that services shall be included within the scope of the Act. This is done by new or amended definitions of "business", "merger", "product", "service", "supply", and "trade, industry or profession", so that all these terms apply both to articles and services. In particular, "service" is defined to mean "a service of any description, whether industrial, trade, professional or otherwise", and "product" is defined to include "an article and a service". Clause 14 amends s. 32(1) of the Act by substituting the term "product", as defined in clause 1(4), for the term "article", thus extending the application of s. 32 (the combines section) to services.

---

<sup>169</sup> Can. H. of C. Debates (June 29, 1971) at 8873-74.

The result of Bill C-2's inclusion of services is that the courts will no longer have to refrain from finding conspiracies in restraint of trade in service industries, as they did before except where the combination had a direct effect on competition in an article. In addition, persons who engage in conspiracy with respect to the provision of labour will no longer be protected by the service exemption, and will have to rely solely on the trade union immunity section for relief.

Clause 2 of the Bill repeals s. 4 of the Act — the trade union immunity section — and substitutes in its place the following:

Section 4 (1) Nothing in this Act applies in respect of

- (a) Combinations or activities of workmen or employees for their own reasonable protection as such workmen or employees;
- (b) contracts, agreements or arrangements between or among fishermen or associations of fishermen and persons or associations of persons engaged in the buying or processing of fish relating to the prices, remuneration or other such conditions under which fish will be caught and supplied to such persons by fishermen;
- (c) contracts, agreements or arrangements between or among two or more employers or in a trade industry or profession whether effected, directly between or among such employers or through the instrumentality of a corporation or association of which such employers are members, pertaining to collective bargaining with their employees in respect of salary or wages and terms or conditions of employment.

Section 4 (2) Nothing in this section exempts from the application of any provision of this Act a contract, agreement or arrangement entered into by an employer to withhold any product from any person, or to refrain from acquiring from any person any product other than the services of workmen or employees.

#### *Section 4 (1)(a)*

This subsection will re-enact the wording now found in s. 4 of the *Combines Investigation Act* with one minor change. In the present provision, "combinations" are exempt; in the proposed subsection, both "combinations" and "activities" are exempt. It is difficult, however, to see how the addition of the word "activities" will have any practical effect on the nature of the exemption.

The difficulties that are present in interpreting this standard have already been pointed out. The Legislature has refused to clarify or set guidelines with respect to the extent of the exemption it considers necessary to protect employee interests. However, in light of the specificity of ss. 4 (1)(b) and (c), the court's jurisdiction to determine what is reasonable has been somewhat narrowed since the activities listed therein are legislatively exempted.

#### *Section 4(1)(b)*

Section 4(1)(b) would replace and make permanent an exemption relating to fishermen and buyers and processors of fish in British Columbia, which has been carried in the *Combines Investigation Act*, on a temporary basis, for quite a few years as a result of an inquiry into the activities of

fishermen and of fish packers in that province. It would also extend this exemption throughout Canada.<sup>170</sup>

*Section 4(1)(c)*

This subsection was added to the amendment of s. 4 to grant immunity to the wide range of multi-employer bargaining techniques that are engaged in at the present time, and to which the application of s. 4 was unclear.<sup>171</sup> Agreements among two or more employers in an industry are exempt insofar as they pertain to collective bargaining with their employees in respect of salary or wages and terms or conditions of employment. Section 4(1)(c) was intended to be responsive to a criticism that was made of Bill C-256, which did not include it, to the effect that the exemptions in respect of collective bargaining were more favourable to employees than to employers.<sup>172</sup>

This sub-section appears to tie in with the use of the device of accreditation to give countervailing power to employers in construction industries where a large number of small, independent contractors often confront one or more of the building trades unions and the balance of power lies with the unions. Accreditation allows employers to band together in a process much like certification to combine their economic strength.

Crispo and Arthurs suggested, when proposing accreditation as a useful device, that it might reinforce proclivities that already existed for the parties to take advantage of the public and share the spoils:

As long as those spoils are represented on the one side by higher wages and on the other by the fruits of industrial peace, the combines legislation is not offended. However, if accreditation were adopted, it would have to be policed very carefully to ensure that only these legitimate advantages were secured by the parties.<sup>173</sup>

It would appear that far from policing very carefully the multi-employer bargaining accreditation device set up through collective bargaining legislation, Parliament is prepared to grant it immunity, subject to s. 4(2).

