"The Mother of Combines": Representations of the United States in Early Canadian Discourse on the Combines Problem and the Formation of Canadian National Identity

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Abstract

In 1887, Canada was in a fervour over so-called "combines," a term used to cover price-fixing schemes, pool agreements, trusts, and other cartel arrangements. The public debate led to the passage in 1889 of the *Anti-Combines Act*, the world's first modern competition statute, enacted a year prior to the United States' *Sherman Antitrust Act*. But while Canada acted before its neighbour to the south, the United States was omnipresent in the Canadian debates in four ways: as a benchmark against which the Canadian economy and the combines problem should be judged; as a model for potential legal action; as a potential economic liberator; and as the very source and propagator of the combines problem. Canadians thus alternately presented the United States as saviour or devil, as paragon or antithesis. The result was a paradox of a sort: Canadians borrowed American ideas in order to avoid becoming American.

Keywords: Legal history, Canadian history, anti-combines act, competition law, Canadian views of United States

Résumé

En 1887, les soi-disant « coalitions », un terme utilisé pour désigner les systèmes de fixation des prix, les accords de mise en commun, les fiducies et les autres ententes, était un sujet de débat proéminent au Canada. Le débat public a d'ailleurs conduit à l'adoption, en 1889, de l'*Acte à l'effet de prévenir et supprimer les coalitions formées pour gêner le commerce*, la première loi moderne sur la concurrence au monde, promulguée un an avant a Loi Sherman (également appelé Sherman Anti-Trust)

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aux États-Unis. Or, bien que le Canada ait agi avant son voisin du sud, les États-Unis ont été omniprésents dans les débats canadiens sur le sujet, et ce, de quatre manières : 1) comme le point de repère par rapport auquel l'économie canadienne et le problème des coalitions devraient être jugés ; 2) comme modèle pour une action juridique potentielle; 3) en tant que libérateur économique potentiel; 4) et comme la source du problème des coalitions. Les Canadiens ont ainsi tour à tour présenté les États-Unis comme un sauveur ou un antagoniste, comme un parangon ou un miroir noir. Le résultat est en quelque sorte un paradoxe : les Canadiens ont emprunté des idées américaines pour éviter de devenir Américains.

Mots clés: Histoire du droit, histoire du Canada, loi anti-concurrence, droit de la concurrence, perceptions canadiennes des États-Unis

In late 1887, Canada was swept up in a fervour over the impact and scope of so-called "combines," a blanket term used to cover price-fixing schemes, pool agreements, trusts, and other cartel and monopoly arrangements. The public debate that ensued ultimately led to the passage in May 1889 of the world's first modern competition statute, *An Act for the Prevention and Suppression of Combinations Formed in Restraint of Trade*—better known at the *Anti-Combines Act* or sometimes the *Wallace Act* after its sponsor, Nathaniel Clarke Wallace.[1] The *Act* came almost exactly a year prior to the United States' more famous *Sherman Antitrust Act*.[2] But while in this case Canada acted before its neighbour to the south, the United States remained omnipresent in public and parliamentary discourse on the combines problem. Canadian legislators, businessmen, and journalists[3] made constant reference to the United States, the American economy, the treatment of combines under American law, and proposed American solutions to the combines problem.[4] Though it would be a mistake to say that the Canadian discourse surrounding combines was wholly derivative of that going on south of the border, the shadow of the United States remained ever-present in the Canadian debates.

This article will explore the manner in which and extent to which the United States was present in and influenced Canadian legal discourse on the combines

1 *An Act for the Prevention and Suppression of Combinations Formed in Restraint of Trade* SC 1889 c 41.

2 *Sherman Antitrust Act* 26 Stat 209 (1890) (codified as amended at 15 USC § 1-7).

3 This article focuses on these actors (and on the popular and political rhetoric surrounding the *Anti-Combines Act* more broadly) because they were the voices that dominated within the legal bodies (primarily the Parliament of Canada) that considered the combines problem. By contrast, academic discourse was largely absent from the debates. While the views of lawyers, judges, and other legal actors played a critical role in the shifting interpretation of the common law restraint of trade doctrine, which formed the basis of both the *Anti-Combines Act* and the American *Sherman Antitrust Act*, I have discussed this shifting legal discourse at length elsewhere. See C. P. Hoffman, "A Reappraisal of the Canadian *Anti-Combines Act* of 1889" *Queen's Law Journal* 39, no. 1 (2013): 127.

4 While the United Kingdom was referenced throughout the legislative debates, it never became a central focus in the same way that the United States did. This was in large part due to the fact that Free Trade and *laissez-faire* ideologies held much greater sway over British law and policy, leading to a system that was far less concerned with the regulation of combines and cartels. See Tony Freyer, *Regulating Big Business: Antitrust in Great Britain and America, 1880–1990* (New York: Cambridge University Press, 1992), 20–21, 46; Michael J. Trebilcock, *The Common Law of Restraint of Trade: A Legal and Economic Analysis* (Toronto: Carswell, 1986), at 15–16. Without British debates or reforms to point to, Canadian attention became focused far more on what was happening south of the border than across the Atlantic.

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problem, and what this discourse reveals about Canadian national identity. While much of this discourse took place in the Canadian Parliament, this article treats Parliament and its members as legal actors engaged in a fundamentally legal act. As such, this article approaches the *Anti-Combines Act* from the perspective of legal, rather than political, history. Part I will outline the background to the combines debate and the events leading up to the passage of the *Anti-Combines Act*, including the ongoing debates about trade reciprocity with the United States. Part II will then explore the four major ways in which Canadian politicians, businessmen, and journalists referred to the United States during the combines debates: first, as a benchmark against which Canadian businesses could be judged; second, as a model for potential legal action; third, as a potential economic liberator through the power of free trade; and, fourth, as the ultimate source and propagator of the combines problem.

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

In 1887, when the combines debate began in earnest, Canada was going through the latest salvo in a years-long dispute over the structure of the Canadian economy and its level of integration with the United States. The overarching question was whether to maintain the National Policy of steep tariffs or instead seek some form of free trade with the United States. While the question had been percolating since Sir John A. Macdonald's return to power in the 1878 election, it rose to a fever pitch in 1887–1888, was briefly replaced by questions of national and sectarian identity from 1888 to 1890, and then reached its apex during the 1891 election, which Macdonald's Conservatives won after framing the opposition Liberals as traitors intent on annexing Canada to the United States.

Because the combines problem arose in the context of the extended debate on trade policy, the two issues were from the beginning intertwined in Canadian public discourse, and both issues were likewise intermingled with questions of Canadian national identity and Canada's place in North America. Thus, before turning to the rise of the "combines problem" within Canada and the parliamentary response culminating in the *Anti-Combines Act* of 1889, I will begin with a brief history of the National Policy and its alternatives.

1. The National Policy and the Unrestricted Reciprocity Debate

The National Policy was a system of high tariffs designed to promote the development of Canadian industry while simultaneously providing funding for the infrastructural investments necessary to settle Canada's western provinces and territories.[5] Introduced in 1879, it became "the single most important political issue in the country," into the first decade of the twentieth century.[6] According to

[5] See Vernon Clifford Fowke, *The National Policy and the Wheat Economy* (Toronto: University of Toronto Press, 1957), at 64.

