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VERTICALLY IMPOSED RESTRICTIONS IN THE GASOLINE INDUSTRY AT COMMON LAW

By MARK Q. CONNELLY*

A. INTRODUCTION

Cases involving exclusive dealing arrangements, known customarily as "solus agreements", tying gasoline service station operators to their suppliers, most frequently the large, integrated oil companies, have in the past few years sparked fresh exposition of the ancient common law doctrine of restraint of trade¹ by courts in the United Kingdom and Australia.² Recently the Ontario Court of Appeal has become the first Canadian appellate court

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¹ *Mitchel v. Reynolds* (1711), 1 P. Wms. 181 (K.B.) is the earliest leading case, although much earlier cases are cited in the reference works, for example, J. D. Heydon, *The Restraint of Trade Doctrine* (London: Butterworths, 1971) at 2-11; H. Blake, *Employee Agreements Not to Compete* (1960), 73 Harv. Law Rev. 625 at 631-32; W. L. Letwin, *The English Common Law Concerning Monopolies* (1954), 21 U. Chi. Law Rev. 355 at 373-75.

² *Esso Petroleum Co. Ltd v. Harper's Garage (Stourport) Ltd.*, [1968] A.C. 269; *Petrofina (Gt. Britain) Ltd. v. Martin*, [1966] Ch. 146 (C.A.); *Cleveland Petroleum Co. Ltd. v. Dartstone Ltd.*, [1969] 1 All E.R. 201 (C.A.); *Texaco Ltd. v. Mulberry Filling Station Ltd.*, [1972] 1 All E.R. 513 (Ch. Div.); *Amoco Australia Ltd. v. Rocca Bros. Motor Engineering Co. Ltd.* (1973), 1 A.L.R. 385 (High Ct.), *aff'd* [1975] 1 All E.R. 968 (P.C.). The *Esso* and *Petrofina* cases are the subject of a comparative comment: D. D. Prentice, *Solus Agreements: Two Recent Cases* (1967), 6 West. Ont. Law Rev. 170.

to consider these arrangements in the gasoline industry from the restraint of trade perspective;³ its approach appears to be more conservative, in effect more pro-oil company, than the approaches of the English and Australian appellate courts. In *Stephens v. Gulf Oil Canada Ltd.*,⁴ the Court of Appeal, reversing the trial court,⁵ held that the solus agreement before it, at least in the peculiar procedural context in which the case arose, was not subject to the restraint of trade doctrine and that, even if it were so subject, the agreement complied with both branches of the relevant test for the enforceability of such agreements: reasonableness with respect to the interests of the parties and with respect to the public interest.⁶

This paper examines exclusive dealing in the gasoline industry under a restraint of trade analysis. The *Stephens* case provides an appropriate focus for analysis since it is the only Canadian appellate decision on point, the exclusive dealing arrangement disclosed in it is not untypical, and the Court of Appeal's opinion presents squarely the questions both of applicability of the doctrine of restraint of trade and of the weight to be given to the interests of the respective parties and the public interest in determining enforceability.

The facts in *Stephens* were somewhat complicated. In 1956, defendant Palen secured a loan of \$43,000 from defendant Gulf in order to build a service station in the city of Ottawa on property owned by Palen. The loan agreement, dated November 8, 1956, provided that during its term Palen would deal continuously and exclusively in Gulf products; that Gulf would sell such products to Palen on specified terms; that the loan was for a period of ten years and that it could be paid off early without penalty, except that a balance of at least \$100 must remain outstanding until the end of the term;⁷ that the covenants were to run with the land; and that Palen would not dis-

³ An exclusive dealing agreement in the gasoline industry was considered, and upheld, under a restraint of trade analysis in 1956 by the Supreme Court of Newfoundland, Trial Division, in *Great Eastern Oil & Import Co. Ltd. v. Chafe*, 4 D.L.R. (2d) 310. Trial court judgments in two prior Ontario cases on solus agreements in the gasoline industry do mention restraint of trade briefly: *McCull Bros. Ltd. v. Avery* (1928), 34 O.W.N. 275; *British American Oil Co. Ltd. v. Hey*, [1941] O.W.N. 397. Two other such cases, ignoring restraint of trade completely, were decided solely on the law and equity of mortgages: *Re Clarke and Supertest Petroleum Corp.*, [1958] O.R. 474; 14 D.L.R. (2d) 454; *Re Moore and Texaco Canada Ltd.*, [1965] 2 O.R. 253; 50 D.L.R. (2d) 300.

⁴ Opinion of December 4, 1975, not yet reported; leave to appeal to Supreme Court of Canada denied, April, 1976.

⁵ (1974), 3 O.R. (2d) 241; 45 D.L.R. (3d) 161.

⁶ This constantly reiterated test was first enunciated by Lord Macnaghten in *Nordenfjelt v. Maxim Nordenfjelt Guns & Ammunition Co. Ltd.*, [1894] A.C. 535 at 565: It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable — reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same it is in no way injurious to the public.

Lord Macnaghten appears in turn to have derived this test from *Horner v. Graves* (1831), 7 Bing. 735; 131 E.R. 284.

⁷ The loan and mortgage were renewable for another ten years at the option of the company in the event that the final or "balloon" payment should not be forthcoming from Palen at the end of the first ten years.

pose of the land and improvements except (1) after giving Gulf a right to purchase them, at the price offered by a third party, for a period of 30 days after notice from Palen and (2) subject to all the covenants between Palen and Gulf, including Gulf's right of first refusal and the exclusive dealing. A mortgage, also dated November 8, 1956, and irredeemable for ten years, was given by Palen to Gulf and was duly registered. The mortgage incorporated the loan agreement by reference and recited that default under the agreement should constitute default under the mortgage. The mortgage instrument drew particular attention to the terms of the agreement relating to exclusive dealing and to Gulf's right of first refusal.

In 1960, Palen agreed to sell to the plaintiff, Stephens, who had been operating the repair shop on Palen's premises, that portion of the land and the building which corresponded to the repair shop. Gulf waived its right of first refusal over that portion of the land that was to be sold to Stephens, and the land and improvements were divided into two parts, one of which was conveyed by Palen to Stephens on November 15, 1960. On that date, and as part of the sale transaction, Gulf, Palen and Stephens entered into a tri-partite agreement which provided in clause 12 that if either Palen or Stephens should wish to sell his portion of the premises, he should first offer it to the other at a price set in the clause. Clause 3 recited that "the purchaser [Stephens] covenants and agrees that this agreement is subject to the terms and conditions of" the 1956 loan agreement between Palen and Gulf and to the mortgage from Palen to Gulf. Finally, clause 13 of the 1960 agreement provided, perhaps redundantly in light of clause 3, that

[I]n consideration of the Company waiving its right of first refusal . . . the purchaser . . . specifically covenants and agrees with the Company, that the said purchase shall be subject to the terms and conditions of the [1956] agreement for loan . . . including the right of first refusal therein contained, which shall continue against the purchaser . . . and further covenants and agrees with the Company that no petroleum products except those obtained from the Company will be . . . sold or dealt in on or about the purchaser's premises

In 1966, Palen, without offering his portion of the land and buildings to Stephens, sold them to Gulf at a price greatly in excess of the price that Stephens would have had to pay under clause 12 of the 1960 agreement.⁸

Eventually, Stephens commenced an action against Palen and Gulf for specific performance of Stephens' right of first refusal or for damages. As against Palen, the cause of action was for breach of contract, and as against Gulf, although the pleadings were apparently no model of clarity on this point,⁹ the cause of action may be taken to have been the tort of in-

⁸ As the Court of Appeal noted, *supra*, note 4 at 64-65, Palen and Gulf, by negotiating directly for the sale to Gulf, did not comply literally with the terms of the 1956 agreement, which merely gave Gulf a right of first refusal to purchase the property at whatever *bona fide* price might be offered by a third party. However, Stephens was not damaged by this technical failure, for the most that he could have demanded was that the property be offered to him at the price specified in clause 12 of the 1960 agreement. Palen would then have taken Stephens' offer to Gulf, and the company would certainly have exercised its pre-emptive right since the price specified in clause 12, the price that Gulf would have been obligated to meet, was only about one half the price that Gulf actually paid.

⁹ See the judgment of the trial court, *supra*, note 5 at 282-84; 202-04.

ducing breach of contract. Notwithstanding the language in the 1960 tripartite agreement concerning the survival intact of all Gulf's rights under the 1956 agreement, Stephens argued that, as a matter of contract interpretation, his right of first refusal as against Palen was superior to that of Gulf. Both courts rejected this claim¹⁰ and so had to consider the merits of plaintiff's second contention: that Gulf's right of first refusal over the purchase of Palen's land was part of a package of restrictive arrangements in favour of Gulf — of which the most notable part was the exclusive dealing — which were in restraint of trade and unenforceable.¹¹ If Gulf's rights were unenforceable, then Palen would be without a defence for failure to observe that clause in the 1960 agreement establishing rights of first refusal between himself and Stephens, and Gulf might be liable for the tort of inducing breach of contract.

The trial court, focussing upon the 1956 agreement, from which Gulf's rights against Palen arose, held that the agreement was indeed a covenant in restraint of trade¹² and that it was not reasonable as between the parties because it was both more than adequate to protect Gulf's legitimately protectable interests and quite onerous in its operation against Palen.¹³ In accordance with the testimony of plaintiff's expert witness, the trial court also held the agreement not to be reasonable in the public interest, on the theory that such exclusive dealing arrangements, which are commonplace in the gasoline industry, erect barriers to entry into oil refining and related industries by closing off retail outlets to new producers.¹⁴ As for remedies, the trial court found specific performance to be barred by laches, assessed damages against Palen for breach of contract and found Gulf not liable for inducing breach of contract.¹⁵

Stephens appealed against Gulf and Palen appealed against Stephens; the Court of Appeal dismissed Stephens' appeal and allowed Palen's. The court held that since the plaintiff in the action was Stephens, and since Palen had not shown any dissatisfaction with the arrangements, the agreement to be considered for purposes of application of the doctrine of restraint of trade was that of 1960 and only insofar as it restrained the trade of Stephens.