Section 4(2) was added to make it clear that no exemption was being granted in respect of any agreement or arrangement on the part of an employer to withhold or refrain from acquiring any product from anyone.<sup>174</sup> The exemption is expressly stated. Any employer who is withholding the services of workmen or employees, or who refrains from acquiring the services of workmen or employees, is not subject to the prohibitions of the Act. This would appear to encompass lock-out activity on the part of employers. It would appear that s. 4(2) is a qualification on the broad scope of s. 4(1)(c), so that

---

<sup>170</sup> Department of Consumer and Corporate Affairs, *Proposals for a New Competition Policy for Canada; First Stage, Combines Investigation Act Amendments* (Ottawa, 1973) at 57.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 47.

<sup>173</sup> "Countervailing Employer Power: Accreditation of Contract or Associations" in Goldenberg & Crispos, eds., *Construction Labour Relations* (Toronto: Canadian Construction Assoc., 1968).

<sup>174</sup> *Supra*, note 170 at 58.

even if an activity "pertains" to collective bargaining, it will not be immune if it has the effect of withholding articles or services from anyone. The extent to which "withholding any product" will be interpreted as including the raising of prices, lowering of quality, or slowing of technological innovation remains to be seen. Also, it must be noted that this section only applies to employers, and that it would appear that combinations of employees are free to agree to withhold articles or services from anyone provided they keep within the protections set out in the rest of the section.

Although the amendments found in Bill C-2 are intended to expand and to set out more clearly the scope of the trade union, it would appear that the judiciary has not been given any clearer set of legislative enactments with which to work. They have merely been given a different set.

#### D. SOLUTIONS

The new *Combines Investigation Act* amendments have as their objective the promotion of competition. In its broadest sense, the promotion of competition for economic purposes arguably should include competition not only in markets for goods and services, but also in markets for labour. Whether socio-political purposes behind competition legislation would lead to similar conclusions is far from settled. Arguments against the accumulation of power by overly large unions must be set against arguments that stability, not competition, is most important in the labour market. Careful consideration would have to be given to whether a true analogy exists between a business monopoly and a union monopoly. An element of freedom of choice exists in a union monopoly unlike a business monopoly, in that workers may dismantle a monopoly by a vote to decertify or defection to raiding unions. Insofar as workers may be the victims of a union monopoly, this distinction would appear important, but the ultimate consumers of the product have no more ability to dismantle a monopolistic union than a monopolistic business, and in this sense the freedom of choice distinction is irrelevant.

During the House of Commons debate on the ill-fated *Competition Act*, numerous socio-political objections were raised about the collective bargaining exemption:

We think it high time in Canada that the government applied anti-combines laws to labour unions.<sup>175</sup>

One concern is that the bill exempts the labour organizations from being subject to the restraint of competition or combines legislation. Certainly, over the history of the 19th century, and the first part of this century, the labour unions, with the development of collective bargaining have managed to obtain for the men a fair recognition of their labour in the development of the country. Unfortunately, however, there have developed on the labour scene conditions that are far from market place conditions and which go a long way beyond what is normally the proper sphere of collective bargaining.<sup>176</sup>

What does it [the bill] do in respect of the situation in some labour unions? They must also be considered multinational corporations.<sup>177</sup>

---

<sup>175</sup> Ron Atkey, Can. H. of C. Debates (March 13, 1974) at 486.

<sup>176</sup> Don Blenkarn, *id.* at 521.

<sup>177</sup> Trevor Morgan, Can. H. of C. Debates (March 29, 1974) at 1002.



On September 20, 1973, Prime Minister Trudeau, in an interview with Anthony Westell of *The Toronto Star*, said the following:

We accept that big business and big unions are monopoly type powers that can be the cause of certain types of cost-push inflation . . . . I intend, as Prime Minister, to counter that type of monopoly. I would include eventually the monopoly of labour in some of the large unions. But as you will see from our bill, as you saw from the last one, we are dealing first with the monopoly of business because that is the more dangerous one . . . having dealt with that, if we are successful, we may also act in other laws to deal with the monopoly of labour.

