A COMPARATIVE STUDY OF PUBLIC POLICIES TOWARD BUSINESS MERGERS WITH EMPHASIS ON THOSE OF CANADA AND GREAT BRITAIN

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THESIS ABSTRACT

Merger policy, as one aspect of anti-monopoly legislation, has only recently begun to occupy the attention of followers of 'anti-trust' to any great extent. In Canada, most of the investigations into proposed mergers have been made since 1954, while the only two cases directly involving mergers, to reach the court, were in this decade. To the present, Great Britain has had no provisions for mergers in her legislation, but much concern has been voiced against merger activity. Very recently, the Government has shown its intentions of setting up machinery, which will deal with consolidations and amalgamations. In the U.S. important steps were taken in 1950 to amend the Clayton Act, in attempts to tighten the law under which permission for mergers will be given.

It is generally agreed that amalgamations can directly contribute to the efficiency of industrial operations through the forces of specialization and larger-scale production. However, mergers can be the most practical way to the consolidation and monopolization of industry. Here lies the basic dilemma for public policy -- how to encourage those mergers which are socially desirable and yet discourage those mergers which are potentially damaging to the competitive structure of the economy.

Canadian combines provisions have been shaped partly by certain idealistic values held in common with the U.S., yet the quite distinct history of enforcement (or lack of enforcement) has been greatly influenced by the institutional settings. The fact that the constitution requires combines law to be in criminal form has probably contributed most to the lack of enforcement and selectivity in Canadian combines control.

In the past, Great Brtain was without any anti-monopoly enforcement agencies. A lack of any inherent antipathy towards the holding of

monopoly power, together with a concentration on the more immediate economic problems made 'anti-trust' inappropriate. However, in the period since the end of the Second World War a whole new jurisprudence has evolved from the 1948 and 1956 enactments, and the recent proposals for a merger policy must be viewed as a step in the growth of a distinctly British experience.

Monopoly policy in the future needs to be integrated into the whole framework of public supervision of the economy. In particular, Canada urgently needs to redefine the objectives behind the legislation and to install new guideposts for the "trust-busters". Economists have a real challenge here to undertake greater research into the relationships between market structure and business performance, in order to provide the authorities with definitive criteria by which to judge mergers.

However, the whole concept of 'anti-trust' reasoning requires to be reviewed in a changing economic world. It seems feasible that international trade will be rapidly expanding in the future as a result of G.A.T.T. tariff reductions. This will call for a wider concept of the domestic market as overseas competition is intensified. Mergers which contribute to the concentration of domestic industry may not damage the competitive structure of the economy, as they might when undertaken behind a tariff wall. In fact, there seems to be a sound a priori reason that Canada and Britain should consolidate some of their fragmented industries in order to compete in growing international markets.

Another challenge to 'anti-trust' enforcement comes from the growth in overall economic planning. Anti-monopoly legislation grew and partly flourished in an environment of negative government regulation of

industry. This is alien to the positive regulation of industry which is involved in 'planning' economic development. If Canada and Britain institute 'planning' machinery on the scale that is employed in some countries of Europe, the whole justification for a vigorous anti-monopoly legislation will be called into question.

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INTRODUCTION

Monopoly[1] arouses much indignation where it is believed that the most desirable results acrue from the free market economy. Monopoly interferes with the consumer-oriented allocation of resources, which is so deep-rooted in our type of society. Specifically, the charges made against monopoly are that:-

(1) Monopoly causes a restriction of economic opportunity and a misallocation of productive resources. The monopolist, and not the market, in which the consumer's dollar votes are reflected, determines the type and quantity of goods that shall be produced. By artificially restricting output, the monopolist forces resources into the production of less desired commodities and does not fully utilize his productive potential.

(2) Monopoly affords the consumer little protection against exorbitant prices. The monopolist can generally charge all the traffic will bear, simply because the consumer has no alternative sources of supply. The consumer is forced to pay the monopolist's price, turn to a less desirable substitute, or go without.