¹⁰ Court of Appeal, *supra*, note 4 at 12-13; trial court, unreported opinion at 15-39 (the reported version of the trial court judgment omits that portion dealing with contract interpretation; see 3 O.R. (2d) at 243-44; 45 D.L.R. (3d) at 163-64).

¹¹ Even if the 'package' of agreements were found to be in restraint of trade and unenforceable, it is conceivable that the right of first refusal in favour of the company standing alone would not be infirm and that it would be severable from the rest of the restrictions. This possibility was not discussed by the trial court, and the Court of Appeal, because of its disposition of the restraint of trade issue, did not have to deal with it. In any case, it may be doubted that the various parts of the package of restraints upon Palen's freedom to trade contained in clause 6 of the 1956 agreement were sufficiently independent of one another to permit severance. See *Attwood v. Lamont*, [1920] 3 K.B. 571.

¹² 3 O.R. (2d) at 266; 45 D.L.R. (3d) at 186.

¹³ *Id.* at 267-70; 187-90.

¹⁴ *Id.* at 279-81; 199-201.

¹⁵ *Id.* at 282-90; 202-10.

Relying on the case of *Cleveland Petroleum Co. Ltd. v. Dartstone Ltd.*¹⁶ and on *dicta* of certain of the Lords in *Esso Petroleum Co. Ltd. v. Harper's Garage (Stourport) Ltd.*,¹⁷ to the effect that a person purchasing land with notice that his ability to trade on it will be subject to certain restrictions may not avail himself of the doctrine of restraint of trade to escape those restrictions, the court held restraint of trade doctrine not to be applicable to the facts before it.¹⁸ Even if the restraint of trade doctrine were found to be applicable to the three party agreement, the Court of Appeal was satisfied that Gulf had discharged its burden of showing the agreement reasonable as between itself and Stephens.¹⁹ Dealers in the position of Stephens gain certain advantages from their arrangements with Gulf such as: aid in financing their stock, use of Gulf credit cards by their customers, and Gulf's assistance in improving their businesses.²⁰ Gulf, on the other hand, has a protectable interest in the security of its loan that was used by Palen in constructing the premises, part of which had been purchased by Stephens.²¹ As for the public interest aspect of the *Nordenfjelt* test,²² the only public interest that the Court of Appeal was able to identify was "the right of men to trade freely, subject to reasonable restraints which are in keeping with the contemporary organization of trade".²³ The court found the agreement in question not to be inconsistent with the public interest as defined.²⁴

B. THE SCOPE OF THE DOCTRINE OF RESTRAINT OF TRADE

1. *Application Generally*

In *Petrofina (Gt. Britain) Ltd. v. Martin*, Diplock, L.J. gave the most widely cited modern definition of the doctrine of restraint of trade: "A contract in restraint of trade is one in which a party (the covenantor) agrees with any other party (the covenantee) to restrict his liberty in the future to carry on trade with other persons not parties to the contract in such manner as he chooses".²⁵

The doctrine's reach appears to have been extended irrevocably beyond the three traditional categories: post-employment restrictions,²⁶ restrictions

¹⁶ *Supra*, note 2.

¹⁷ *Supra*, note 2.

¹⁸ *Supra*, note 4 at 28.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 29-32.

²² *Supra*, note 6.

²³ *Supra*, note 4 at 38.

²⁴ *Id.*

²⁵ *Supra*, note 2 at 180.

²⁶ *Herbert Morris Ltd. v. Saxelby*, [1916] 1 A.C. 688 (H.L.); *Maguire v. Northland Drug Co.*, [1935] 3 D.L.R. 521; [1935] S.C.R. 412; *American Building Maintenance Co., Ltd. v. Shandley* (1966), 58 D.L.R. (2d) 525 (B.C. C.A.); *T.S. Taylor Machinery Co., Ltd. v. Biggar* (1969), 2 D.L.R. (3d) 281 (Man. C.A.). To come within the doctrine, the restrictions must operate after the term of employment: *Warner Bros. Pictures Inc. v. Nelson*, [1937] 1 K.B. 209; compare, *Eastham v. Newcastle United Football Club Ltd.*, [1964] 1 Ch. 413 at 429; but see, *A. Schroeder Music Publishing Co. Ltd. v. Macauley*, [1974] 3 All E.R. 616 (restrictions operated during the term, but characterization of arrangement as 'employment' doubtful).

upon the seller of a business,²⁷ and horizontal agreements among competitors to limit their competition,²⁸ to various types of exclusive dealing arrangements between suppliers and their customers and requirements contracts between producers and suppliers of raw materials to those producers. Even before the recent gasoline cases,²⁹ the doctrine had been found applicable by the English courts in cases, for example, where a restaurant proprietor agreed to take all of his requirements of wine from a certain producer;³⁰ where dairy farmers were obligated to sell their entire output of milk to a co-operative creamery of which they were members;³¹ where hop growers were obligated to sell their output of hops to a certain marketing agency;³² and where an automobile dealer had contracted to purchase all of his requirements of gasoline from the filling station from which the dealer had purchased the land to erect the distributorship.³³ The High Court of Australia held the restraint of trade doctrine applicable to an agreement by a baker to take all of his requirements of flour from a certain miller,³⁴ and the House of Lords has held the doctrine applicable to the rules of a professional society seeking to limit the types of trade in which its members might engage.³⁵ In *Petrofina*, the Court of Appeal expressly declined to limit the applicability of the doctrine to situations where the covenantor is prohibited from trading, as opposed to situations where the manner of his trade is restricted.³⁶ In that case, the doctrine was held fully applicable to restrictions upon the covenantor's ability to trade on a particular piece of land,³⁷ and in the *Esso* case, restrictions upon trading recited in a mortgage of land were held not to be immune from the doctrine.³⁸

Although a vast proportion of every-day commercial contracts literally restrain one or both parties' liberty to trade with third parties, if only because by satisfying a need with one contract one is not likely to enter into another, English judges generally have not attempted to define the categories of contract to which the doctrine is and is not applicable. In *Pharmaceutical Society of Great Britain v. Dickson*, Lord Hodson said:

The issue which in practice, once restraint is found to exist, is litigated between

²⁷ *Nordenfelt*, *supra*, note 6.

²⁸ *Vancouver Malt and Sake Brewing Co. Ltd. v. Vancouver Breweries Ltd.*, [1934] A.C. 181 (P.C.).

²⁹ *Supra*, note 2.

³⁰ *Servais Bouchard v. Prince's Hall Restaurant Ltd.* (1904), 20 T.L.R. 574 (C.A.).

³¹ *McEllistram v. Ballymacelligott Co-operative Agricultural and Dairy Society Ltd.*, [1919] A.C. 548.

³² *English Hop Growers Ltd. v. Dering*, [1928] 2 K.B. 174 (C.A.).

³³ *Foley v. Classique Coaches Ltd.*, [1934] 2 K.B. 1 (C.A.).

³⁴ *Queensland Cooperative Milling Association Ltd. v. Pamag Ltd.* (1973), 47 A.L.J.R. 342 (High Ct.).

³⁵ *Pharmaceutical Society of Great Britain v. Dickson*, [1970] A.C. 403.

³⁶ *Supra*, note 2.

³⁷ *Id.*

³⁸ *Supra*, note 2. There is a paucity of Canadian judicial authority discussing restraint of trade outside the post-employment and sale of business situations, although in *General Films Ltd. v. McElroy*, [1939] 4 D.L.R. 543, the Saskatchewan Court of Appeal applied restraint of trade analysis to an exclusive dealing arrangement between a distributor and an exhibitor of films. The court upheld the agreement as reasonable.

the parties is not 'Is this the kind of case to which the doctrine applies?' but 'Is the restraint reasonable?' I do not find it possible to segregate any particular class of case so as to exclude it from the ambit of the doctrine although there are of course many cases where it is futile to raise it.³⁹

And in the *Petrofina* case Lord Denning stated that:

The categories of restraint of trade are not closed. As methods of trading change, so do the areas of restraint expand. The law, if it is to fulfill its purpose, must keep pace with them.⁴⁰

If courts are unwilling or unable to define the reach of the doctrine *a priori*, then at its borders, in those cases where, due to lack of historical precedent or for other reasons, the appropriateness of applying the restraint of trade doctrine appears doubtful, courts may be expected to declare the doctrine applicable and then simply to pass the agreements in question through a very wide sieve of "reasonableness".⁴¹

In recent cases, there have been at least three definitional attempts, none very successful in the writer's opinion, to identify certain classes of restrictive agreements as outside the coverage of the doctrine.

An example of the first attempt is contained in Lord Wilberforce's opinion in the *Esso* case, where he said that judges have not required a justification of reasonableness for such contracts "as, under contemporary conditions, may be found to have passed into the accepted and normal currency of commercial or contractual or conveyancing relations".⁴² Later in the opinion Lord Wilberforce characterized the solus agreement in the case as follows:

It is not a mere agreement for exclusive purchase of a commodity, though it contains this element: *if it were nothing more, there would be a strong case for treating it as a normal commercial agreement of an accepted type.*⁴³ (emphasis added)

That something more in the *Esso* case was the fixed and lengthy period of the tie and the restrictions concerning the terms upon which the filling station might be sold. In *Queensland Cooperative Milling Association Ltd. v. Pamag*

³⁹ *Supra*, note 35 at 431.

⁴⁰ *Supra*, note 2 at 169. In the *Esso* case, *supra*, note 2 at 298-99, Lord Reid said:

I would not attempt to define the dividing line between contracts which are and contracts which are not in restraint of trade, but in my view this contract must be held to be in restraint of trade.

Compare Mr. Justice Stewart's famous aphorism on the subject of hard-core pornography in *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964):

I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand definition; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it

⁴¹ Compare the opinion of Lord Morris in the *Esso* case, *supra*, note 2 at 306, concerning the coverage of the doctrine:

Nor do I think that any firm inference can be deduced from the circumstances that in respect of certain groups of cases no one has claimed that the doctrine applies or has sought to invoke it. That might be for the reason that there are some situations in which it would not be thought by anyone that the doctrine could successfully be invoked.