[6] Michael Bliss, *A Living Profit: Studies in the Social History of Canadian Business, 1883–1911* (Toronto: McClelland and Stewart, 1974), 12 [Bliss, *A Living Profit*]. Christopher Pennington was slightly more circumspect, stating, "In late nineteenth-century Canadian politics there were really only two subjects of life-or-death importance: the trade question, and the race-and-religion

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Edward Porritt in 1917, "In the thirty-five years from 1879 to 1914, and in particular from 1879 to 1897, there was no phrase in political discussion in Canada in more frequent use than the phrase, 'the National Policy of the Dominion.'"[7] Indeed, it was so omnipresent in Canadian political discourse that it was often referred simply as "the NP."[8]

From its introduction by Macdonald's Conservative government, the opposition Liberals had been staunchly opposed to the NP. While Liberal critiques had little traction in the NP's early years—whether because it was difficult to run against the patriotic-sounding "National Policy"[9] or because it initially worked to increase Canadian investment and development[10]—that changed in the mid-1880s as the Long Depression devastated the economy. From 1883 to 1890, over one thousand businesses failed every year, including seven banks.[11] The country also experienced significant emigration to the United States, which was, in the words of Michael Bliss, "a basic sign of national failure."[12] The situation was perhaps worst in the West: a combination of falling land prices (a speculative bubble burst in 1883), high tariffs on both sides of the Canadian–American border, and monopoly freight rates on the new Canadian Pacific Railway defeated Canadian dreams of quickly settling the Prairies.[13]

In this economic and political climate, "Macdonald should have lost the 1887 election."[14] Macdonald and the Conservatives survived in large part because of the weakness of the Liberal Opposition under Edward Blake, who offered no alternative to the National Policy, had offended many Protestants in Ontario with his support of Louis Riel during the 1885 rebellion, and, on top of that, was a poor campaigner. When he stepped down in 1887, Blake made what might be his most lasting contribution to Canadian politics: he personally selected his successor, future Prime Minister Wilfrid Laurier.[15]

Though seen by many within the party as an interim leader who would serve only until someone more suitable could be found, Laurier recognized the need for new policies to offer reasons for Canadians to vote for Liberals over the incumbent Conservatives. At the same time, Canadian expatriate millionaire Erastus Wiman began a massive campaign in both Canada and the United States for so-called "commercial union" between the two countries—in essence, a customs union with common external tariffs and limited internal trade barriers. Commercial union proved a step too far for Laurier, who recognized it could open Liberals up to claims

question." Christopher Pennington, *The Destiny of Canada: Macdonald, Laurier, and the Election of 1891* (Toronto: Allen Lane Canada, 2011) (ebook version), at Part I, Chapter 1.

7 Edward Porritt, "Canada's National Policy" Political Science Quarterly 32, no. 2 (1917):177.

8 Desmond Morton, *A Short History of Canada*, 6th ed. (Toronto: McClelland & Stewart, 2006) (ebook version), at Part II, Chapter 3.

9 Pennington, *supra* note 6, at Part I, Chapter 1.

10 See Carman D. Baggaley, "Tariffs, Combines and Politics: The Beginning of Canadian Competition Policy, 1888–1900," in *Historical Perspectives on Canadian Competition Policy,* ed. R. S. Khemani and W. T. Stanbury (Halifax: Institute for Research on Public Policy, 1991), 1 at 3–5.

11 *Ibid* 4.

12 Bliss, *A Living Profit, supra* note 6, 102; see also Baggaley, *supra* note 10, 4.

13 See Morton, *supra* note 8, Part II, Chapter 3; Pennington, *supra* note 6, Part I, Chapter 3.

14 Morton, *supra* note 8, Part II, Chapter 4.

15 *Ibid*; Pennington, *supra* note 6, Part I, Chapter 2.

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that they were laying the grounds for annexation to the United States; instead, when the 1888 parliamentary session began, Laurier's Liberals endorsed a scheme of "unrestricted reciprocity" (or "UR"), whereby trade barriers between Canada and the United States would be eliminated, but each state would continue to set its own external tariff.[16]

"The Great Free Trade Debate" that ensued dominated the 1888 parliamentary session. Beginning on March 14, the Commons debated the issue for a full three weeks, to the point where "newspapers on both sides called for an end to the debate on the grounds of excessive boredom."[17] In the end, the Liberals' motion in favour of unrestricted reciprocity failed by 67 to 124,[18] but the proceedings set the stage for an extended debate that would only be resolved in the 1891 election.[19]

2. *The Rise of the Combines Problem*

While the debates on trade policy were ongoing, the so-called "combines problem" percolated up into Canadian public consciousness, before exploding in late 1887. Combines had, to some extent, always existed in Canada. As elsewhere, local producers, distributors, and retailers had, from an early date entered into informal agreements setting the prices to be charged for products and the terms of service to be offered. More formal agreements on a broader scale came later, beginning with the short-lived Ottawa Lumber Association in 1836. In the ensuing decades, combines would appear in industry after industry, typically following declines in price caused by overproduction, increased competition from the United States, or economic depressions.[20] The Canadian Salt Association, formed among the salt producers of Goderich, Ontario, is a prime example—faced with inexpensive imports from the United States and increasing costs because of the need to replace expensive equipment, the salt manufacturers of Goderich, Ontario, agreed in 1871 to appoint a joint sales agent that would sell their salt at a uniform price.[21] Though the agreement quickly broke down, it resulted in the first—and most famous—Canadian judicial case centred on the combines question, in which Strong VC refused to enjoin the agreement as an unreasonable restraint of trade.[22]

The number and scope of Canadian combines increased dramatically in the 1880s, however. Strong economic growth and the protection offered by the National Policy encouraged over-investment in industries seen as particularly profitable; the resurgence of the Long Depression in 1883 resulted in a collapse in demand and a corresponding collapse in prices. The situation was made worse by improvements in transportation and communications infrastructure; businesses

16 Pennington, *supra* note 6, Part I, Chapter 3.
17 *Ibid.*
18 *Journals of the House of Commons of the Dominion of Canada*, 6th parl., 2d sess., vol. 22 (7 April 1888) at 161–64.
19 See, generally Pennington, *supra* note 6.
20 Forster, *supra* note 11, 110.
21 See W. E. 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," *McGill Law Journal* 38, no. 3 (1993): 517.
22 *Ontario Salt v Merchants Salt* (1871), 18 Gr Ont Ch 540.

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that once had local monopolies found themselves undercut by competitors in distant cities that could sell via catalogue and ship via rail.[23] In some instances, the increased labour unrest also contributed to the decision to combine, in order to collectively crush upstart unions before they gained a foothold in the industry.[24] In this environment, the incentives to combine to fix prices and terms of sale were overwhelming.