1. The term 'monopoly' means a single seller, or a group of sellers acting together, who control a substantial part of the supply of a commodity in any market and can therefore manipulate the price, the quality or the supply of the commodity which is to be made available. The 'restrictive practices' associated with control over supply are measures which the monopolist or monopsonist employs to exploit the market and to strengthen his control over it. They include restraints or restrictions in connection with the supply of the commodity, or the conditions under which it is sold or marketed, or in relation to potential competition.

(3) Monopoly often restrains technological advances and thus impedes economic progress. The argument is that although the monopolist may engage in research and invent new materials, methods and machines, he will be reluctant to make use of these inventions if they would compel him to scrap existing equipment or if he believes their ultimate profitability is in doubt. Instead of moving goods by price reduction he is prone to spend large sums on alternative methods of promoting sales, so the community is deprived of any gain.

These arguments are in conflict with Schumpeter's thesis that firms require monopoly profits as an incentive to undertake research, and that in the long-run the firm's monopoly position will fall to the competition from the new products of other firms.

(4) Monopoly contributes to the inequality in the distribution of income, because the monopolist is not compelled to pass on to consumers, suppliers or laborers, the gains of improved technology. Monopoly profits are not widely distributed, since corporate dividends go mainly to the upper income groups.

(5) Monopoly tends to impede the effectiveness of general stabilization measures and to distort their structural impact on the economy. Monopolistic and oligopolistic firms may insulate themselves against credit restriction designed to curb investment and check inflation. They may do so by raising prices to offset higher interest costs, by raising prices to finance investment out of increased profits, or by resorting to the capital market rather than to banks for their supply of loanable funds. However, the lack of market control of competitive firms makes them the weakest borrowers and poorest credit risks and they must therefore, bear the brunt of any "tight money" policy.

(6) Monopoly threatens not only the existence of a free economy, but also the survival chances of free political institutions. "The enemy of democracy is monopoly in all its forms, and political liberty can survive only within an effective competitive system. If concentrated power is tolerated, giant pressure groups will ultimately gain control of the government or the government will institute direct regulation or organized pressure groups. In either event, free enterprise will then have to make way for collectivism and democracy will be superseded by some form of authoritarianism."[2]

Public policy has a choice amongst three possible alternatives with respect to concentrated industries:-

(1) Maintenance of the status quo:

Defenders of the status quo generally advance the "workable competition" thesis. They argue that bigness and concentration are no cause for alarm because competition is present and working in the economy, where constant technological progress is reflected in ever-increasing output, lower prices and new and improved products. Their emphasis is on performance and results rather than the structural organization which compels such performance and results.

(2) Imposition of public regulation or public ownership:

Public regulation or public ownership is advanced in the belief that the abuses of private monopoly will be avoided by social control and that industrial efficiency will be insured. They believe that if monopoly is inevitable for efficient organization in mass production and distribution, then it is preferable that such monopoly be publicly supervised or publicly owned.

(3) The promotion of vigorous competition:

The advocates of promoting more "effective competition" believe that the

2. W. Adams: "The Structure of American Industry" (New York: MacMillan 1961) p. 542.

preservation of competitive free enterprise is both desirable and possible. They advocate a structural arrangement in private industry characterized by decentralized decision-making and "effective competition".

In Western economies it is generally accepted that the State has a role to play in eradicating monopoly situations and seeking to enforce a certain amount of competition. "The ultimate justification of an anti-monopoly policy rests heavily on the belief that the maintenance of competition has an important contribution to make to efficiency in resource use and to continous product and process improvement".[3]

What follows is a study of the third of these public policy alternatives and concerns anti-monopoly legislation as it has evolved and as it has been enforced in Canada and Britain. In particular, the central discussion involves the process of monopolizing through merger. Mergers are often cited as the major source of economic concentration and it is sometimes held that the very large size firms of the present day have grown chiefly by absorbing competitors.

In recent years there has been increasing concern over the strength and the size of big business. ".....No great stretch of the imagination is required to foresee that if nothing is done to check the growth in concentration, either the giant corporations will ultimately take over the country, or the government will be impelled to step in and impose some form of direct regulation in the public interest."[4] The concern of the Federal Trade Commission has been echoed outside the United States and it is of some significance that in the last 15 years new legislation has been enacted in the U.S., Canada and Britain, in attempts to quell monopoly.