⁴² *Supra*, note 2 at 332-33.

⁴³ *Id.* at 337.

Ltd., wherein the defendant baker had agreed to purchase from plaintiff milling company all of his requirements of flour to be used at a certain bakery, Stephen, J. of the High Court of Australia (speaking only for himself on this point) stated that the case of "nothing more" than "a mere agreement for exclusive purchase of a commodity" was presented, and that the doctrine ought not apply.⁴⁴ Unlike the situation in the gasoline solus agreements, there was no restriction upon the types of goods that the baker might sell to its customers, and, assuming the fungibility of flour, the brand used would be a matter of complete indifference to the baker's customers.⁴⁵ The distinction Stephen, J. attempts to draw between the applicability of the restraint of trade doctrine to contracts restricting the products that the covenantor may sell (exclusive dealing contracts) and its non-applicability to contracts restricting the inputs that he may use in manufacturing what he sells (requirements contracts) does not seem compelling. For one thing, Diplock, L.J.'s definition of restraint of trade, focussing on restriction of the covenantor's liberty to trade with persons not parties to the contract, makes no distinction between the covenantor's trade with his customers and with his suppliers. Secondly, and more importantly, the covenantor may be equally impeded in carrying on his business as he sees fit and in assuring his competitive welfare whether he be limited in the products that he may sell or the inputs that he must purchase.

In *Queensland Milling*, Stephen, J. raised a second basis for exclusion of the restraint of trade doctrine, which he repeated in dissent in *Amoco Australia Pty. Ltd. v. Rocca Bros. Motor Engineering Co. Pty. Ltd.* Since the doctrine refers to limitations upon a person's liberty to trade, then, the Justice states, it ought not apply where the covenantor must accept a restriction in order to obtain some factor of production necessary to his trade. For example, in the *Queensland Milling* case, the baker, in order to open the new bakery, needed financing on terms more advantageous than could be obtained from banks.⁴⁶ The only source of suitable financing was the milling association.⁴⁷

⁴⁴ *Supra*, note 34 at 350-51.

⁴⁵ *Id.*

⁴⁶ *Id.* at 346-47.

⁴⁷ The United States Supreme Court, in construing s. 1 of the *Sherman Act* (conspiracies in restraint of trade) and s. 3 of the *Clayton Act* (prohibition against exclusive dealing in its various forms where the effect "may be to substantially lessen competition or to tend to create a monopoly"), has been particularly hostile to arrangements conditioning the availability of one product, the 'tying product', to the user's consumption of another, the 'tied product'. In *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969), the Court held, in a 5 to 4 decision, that the steel company's practice of causing a subsidiary corporation to extend land development loans on favourable terms to developers who would erect prefabricated homes manufactured by the steel company on each of the lots developed violated the *Sherman Act*. The dissenters objected that the result of the Court's holding might be anti-competitive, as outlawing what was in effect a form of price competition in the sale of the homes themselves.

In *United Shoe Machinery Co. of Canada v. Brunet*, [1909] A.C. 330, the Privy Council held restraint of trade analysis inapplicable to the company's practice of leasing its machinery exclusively under a condition that it should not be used in conjunction with machinery made by any other manufacturers, but the decision was criticized by Lord Reid in *Esso, supra*, note 2 at 297, and in light of more modern developments it is of doubtful validity.

In *Amoco*, there were no suppliers of gasoline other than the large oil companies, and apparently all of them insisted upon solus agreements as a condition to supplying their product.⁴⁸ Therefore, in accepting the restrictions in question, the baker and the service station operator, respectively, were not limiting any liberty to trade that they otherwise would have enjoyed, since neither would have been able to engage in his chosen trade at all without entering into such restrictions. In other words, while prior to entering into the contract in question each covenantor had a theoretical *liberty* to trade, neither had a practical *ability* to trade, and he only acquired such ability by virtue of the restrictive agreement. By applying the restraint of trade doctrine in such cases, so the argument goes, courts might actually impede freedom of trade since, for example, had the defendant baker not been able to open the new bakery with financing from the milling association, the milling association probably would have done so itself, thereby "adding to the already large number of mill-owned bakeries in the area".⁴⁹ Stephen, J. continued:

If such ties are to be subject to the doctrine, its effect may then be to encourage vertical integration in the industry, a strange result of this public policy in favour of the individual's freedom to trade⁵⁰

The difficulty with this line of reasoning is that it assumes its own result. That is, a particular restrictive agreement in a given industry may not be challenged as a restraint of trade if the dominant powers in the industry have been successful, through prior agreements not themselves challenged,⁵¹ in making the restraints general, so that no one can enter the industry without acceding to them. The reward for universal imposition of a restraint of trade is immunity from the doctrine.

The third line of reasoning that courts have used as a basis for exclusion of the doctrine, and the one employed by the Ontario Court of Appeal in *Stephens*, states that since restraint of trade implies a derogation from the covenantor's prior existing freedom to trade, therefore, where a person purchases or leases land on condition that he accede to a restrictive covenant relating to trading on the land, the restraint of trade doctrine cannot be applied to relieve him of the covenant. This ground for exclusion was first

⁴⁸ *Supra*, note 2 at 415-16.

⁴⁹ *Supra*, note 34 at 351.

⁵⁰ *Id.*, citing the dissent of Douglas, J. in *Standard Oil Co. of California v. United States*, 337 U.S. 293 at 315 (1949), the leading American case on the legality of exclusive dealing arrangements in the gasoline industry under s. 3 of the *Clayton Act*. Mr. Justice Douglas argued that the effect of outlawing such arrangements would be to encourage the oil companies to integrate vertically by merger, thus turning erstwhile small business proprietors into clerks. The strengthening of the anti-merger provision of the *Clayton Act* (section 7) by Congress the following year probably effectively drew the teeth from the Douglas dissent insofar as the United States is concerned.

⁵¹ If exclusive dealing arrangements were attacked on restraint of trade grounds early in the course of their appearance in an industry and were upheld, then their validity might be *stare decisis*.

stated in *dicta* of various of the Lords in the *Esso* case,⁵² and it was applied by the English Court of Appeal in *Cleveland Petroleum Co. Ltd. v. Dartstone Ltd.*⁵³ In *Stephens*, the Ontario Court of Appeal expressly adopted the *Esso dicta* and held the restraint of trade doctrine not to be applicable to the three party agreement since:

Stephens did not have any interest in Palen's property at the time when he entered into the Three-Party Agreement [and] the restrictions imposed upon him as a condition of being allowed to purchase part of Palen's property conformed with the covenants to which Palen's property was already subject.⁵⁴

The distinction between a person acceding to restraints upon his freedom to trade on land he already possesses, on the one hand, and acceding to restraints as a condition of gaining possession, on the other, is a correct literal construction of Lord Reid's statement in *Esso* that "[r]estraint of trade appears to imply that a man contracts to give up some freedom which otherwise he would have had".⁵⁵ Furthermore, this basis for exclusion of the doctrine is comprehensible in terms of courts' hesitancy to throw into doubt generally the validity of ordinary negative covenants on the use of land, bearing in mind, as Diplock, L.J. stated in the *Petrofina* case, that "English law has ever been tender to interests in land".⁵⁶ However, insofar as the restraint of trade doctrine overall seeks to further a public interest in a competitive economy, the distinction seems less than compelling.⁵⁷ And as far as fairness is concerned,⁵⁸ it is doubtful that it is any more intolerable to allow a man who has taken land subject to restraints to renege upon his agreement than to allow a man to renege on an agreement to which he voluntarily submitted concerning the use of land he already owned.

2. *May Stephens Raise Restraint of Trade?*

Whether or not one agrees with the distinction as a general matter, however, it is in reality a red herring in the *Stephens* case. The application of the

⁵² *Supra*, note 2 at 298 (Lord Reid), 309 (Lord Morris), 316-17 (Lord Hodson), and 325 (Lord Pearce). Lord Hodson said:

[T]he purchaser of land who promises not to deal with the land he buys in a particular way is not derogating from any right he has, but is acquiring a new right by virtue of his purchase . . . [O]n the other hand, if you subject yourself to restrictions as to the use to be made of your own land so that you can no longer do what you were doing before, you are restraining trade and there is no reason why the doctrine should not apply.

In laying out this basis for non-applicability of the doctrine, Lords Reid and Pearce appear to have had the limited purpose of rationalizing the consistent refusal of English courts in the nineteenth century to apply restraint of trade analysis to covenants whereby public houses were tied to particular brewers.

⁵³ *Supra*, note 2; criticized by Walsh, J. in *Amoco*, *supra*, note 2 at 397.

⁵⁴ *Supra*, note 4 at 26-27.

⁵⁵ *Supra*, note 2 at 298.

⁵⁶ *Supra*, note 2 at 187.

⁵⁷ See J. D. Heydon, *Recent Developments in Restraint of Trade* (1975), 21 McGill Law J. 325 at 330-31, where the author refers to the *Esso dicta* as a "questionable limitation on the doctrine [of restraint of trade]".

⁵⁸ Lord Pearce in *Esso* stated that it would be "intolerable" to allow a person who has taken land subject to a tie to repudiate the tie, *supra*, note 2 at 325.

Esso dicta by the Court of Appeal in *Stephens* appears to have resulted from syllogistic reasoning in the following form: An agreement in restraint of trade is unlawful only in the sense that it is unenforceable as between the parties to it.⁵⁹ Neither of the parties to the 1956 Agreement for Loan — Palen and Gulf — is complaining of it.⁶⁰ Therefore, Stephens must be raising restraint of trade in connection with the agreement to which he is a party, that of 1960.⁶¹ In that agreement, Stephens was a purchaser of land on which the right to trade had already been restrained, and, applying the *Esso dicta*, Stephens cannot raise restraint of trade.⁶²

With respect, the Court of Appeal appears to have misapprehended the theory of the plaintiff's action. The gravamen of the action is not Stephens' attempt to avoid the restraints upon his own freedom to trade to which he submitted in 1960. If it were, then the circumstances under which he submitted to such restraints might be of controlling importance. Rather, Stephens is suing Palen for breach of a contract by which Palen agreed not to sell his land without first offering it to Stephens, and he is suing Gulf for tortious interference with that contract. The alleged primacy of Palen's obligation to extend to Gulf the first right to purchase the land in question is a matter for Palen's and Gulf's respective defences, and Palen's obligations to Gulf have their origin not in the 1960 tri-partite agreement but in the 1956 agreement for loan. Stephens' claim is precisely the non-enforceability of an agreement in restraint of trade, but the agreement attacked is the one in 1956, and not the one in 1960. May Stephens make such a claim? In considering an answer, it may be helpful to distinguish Stephens' action as between the two defendants.