Initially, Canadians showed little interest in the combines problem—to the point that papers reported on combine activity as if it were regular business news[25]—until the issue broke into public consciousness in mid-1887 with revelations of a cartel formed by the Dominion Wholesale Grocers' Guild to fix the wholesale price of granulated sugar. The combine scheme was composed of three related provisions: first, it established a uniform wholesale price that Guild members were to charge for sugar; second, it prohibited Guild members from themselves engaging in retail sales; and third, it pressured sugar refiners (through threat of a coordinated boycott by Guild members) to charge a premium to non-members.[26]

Although initial reports on the sugar combine were brief and did little more than report the agreement as business news,[27] it quickly gained further attention for three reasons. First, the combine dealt with a commodity purchased and used by all Canadian households. Second, the means by which the combine was enforced were relatively novel, at least in Canada. While price-fixing agreements were known,[28] this was the first vertical hub-and-spoke conspiracy between manufacturers and wholesalers to gain public attention. Third, the story neatly fit the existing Liberal critique of the National Policy, as it seemed a perfect example of a domestic industry taking advantage of high tariffs to overcharge Canadians for a necessity.[29] Unsurprisingly, the sugar combine became a cause célèbre within a matter of weeks, and reports of other combines quickly followed.[30] One particularly shocking revelation—that coal merchant Elias Rogers had been instrumental in a combine to fix the price of anthracite coal in Toronto—appears to have changed the outcome of the Toronto mayoral election in January 1888, which Rogers had been expected to win. The combine was discovered and revealed by a Conservative backbencher

[23] See Baggaley, *supra* note 10, 8.
[24] See, e.g., *Schrader v Lillis* (1886), 10 OR 358; see also Eric Tucker, "The Faces of Coercion: The Legal Regulation of Labor Conflict in Ontario, 1880–1889," *Law and History Review* 12, no. 2 (1994):277.
[25] See Baggaley, *supra* note 10 at 9; see also Bliss, *A Living Profit, supra* note 6, 33–54.
[26] House of Commons, "Report of the Select Committee," in *Journals of the House of Commons*, 6th parl., 2d sess., vol. 22 (16 May 1888) Appendix 3, 3–5 ["Select Committee Report"].
[27] See, e.g., "News from Montreal: Grocers' Combinations," *The [Toronto] Globe,* 6 July 1887, 1.
[28] See, e.g., Code, *supra* note 21.
[29] Indeed, the *Globe*'s first editorial on sugar combine began by tying it to the National Policy. See "Sugar Refiners' and Grocers' Combination," *The [Toronto] Globe,* 23 July 1887, 8.
[30] See, e.g., "News from Montreal: Alleged Contractors' 'Combine,'" *The [Toronto] Globe,* 15 July 1887, 1; "News from Montreal: That 'Combine,'" *The [Toronto] Globe,* 16 July 1887, 1 (reporting bid-rigging scheme for road construction contracts in Montreal; "A Corner in Salmon," *The [Toronto] Globe,* 23 July 1887, 8 (reporting combine in canned salmon); "Notes and Comments," *The [Toronto] Globe,* 27 July 1887, 4 (reporting on combine formed by American envelope makers); "Trusts," *The [Toronto] Globe,* 5 August 1887, 4 (blaming the "trusts" problem in United States on protectionist trade policy) "Combination to Plunder the Public," *The [Toronto] Globe,* 15 August 1887, 4 (reporting on combine among Canadian cotton mills).

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best known for his role as Grand Master of the Orange Order of British America: Nathaniel Clarke Wallace.[31]

While many things contributed to the furore over combines, three are worth mentioning. First, at a time when even the worst cartel agreements and attempts to monopolize were not criminal (though they might be unenforceable),[32] combines did little to keep their actions secret, making it quite easy for journalists to learn and report of conduct perceived as shocking.[33] Second, as the United States was also going through an extended debate on combines and trusts, journalists could readily reprint horror stories from south of the border.[34] Finally, Wallace's discovery and revelation of the Toronto coal combine led by mayoral candidate Elias Rogers seems to have led directly to Wallace's interest in the combines question, as well as to have shifted the political discourse around combines so that it was no longer defined wholly by the National Policy, thereby encouraging other Conservatives to engage in the debate.

3. *The Common Law Restraint of Trade Doctrine in 1888–1889*

Before proceeding to parliamentary consideration of the combines problem, however, it is worth briefly laying out both why the combines problem was not sufficiently addressed under the common law restraint of trade doctrine and why legislators in both Canada and the United States would nonetheless use it as the basis for legislative solutions.

Prior to the House of Lords' judgments in *Mogul Steamship v McGregor, Gow & Co* (1892)[35] and *Nordenfelt v Maxim Nordenfelt Guns & Ammunition* (1894),[36] the restraint of trade doctrine under British (and thus Canadian) common law was still largely defined by *Mitchel v. Reynolds*, decided by the Queen's Bench in 1711.[37] Under *Mitchel* and its progeny, courts applied a three-part test: to be valid, a restraint (1) must be particular, or partial (that is, limited to a specific geographic place), rather than "general" (without geographic limits); (2) must be reasonable; and (3) must be given for lawful consideration, even if the promise was made under

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31 See Andrew Thomson, *The Sentinel and Orange and Protestant Advocate, 1877–1896: An Orange View of Canada* (MA Thesis, Wilfrid Laurier University Department of History, 1983) [unpublished], 57; Christopher Armstrong and H. V. Nelles, *The Revenge of the Methodist Bicycle Company: Sunday Streetcars and Municipal Reform in Toronto, 1888–1897* (Toronto: P Martin, 1977), 15; Baggaley, *supra* note 10, 10; Michael Bliss, "Another Anti-Trust Tradition: Canadian Anti-Combines Policy, 1889–1910" *Business History Review* 47, no. 2 (1973):178 [Bliss, "Another Anti-Trust Tradition"]; Brian P. Clark, "Wallace, Nathaniel Clarke," *Dictionary of Canadian Biography*, vol. 13 (University of Toronto/Université Laval, 1994), online: Dictionary of Canadian Biography Online http://www.biographi.ca/en/bio/wallace_nathaniel_clarke_13E.html. See also Testimony of Elias Rogers (17 March 1888), in "Select Committee Report," *supra* note 26, 147.

32 See Hoffman, *supra* note 3.

33 Interestingly, while the conduct may have been seen as shocking to journalists and to the broader public, it was in many instances widespread within the specific business community. Indeed, much of the conflict in early competition law is centered on public attempts to override practices such as price fixing that had been normalized within business communities with the expectations of the broader populace. This mismatch between business practices and the public perception of those practices deserves greater attention in the future.

34 See *infra* Part II.4.

35 *Mogul Steamship v McGregor, Gow & Co* [1892] AC 25 (HL).

36 *Nordenfelt v Maxim Nordenfelt Guns & Ammunition* [1894] AC 535 (HL).

37 *Mitchel v Reynolds* (1711), 10 Mod 130, 88 ER 660 (QB).

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seal.[38] Under *Mitchel*, all general restraints of trade were unenforceable, as they encouraged monopoly, but partial restraints limited to a particular place did not raise the same risk "if done fairly, and upon a good and lawful consideration, and with no [ill] intention."[39]

For partial restraints of trade, validity hinged on whether the restriction was reasonable. In *Horner v Graves,* Tindal, CJ, of the Court of Common Pleas laid out a standard that would be used throughout the nineteenth century and was endorsed by the Judicial Committee of the Privy Council in *Collins v Locke* in 1879:[40]

> [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 eye of the law, unreasonable. Whatever is injurious to the interests of the public is void, on the grounds of public policy.[41]

The default rule was that contracts in partial restraint of trade were presumed unreasonable until proven otherwise,[42] but it was generally quite easy to prove reasonableness under the *Horner* standard. Indeed, by the late nineteenth century, courts and treatise writers had moved strongly in favour of findings of reasonableness.[43] Ancillary agreements would generally be sustained as reasonable, barring exceptional circumstances. Combine agreements, however, were more likely to be found unreasonable.