3. E. S. Mason in C. Kayson and D. F. Turner: "Anti-Trust Policy: An Economic and Legal Analysis" (Harvard University Press, 1959) p.xviii.
4. Federal Trade Commission: Report on the Merger Movement (1948) p.68

Before commencing our analysis in detail it is appropriate to set out some general definitions of the firm, the entity involved in mergers which present society with a public policy problem.

The business firm in the real world is both an administrative organization and a collection of productive resources. In the traditional 'theory of the firm' in economics, which has been developed for the purpose of assisting in the problem of price determination and resource allocation, 'the firm' is simply a 'price-and-output-decision maker,' while the growth of this 'firm' is nothing more than an increase in the output of the given product.

In the real world, where the firm is a growing organization, the firm must be endowed with many more attributes than are possessed by 'the firm' in 'the theory of the firm'.

One important aspect of the definition of the firm involves its role as an autonomous administrative planning unit, the activities of which are interrelated and are co-ordinated by policies which are framed in the light of their effect on the enterprise as a whole. The constituent members of the central management or policy-making body vary from firm to firm. This body is the highest authority within the administrative framework of the firm and it is responsible for establishing or altering the administrative structure of the firm, laying down general policies and making decisions on those matters where no subordinate executive has been authorized to act or where no clear-cut principles have beenset out in advance. The latter category would include all major investment and financial decisions as well as the filling of the top managerial posts.

The significance of this aspect of the firm becomes clearer when one remembers that the firm is also a collection of productive resources, the disposal of which between different uses and over time is determined by administrative decisions. The physical resources within the firm include both tangible objects, such as its capital equipment and stock of semi-finished and finished goods, as well as the human resources available, such as the skilled labor and the clerical, administrative and managerial staff.

The general purpose of the firm's management is to organize the use of these resources at its disposal for the production and sale of goods and services at a profit.

We shall shortly assert that one of the motivating forces in the firm is the innate desire to expand its operations. Although such growth can bring forth greater fruits for the economy, through the benefits offered by large-scale production, there is a basic conflict for society if such growth takes one of two roads open to it.

A firm may grow by internal expansion, which includes all growth except that which comes about by absorbing firms or substantial properties from firms with formerly independent existences. On the other hand, external growth may take place by the purchase of the assets or the shares of another company. It is this external expansion and the underlying conflict for society which is paramount in this study.

Expansion often means specialization which itself is associated with greater efficiency in production.. However, the competition among firms that ensures that the fruits of specialization are passed on to

the final consumer of the product is inevitably lessened, where the external route is the selected mode of expansion. Depending on the market positions of the merging firms, it is possible for competition to be reduced to the point where the market power of the newly consolidated firm is great enough to preclude the passing on of the gains of increased efficiency to the consumer.

Recognition of this conflict indicates that it would be interesting to examine these changes quantitatively, in terms of costs and profits, and that conclusions as to whether or not any merger was in the public interest might be reached by examining the extent to which cost reductions were passed on to the consumer, or by examining the extent to which wages were increased, or by estimating the rise in productivity or by calculating the effect of the merger on any other factors synonymous with the public interest. However, such an approach is quite unrealistic, since not only are mergers a response to a new situation but also, it takes time for their full effects to be achieved. There are few occasions for the use of this "performance" approach in merger policy, since a comparison of the situation immediately before the merger with the situation immediately after the merger would only be useful if it is assumed not only that in the absence of the merger things would have continued as before, but also that after the merger a new and permanent situation is quickly reached.

The problem is of reconciling this desire to achieve technical efficiency and economic progress with the desire to avoid a degree of centralization so high as to threaten individual freedom in the economic sphere. This is the basic dilemma for public policy in controlling mergers and a reconciliation has been attempted by the employment of a "structural" approach. In a judgement of whether a particular merger is to be permitted or prohibited, an assessment of market power is essential in order to assess the probable consequences of the merger on the level or vigor of competition.

However, there is no unequivocal means of assessing market power, while economists are relatively ignorant of the relationships between market structure and business behavior, and between the level of competition and that efficiency of resource use that it is assumed is the desired end. There is therefore, an element of faith in the propostion that maintaining competition substantially improves the efficiency of resource use. And there is a substantial amount of guesswork involved in forming a judgement on market power or the level of competition, based as it is on the available evidence of market structure and business practices.