Insofar as the defendant Palen is concerned, Stephens is really not a party to the restraints which bound Palen and which Stephens seeks to characterize as in restraint of trade. In the famous case of *Mogul Steamship Company Ltd. v. McGregor, Gow & Co.*,⁶³ it was held that a non-party to an agreement in restraint of trade who suffers injury to his business as a result of the operation of the agreement does not have a cause of action for damages against the covenantors. In *Mogul Steamship*, the defendant ship owners conspired (successfully) to drive plaintiff ship owner out of the China tea trade by engaging in a concerted campaign of predatory pricing.

To do intentionally that which is calculated in the ordinary course of events to damage, and which does in fact damage, another in his trade is an actionable wrong if done without just cause or excuse. In *Mogul Steamship*, the Lords found just cause or excuse in the promotion of the defendants' own business interests. Indeed, a banding together by competitors for the purpose of driving a mutual competitor out of business, far from being subject to reproach, was regarded as the very lifeblood of England's greatness as a

⁵⁹ *Supra*, note 4 at 22-23.

⁶⁰ *Id.* at 26.

⁶¹ *Id.* at 25.

⁶² *Id.* at 26-28.

⁶³ [1892] A.C. 25.

commercial power.⁶⁴ The plaintiff next asserted that the action was maintainable because, even if the object of the conspirators were not unlawful, the means adopted, an agreement in restraint of trade, was unlawful. But, the Lords held, "unlawful", in the sense of a conspiracy to achieve a lawful end by unlawful methods, means "indictable". An agreement in restraint of trade is not indictable; it is unlawful only in the sense of being unenforceable as between the parties.

In essence, *Mogul Steamship* announced not a rule of standing for restraint of trade cases but a rule of substantive law: that a conspiracy among traders to injure a mutual competitor's trade by predatory pricing does not confer a cause of action in favour of the injured competitor. While on the one hand it continues to be true that agreements in restraint of trade are not criminal offences, on the other, to the extent the *Mogul Steamship* holding was dependent upon a rapturous assessment of the social utility of concerted predatory pricing, its continued vitality is open to doubt.

There is no absolute rule that a non-party may not complain of an agreement in restraint of trade. In *Eastham v. Newcastle United Football Club Ltd.*, Wilberforce, J. (as he then was) held that a professional football player could maintain an action for a declaratory judgement that the reserve rules of the league and of the football association were in restraint of trade, notwithstanding that the player's only contractual relationship was with his team and not with the league or the association.⁶⁵ Of course, the rules in *Eastham* were aimed to have their principal — and quite harsh — effect specifically upon persons in the position of the plaintiff, and there is perhaps no such precision of aim against Stephens in the agreement between Palen and Gulf.

Even if, however, *Mogul Steamship* were construed as a standing case, Stephens may be in a stronger position to complain of the restriction between Palen and Gulf than was the plaintiff in *Mogul Steamship* to complain of the agreement there, for Stephens has a contract with Palen, the enforceability of which rises or falls inversely as the enforceability of the contract allegedly in restraint of trade,⁶⁶ whereas in *Mogul Steamship*, the only nexus between the parties was the plaintiff's alleged injury. There may be some basis for a distinction between allowing a plaintiff to use a rule of law to create an action for himself and allowing him to use the rule to defeat a defence to his otherwise valid action.

⁶⁴ *Id.* at 50 (*per* Lord Morris). See also, Bowen, L.J. in the Court of Appeal, [1889] 23 Q.B.D. 598 at 615-18.

⁶⁵ *Supra*, note 26. See also *Nagle v. Feilden*, [1966] 2 Q.B. 633; *Buckley v. Tutty* (1971), 125 C.L.R. 353. In *Northern Messenger (Calgary) Ltd. v. Frost* (1966), 57 D.L.R. (2d) 456 at 463 (S.C. Alta.), defendant in an action for inducing breach of contract succeeded on a claim that certain of the clauses of the contract breach of which he induced were void as unreasonable under the doctrine of restraint of trade.

⁶⁶ This assumes, of course, that the mutual rights of first refusal as between Palen and Stephens do not themselves contain some independent infirmity. The Court of Appeal was of the view, *supra*, note 4 at 48-61, that Palen's right under clause 12 of the 1960 agreement to purchase Stephens' land at a fixed price was void as a "restraint on alienation" and that Stephens' corresponding right over Palen's land therefore could not stand. The court's theories on the law of real property are beyond the scope of this paper.

Stephens' standing to raise the restraint of trade issue against Gulf, in order to attempt to defeat the company's defence of justification for inducing breach of the contract between Palen and Stephens,⁶⁷ is more straightforward. The agreement for loan of 1956 provided that it was to enure to the benefit of, and be binding upon, all purchasers and grantees of Palen's lands and all persons claiming any interest therein through Palen.⁶⁸ Stephens is such a person. Furthermore, by their terms, clauses 3 and 13 of the 1960 tri-partite agreement made Stephens a party to the 1956 agreement for loan, to the terms and conditions of which Stephens expressly agreed to subject himself. As against Gulf, therefore, Stephens stands in the shoes of Palen under the 1956 agreement, and he should have all the rights and obligations of Palen, including the right to claim that the agreement was unenforceable, whether or not Palen himself chooses to make such a claim.

In summary, and without putting too fine a point on the various factors that would lead to a conclusion that Stephens has *locus standi*, this writer would agree with the trial judge that Stephens "has a sufficient interest in the subject matter of the agreement of 1956 . . . that he may properly raise its validity as an issue in these proceedings".⁶⁹

Having decided, however, that Stephens could not raise the doctrine of restraint of trade in respect of Palen's obligation to give Gulf a right of first refusal, the proper course for the Court of Appeal would have been to dismiss Stephens' action for that reason, rather than to misconstrue the theory of the litigation and to proceed as if Stephens were complaining of a restraint upon his own freedom to trade. What Stephens wanted was the land that Palen sold to Gulf — not a declaration that Stephens was free to trade in the goods of a producer other than Gulf.

C. APPLICATION OF THE *NORDENFELT* TEST

The Court of Appeal in *Stephens* was satisfied that even if the arrangements before it were susceptible to restraint of trade analysis, they were valid under Lord Macnaghten's test in *Nordenfelt*: "reasonable" with respect to both the private interests of the parties and the public interest.⁷⁰

Of course, the two aspects of the *Nordenfelt* analysis do not fit into mutually exclusive, water-tight compartments because, as the Court of Appeal noted in *Stephens*, the entire "doctrine of restraint of trade is founded upon

⁶⁷ Of course, the fact that Stephens could raise the restraint of trade issue does not necessarily mean that he would succeed as against Gulf. The trial court held that, notwithstanding that the 1956 agreement for loan was in restraint of trade and unenforceable, Gulf's *bona fide*, although mistaken, belief in the enforceability of its contract was a defence to the tort of inducing breach of the later contract, 3 O.R. (2d) at 289; 45 D.L.R. (3d) at 209. See generally, J. D. Heydon, *The Defense of Justification in Cases of Intentionally Caused Economic Loss* (1970), 20 U. of T. L.J. 139 at 161-71.

⁶⁸ *Supra*, note 4 at 25.

⁶⁹ Trial court, unreported opinion, at 41.

⁷⁰ *Supra*, note 6.

public policy".⁷¹ And not only is the doctrine generally an expression of public 'policy' (as indeed may be said of any common law doctrine) but, in applying it, the public and private 'interests' tend to run together. This is so for at least three reasons. First, it is in the interests both of the public and of the party restrained "that a man should be free to exercise his skill and experience to the best advantage for the benefit of himself and of all those who desire to employ him".⁷² That is, there is both a public and a private interest not only that a man be kept off the welfare rolls but that he make the maximum productive contribution to society of which he is capable. Secondly, there is both a private and a public interest that parties be compelled to abide by contracts freely made.⁷³ Thirdly, when weighing the private interests of the covenantee, it has been established, at least since the case of *Herbert Morris Ltd. v. Saxelby*,⁷⁴ that the court will make its own examination of what are those rights for which he may legitimately seek protection. It is consideration of the public interest that determines what is an interest of the covenantee which he has a right to have protected.⁷⁵

1. *Interests of the Parties*

As for the interests of the covenantee Gulf Oil Company that would justify the restraint of trade in *Stephens*, the Court of Appeal looked solely to the mortgage loan for \$43,000 made by Gulf to Palen in 1956 and to Gulf's interest in the security of that loan. The loan was for a period of ten years and therefore the court was satisfied that a tie for an equal period was no more than reasonable to protect Gulf's interest in repayment.⁷⁶ As for the fact that Gulf had required a provision whereby the mortgage could not be paid off in full before the expiry of the ten year term, the court said that "[t]he mere postponement of the right to redeem a mortgage is not in itself unreasonable".⁷⁷ That is a fair enough statement of the law of mortgages, but the Court of Appeal appears to have missed the evidentiary significance of the non-redeemability of the mortgage. One would not expect a lender whose chief concern was the security of his loan to prohibit repayment in full before the expiry of the term. The non-redeemable mortgage is simply an insufficient base upon which to erect Gulf's right to the

⁷¹ *Supra*, note 4 at 13. See also the opinions of Lord Parker in *A.G. Australia v. Adelaide Steamship Co. Ltd.*, [1913] A.C. 781 at 797 and Lord Wilberforce in *Esso v. Harper's Garage*, *supra*, note 2 at 340.