In an earlier article, I surveyed nineteenth-century "combines-type" restraint of trade cases decided by courts in Canada, England, and Wales, or by the Judicial Committee of the Privy Council, finding thirteen such cases—four arising out of Canada, eight out of England and Wales, and one out of an appeal from the colony of Victoria to the Judicial Committee of the Privy Council.[44] Of these cases, five (38%) were found to be unreasonable or partially unreasonable restraints of trade, although only one of the Canadian combines (25%) was found to be unreasonable. Of the four most recent combines cases prior to 1888, however, all but one (75%) were found unreasonable, including the Judicial Committee of the Privy Council decision in *Collins v Locke*[45] and *Mineral Water Bottle Exchange & Trade*

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

39 *Mitchel, supra* note 37 at 133.

40 *Collins v Locke* [1879] 4 AC 674 at 686 (PC).

41 *Horner v Graves* (1831), 7 Bing 735 at 743, 131 ER 284 at 287 (CP).

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

43 See, e.g., Joseph Chitty, *A Treatise on the Law of Contracts, Not under Seal, and upon the Usual Defenses to Actions Thereon*, 12th ed., ed. J. M. Lely and Nevill Geary (London: Sweet & Maxwell, 1890), 682; 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: Stevens & Sons, 1885), 316–19.

44 Hoffman, *supra* note 3.

45 *Collins v Locke* [1879] 4 AC 674 at 686 (PC).

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Protection Society v Booth.[46] Based on this review of case law, I concluded that "the restraint of trade doctrine remained alive, if perhaps not vibrant, in 1889" and that "combines with severe potential impacts on commerce were invalidated with some regularity."[47]

And yet, the restraint of trade doctrine was also ill-suited to prevent the propagation of combines—at least, not without some additional teeth. Because the restraint of trade doctrine originated as a defence against the enforcement of an otherwise valid contract, it could only be raised by the parties themselves; there was no accepted means by which injured third parties could challenge combine agreements, such as through tort actions or criminal prosecutions. Indeed, nineteenth-century judges often distinguished between the questions of enforceability and criminality—that a combine agreement was unenforceable did not make entering into it criminal, nor did legislation barring indictment make an agreement enforceable.[48]

Despite these deficiencies, it is unsurprising that reformers in both Canada and the United States both turned to restraint of trade doctrine when constructing legislative solutions to the combines problem. As a doctrine that already addressed these issues and offered existing standards in judging between legal and illegal, restraint of trade offered a ready-made body of law that could simply be expanded into other types of legal actions, whether they be civil or criminal.

4. *The Wallace Select Committee and the* Anti-Combines Act

When the 1888 parliamentary session began in February, Wallace introduced a motion to create a 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."[49] Over the next two months, Wallace's Select Committee held twenty-six hearings, in which it heard evidence from sixty-three witnesses as to possible combines in sugar and groceries, anthracite coal, biscuits and confectionery, watch mechanisms and cases, barbed wire, binder twine, agricultural implements, stoves, oatmeal millers, egg, barley, fire underwriting, and coffins and undertaking, and on May 16, 1888, issued its report with over 700 pages of testimony and other evidence.[50] The report detailed the existence and scope of combines in practically all areas of investigation; only sales of barley and of agricultural implements were found to be free of combines.[51] Two days later, Wallace introduced a private member's bill that would, after amendment, become the *Anti-Combines Act*.[52]

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46 *Mineral Water Bottle Exchange & Trade Protection Society v Booth* [1887] 36 CD 465.

47 Hoffman, *supra* note 3, 157.

48 See, e.g., *Hilton v Eckersley* (1855), 6 E & B 47, 119 ER 781 (Ex Ch) at 784–785 (QB) (Crompton, J). See also Tucker, *supra* note 24, 282.

49 *House of Commons Debates*, 6th parl., 2d sess., vol. 25 (29 February 1888), 28 (Nathaniel Clarke Wallace).

50 "Select Committee Report," *supra* note 26, 3.

51 *Ibid*, 7.

52 *House of Commons Debates*, 6th parl., 2d sess., vol. 26 (18 May 1888), 1545 (Nathaniel Clarke Wallace). The full text of Wallace's initial draft bill, which was not published in the official Hansard, is available in "The following is the text of the act for the suppression of combines introduced by

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Due to the lateness of the parliamentary calendar, no action was taken during the 1888 session. At the first opportunity, Wallace reintroduced the bill during the 1889 session of Parliament.[53] Although second reading of Wallace's bill was initially scheduled for the next day (February 7, 1889), it did not occur until early April.[54] The reasons for the delay are unclear, but Wallace himself likely had some role, as at the time of second reading, he moved to replace his initial bill with an amended version.[55] The bill was then referred to the Committee on Banking and Commerce, where "large deputations" representing Canada's business community appeared to attack the bill.[56] Wallace later accused the Liberal Opposition of trying to kill his bill in committee: "[T]hey came down before the Banking and Commerce Committee at its last meeting with a great array of lawyers from Montreal and Toronto, and with amendments carefully considered, to legislate this Bill out of existence."[57] Unfortunately, the records of the Banking Committee hearings have not survived.

Wallace's bill, on the other hand, did survive the committee process and, indeed, came out stronger in at least one respect: when third reading occurred on April 22, 1889, the bill had gained the full support of the Government and was shepherded through the Commons by Minister of Justice (and later Prime Minister) John Sparrow David Thompson.[58] At this point, debate centred not on whether anti-combines legislation was necessary, but on whether Wallace's bill would do anything to combat the alleged evil.[59] In the end, however, the bill passed the Commons unanimously and was referred to the Senate, where it faced more substantial opposition from senators who believed the bill inadequately defined what conduct was prohibited, putting legitimate business behaviour at risk.[60] The Senate passed the bill only after further amendments reintroducing the terms "unduly" and "unreasonably" earlier deleted by Wallace.[61] After a short debate

Mr. Clarke Wallace," *The Canadian Journal of Commerce, Finance and Insurance Review* (15 June 1888): 1152.

53 *House of Commons Debates*, 6th parl., 3d sess., vol. 27 (6 February 1889), 19 (Nathaniel Clark Wallace).

54 See *House of Commons Debates*, 6th parl., 3d sess., vol. 28 (8 April 1889), 1117.

55 The bill was not printed at second reading, making it unclear what changes were introduced at this point by Wallace versus later by the Committee on Banking and Commerce. See Baggaley, *supra* note 10, 25. It is likely, however, that Wallace's revised bill amended Section 1 to replace the qualifying language of "unduly" and "unreasonably" with "unlawfully," increased fines to $4,000 for individuals and $10,000 for corporations, and deleted the provision in Section 2 that would have permitted the revocation of corporate charters.

56 See *House of Commons Debates*, 6th parl., 3d sess., vol. 28 (22 April 1889), 1446 (George Guillet).

57 *House of Commons Debates*, 6th parl., 3d sess., vol. 28 (22 April 1889), 1440 (Nathaniel Clarke Wallace).

58 See *House of Commons Debates*, 6th parl., 3d sess., vol. 28 (22 April 1889), 1437 (John Sparrow David Thompson).

59 See, e.g., *House of Commons Debates*, 6th parl., 3d sess., vol. 28 (22 April 1889), 1439 (Louis Henry Davies); *ibid,* 1437–38 (David Mills); *ibid,* 1438 (James David Edgar); *ibid,* 1439 (John Sparrow David Thompson); *ibid,* 1441 (William Mulock).