This essay transposes the problem into the Canadian and British settings. Although both countries have certain unique characteristics in their policies, each is representative of two different modes of approach to the problem. Canada uses the 'purist' set of rules which are enforced by the judiciary, while Britain is much more pragmatic and employs a quasi-judiciary and an administrative tribunal as enforcement authorities.

The essay commences with a theoretical study of the motivating forces underlying the firm's desire to expand and from this emerges the essential component in any merger policy --- the desirability of a discriminating and selective policy.

The dangers of monopoly are discussed in Chapter Two together with a consideration of the possible criteria that could be employed in judging a merger. What emerges is that only by a careful examination of the facts in each case can a selective policy be implemented.

Merger policy is only one aspect of what is generally termed 'anti-trust' law, so that Chapter Three supplies the reader with the

general setting for monopoly control, before the individual merger policies of Canada and Britain are explored in detail. Since the U.S. has what is probably the most comprehensive set of monopoly controls and quite recently has been invoking new standards for mergers, a short space is devoted to American experience. Europe has little or no merger policy and only passing reference is made to events there.

Since monopoly control represents only one side of the management of the modern economy, which itself is taking on new dimensions, some tentative suggestions are made as to the place of merger control in the near future.

The problem of monopoly and restrictive practices and their regulation is fundamentally an economic question, with political, social and legal ramifications But the law is concerned with the procedure of the regulation and its implementation, and whether or not the economic objectives of the legislation are achieved will depend in large part on how the controls are administered. Our task will be to examine the legal rules and their enforcement and assess their adequacy for the declared goals. Since Canada and Britain employ different methods in attempting to attain certain declared goals, some conclusions emerge on the appropriateness and effectiveness of the respective modes of approach.

The author is aware that 'anti-trust' enforcement is just one aspect of public policy designed to curb mergers, although it forms the major weapon. In certain industries, government regulatory agencies play an important role in supervising amalgamations. In the U.S., the Civil Aeronautics Board can refuse permission for a proposed merger, while in Canada, the Government would be directly involved in a proposed consolidation

of Air Canada, which is State owned, and the privately operated Canadian Pacific. In Britain, the Covernment is the sole owner of both B.E.A. and B.O.A.C. and it would therefore decide on the desirability of a merger.

Since this is a study of merger policy for industry in general, and these regulatory contols are only effective for specific industries, it is submitted that they are not of such general application as to warrant attention here. Ours is a study of the Combines Investigation Act in Canada and the Monopolies and Restrictive Trade Practices Act in Britain, as they apply to mergers.

CHAPTER ONE

THE INDUCEMENTS AND MOTIVATIONS OF MERGER

Using the concept of "the firm" which was introduced above, it is now possible to proceed with an analysis of the functions of the firm and to account for the role of acquisition and merger in the growth and development of such a business enterprise. An attempt will be made to answer such pertinent questions as: what is it that motivates the firm? What induces it to grow in size? What determines the method of expansion? Why is merger often preferred as the road to larger size rather than some alternative method?

Throughout this theoretical appraisal of the motivation of the firm, it is assumed that investment decisions are guided by opportunities to make money; that firms are in search of profits. And in the "management controlled" enterprise of the present day, the individuals of the co-ordinating team will wish to retain and reinvest these profits in the firm for purposes of prestige, personal satisfaction in the successful growth of the concern, in order to provide scope for their ambitions and abilities or for the mere love of the game.[1] In this context dividends will be viewed as a cost to be kept at a level just sufficient to satisfy present stockholders and to entice further capital from the market when required. The assumption is, therefore, that in general the financial and investment decisions of the firm are controlled by a desire to increase total long-run profits, and there is a marked tendency for the firm indefinitely to retain as much profit as possible for reinvestment in the firm. Hence "the firm is supposed to value aggregate profits, aggregate turnover, aggregate capital, share of the market and public image. All of these things are correlated with almost any measure of size and some themselves are measures of size."[2] The proposition is that "profits

1. E.T.Penrose: "The Theory of the Growth of the Firm" (New York: Wiley 1959 P.28)
2. R. Marris: "A Model of the 'Managerial' Enterprise", Quarterly Journal of Economics, May 1963, P.186.

would be desired for the sake of the firm itself in order to make more profit through expansion."[3]

If we assume that profits are sought primarily for the sake of the firm to reinvest in the firm, then an increase in total long-run profits is equivalent to increasing the long-run rate of growth and so "growth" and "profits" become synonymous as the goal of the firm's investment activities. For the individuals involved in the firm, there exists a host of subjective incentives, on which we need not elaborate here.