⁷² *Per* Lord Atkinson in *Herbert Morris Ltd. v. Saxelby*, *supra*, note 26 at 699; but see Lord Parker at 707-08 in the same case insisting on the complete separateness of the two aspects of the *Nordenfelt* test.

⁷³ *English Hop Growers Ltd. v. Dering*, *supra*, note 32 at 181. Taken by itself, in the restraint of trade context this principle would usually point to a result opposite from that indicated by the freedom-to-trade principle. Depending on the result one wishes to reach, one will put more or less weight on the word "freely" in the formulation. See discussion of equality of bargaining power, *infra*, text accompanying footnotes 152-54.

⁷⁴ *Supra*, note 26.

⁷⁵ *Per* Diplock, L.J. in *Petrolina (Gt. Britain) Ltd. v. Martin*, *supra*, note 2 at 182; see also, *Amoco v. Rocca Bros.*, *supra*, note 2 at 400.

⁷⁶ *Supra*, note 4 at 30-32.

⁷⁷ *Id.* at 31.

restraint of trade in question. To paraphrase the Privy Council in another restraint of trade case: it is a case not of a restrictive covenant in aid of a mortgage, but of a mortgage in aid of a restrictive covenant.⁷⁸

If the Court of Appeal's analysis of Gulf's interest in the mortgage was insufficient to sustain the court's favourable view of the arrangements, then there must be considered what other interests exist for which Gulf might legitimately seek protection in this type of contract.⁷⁹ Gulf is in the business of selling gasoline and other automotive products, and, in general, it is in the company's interest to sell as much of these products as possible at the best price it can obtain. Is that interest one which the company may seek to further by long term contracts tying its retail distributors to itself as sole supplier? This question has yet to be faced squarely by any court in a gasoline solus agreement case.

It has been held in many cases that one interest a covenantee may *not* seek to further by means of a contract in restraint of trade is protection against competition *per se*.⁸⁰ Where an oil company (or the producer of any product) seeks to ensure itself of a high sales volume by entering into long term exclusive dealing contracts with otherwise independent retailers, it would appear reasonable to construe the arrangement as an effort by the oil company to protect itself against competition *per se*. That is so because if the producing company were unable to tie retailers to it, then in order to sell gasoline it would have to engage in constant battle against other producers to convince retailers of the superior merits of its product, its better price, or its better terms of delivery or payment as compared with other possible sources of supply. The fact that the competitive pressure to find outlets is *lightened* by the practice of tying up retailers under long term contracts of course does not mean that competition among producers is *eliminated*. For even long term contracts do expire, and each producer must keep its product,⁸¹ prices and terms sufficiently attractive to sign up renewals and new retailers entering the business for the first time. Furthermore, no matter how many retailers (short of all or virtually all of them in a given geographic market) a particular oil company has tied to itself, the company won't sell much gasoline unless it remains competitive with the other oil companies in the important particulars. That is, if Company X, for example, charged its retailers a great deal more

⁷⁸ *Vancouver Malt and Sake Brewing Co. Ltd. v. Vancouver Breweries Ltd.*, *supra*, note 28 at 188.

⁷⁹ Of course, the burden would not be on a court to ferret out such interests, but on Gulf to show them, since the party asserting validity of a contract in restraint of trade has the burden of proving its reasonableness in respect of the parties' interests, *Herbert Morris Ltd. v. Saxelby*, *supra*, note 26. The reported opinions in *Stephens*, at trial and appellate levels, do not reveal that Gulf argued any interest other than the security of its loan for which it required protection.

⁸⁰ For example, *American Building Maintenance Co.*, *supra*, note 26; *Attwood v. Lamont*, *supra*, note 11; *Herbert Morris Ltd. v. Saxelby*, *supra*, note 26; *Maguire v. Northland Drug Co.*, *supra*, note 26; *Regent Oil Co. Ltd. v. J.T. Leavesley (Lichfield) Ltd.*, [1966] 2 All E.R. 454 (Ch. Div.); *Vancouver Malt*, *supra*, note 28; *McEllistrim's case*, *supra*, note 31.

⁸¹ We are speaking in general terms, ignoring the high degree of fungibility in the gasoline produced by the various oil companies.

for its gasoline than Companies Y and Z charged for theirs, it would not be long before X's retailers would lose their customers to the retailers of Y and Z,⁸² and, despite the existence of a binding contract, X's retailers would be forced to stop doing business with X. Nonetheless, it is asserted, exclusive dealing contracts lighten the competitive pressures for any particular covenantee-oil company, and, therefore, it is correct to characterize them as a means of protection against competition *per se*.

An examination of the cases, however, would indicate that the bald statement that "a covenantee in a contract in restraint of trade is not entitled to protection against competition *per se*" is not really a settled proposition. Many of the cases wherein such a statement has been made have involved post-employment restraints, which courts are particularly chary of enforcing.⁸³ In the sale of business cases, on the other hand, it is obvious that the covenantee-purchaser may well be entitled to protection from the competition of the seller.⁸⁴ For it is precisely that covenant by the seller not to compete — at least under his own name — that is the economic substance of a sale of "goodwill".⁸⁵ And in cases of the type represented by *Vancouver Malt*,⁸⁶ to say that the covenantee is not entitled to protection against competition *per se* is merely another way of stating that the court will not enforce naked, non-ancillary agreements not to compete made between erstwhile or potential competitors.⁸⁷ When exclusive dealing cases are examined, the record is seen to be exceedingly mixed.

⁸² This assumes that the ultimate consumers, car owners, have a choice among outlets supplied by a number of companies and, as would usually be the case where the first supposition holds, that those retailers who have a cheaper source of supply will find it advantageous in order to expand their share of the business to pass at least some of their relative cost savings on to consumers — in other words, that the market for the ultimate consumer be 'workably competitive'.

⁸³ *Herbert Morris Ltd. v. Saxelby*, *supra*, note 26; *Maguire v. Northland Drug Co.*, *supra*, note 26; *American Building Maintenance Co. v. Shandley*, *supra*, note 26; *Attwood v. Lamont*, *supra*, note 11.

⁸⁴ The distinction on this ground between covenants given in the employment context and those entered into in the sale of a business is discussed by Lord Atkinson in *Herbert Morris Ltd. v. Saxelby*, *supra*, note 26 at 701.

⁸⁵ Even in the sale of business cases, however, the parties are not completely free to sterilize effectively the capacity of the seller to engage in any trade at all, and, therefore, it is necessary in each case to determine the exact scope of the business with respect to which goodwill has been sold.

⁸⁶ *Supra*, note 28.

⁸⁷ "Ancillary" and "non-ancillary" are labels deriving from the famous opinion of Judge (later Chief Justice) Taft, discussing common law antecedents to the *Sherman Antitrust Act*, in *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd.* 175 U.S. 211 (1899). "Ancillary" covenants in restraint of trade were those made in furtherance of some other lawful contract, such as a contract for employment or sale of a business; "non-ancillary" covenants (Judge Taft did not actually use that term) would be those made not to facilitate some other lawful commercial agreement but rather to restrain competition standing alone. Although the *Vancouver Malt* case would suggest that "non-ancillary" agreements in restraint of trade were unenforceable at common law in England, such a generalization is not warranted by an examination of the cases. Rather, the enforceability of such agreements seems to have varied along a particularly erratic course. See Heydon, *supra*, note 1 at 240-57.

In *McEllistrim's* case,⁸⁸ where a dairy farmer was obligated to sell his entire output of milk to a certain co-operative dairy society, Lord Birkenhead first stated that the society was not entitled to be protected against mere competition but then conceded that it might well have had a protectable interest in a stable milk supply, an interest which, however, it could have secured by a contract less onerous in its operation on the farmer.⁸⁹ Similarly, in *Regent Oil Co. Ltd. v. J. T. Leavesley (Lichfield) Ltd.*,⁹⁰ a gasoline solus agreement case, the court stated that the oil company was not entitled to protection against competition *per se* but that its interest in selling as large a quantity of its goods as possible could be protected by an otherwise "reasonable" exclusive dealing arrangement.⁹¹ For reasons discussed above,⁹² the writer believes the respective statements in each of these cases to be internally inconsistent. In the *Queensland Milling* case,⁹³ Stephen, J. stated (for himself alone on this point) that the doctrine that the covenantee is not entitled to protection against competition *per se* does not apply where the parties to the agreement do not compete between themselves, that is, in the typical exclusive dealing case.⁹⁴ In *Esso*, Lord Reid did not find the oft-quoted statement that "a person is not entitled to be protected against mere competition . . . very helpful in a case like the present",⁹⁵ and all of the Lords appeared to concede that Esso had a protectable interest in maintaining what Lord Reid termed "a stable system of distribution".⁹⁶ Lords Reid, Morris and Pearce accepted Esso's argument that the solus system facilitated certain economies in distribution not otherwise realizable,⁹⁷ a point on which no evidence was offered by Gulf in the *Stephens* litigation.

Perhaps the most interesting observation on the matter of protection against competition *per se* in an exclusive dealing arrangement is that of Lord Denning in *Petrofina*. His Lordship was of the view that if solus agreements had been challenged when they were first introduced into England, they might well have been held unreasonable for the reason that the company that introduced them was seeking simple protection against the competition of its rivals. Since, however, they were not attacked then, and since they had come to dominate the industry, "a comparatively small company like Petrofina [if] it

⁸⁸ *Supra*, note 31.

⁸⁹ *Id.* at 563-65.

⁹⁰ *Supra*, note 80.

⁹¹ *Id.* at 456.

⁹² *Supra*, text accompanying notes 80-82.

⁹³ *Supra*, note 34.

⁹⁴ *Id.* at 348. It would be possible, however, for the parties to exclusive dealing arrangements to be in direct competition with each other, as where, a vertically integrated oil company owns its own retail outlets as well as supplies service station owners under solus agreements. In this situation, which is common in the gasoline industry in Canada, it might be relevant to determine whether the purpose or effect of the solus agreement is to put service station owner-operators at a competitive disadvantage in relation to company-owned outlets.

⁹⁵ *Supra*, note 2 at 301.

⁹⁶ *Id.* at 302.