60 See, e.g., *Senate Debates*, 6th parl., 3d sess. (26 April 1889), 622 (John Macdonald); *Senate Debates*, 6th parl., 3d sess. (29 April 1889), 635 (Francis Clemow); *ibid,* 641 (Jedediah Slason Carvell); *ibid,* 639 (John Joseph Caldwell Abbott).

61 *Senate Debates*, 6th parl., 3d sess. (29 April 1889), 654. The bill passed over five objections, but many of the senators who expressed reticence about the bill during the debates appear not to have been present for the final vote, which occurred after the evening recess.

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as to whether the Senate amendments had fatally undermined the bill, Wallace—and the Commons—accepted the revised bill as a tentative first step to resolving the combines problem.[62]

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 misdemeanor 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.[63]

At the time of final passage, however, Wallace reserved the right to revisit the matter in the future: "if after the experience of a year it should be proved that further amendments are necessary and that it is desirable to restore the Bill to its original shape, then that should be done."[64] Indeed, during the 1890s, Wallace and his allies repeatedly attempted to do just that, but each effort failed upon reaching the Senate.[65] While the *Anti-Combines Act* ultimately proved a failure, that had far more to do with subsequent judicial decisions in the United Kingdom than with bad faith on Wallace's part or a conspiracy by the Conservative government.[66]

II. The United States in the Combines Debates of 1888-1889

Having briefly explained the background to the combines debates, I turn now to how the shadow of the United States influenced the rhetoric used by both

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62 *House of Commons Debates*, 6th parl., 2d sess., vol. 28 (30 April 1889), 1691.
63 SC 1889 c 41 s 1.
64 *House of Commons Debates*, 6th parl., 2d sess., vol. 28 (30 April 1889), 1689 (Nathaniel Clarke Wallace).
65 See Baggaley, *supra* note 10 at 32–34.
66 For a detailed review at the state of restraint of trade law at the time the *Act* was passed and of the various critiques of the law, see Hoffman, *supra* note 3.

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proponents and opponents of Wallace's bill. I will look in turn at how the United States was used (1) as a benchmark against which the Canadian economy could be judged, (2) as a model for potential legal action, (3) as an economic liberator through the power of free trade, and (4) as the ultimate source and propagator of the combines problem.

1. The United States as Benchmark

Least surprisingly, Canadian politicians, businessmen, and journalists repeatedly referenced the United States as a benchmark for the Canadian economy and for the proliferation of combines. That Canadians would look to the United States is unsurprising—it shared Canada's only land border, a common language with Canada's English-speaking community, Canada's common law heritage, had a currency set at parity, and Canadians had easy access to American periodicals and catalogues. And, at a time when north–south trade across the border was much greater than east–west trade between Canadian provinces,[67] Canadian business-people and consumers were acutely aware of economic conditions and prices south of the border. Much more than the United Kingdom, which was across the sea, had no tariffs of significance, and used a different currency, the United States was the natural comparison for economic matters in Canada, though references to the mother country remained relatively common.[68]

Most frequently, Canadians used the United States as a pricing benchmark, as there was an implicit assumption that if the Canadian price of goods was roughly equivalent to the price in the United States, then the price was "fair." In one notable example, the Wallace Select Committee concluded that a combine in the binder twine industry did not increase consumer prices, as "prices paid in Canada are no higher than in United States and Great Britain."[69] The Select Committee instead attributed higher prices to the increased cost of raw materials, particularly manilla, distribution of which had been monopolized by an American syndicate.[70] Similar cross-border price comparisons were made with other goods, including stoves,[71] anthracite coal,[72] and barley.[73]

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67 Indeed, in some cases, north-south Canadian-American trade displaced east-west trade even within the United States. American brewers, for instance, preferred to purchase Canadian barley rather than barley from the western states, which was not suited for making lager ales. See Testimony of George Taylor, MP (27 April 1888), in "Select Committee Report," *supra* note 26, 316.

68 See, e.g., "Select Committee Report," *supra* note 26, 8.

69 *Ibid.*

70 *Ibid.*

71 *Ibid,* 9 (noting that the price of stoves was generally comparable in the United States and Canada, with some styles cheaper in Canada).

72 Testimony of Thomas McConnell (5 April 1888), in "Select Committee Report," *supra* note 26, 208–209; Testimony of George F. Hartt (10 April 1888), in "Select Committee Report," *supra* note 26, 239 (comparing price of anthracite coal in Montreal to price in Toronto and in American cities, including Buffalo).

73 Testimony of George Taylor, MP (27 April 1888), in "Select Committee Report," *supra* note 26, 314 ("We always pay as much to the Canadian farmers as the Americans do to their farmers. I have been buying for 25 years and I do not know of any difference.").

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Divergence in prices between the United States and Canada, on the other hand, was used as evidence of combine activity. In the case of sweetened biscuits, for instance, Montreal retail grocer Walter Paul testified that "Prices here are from 25 to 50 per cent higher than in the United States," despite the fact that "we ought to be able to produce biscuits as cheap in Canada as in any other country in the world" because of similar raw material costs.[74] This, the Select Committee concluded, was the result of a combine amongst confectioners designed to maintain prices despite falling costs.[75]

Differential pricing policies in Canada and the United States were also seen as proof of a combine in the insurance industry. Throughout 1888, the *Canadian Manufacturer and Industrial World* ran a series of articles attacking the Canadian fire insurance industry for charging double premiums to insure buildings with gasoline stoves, when many of the same insurers offered coverage in the United States at normal cost.[76] The *Canadian Manufacturer* repeated its critique often enough that eventually a competing journal, *The Monetary Times and Trade Review* published an editorial mocking its obsession.[77] Obsessed or not, the *Canadian Manufacturer* was on to something; in its report, the Select Committee concluded that an insurance industry combine imposed a uniform schedule of rates on its members, resulting in higher prices "in nearly every instance" and rates that did not take into account the actual risks of the enterprise.[78] As in the case of biscuits, higher prices than those across the border were evidence of the malfeasance of Canadian combines.

Of course, cross-border uniformity of prices proved little, as transnational combines could be setting a single price, separate combines could have fixed the same price, or a wholly Canadian combine could have fixed prices at the American market price. But, given the relatively unsophisticated understanding of combines and cartel activity at the time compared with contemporary competition law scholarship, this was a point largely missed by Wallace, the Select Committee, and others. In the case of binder twine mentioned above, for instance, the Select Committee failed to consider that uniform prices in Canada, the United States, and the United Kingdom were the result of combine activity in all three nations, despite extensive testimony about an American combine. Indeed, the testimony of John Connor, a New Brunswick rope manufacturer, supports the conclusion that an American combine fixed the price of binder twine within the United States (but not the price for export), while a Canadian combine, protected by the National Policy tariff, separately fixed the price at a roughly similar rate.[79] As noted above, the Select

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74 Testimony of Walter Paul (18 April 1888), in "Select Committee Report," *supra* note 26, 131–32.
75 "Select Committee Report," *supra* note 26, 9.
76 See "Fire Underwriting and Gasoline Stoves," *The Canadian Manufacturer and Industrial World,* 6 April 1888, 220; "The Insurance Combine Against Gasoline Stoves," *The Canadian Manufacturer and Industrial World,* 1 June 1888, 371; "Editorial Notes," *The Canadian Manufacturer and Industrial World,* 1 June 1888, 372–73; "Insurance Reform," *The Canadian Manufacturer and Industrial World,* 5 October 1888, 234–35.
77 "Gasoline Stoves," *The Monetary Times and Trade Review,* 13 April 1888, 1272.
78 "Select Committee Report," *supra* note 26, 10.
79 See, e.g., Testimony of John Connor (22 March 1888), in "Select Committee Report," *supra* note 26, 345–52.