These particular motivations are applicable to the type of entrepreneur who has been referred to as being "product minded" or as a "good-will builder".[4] His attention will be turned towards the improvement of his products and the introduction of new products, the reduction of costs, the development of better technology, the extension of markets through better service to consumers and any such improvement and extension in the activities of his organization.

He should be distinguished from the "empire-building" entrepreneur whose product improvement activities will be delegated to other persons in the firm, while his attention is occupied with extending the scope of the enterprise through acquisition or the elimination of competition by means other than competition in the market. His goal will be the creation of a powerful industrial "empire" extending over a wide area.

This innate desire for expansion will be set afire by events outside the firm as well as by circumstances inside the firm. The external inducements include a growing demand for particular products, changes in technology which call for larger scale production, special opportunities to obtain a better market position or achieve a monopolistic advantage and defensive measures against changes which could adversely affect the firm's

3. Penrose: Op. Cit. p.29

4. IBID P.39.

existing operation and against which protection is sought, for example, through backward integration to control sources of supply, diversification of final products to spread risk, or expansion of existing products to preclude the entry of new competitors.[5] Internal inducements to expansion arise largely from the pool of unused productive services, resources and special knowledge, all of which will always be found within any firm. Such unused services available from existing resources are a "waste" and if they can be used profitably, they may provide a competitive advantage for the firm.

Much attention has been paid in the literature to the economies of size which may be present when the large firm, because of its size, can not only produce and sell goods more efficiently than smaller firms, but also can introduce large quantities of new products more efficiently. Economies of size have been segregated into three types: "technological" economies, which are derived from producing large amounts of given products in large plants; "managerial" economies result from improved managerial division of labor; "financial" economies reduce unit costs when purchases, sales and financial transactions are made on a large scale. Economies of growth are the internal economies available to the individual firm and are derived from the unique collection of productive services available to it, and create for the firm a differential advantage over other firms in putting on the market new products or increased quantities of old products.

Having established this inherent desire of the firm to expand its operations, it becomes important to discuss the mode of expansion that will be selected from the available alternatives. The firm has the option of internal expansion by building new plants and creating new markets for itself, or it can expand by acquiring the plants and markets of already existing firms. If growth is considered profitable regardless of any change in the existing position of other producers, then the firm will choose the merger method of expansion only if it is considered cheaper than internal

5. IBID P.65.

expansion. Some writers, including J.F. Weston,[6] have included among the motives for merger the desire to achieve economies of large-scale production, distribution or advertising economies, or the financial advantages of large size. Undoubtedly these are motives for expansion but not necessarily for the merger method of expansion.

What are the considerations that induce the firm to prefer to expand by merger rather than by internal growth? Whenever the acquisition of another firm is considered the cheaper method of expansion, then the price of this other firm must be less than the investment outlay required for the expanding firm to build the necessary plant, markets and trade connections. In other words, the merger technique can help the expanding firm to overcome barriers to entry into new fields and to reduce the absolute cost advantages of large sized competitors in its present field of production.

The firm which is about to embark on a policy of diversification of its product lines will be at a disadvantage compared to the established firms in those lines. They will be enjoying what Galbraith has called the "economies of experience"; they will have the relevant patents and technical "know-how"; their market positions will be established and through widely advertised brand names the public will be familiar with their products; they may be vertically integrated which would ensure readily available sources of supplies and distribution outlets; new issues of their stock will enjoy the confidence of the investing public; they may be enjoying economies of scale as a result of their own past expansion.