⁹⁷ *Id.* at 302, 312, 322-23.

is to obtain an entry into the trade" has to accept solus agreements as the *modus operandi* "lest it be swallowed up by its giant rivals".⁹⁸ That Gulf's position in the gasoline industry in Canada in the mid 1950's was analogous to Lord Denning's characterization of Petrofina's position in England in the early 1960's is by no means apparent.⁹⁹

In the trial court judgment in *Stephens*, Mr. Justice Henry did not discuss the question whether Gulf had a protectable interest in a "stable system of distribution" such as to warrant a solus agreement,¹⁰⁰ but it is reasonably clear that his answer would have been in the negative since, in his view, the sole *desideratum* was to avoid any impairment of "the competitive market function".¹⁰¹

In summary, restraint of trade decisions to date do not establish a clear rule that a covenantee may not through an exclusive dealing contract seek to protect itself against the competition of its rivals. Rather, the rule of no-protection-against-competition-*per se* would appear to be limited to post-employment contracts, bare covenants among competitors not to compete, and, perhaps, certain other contracts where the covenantee's desire to protect itself against competition *per se* is demonstrably at the pecuniary expense of a covenantor who is in a position of grossly unequal bargaining power with the covenantee. For example, in *McEllistrim's* case, where the society had bound its members perpetually to sell milk exclusively to it, it was established that other creameries were willing to pay the farmers a better price for the milk.¹⁰² The extension of the rule more generally would depend upon whether courts felt that an important aspect of the public policy behind the restraint of trade doctrine was the fostering of a competitive economy.

Turning to reasonableness from the perspective of the interests of the covenantor, it was stated by Lord Parker in *Herbert Morris* that courts will not "weigh the advantages accruing to the covenantor under the contract against the disadvantages imposed upon him by the restraint",¹⁰³ and, at least in the context of non-employment cases, a number of courts have said that the parties will be presumed to be the best judges of what is reasonable in their own interests.¹⁰⁴ What modern courts do in reality, however, in determin-

⁹⁸ *Supra*, note 2 at 173-74. See also the similar analysis by Diplock, L.J. in the same case at 188.

⁹⁹ Furthermore, the logical result of Lord Denning's reasoning on this point may be criticized for a reason similar to that advanced in connection with Stephen, J.'s views as to applicability of the restraint of trade doctrine in the *Queensland Milling* case (text accompanying notes 46-51, *supra*): universality of an anti-competitive practice produces immunity from attack.

¹⁰⁰ Like the Court of Appeal, the trial court analyzed Gulf's interests solely in terms of protection for its loan: 3 O.R. (2d) at 268-69, 45 D.L.R. (3d) at 188-89.

¹⁰¹ 3 O.R. (2d) at 280; 45 D.L.R. (3d) at 200.

¹⁰² *Supra*, note 31.

¹⁰³ *Supra*, note 26 at 707.

¹⁰⁴ *Northwestern Salt Co. Ltd. v. Electrolytic Alkali Co. Ltd.*, [1914] A.C. 461, 471 (H.L.); *English Hop Growers Ltd. v. Dering*, *supra*, note 32 at 187; *Texaco Ltd. v. Mulberry Filling Station Ltd.*, *supra*, note 2 at 525; *Great Eastern Oil & Import Co. v. Chafe*, *supra*, note 3 at 318.

ing consistency of the agreement with the interests of the parties — as is well illustrated by the *Esso*, *Petrofina* and *Amoco* cases — is to weigh what the covenantor has given (his freedom in the future to trade as he sees fit) as against what he has received (financing, rebates or other benefits).¹⁰⁵ What the covenantee-oil company gets is, in a sense, the mirror image of what the covenantor-service station proprietor gives, and where the court determines that the covenantor has given too much it will find the agreement not reasonable.

Thus, for example, in both *Petrofina*¹⁰⁶ and *Amoco*,¹⁰⁷ where the agreements were struck down, the service station operators were obligated for many years (12 and 15 years, respectively) to purchase a very large minimum gallonage of gasoline, totally without regard to whether or not they could sell such gasoline. While there does not appear to have been a mandatory minimum purchase requirement in *Esso*, the Lords there held invalid a solus agreement for 21 years, “far beyond any period for which developments are reasonably foreseeable”,¹⁰⁸ but sustained the enforceability of a shorter agreement, for a period of four and a half years.

In *Stephens*, the Court of Appeal held the agreement to be not unreasonable in the covenantor’s interests. In return for promising to deal exclusively in Gulf products and to carry on the business continuously, efficiently and in a proper manner,¹⁰⁹ the proprietor received the following benefits:¹¹⁰ the mortgage loan, the assistance of Gulf in financing the dealer’s stock and improving his buildings, and the use of Gulf credit cards.¹¹¹ The only one of these benefits that Gulf was obligated to supply under the terms of the contract, however, was the mortgage loan, and it would appear that in construing the reasonableness of the contract, the court should have judged it by the

¹⁰⁵ The historical evolution of courts’ willingness to consider the interests of the covenantor, and not just the need of the covenantee for protection, under the private interests branch of the test is discussed in the context of post-employment restraints in *Blake*, *supra*, note 1 at 686-87. An emphasis upon the right of the covenantee to be protected is seen in the *Nordenfelt* formulation itself, *supra*, note 6 at 565, where after declaring the test of validity to be “reasonable in reference to the interests of the parties concerned and reasonable in reference to the interests of the public”, Lord Macnaghten adds a clause of explication: “so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public”.

¹⁰⁶ *Supra*, note 2.

¹⁰⁷ *Supra*, note 2.

¹⁰⁸ *Supra*, note 2 at 303.

¹⁰⁹ *Supra*, note 4 at 3 and trial court judgment, 3 O.R. (2d) at 265; 45 D.L.R. (3d) at 185. The obligation to carry on the business continuously could be quite burdensome if, for example, the proprietor was not doing well and wished to engage in another business but could not find an acceptable purchaser for the service station business.

¹¹⁰ The proprietor in relation to whom the Court of Appeal construed the agreement was *Stephens* — not *Palen*. See text accompanying notes 59-69, *supra*, and 114, *infra*.

¹¹¹ *Supra*, note 4 at 28.

obligations contained therein, and not by the additional, but un-bargained for, benefits that the oil company from time to time chose to confer.¹¹² Nor does there appear to have been any evidence that the mortgage was at a particularly favourable rate.¹¹³

In sum, the covenantor in *Stephens* appears to have received an average mortgage loan in return for submitting himself to a ten-year restraint upon his freedom to choose suppliers for his business as he saw fit.¹¹⁴ It was not enough for the oil company that he should repay their investment. It is respectfully submitted that the Court of Appeal was too quick to find in favour of Gulf on the reasonableness-in-the-interests-of-the-parties point. Gulf had the burden of proof,¹¹⁵ and the company appears to have adduced little, if anything, in the way of evidence. In essence, Gulf appears to have bought itself a cheap ten years' worth of freedom from the competition of its rivals for the business of a certain outlet. While we would not expect, or perhaps even desire, a court to make forays into disputed points of economics, we would expect at this late date in the history of competition policy that if an appellate court were to show any predisposition on a case of the present type, it would be toward having huge oil companies compete for customers on the basis of price rather than long term exclusive dealing contracts.

2. *The Public Interest*

The second branch of the *Nordenfelt* test, the reasonableness of the arrangement in light of the public interest, has in practice been, if not forgotten, at least ignored. In 1913, Lord Parker stated that he was "not aware of any case in which a restraint though reasonable in the interests of the parties has been held unenforceable because it involved some injury to the public",¹¹⁶ and a half century later Diplock, L.J. was able to make virtually the same

¹¹² *Amoco v. Rocca Bros.*, *supra*, note 2 at 396-97. Furthermore, it is not clear whether this additional assistance was in fact rendered to Palen/Stephens or whether Gulf simply had a general policy of aiding its dealers. See, Court of Appeal opinion, *supra*, note 4 at 28, and trial judgment, 3 O.R. (2d) at 266-67; 45 D.L.R. (3d) at 186-87.

¹¹³ Indeed, there was some evidence to the contrary: see trial judgment, 3 O.R. (2d) at 268; 45 D.L.R. (3d) at 188.

¹¹⁴ Since the Court of Appeal construed the agreement only in its effect upon Stephens, it construed the term as being only six years because Stephens became a party four years after the original agreement, *supra*, note 4 at 29. Agreements for durations of approximately five years had been declared valid in *Esso*, *supra*, note 2 and in *Great Eastern Oil & Import Co. Ltd. v. Chafe*, *supra*, note 3. If, however, the agreement had been construed in its operation on Palen, as has been suggested would have been the proper course (text accompanying notes 59-69, *supra*), then its duration was ten years.

¹¹⁵ *Supra*, note 79.

¹¹⁶ *A.G. Australia v. Adelaide Steamship Co. Ltd.*, *supra*, note 71 at 795. Heydon, *supra*, note 1 at 29-30, catalogues the reasons why he believes that public interest analysis was effectively shunted aside by the English courts in the late nineteenth and early twentieth centuries.

statement.¹¹⁷ The situation has not changed as of this writing, with the exception of the trial court judgement in the instant case.¹¹⁸

Not content to rest his finding of the invalidity of the solus agreement on the interests of the parties, Mr. Justice Henry found that it also conflicted with the public interest, which he found not to be restricted merely to the prevention of "pernicious monopoly",¹¹⁹ but to embrace "preservation of the competitive market system".¹²⁰ Mr. Justice Henry's conclusions as to the incompatibility of the solus agreement with the public interest were in accord with the views of plaintiff's expert economic witness who testified as to his own opinions and as to the conclusions of a certain report of the Restrictive Trade Practices Commission.¹²¹ The trial judge found that solus agreements of the type of the 1956 agreement for loan limited consumers' choice among various automotive products; encouraged wasteful, non-price competition among supplying companies; created various inefficiencies in the distribution of automotive products; and, by tying up sales outlets, erected barriers to entry by new producers and new products into the market.¹²² As the trial judge pointed

¹¹⁷ *Petrofina (Gt. Britain) Ltd. v. Martin*, *supra*, note 2 at 181.