The members of Parliament quoted and the Prime Minister, then, agree that the competition laws should be extended to cover unions, although the Prime Minister does not feel that the time is appropriate at the present. However, none of these proposals contain any analysis of the extent of the coverage, or whether such inclusion would be helpful in prohibiting anti-competitive union conduct, or the problems that arise because some labour relations legislation now expressly proscribes some union activities which were once condemned under conspiracy-in-restraint-of-trade doctrines.<sup>178</sup>

1. *Should the Issue be left to the Courts?*

In both Canada and the United States, the legislatures have been of little aid to the courts through the years in resolving the conflicting policies found in anti-combines and labour relations legislation. Even the Canadian Parliament's revision of the *Combines Investigation Act* to leave interpretation of the collective bargaining exemption to the courts to a great extent. Legislative intention has been expressed in the anti-combines and labour legislative enactments only to the degree that it is in the best interest of the country that neither field be subordinated to the other.

Many of the cases discussed above demonstrate the insuperable difficulties that a court faces when it attempts to formulate general principles governing trade union immunity from anti-combines legislation. Generalized principles are only applicable if the extreme solutions of barring union organization along product market lines, or exempting union activities entirely from anti-combines legislation are imposed. Decisions which attempt to reconcile the two policies necessarily resort to arbitrary judgments based on political realities, not on reasoned application of judicial standards. When judges are forced to make such decisions, a principal exercise of the judicial function is impossible. The boundaries of compromise between the two conflicting theories, therefore, must come from a clear legislative analysis of the political realities and needs involved.

2. *Proposals: Reform to be Contained in Anti-Combines Law or in Labour Relations Law?*

The legislative solutions which have been proposed can be divided into

---

<sup>178</sup> There may also be some constitutional problem in using the 'criminal law power' in combines legislation of the Federal Parliament to regulate labour unions, since labour relations have been held to be a matter falling within the powers of the Legislatures: *Toronto Electric Comm'ners v. Snider*, 1925 A.C. 396 (P.C.). See, also, Arthurs, *supra*, note 154 at 110-13.

two categories — those which favour the application of anti-combines legislation to unions, and those which propose amendments to the labour relations legislation to deal with the problem. Before considering these, it should be noted that the empirical data necessary to the formulation of any comprehensive legislative solution have not been gathered. There is no reliable information on the extent or economic importance of union efforts to lessen competition in the product market or to shelter employers from such competition. Careful factual inquiries must be undertaken before this issue can be dealt with otherwise than in an abstract, theoretical sense.

It has been said, in the American context, that it is no exaggeration to assert that whenever a change in the labour laws has been thought desirable, someone has suggested widening or narrowing the applicability of the *Sherman Act* to unions.<sup>179</sup> This tendency can be seen exhibited in the above-quoted comments from Canadian politicians on the proposed *Competition Act*. However, many observers have felt that the applicability of the anti-combines laws to labour unions would not effectively stop trade union activities that were limiting competition in the product market.

Two commentators, James Murray<sup>180</sup> and James Schlesinger,<sup>181</sup> have examined the manner in which anti-combines laws were applied to companies in the United States and have concluded that a similar method of application would not break up monopoly union power to any great extent. The courts have not used anti-combines laws to break up large corporations into smaller units, but to prevent new consolidations of power from taking place. Competition law emphasizes prosecutions based on predatory practices. Schlesinger has called such practices "surface signs"<sup>182</sup> indicative of cut-throat pressure and excessive competition. The monolithic monopolies have no need to engage in predatory practices and go unscathed. How would such an approach affect trade unions? Should anti-combines law be applied to them?

Initially, it should be noted that unions which impose the most uniform wage patterns upon competing employers and which seem to be in the best position to affect the amount of competition in the industry are usually found in two environments. The first group is found in the oligopolistic industries which display little competition in basic prices. The uniform prices in such industries may be the cause of wage uniformity, rather than *vice versa*. It is likely that the characteristics of the industry itself are what prevent competition. Allowing these oligopolistic companies to be large will of necessity result in large unions. Allowing industry-wide pricing policies encourages industry-wide bargaining by industry-wide unions.<sup>183</sup> Unless the courts are included to assume that the anti-combines laws were intended to break large corporations into smaller units, it is difficult to see how they could interpret them this way if applied to unions.

---

<sup>179</sup> *Supra*, note 12 at 15.

<sup>180</sup> *Supra*, note 19 at 279.