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Committee, however, attributed price increases not to the Canadian combine, but to an increase in raw material costs,[80] a dubious conclusion to say the least.

Regardless of whether comparing Canadian prices with those in the United States proved anything about combine activity, however, one thing is clear: Canadian politicians, businessmen, and journalists repeatedly used American prices as a benchmark and judged the existence and effects of Canadian combines on how prices compared with those on the other side of the border.

2. *The United States as a Model for Legal Action*

The United States also appeared in the combines debates as a potential model for legal action and legal reform. Though Canada ultimately acted before the United States in response to the combines problem, the contemporaneous nature of the debates in both states offered Canadian politicians, businessmen, and journalists a chance to look to what steps the United States had tentatively taken or had under consideration.

First, there is evidence that Canadians looked to American case law for guidance on the limits of acceptable conduct. George Lightbound, a wholesale grocer who protested the sugar combine, testified to the Select Committee that he had been advised by his solicitor of an American case holding a combine to be an illegal conspiracy, though he was uncertain of the particulars. Based on the decision, his solicitor advised that "all the parties to this [sugar combine], including the refiners, were open to indictment for conspiracy."[81] Lightbound did not pursue the matter, however, as "[m]ost of these gentlemen, although I differ from them in this matter, are my friends, and we do not want to bring the matter into the criminal courts if it can be avoided."[82] Although Canadian judges and lawyers of the late nineteenth century were moving increasingly away from citations to American law,[83] it is nonetheless likely that other attorneys would likewise have referenced American jurisprudence concerning combines due to the confused state of English and Canadian precedent.[84]

More immediate to the *Anti-Combines Act* itself, Canadians were also watching the ongoing debates in Congress and in the state legislatures about combines and trusts. Wallace himself closely followed American news on the issue, basing his initial draft of the *Anti-Combines Act* on a bill under consideration by the New York legislature.[85] The American legislative debates were also raised during the Select Committee's hearings. When asked how to remedy the effect of American combines in Canada, watch distributor Charles Stark responded that Parliament could criminalize combine activity within Canada, and that the United States was then considering its own legislation on the matter. "They are making a law now in the

[80] "Select Committee Report," *supra* note 26, 8.
[81] Testimony of George Lightbound (9 March 1888), in "Select Committee Report," *supra* note 26, 28.
[82] *Ibid.*
[83] See G. Blaine Baker, "The Reconstitution of Upper Canadian Legal Thought in the Late-Victorian Empire," *Law and History Review* 3, no. 2 (1985): 219–92.
[84] See Hoffman, *supra* note 3.
[85] Bliss, "Another Anti-Trust Tradition," 178.

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United States and they are enforcing that in different States. The thing has got to be such an abuse and nuisance that they are taking it up, and it is only a question of time when it will be general in the States that these things will be squashed."[86] Though Canada ultimately came to act first (beating the United States' *Sherman Antitrust Act* by a year and New York's *Donnelly Act* by a decade), the prospect of American legislative action gave inspiration to Wallace and other proponents of a Canadian response to the combines problem.

Wallace and his fellow Conservatives may not have been the only ones to borrow ideas from the United States, however. As the combines/trusts issue rose in American consciousness in 1887–1888, American Democrats—like Canadian Liberals—tried to tie the problem to the nation's high tariff wall. In January 1888, Republican Senator John Sherman proposed a then novel solution in a reply to a speech by Democratic President Grover Cleveland. According to Sherman, "When such combinations to prevent a reduction of price by fair competition exist I agree that they may and ought to be met by a reduction of duty." Sherman repeated similar sentiments over the following months, going so far as to suggest that it might be appropriate to adjust the tariff on sugar in response to the "dangerous" Sugar Trust.[87] Sherman remained a staunch protectionist, however, making it difficult to determine whether he genuinely believed it appropriate to reduce the tariff temporarily to combat the effects of combines or whether he simply raised the issue in order to shift discourse away from free trade.

During the 1888 Canadian debates on the *Anti-Combines Act*, the Liberal Opposition proposed an almost identical solution: permitting the Governor-in-Council to reduce or eliminate the tariff on goods found to be subject to combines. Although there is no direct evidence that the Liberals were inspired by Sherman, the timing makes it highly likely. Unlike Sherman, however, the Liberals were genuinely opposed to high tariffs, and in 1897, the Wilfrid Laurier government enacted the tariff reduction proposal into law, though it proved unsatisfactory, as it had no effect on combines in local markets (e.g., those among retailers and wholesalers) and did not discriminate in its effects between combining and non-combining firms.[88]

It is not wholly surprising that both Conservatives and Liberals were willing to look to the United States for a potential solution to the combines problem. After all, the two nations shared a common legal heritage, and both were then caught up in nearly identical debates on the role of combines and trusts in their respective economies. More importantly, because the combines question was not prominent in British discourse until much later,[89] Canadians were largely unable to look to the United Kingdom for a solution. If Canadians hoped to find some international precedent, they would have to look to the United States.

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86 Testimony of Charles Stark (9 March 1888), in "Select Committee Report," *supra* note 26, 328.
87 "John Sherman's Opportunity," *The New York Times,* 20 August 1888.
88 Bliss, "Another Anti-Trust Tradition," 183.
89 See Freyer, *Regulating Big Business: Antitrust in Great Britain and America, supra* note 4, 4.

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3. *The United States as Economic Liberator through Free Trade*

Given the Liberal Opposition's focus on trade reciprocity with the United States during the period in which the combines problem first arose, it is unsurprising that the United States also appeared in political discourse as a potential economic liberator. For Liberals intent on dismantling the National Policy tariffs, the solution to the combines problem was not Canadian-specific legislation, which they believed would have little (if any) effect, but instead was opening the border to free trade with the United States.[90]

From the very beginning, the Liberal Opposition tied the combines problem to the National Policy. Sir James David Edgar, the first Liberal to speak after Wallace moved for the creation of the Select Committee, argued "that the only real remedy for combines which are protected by a high tariff, is to reduce the duty," though he did admit that other remedies might be necessary for "some combines which are affected by the tariff."[91] Liberal MP James Frederick Lister was more clear: Wallace and other Conservatives could not "condemn the combine and at the same time attempt to sustain the so-called National Policy or high tariff policy of this Administration," since combines were "the natural and inevitable outcome of a high protective tariff."[92] Though Liberal MPs may not always have referred to the United States by name, given their simultaneous push for trade reciprocity, it is impossible to interpret the repeated references to reducing tariffs or repealing the National Policy in any other light.[93]

Similar ideas also appeared in the testimony before the Select Committee. J. A. Matthewson, a wholesale grocer who protested the Dominion Wholesale Grocers' Guild's sugar combine, testified that he attempted to purchase sugar from the United States, but it was impossible because of the high tariff. "We were practically told: 'You cannot get that from the United States, because our friends the refiners have a tariff in their favor,' knowing that we had got hold of the idea that sugars could not be got from other countries."[94] Likewise, *The Globe* reported on August 25, 1887, that American sugar could be purchased in England for less than half the price prevailing in Canada and called for a reduction in the tariff, though the editorialist despaired that any action was unlikely, as "the people have three times endorsed [the National Policy] at the polls," such that "to purchase foreign refined sugar is a crime not to be named among 'patriots,' and one that must be suppressed at all hazards."[95] The United States offered hope of escape from the worst Canadian combines.