Evidently, if the firm can acquire an established going concern rather than have to build one itself, many of these disadvantages would be substantially reduced. Plant can often be acquired at considerably less than its reproduction cost and of major importance is the fact that the

6. J.F. Weston: "The Role of Mergers in the Growth of Large Firms". (Berkeley: University of California Press. 1953) P.86.

firm may acquire an experienced management "team" and an experienced technical and labor force. This addition of new managerial and technical services to the firm's internal supply of productive services is far more important than the elimination of competition which is a corollary of an acquisition. Meanwhile, new products, new processes, new plants, new productive organization, patent rights and a valuable market position all will have been obtained which might otherwise have taken years to build up. And the firm enters its new market in the preferred position of an established competitor since the entry barriers to some extent will have been surmounted.

It is not suggested, however, that the firm can swallow up every likely firm in sight in any given period of time. The limit to the rate of expansion will be provided by the managerial problems of regulating the relation between the parent firm and its new acquisition, and the problem of working out a consistent general policy. The problems of co-ordination and integration are likely to be lighter for the firm where its acquisitions complement or supplement its existing activities partly because of the past experience of its management. "Thus the existing resources of our firm will not only limit the extent to which successful expansion can be effected through acquisition, but will also influence the direction of external expansion."[7]

Another reason why the external method of expansion is preferred to internal expansion is concerned with the financial aspect of growth. Simply, it may be more feasible to finance an acquisition than to finance internal growth. It may appear especially attractive when the securities of an existing company are selling at substantially less than their book values, and even more below the replacement cost of their

7. Penrose: Op. Cit. p.129.

underlying assets. Such undervaluation of the publicly traded stock of a firm would result mainly from a lack of knowledge on the part of the investing public of the value of the firm, a lack of confidence in its management, or a discounting of the less marketable stocks for lack of liquidity. This appeared to be of importance in the 1940-47 merger movement in the U.S.A.[8]

The lack of ready capital is often rated as a barrier to new entrants to a particular field. After undertaking growth through acquisitions, the expanded enterprise may appear as a less risky proposition in the eyes of the investing public, for the purchased facility may have already demonstrated its revenue-earning capacity and the issue of stock in the market may be facilitated as a result of this quickly attained larger size. As Butters, Lintner and Cary observed in their study of the recent merger movement in the U.S.A., an important motive for acquisition was the desire of the acquirer to obtain the working capital of the seller.[9] Such acquisitions, when financed by an exchange of stocks, avoid any cash drain on the acquiring company.

However, one writer in describing the waves of mergers in the U.S.A. during the years 1897-99 and 1926-29, both of which rode to their respective peaks with concomitant rapidly rising stock prices, has stated: "The most important single motive for merger at the peaks of merger movements seems to have been promotional profits.....Both periods were marked by easy money and a securities-hungry public. This environment gave rise to a new type of entrepreneur - the producer of mergers."[10] The professional

8. J.K.Butters, J. Lintner and W.L.Cary: "Effects of Taxation - Corporate Mergers", (Harvard University 1951) P.224.
9. IBID P.231.
10. J.W.Markham: "Survey of the Evidence and Findings on Mergers" in 'Business Concentration and Price Policy', (Princeton: Princeton University Press for National Bureau of Economic Research 1955) P.181.

promoter of mergers, which role was often played by the investment banks, issued the stock of the newly incorporated company in return for the plants of the original concerns. Such mergers had one common feature - the whole was greater than the sum of its parts while the difference between the two was the promoter's profits. In Canada, "most mergers seem to have been promoted by men with financial rather than industrial experience, and promoters' profits seem to have been the largest single incentive to combination."[11]

The Butters, Lintner and Cary study revealed that the severity of cyclical fluctuations of a business motivated many firms to diversify into new products by merger. They quoted as an example, the McGraw Electric Company, a manufacturer of light household electric appliances, in recommending the acquisition of the Wire Material Company to its shareholders explained: "The line of products of the surviving company will be considerably diversified as compared with McGraw's present line. The diversification will be primarily in the capital goods field in which McGraw has not participated to any important degree up to the present time. The industry in which this diversification will take place is a necessary and important adjunct to the electric utility industry, the expansion of which, history has shown, follows primarily population growth and industrial development rather than economic fluctuations."[12]

The existence of excess capacity in an industry may arise for a variety of reasons, including a secular decline in demand, increased foreign competition, over-expansion of the trade in the past or the introduction of new or improved technological methods. In the inter-war period