¹¹⁸ The decision in *Pharmaceutical Society of Great Britain v. Dickson*, *supra*, note 35, invalidating the Society's rule restricting the types of products that member-pharmacists could deal in, rested at least partly on public interest grounds, but a finding of inconsistency with the public interest followed automatically from the finding that the rule was beyond the statutory powers of the Society. In *Esso*, Lord Hodson explicitly rested his decision on the public interest, *supra*, note 2 at 321. It is interesting to speculate what others of the Lords would have found as to the public interest had the service station proprietor in *Esso* not explicitly disclaimed reliance on the public interest aspect of the test, *supra*, note 2 at 340. In that case, Lords Hodson (at 319) and Reid (at 300) stated that the decision in the case of *Kores v. Kolok*, [1959] Ch. 108, wherein two employers mutually agreed not to hire each other's former employees, should have been rested on public interest grounds. There is one Canadian trial court judgement holding a post-employment restraint among medical doctors invalid as contrary to the public interest in patients' freedom to consult the doctor of their choice: *Sherk v. Horowitz*, [1972] 2 O.R. 451; (1971) 25 D.L.R. (3d) 675; *aff'd on other grounds*, [1973] 1 O.R. 360; (1972) 31 D.L.R. (3d) 152.

¹¹⁹ Prevention of "pernicious monopoly" was the public interest identified by Lord Parker in the *Adelaide Steamship* case, *supra*, note 71 at 796.

¹²⁰ 3 O.R. (2d) at 274; 45 D.L.R. (3d) at 194.

¹²¹ Restrictive Trade Practices Commission, *Report on an Inquiry Into the Distribution and Sale of Automotive Oils, Greases, Anti-Freeze, Additives, Tires, Batteries, Accessories and Related Products* (Ottawa, 1962). To the extent that he relied on conclusions stated in this type of government report, the trial judge was in good company: see Lords Reid, Hodson and Pearce in *Esso*, *supra*, note 2 at 301, 320, 322.

¹²² 3 O.R. (2d) at 279-80; 45 D.L.R. (3d) at 199-200. It is not altogether clear from the opinions in the case just what products in addition to gasoline were covered by the solus agreement. The opinion of the Court of Appeal states (at 3) that Palen agreed to deal exclusively in Gulf's gasoline, other petroleum based products and anti-freeze and other automotive products with which Gulf might choose to supply him. The testimony of Dr. English, plaintiff's expert economist, seems to have been based on the assumption that Palen was obligated to carry a wide range of automotive products distributed by Gulf: 3 O.R. (2d) at 276-79; 45 D.L.R. (3d) at 196-99; and the trial judge referred to "products such as oils, greases, additives, tires, batteries and accessories . . . made available by Gulf", 3 O.R. (2d) at 269; 45 D.L.R. (3d) at 189. While the tri-partite agreement of 1960 incorporated by reference all of the 1956 agreement for loan, specific reference was made to Stephens' obligation to deal exclusively only in the "petroleum products of the company", *supra*, note 4 at 6.

out, these supposed ill-effects did not come about from the existence of the one solus agreement involved in the case, but he felt justified on the bases of both testimony at trial and "common knowledge" in finding agreements of this type to be common in the industry.¹²³

The Court of Appeal held the solus agreement to be not unreasonable from the point of view of the public interest.¹²⁴ The court held that the trial judge had erred both in identifying the relevant public interest and in evaluating the evidence.

Quoting a stunningly opaque passage in the opinion of Ungood-Thomas, J. in *Texaco Ltd. v. Mulberry Filling Station Ltd.*,¹²⁵ the Court of Appeal in *Stephens* stated that in applying the second limb of the *Nordenfelt* test of reasonableness, "one has to consider whether the restrictions were reasonable in reference to the interests of the public as expressed in one or more propositions of law, rather than in reference to the interests of the public at large". It is inappropriate to consider the interests of the public at large, the court reasoned, again quoting the judgement in *Texaco*, because such a consideration would, first, involve the court in balancing a mass of conflicting economic, social and other interests which a court of law is ill-equipped to do, and, second, produce declarations of what is public policy that would vary from judge to judge "like the length of the chancellor's foot".

The only "proposition of law" relating to the public interest and relevant to the facts of this case that the Court of Appeal was able to identify was "the right of men to trade freely, subject to reasonable restraints". Since the court had already found this agreement to be reasonable as between the parties,¹²⁶ it was not about to find it unreasonable "for some fancied and problematical injury to the public welfare".¹²⁷

While one has considerable sympathy for what may be taken to be the Court of Appeal's over-all position — that courts are inappropriate bodies to make determinations on questions of economics — the court's opinion presents a variety of difficulties. First, it is doubtful that courts are any less competent to make determinations on questions involving economic evidence than on those involving, for example, medical evidence. The latter types of questions are dealt with judicially every day in negligence and homicide cases. In either situation, what is important is that there be a sufficient basis in expert testi-

¹²³ 3 O.R. (2d) at 275, 280; 45 D.L.R. (3d) at 195, 200. One may doubt just how 'common' such knowledge is to persons not familiar with the industry.

¹²⁴ The following discussion of the public interest aspects of the Court of Appeal's opinion has reference to pp. 34 to 39 of the unreported opinion.

¹²⁵ *Supra*, note 2 at 527.

¹²⁶ The findings as to reasonableness both in the private and the public interests is a question of law and not of fact, and an appellate court therefore must make its own determination on reasonableness: *Amoco v. Rocca Bros.*, *supra*, note 2 at 399; *A.G. Australia v. Adelaide Steamship Co. Ltd.*, *supra*, note 71 at 797.

¹²⁷ Quoting Cheshire and Fifoot, *The Law of Contract* (8th ed. London: Butterworths, 1972) at 366.

mony for the court to make an intelligent finding.¹²⁸ In the instant case, there was such a basis in the form of the testimony of Dr. English, whose extensive qualifications and impressive credentials were noted by the trial court.¹²⁹ Dr. English was the only expert witness, defendants themselves not having chosen to call an expert economist. While the trial court could have chosen to disregard the testimony of plaintiff's expert, it certainly was not obligated to do so. In a future restraint of trade case involving a solus agreement in the gasoline industry, the party asserting the validity of the agreement might choose to call its own expert to testify that the effect of the type of agreement was not anti-competitive, and if the court were to find that expert's views convincing, the fact that the result would be inconsistent with the result in the trial court judgement in *Stephens* would not be intolerable.

The difficult point, however, and the one which may differentiate economic evidence in a restraint of trade case from medical evidence in a tort action, is that the court must weigh the economic evidence in the context of an identification, not to say declaration, of what is the relevant public interest. The trial judge in *Stephens* felt that, largely on the basis of the policy behind the *Combines Investigation Act*, he could identify the public interest as preservation of a competitive market for automotive products.¹³⁰ It has been stated by an eminent scholar that one guide to the identification of public policy that courts "are certain to employ whenever it is available is statutory legislation *in pari materia*".¹³¹ The *Combines Investigation Act* as it existed at times relevant to the *Stephens* case, on the other hand, said nothing about exclusive dealing arrangements in particular, although that has been changed by very recent amendments.¹³² While application of the policy behind a statute

¹²⁸ And it does not hurt to have an expert trial judge. For the fifteen years immediately prior to his appointment to the Ontario Supreme Court, David H. W. Henry was Director of Investigation and Research under the *Combines Investigation Act*, a fact of which he advised the parties in the litigation in the event that they should wish to disqualify him. They did not so wish (unreported trial judgment at 40). While the trial court is bound to make its findings exclusively on the basis of the evidence before it, in interpreting that evidence the judge cannot ignore his or her own experience. Nor would such a discounting be necessarily desirable, even if possible, unless we can assert that judges are effective in inverse proportion to the breadth of their experience. It is not even unheard of for a trial judge ignorant in a field of learning as to which crucial evidence is to be adduced in a case to familiarize himself with that field: see *United States v. Morgan*, 118 F. Supp. 621 at 650 (S.D.N.Y., 1953).

¹²⁹ 3 O.R. (2d) at 275; 45 D.L.R. (3d) at 195.

¹³⁰ 3 O.R. (2d) at 274; 45 D.L.R. (3d) at 194.

¹³¹ P. Winfield, *Public Policy in the English Common Law* (1929), 42 Harv. Law Rev. 76 at 97. In *Sherk v. Horowitz*, *supra*, note 118, the court looked to statutorily expressed policies in favour of untrammelled access to medical care in identifying a public interest in patients' free choice among doctors.

¹³² *An Act to Amend the Combines Investigation Act* 1975, c. 76, s. 12 (in force January 1, 1976). Section 32 of the Act as it existed before the recent amendments, (R.S.C. 1971, c. 314, s. 1), is a general prohibition against agreements that prevent or lessen competition "unduly", but "unduly" has been interpreted to mean virtual elimination of competition, (see Cartwright, J. in *R. v. Howard Smith Paper Mills*, [1957] S.C.R. 403), and the section has been used by the government exclusively to attack horizontal collusion, usually blatant price fixing. As to whether s. 32 of the unamended Act could have been interpreted to cover vertically imposed anti-competitive arrangements, see D. Cayne, *Market Power, Efficiencies, and the Public Interest in Canadian Combines Law* (1970), 16 McGill Law J. 488 at 510, n. 61.

to facts not covered by its terms may appear odd at first, it is submitted that on balance the trial judge was correct here. Competition in the marketplace is well enough accepted as a *desideratum* in Canada today, at least for those areas of the economy not subject to pervasive public utility-type regulation, that a court may conclude that the public interest is in that state of affairs which will promote, or at least not impede, competition.