In the meantime, the Liberal Opposition in the House of Commons appear to have realized that the combines problem could serve as a stalking horse for their

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90 See Bliss, "Another Anti-Trust Tradition," 182.

91 *House of Commons Debates*, 6th parl., 2d sess., vol. 25 (29 February 1888), 31 (James David Edgar).

92 *House of Commons Debates*, 6th parl., 2d sess., vol. 25 (29 February 1888), 31 (James Frederick Lister).

93 See, e.g., Testimony of J. A. Matthewson (9 March 1888), in "Select Committee Report," *supra* note 26, 31 (noting that Canada had incurred "the ill-will of our neighbors [the United States] most decidedly by levying a tariff which largely meant them.").

94 *Ibid.*

95 "The 'Undervaluation' Screw to Be Turned," *The [Toronto] Globe,* 25 August 1887, 4.

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broader goal of repealing the National Policy tariffs. But while any repeal bill was doomed to failure due to the Conservative majority, Liberals pressed a compromise proposal, whereby the Governor-General-in-Council could reduce the tariff on goods subject to combines, as noted above. The failure of the Liberals' article-specific remedy illustrates the chief flaw in their approach to resolving the combines problem: free trade with the United States could only mitigate the effects of Canadian combines where the relevant market was larger than Canada. Where markets were local, regional, or even national—as was the case especially in the wholesale distribution and retail sale of goods—free trade could do little to remedy the effects of combines. It made little difference, for instance, if American refiners sold granulated sugar for less than Canadian refiners if higher consumer prices were the result of a combine among wholesale grocers. While some Liberals (such as Sir James David Edgar) recognized that trade reciprocity with the United States was not a universal panacea,[96] they offered no alternative policy.

Two other factors made free trade with the United States an unlikely solution to the Canadian combines problem, despite Liberal rhetoric. First, the political situation in the United States made any agreement unlikely. Although the Democratic administration of Grover Cleveland made repeated attempts to step back from the protectionist policies of his Republican predecessors, Republicans in the Senate were able to block most of his efforts, including the proposed Bayard-Chamberlain Treaty that would have resolved the long-festering Canadian–American fisheries dispute.[97] Indeed, the Liberal calls for unrestricted trade reciprocity with the United States coincided with a period of heightened American annexationist rhetoric. For instance, in mid-1888, Republican Senator John Sherman of Ohio, a former proponent of commercial union with Canada, came out against free trade with Canada on the grounds that it would hurt the cause of annexation. Instead, America's best interests were served by refusing trade deals with Canada in order to starve the nation into surrender.[98] Senator Sherman is, of course, most remembered now as the sponsor of the American *Sherman Antitrust Act* of 1890.

This brings us to the second factor making free trade with the United States an unlikely solution to the combines problem: the American economy was by no means free of the combines problem. While this point was largely lost on the Liberal Opposition, it was not missed by Wallace and other Conservatives.

4. The United States as "Mother of Combines"

In response to Liberal claims that the combines problem could be solved through free trade with the United States, Wallace and other Conservatives constructed a discourse that instead portrayed the American economy as dominated by combines and claimed that opening up the border would subject Canadians to something far worse than the status quo.

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[96] *House of Commons Debates*, 6th parl., 2d sess., vol. 25 (29 February 1888), 31 (James David Edgar).
[97] See Pennington, *supra* note 6, Part I, Chapter 5.
[98] See *ibid.*

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Although combines had existed in Canada for approximately two decades, they had not reached the sophistication or scale of those of their siblings in the United States. There was simply no Canadian equivalent of the large, centralized trusts such as Standard Oil that had come to dominate the American economy and the headlines.[99] This is borne out in the contemporaneous news reports. Though it would later take a more moderate stance,[100] in 1888 during the height of the combines fervour, the *Canadian Manufacturer* took a decidedly anti-combines stance, regularly reporting on the evils of combines on both sides of the border. The reporting reached a high point in the April 6, 1888, issue, which featured articles and editorial notes on nine combines—five in the United States, three in Canada, and one in Europe. But while the three Canadian combines were certainly troubling —the binder twine[101] and fire insurance combines[102] discussed above, as well as an agreement by the merchants of Granby, Quebec, to divide their lines of business[103]—they did not compare with the five American combines, which included a proposal under consideration by the American Stove Association to consolidate the industry into a trust[104] and the formation by the Western Paper Manufacturers' Association of a pool arrangement that allowed the Association to order the shutdown of some or all member mills.[105] These two American combines were unquestionably unenforceable restraints of trade under English and Canadian law because they deprived the parties of the ability to run their businesses according to their own best judgment;[106] the Canadian combines did not even begin to approach them in either their effects upon the public or their restrictions upon the combine members. The same holds true writ large—some features not uncommon in American combines, including the trust holding structure and the cession of control to a central entity, simply did not exist at all in Canadian combines.

Testimony before the Select Committee supports the more advanced state of American combines. According to several witnesses, Canadian combines were formed at the instigation or with the support of American cartels. Charles Stark, a watch seller and watch case manufacturer, accused an American combine of tying the sale of watch movements to the sale of watch cases, rendering his business worthless.[107] While John Jones, a Montreal wholesale jeweller, claimed the tying arrangement had been necessary to prevent the sale of "bogus" Swiss watches

[99] Bliss, "Another Anti-Trust Tradition," 186; Jamie Benidickson, "The Combines Problem in Canadian Legal Thought, 1867–1920" University of Toronto Law Journal 43, no. 4 (1993):799–850.

[100] The change in policy began in June 1888, when the *Canadian Manufacturer* distinguished between "combinations" and "monopolies," in which it endorsed legislation to protect against bad combines, but not blanket prohibitions on combines and trade associations. "Combinations Versus Monopoly," *The Canadian Manufacturer and Industrial World,* 1 June 1888, 371. See also "Editorial Notes," *The Canadian Manufacturer and Industrial World,* 1 June 1888, 373 ("The use of combinations for illegal purposes should be 'repressed,' but combinations—never.").

[101] "Editorial Notes," *The Canadian Manufacturer and Industrial World,* 6 April 1888, 229.

[102] "Fire Underwriting and Gasoline Stoves," *supra,* note 76, 220.

[103] "Editorial Notes," *The Canadian Manufacturer and Industrial World,* 6 April 1888, 226.

[104] *Ibid,* 228.

[105] *Ibid,* 229.

[106] See *Hilton v Eckersley* (1855), 6 El & Bl 47, 119 ER 781, (Ex Ch); see also Hoffman, *supra* note 3.

[107] Testimony of Charles Stark (9 March 1888), in "Select Committee Report," *supra* note 26, 326.

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"advertised and sold as genuine American watches,"[108] the real impetus was probably that Stark operated a catalogue business that was significantly undercutting the prices charged by retail jewellers.[109] Although the evidence points to this being a Canadian wholesalers' cartel enforced by American manufacturers, Stark nonetheless blamed the broader combines problem on the United States, since combines "are of recent growth and originated in the States."[110]

American influence can also be seen in the formation of the combine of Toronto coal dealers, operated through the Coal Section of the Toronto Board of Trade. Failed Toronto mayor candidate Elias Rogers claimed that the combine was created at the instigation of the American coal producers, who "insisted on our organizing and fixing prices."[111] But, Thomas McConnell, a rival coal merchant, testified that it had been Rogers himself who was behind the formation of the combine. According to McConnell, Rogers brought the American coal producers to Toronto and was instrumental in gaining their acquiescence in enforcing the Coal Section's pricing scheme. But, ironically, this did not make the combine any less American, as, McConnell further testified that Rogers "has been an American himself" and was also a member of the American coal combine.[112] Whether the decision to form a combine was made in Toronto or south of the border, the perception was that it was ultimately an American decision.