11. L.G. Reynolds: "The Control of Competition in Canada", (Cambridge: Harvard University Press 1940) p.173.

12. Butters, Lintner and Cary, p.225, quoted from McGraw Electric Company: 'Notice of Special Meeting of Shareholders', July 12, 1949.

in Britain this phenomenon presented itself in such industries as coal, steel, shipbuilding, flour-milling and textiles and many amalgamations and centralized marketing schemes were carried through with government support and approval, as part of a process of rationalization for stability and progress.[13] Technological change by intensifying this problem of surplus capacity may accelerate this process of merger and acquisition, with the result that a convenient way of introducing the new techniques is found with the least disturbance to industry as a whole.

Where quota arrangements are in operation providing for a division of the trade available or for the allocation of scarce raw materials, merger may prove to be the easiest way for the firm to expand its share of the market. In the British cement, flour-milling and sugar-refining industries in the inter-war years many acquisitions were motivated by these privately-organized or officially-sponsored market-sharing arrangements.[14]

It may be that a take-over bid is motivated by a desire to maintain favorable public relations. For in a community of small size, which is only capable of supporting one seller, to drive out the existing enterprise by duplicate operations and thus inflict financial hardships upon local residents would be to invite considerable ill-will towards the large outside firm. Acquisition would appear to be the superior technique in order to preserve the good-will of the local community.

The prevailing attitude of a society towards certain business practices, as reflected in its anti-monopoly laws, has induced many mergers and acquisitions. The 1898-1903 American merger movement, which coincided with a relaxation of incorporation laws, the widening of national markets through transportation developments and the development of financial markets

13. J.H. Dunning and C.J. Thomas: "British Industry", (London: Hutchinson, 1961) P.44-47.

14. R. Evely and I.M.D. Little: "Concentration in British Industry", (Cambridge University Press 1960) p.188.

increasing the marketability of securities, was preceded by the passing of the Sherman Act in 1890. Given this expansionist economic climate and the fact that the recent legislation outlawed collusive activity, businessmen sought to engage in practices as one firm and in that which was outlawed when practiced by separate entities.[15] The recent merger activity in Britain's more concentrated industries, such as man-made fibres, oil-refining, tobacco and sugar, reached a peak in 1959-61 and may have been stimulated by the fact that the Restrictive Trade Practices Act of 1956, while raising a presumption that price-fixing and other restrictive practices were against the public interest, left firms free to combine their efforts through merger.[16]

It may be appropriate at this point to consider not why firms buy other firms, but to reverse the question and to ask what motivates the seller in these transactions. Butters, Lintner and Cary [17] segregated the seller's considerations into management reasons, investment reasons and taxation reasons.

In their sample it was found that management considerations were more important in the sale of smaller companies. The most frequent motivation that was cited was the desire of the owner-manager to retire, and in the usual case, for various reasons, there was a dearth of adequate management succession. In any case, the owner-manager usually has most of his wealth invested in the business and he is understandably reluctant to expose his family to the serious financial risks involved in abdicating control of his business in favor of an untried successor. To the degree that the business is dependent on the skills of the owner (as in some cases of an aging top-management team) its future success will be threatened by

15. Weston: OP. Cit. p.82
16. S. Brittan: "The Observer" March 8, 1964, p.7
17. Butters, Lintner and Cary, Op. Cit. p.205-222.

his (or their) retirement. However, the most common reason for retaining the business, despite the pressure to sell, is the desire of the owner to turn his business over to his son.

Sometimes the objective of selling part of the business may be to lighten the load carried by the management while some owner-managers, with reasons ranging from a desire for greater security to a desire for the prestige of being a responsible official in a large organization, are glad to become connected with larger companies.

The other main non-tax motivations for sale cited are investment considerations. The expectation by an owner that his holdings will decline in value for various reasons, either suddenly in the near future or gradually over the years can prompt many a sale. However, it may be that the investment motive for sale is simply the normal desire of an investor for greater diversification and improved quality and marketability of his investment holdings.