<sup>181</sup> *Market Realism v. Logical Absolutes in Labor Reform* (1962), 48 Va. Law Rev. 58.

<sup>182</sup> *Id.* at 73-74.

<sup>183</sup> Murray, *supra*, note 19 at 188.

The second environment where one finds unions with the ability to affect product market competition is in industries that are characterized by intense competition. Where competition is strong, it is difficult to establish industry-wide bargaining simply because of the existence of non-union firms. Unions in such industries find it necessary to make use of methods which unions in oligopolistic industries would find unnecessary. A good example of this is the *Pennington* case.<sup>184</sup> The UMW, situated in a highly competitive industry where entry was easy, was continually placed on the edge of excessive rivalry. Whether the mine workers' market power was greater than or equal to that of unions in the oligopolistic sectors was not examined. Instead, by concentrating on predatory practices, the anti-combines law was used to prosecute a union which was operating in a market in which the dangers of inadequate rivalry were lessened, "since predatory practices are but a sign that the strength and cohesion of the inter-firm organization is not overly impressive".<sup>185</sup> Yet the anti-combines laws leave untouched the better-hidden sources of union power which help to make competition inadequate in a number of industrial markets. In Schlesinger's conclusion, the present anti-combines law, if applied to unions, would forfeit their ultimate *desideratum* which is the attainment of the right balance between organization and competition. The current interpretation of anti-combines laws, if applied to trade unions would weaken market power where more was needed and ignore it when excessive.<sup>186</sup>

Murray argues that historically anti-combines laws were very effective in limiting the growth and effectiveness of organized labour during the early part of this century, when its main thrust was to organize the unorganized sectors. If an historical analysis is any indication of the effects that anti-combines laws would have if applied to unions today, it would seem that such laws would be most effective in preventing new groups from being organized.

A new union among migrant workers could probably be hurt badly by the anti-trust laws as once interpreted. Large, well-established and wealthy unions would find the laws much less troublesome. This could force the unorganized workers to rely excessively on existing unions to organize them and might tend to perpetuate and increase the power of existing unions rather than decrease it.<sup>187</sup>

Another practical problem which Murray points out is how to determine that a union has a monopoly on labour. If the percentage of workers in an industry were the criterion, (presuming that a definition of an 'industry' could be agreed upon), almost all of the craft unions would probably be in violation of the anti-combines laws because they represent 80-90 per cent of all the craftsmen in each trade. The largest national union in the United States, however, the Teamsters, would remain unscathed because of its diverse membership.

One further practical problem occurs in that many activities that would likely be prohibited if anti-combines legislation were applied to trade unions organizational strikes, secondary boycotts, and the like — have already been

---

<sup>184</sup> *Supra*, note 96.

<sup>185</sup> Schlesinger, *supra*, note 181 at 24.

<sup>186</sup> *Id.* at 74.

<sup>187</sup> *Supra*, note 19 at 288.

proscribed by the labour relations statutes. The labour relations statutes already impose an extensive regulatory framework on collective bargaining activities. If the anti-combines laws were added to this body of regulatory laws, there would be a great deal of overlapping, duplication, and confusion.

As a result of these problems, both Winter<sup>188</sup> and Stephen Frank<sup>189</sup> have suggested that any additional legislation used to quell direct commercial restraint imposed by union activity should not be contained in an anti-combines statute but in amendments to the labour relations statutes. It is not obvious that this is an inescapable conclusion to be drawn from the above-mentioned problems. Many of the problems discussed with respect to the anti-combines legislation relate not only to its possible application to trade unions but also to its present application to companies. Perhaps an examination of how to amend the legislation to include trade unions would result in a more comprehensive and much-needed reform of the anti-combines laws as they apply to companies, to ensure that larger units are broken up rather than sole attention being directed towards amalgamation or increased power.

However, regardless of which legislative approach is to be preferred, the legislatures should direct their attention to the issue. There needs to be a determination of the extent to which unions are actually abusing their present immunity status and consideration of the methods of resolving the problem without impairing the structures of collective bargaining.

---

<sup>188</sup> *Supra*, note 12.

<sup>189</sup> *The Myth of the Conflict Between Anti-Trust Law and Labor Law in the Application of Anti-Trust Law to Union Activity* (1964), 69 Dick. Law Rev. 1.