Conservatives also worried that American firms were engaged in predatory pricing (in the form of dumping) in order to destroy Canadian competitors in their infancy. In February 1888, for instance, Wallace cited an 1887 speech by Liberal MP James Frederick Lister in which Lister detailed the threat posed by Standard Oil. "We know perfectly well, as far as the United States is concerned, that the whole oil interest in the United States is practically controlled by the Standard Oil Company, and we know that they have been bringing oil into this country to sell at a less price than the cost of producing it, in order to get the control of this market."[113] Similarly, the New Brunswick rope manufacturer John Connor testified to the Select Committee that the American binding twine syndicate was "concentrating their efforts to kill the rival manufacturers and spread their product of low quality throughout Canada as well."[114]

The discourse of the United States as originator and propagator of combines reached a fever pitch in the 1888 parliamentary debates on trade reciprocity. Responding to Liberal claims that trade reciprocity would cure the combines problem, Conservatives argued instead that free trade would merely expose Canadian businesses and consumers to the far worse American combines. Conservative MP John Ferguson spoke most directly to Liberal proponents of unrestricted reciprocity when, on March 27, 1888, he said, "Why, … the 'promised land' of

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[108] Testimony of John H. Jones (9 March 1888), in "Select Committee Report," *supra* note 26, 332.
[109] Testimony of Charles Stark (9 March 1888), in "Select Committee Report," *supra* note 26, 330.
[110] *Ibid* at 331.
[111] Testimony of Elias Rogers (17 March 1888), in "Select Committee Report," *supra* note 26, 147–50.
[112] Testimony of Thomas McConnell (5 April 1888), in "Select Committee Report," *supra* note 26, 211.
[113] *House of Commons Debates*, 6th parl., 2d sess., vol. 25 (29 February 1888), 33 (Nathaniel Clarke Wallace) (quoting James Frederick Lister from 1887 debates).
[114] Testimony of John Connor (22 March 1888), in "Select Committee Report," *supra* note 26, 346.

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hon. gentlemen opposite is the mother of 'combines,' and it is well known that the combines regulate the whole trade of the country, and yet this is the country the hon. gentlemen invite us to go to."[115] These sentiments were repeated a week later by James Masson, representative for Grey North: "They tell us that we are cursed with combines, and they calmly propose to cast us helpless into the lap of the mother of combines."[116] Even when they did not use the "mother of combines" language, Conservative politicians portrayed the United States as utterly dominated by combines.

By the 1889 parliamentary session, both reciprocity and the combines problem had largely been replaced in the press, in the public mind, and on the legislative calendar by other issues, especially the Quebec *Jesuits' Estates Act*. Insofar as the issues were raised, however, Liberals continued to claim free trade was a better solution, and Conservatives continued to rebut with claims of the perfidy of American combines. On March 14, 1889, for instance, Conservative MP Josiah Wood claimed, "Every person knows that there is no country in the world to-day where combinations of capital exist on a more extended scale, or with more perfect organization, and with more extended and dangerous powers, than they do in the United States at the present time."[117] On April 8, 1889, George Guillet put the issue most colourfully, noting "What they say practically amounts to this: the jackals are abroad in this country, let us introduce a horde of American wolves to drive out the jackals. They say the hawks are carrying off the chickens and they would prevent that by permitting the American eagle and vulture to carry off our lambs."[118]

Although the issue was largely argued on partisan grounds, some Liberals did acknowledge and try to remedy the threat of American combines. During the debates on the *Anti-Combines Act* itself, Liberal MP James McMullen recognized targeted action was necessary:

> When we look at the history of the United States, and see the evils which have arisen there in connection with these combines, I think we will decide that it is high time that something should be done here to prevent the implanting of these evil and pernicious systems in Canada, which result in giving to those who are producers the advantage which should be obtained by the consuming public. …
>
> [T]he fact is that combines in that country have succeeded to such an extent that it seems as if everyone was interested in a combine. When those companies approach the legislatures, almost every man sitting in the House is either directly or indirectly interested in a combine, and consequently they cannot be reached.[119]

While McMullen did not directly adopt the rhetoric of the United States as "mother of combines," he and other Liberal supporters of anti-combine legislation recognized that free trade was itself not a universal palliative.

[115] *House of Commons Debates*, 6th parl., 2d sess., vol. 25 (27 March 1888), 459 (John Ferguson).
[116] *House of Commons Debates*, 6th parl., 2d sess., vol. 25 (4 April 1888), 543 (James Masson).
[117] *House of Commons Debates*, 6th parl., 3d sess., vol. 27 (14 March 1889), 627 (Josiah Wood).
[118] *House of Commons Debates*, 6th parl., 3d sess., vol. 28 (8 April 1889), 1115 (George Guillet).
[119] *House of Commons Debates*, 6th parl., 3d sess., vol. 28 (22 April 1889), 1441 (James McMullen).

Regardless of whether American combines were genuinely as bad as argued by Conservative MPs (though they probably were), the discourse of the United States as "mother of combines" demonstrated widespread Canadian discomfort with their neighbour to the south. American combines and trusts were genuinely problematic, but the vehemence of Conservative discourse suggests that something else was also at play—the United States represented what Canada could have been, but had chosen not to be.

III. Conclusion

References to the United States pervaded the Canadian anti-combines debates of 1887 to 1889. From the very beginning, the Liberal Opposition tied the existence of combines in Canada to the National Policy tariff and argued that opening up the border with the United States would prove fatal to the combines. On the other hand, Conservatives—buoyed by testimony before Wallace's Select Committee—argued that combines were much more advanced south of the border and implicated numerous American companies and American émigrés in the formation and propagation of combines in Canada. Though this debate was centrally over economic policy, it was not limited to it, and had serious implications for the evolving discourse of Canadian national identity. For the Conservatives under Sir John A. Macdonald, being Canadian meant resisting the influence of the United States in the economic sphere, as well as the political; for the Liberal Opposition, being Canadian meant something different, focused more on maintaining a British style of government or maintaining vague cultural ties to the mother country than on the level of economic integration with the United States. Though these conflicting conceptions of Canadian national identity would come to a head in the 1891 parliamentary election, the slow growth of the conflict can be seen clearly in the 1887 to 1889 combines debates in and out of Parliament.

Even as Conservatives portrayed the United States as "the mother of combines," however, they remained willing to look to American law for potential solutions to the combines problem. Given Liberal free trade rhetoric, it is unsurprising that they borrowed American ideas, especially when those ideas called for lowering the tariff. But Conservative rhetoric explicitly questioned any influence from the United States. Though some explanations could be theorized—American law was less threatening than American businesses, Canadians had to look somewhere for legal ideas since the United Kingdom had failed to act on the combines problem, or simply that Wallace's borrowing of a failed New York bill did not represent broader Conservative policy—the great paradox of the anti-combines debates remains: Canadians borrowed American ideas in order to avoid becoming American.

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