The Court of Appeal's view seems to be that courts should refrain from deciding cases on grounds of public interest because the opinions of the different courts as to the content of the public interest would vary, as the length of the chancellor's foot, or would be capricious, as the unruly horse. But courts, except possibly in the relatively rare cases where they are construing the clearest of statutes, are always declaring public policy either expressly or *sub silentio*. Even the decision of a court in a given litigation not to act, to rule for the defendant and leave the parties in the *status quo ante*, is a declaration that public policy is not offended by leaving the defendant in his natural position of advantage of which the plaintiff complains. In fact, in restraint of trade cases, "public policy" is almost a form of imprecation that judges hurl at anyone who would make a decision contrary to the one advocated by the particular judge: "any other result would amount simply to the opinion of a mere judge as to what is public policy". And the defence mechanism can be used equally to enforce or invalidate an agreement. Compare, for example, the decisions in favour of restrictive agreements in *Mogul Steamship*,¹³³ *Texaco v. Mulberry Filling Station*,¹³⁴ and *Ontario Salt Co. v. Merchants Salt Co.*¹³⁵ with decisions invalidating such agreements in *U.S. v. Addyston Pipe & Steel Co.*¹³⁶ and *Standard Oil Co. of California v. U.S.*¹³⁷ In all of these decisions the respective courts declared that any result other than the one reached would require judges to enunciate public policy according to their own whims.

As for the variability of judicially declared public policy, while it would concededly be intolerable to have different judges faced with similar fact situations contemporaneously finding mutually contradictory public policies, it is nonetheless appropriate, as the Court of Appeal in *Stephens* recognized, that "the reconciliation of the rights of freedom of contract and freedom of trade, and the determination of what is in the public interest, will vary with the changes in economic conditions from time to time".¹³⁸ As Professor

¹³³ *Supra*, note 63 at 45 (Lord Bramwell), and at 50-51 (Lord Morris).

¹³⁴ *Supra*, note 2 at 525-26.

¹³⁵ (1871), 18 Gr. 540, 549 (Ont. Ch.).

¹³⁶ *Supra*, note 87 at 283.

¹³⁷ *Supra*, note 50 at 310-14 (Frankfurter, J.)

¹³⁸ *Supra*, note 4 at 13, citing the *Vancouver Malt* case, *supra*, note 28 at 189, wherein Lord MacMillan observed that:

[T]he scope of a doctrine which is founded on public policy necessarily alters as economic conditions alter. Public policy is not a constant. More especially is this so where the doctrine represents a compromise between two principles of public policy . . . the principle that persons . . . should be held to their bond and . . . the principle that every person should have unfettered liberty to exercise his power and capacities for his own and the community's benefit.

See also, Younger, L.J. in *Attwood v. Lamont*, *supra*, note 11 at 581.

Winfield wrote a half century ago, "[t]his variability of public policy is a stone in the edifice of the doctrine, and not a missile to be flung at it."¹³⁹ Capriciousness in the declaration of public policy will be avoided if judges will attend to legislatively declared policy on analogous questions, where available, and to other judicial declarations on the subject as guides. "[T]he better view seems to be that the difficulty of discovering what public policy is at any given moment certainly does not absolve the bench from the duty of doing so".¹⁴⁰

In *Stephens*, the Court of Appeal, as an independent ground for reversing the trial judge on the public interest question, held that even if it were appropriate for a court to make a more wide-ranging inquiry into the public interest, and even if the trial judge were correct in finding the dominant public interest to be "the dynamic operation of the competitive market", there was not sufficient evidence before the trial court upon which it could conclude that the operation of the agreement in question was contrary to that public interest. For reasons discussed above,¹⁴¹ it is submitted that the Court of Appeal was incorrect, and that the evidence in the form of expert testimony was sufficient, if believed, to support the trial judge's finding.

In *Pharmaceutical Society of Great Britain v. Dickson*, Lord Wilberforce was sceptical as to whether any public interest consideration, other than the interest that a man be able to trade freely, could be taken into account by a court of common law as opposed to a specialized tribunal such as the Restrictive Trade Practices Court.¹⁴² While the writer would not narrowly prescribe the range of inquiry that may be made by the common law court,¹⁴³ a happier solution may well be the legislative one, such as the vertical restraint provisions recently added to the *Combines Investigation Act*. Under s. 31.4 of the amended Act, the Director of Investigation and Research may bring a proceeding before the Restrictive Trade Practices Commission in a case of ex-

¹³⁹ *Supra*, note 131 at 95.

¹⁴⁰ *Id.* at 97. The passage of which the quotation appears as the last sentence reads: How is public policy evidenced? If it is so variable, if it depends on the welfare of the community at any given time, how are the courts to ascertain it? Some judges have thought this difficulty so great, that they have urged that it would be solved much better by the legislature and have considered it to be the main reason why the courts should leave public policy alone. Others, while accepting the doctrine, have uttered a warning that the judges are more to be trusted as interpreters of the law than as expounders of public policy. This admonition is a wise one and judges are not likely to forget it. But the better view seems to be that the difficulty . . . (citations omitted).

¹⁴¹ Text accompanying notes 128-29, *supra*.

¹⁴² *Supra*, note 35 at 441.

¹⁴³ Nor apparently would Lord Wilberforce himself have done so when he considered the scope of the public interest inquiry some fifteen months earlier, in the *Esso* case, *supra*, note 2 at 340-41, where he stated:

[I]n relation to many agreements containing restrictions, there may well be wider issues affecting the interests of the public than those which relate merely to the interests of the parties; these may have been the subject of inquiry as in this case under statutory powers (Monopolies and Restrictive Practices Act, 1948) or the subject of a finding by another court (Restrictive Trade Practices Act, 1956) or may be investigated by the court itself. (Emphasis added).

clusive dealing, tied selling or market restriction.¹⁴⁴ Where the Commission, after notice and hearing, finds that the practice, because it is widespread in a market or is engaged in by a major supplier of a product in a market, is likely substantially to lessen competition, the Commission may make an order prohibiting the practice. Of course, s. 31.4 will only avail where the Director chooses in his discretion to bring a proceeding before the Commission. Private parties are left to their common law remedies.¹⁴⁵

D. CONCLUSION

One may legitimately ask, considering the very narrow approach to the public interest adopted by the Court of Appeal, and considering that the public interest may in any event be taken into account in considering the legitimate interests of the parties,¹⁴⁶ whether there is anything left today to the public interest as a separate test of reasonableness under *Nordenfelt*. In *Esso*, Lord Pearce stated that the two aspects of the *Nordenfelt* test should be fused,¹⁴⁷ a conclusion with which the Ontario Court of Appeal is in sympathy.¹⁴⁸ On the other hand, Lord Wilberforce in *Esso* emphasized that it was "important that the vitality of the second limb . . . should continue to be recognized",¹⁴⁹ and the Australian High Court in *Amoco* stated that the distinction between the first and second branches of the *Nordenfelt* test is not obliterated.¹⁵⁰ Ironically, Lord Hodson in *Esso* stated that he would prefer to have rested the decision "on the public interest rather than that of the parties, public interest being a surer foundation than the interest of private persons or corporations when widespread commercial activities . . . are concerned".¹⁵¹

What may prove, however, to be the most influential undermining of the public interest branch of the *Nordenfelt* test comes from an unexpected source, the opinion of Lord Diplock in *A. Schroeder Music Publishing Co. Ltd. v. Macauley*. There His Lordship appears to suggest that the entire doctrine of restraint of trade had been nothing more nor less than a facade behind which courts have sought refuge in order to avoid enforcing contracts unconscionable as between the parties:

It is, in my view, salutary to acknowledge that in refusing to enforce provisions of a contract whereby one party agrees for the benefit of the other party to exploit

¹⁴⁴ "Market restriction" is defined in s. 31.4(1) of the Act to be a practice whereby a supplier of a product, as a condition to supplying it, limits to a defined market the right of the purchaser to re-sell it.

¹⁴⁵ Where the Director does bring a proceeding before the Commission and where the Commission makes an order prohibiting the supplier from engaging in the practice and where the supplier fails to comply with the order, then s. 31.1 of the amended Act confers upon a party injured by such failure a cause of action for damages. That is, an injured private party has a statutory cause of action when unlikelihood is piled upon unlikelihood.

¹⁴⁶ *Supra*, text accompanying notes 71-75.

¹⁴⁷ *Supra*, note 2 at 324.

¹⁴⁸ *Supra*, note 4 at 35.

¹⁴⁹ *Supra*, note 2 at 341.

¹⁵⁰ *Supra*, note 2 at 400.

¹⁵¹ *Supra*, note 2 at 321.

or to refrain from exploiting his own earning power, the public policy which the court is implementing is not some 19th century economic theory about the benefit to the general public of freedom of trade, but the protection of those whose bargaining power is weak against being forced by those whose bargaining power is stronger to enter into bargains that are unconscionable.¹⁵²

While, as previously indicated,¹⁵³ the writer agrees that modern courts usually are swayed in the restraint of trade context by a comparison of what a dealer has given his supplier as against what he has received, a difficulty with Lord Diplock's quoted view as a matter of historical analysis is that in two of the recent trilogy of gasoline cases holding the solus agreements unenforceable under the private interests branch of the *Nordenfelt* test, the court found that there was *not* inequality of bargaining power between the parties.¹⁵⁴ To this Lord Diplock might be expected to reply that the findings in these cases were not realistic: while it is true to say that the oil companies needed outlets just as the proprietors needed oil companies, that is not to say that the parties were of *equal* bargaining power. Furthermore, if the service station proprietors had possessed a bargaining power equal to that of the oil companies, it is hard to see why they would have accepted obligations that the courts found excessively onerous. Indeed, to state that a small entrepreneur has bargaining power equal to that of a giant oil company wielding a standard form contract comes close to defying common sense.

¹⁵² *Supra*, note 26 at 623. Lord Diplock's views were pressaged by his judgment (as Diplock, L.J.) in *Petrofina*, *supra*, note 2 at 181, and his 'realism' appears already to be commanding a following: see the opinion of Lord Denning, M.R. in *Clifford Davis Management Ltd. v. WEA Records Ltd.*, [1975] 1 All E.R. 237.

¹⁵³ *Supra*, text accompanying note 105.

¹⁵⁴ *Esso*, *supra*, note 2 at 301, 313, 322; *Amoco*, *supra*, note 2 at 400. The opinions of the Court of Appeal in *Petrofina* are silent on the matter of equality of bargaining power, and, therefore, Lord Diplock cannot be accused of contradicting Diplock, L.J.