In Butters, Lintner and Cary's sample, taxation was given as a major reason for sale. However, the importance of taxation here will depend on the tax structure prevailing in the country under consideration, and so the impact of taxation as a motivation for sale will vary with the particular circumstances. The impact of the estate tax on the owners of family businesses will be reinforced by the combined effects of high income taxes and of low capital gains tax rates in the U.S.A. (However, Canada has no capital gains tax while Britain's recent experiments with such a tax are of very limited scope). If owners are to pass on their holdings to their heirs, they must accumulate large amounts of liquid assets in order to provide for their estate taxes and for their other liquidity needs. The personal income tax makes the accumulation of such funds prohibitively costly if not impossible. The recent sale of Labatt shares to an American brewery provides an example of a sale which was prompted by the problem of finding a large amount of cash to satisfy the

succession duty collectors.[18] One of the undesirable results of succession duties and the ensuing sale of Canadian small family-businesses, is that in a surprisingly large number of cases the purchase has been made by foreign interests, at a time when Canadians are suspicious of alien ownership and control of their businesses.

The impact of the estate tax on the owners of small businesses is reinforced by the combined effects of high income taxes and of low or non-existent capital gains tax rates. While funds taken out of the business as dividends may be taxed at very high rates, owners may convert the stock of their companies into cash or marketable securities at a low or non-existent tax cost.

We now turn to the motive which is perhaps the most frequently advanced explanation of merger - merger for the reduction of competition or for market monopolisation.

Since merger does not add capacity in the market, such a mode of expansion does not intensify existing competitive conditions as does the direct entry, through internal expansion, of a firm into a new market. In fact, expansion by merger, since no capacity is added, is not entry and no appeal can be made to the generally accepted competitive benefits from entry. Expansion in this way avoids the downward drag on prices that might follow from expanding by building.

However, where an industry is "sick" and suffering from "too much competition", merger may be the route chosen to bring more stable conditions to the market.

At the other extreme is the ambitious "empire-building" entrepreneur who may be seeking monopoly profits through market domination.

18. "The Winnipeg Tribune", Feb. 28, 1964, p.6.

Through mergers, the revenue curve of this firm may become less elastic and the value of the acquired firm to him would be increased correspondingly. To this entrepreneur, with extensive ambitions to achieve impressive results in a relatively short space of time, the merger route may be the only practical road to his goal.

The most outstanding examples of mergers for monopoly occurred during the 1887-1904 period in the U.S.A. when the great trusts, such as Standard Oil, U.S. Steel and American Tobacco were conglomerated through mergers. In Canada, perhaps the best example of monopoly achieved through merger and various predatory business practices was provided by the match industry and the activities of the Eddy Match Company.

Markham[19] has observed that "the paths of economic theory and merger literature have rarely crossed", which has led in many studies to the improper conclusion that mergers have generally resulted in monopoly and that monopoly has been their goal. The explanation of merger cannot be a simple monocausal one.

It has been the object of this initial study to underline the basic driving force behind the modern corporate firm - the urge to expand for the sake of the firm. We have seen that external expansion or merger has many advantages to offer the expanding firm over the internal method of growth. But we have seen that this underlying drive for expansion covers a wide gamut of motivations ranging from a desire to attain industrial domination on the one hand to the desire to maintain a going enterprise on the other. In between are the objectives of expansion without overtones of industrial domination and the natural propensity of an alert businessman to pick up a good bargain when he thinks he sees one.

19. Markham: Op. Cit. p.143.

Merger is an integral part of the competitive business process - the strong absorbing the weak, a useful method for the entry and exit of liquid assets and entrepreneurial talent seeking employment in market areas which are viewed with varying degrees of optimism. In short, merger is but one aspect of this business metamorphosis.

It is now appropriate to observe some of the effects of mergers and acquisitions on the competitive structure of the market economy, and in particular, to see how this structure, which is held in such esteem by our Western societies, can be impared by some business mergers.

CHAPTER TWO

COMPETITION, MARKET POWER, AND THE PUBLIC INTEREST

The underlying assumption is that our society has a vested interest in the preservation of a predominantly market economy, and that the public interest lies in promoting this, by ensuing a certain level of competition in industry sufficient to prevent the accumulation of unchecked private economic and political power. Our concern is with large-scale economic power and the likely undesirable consequences when markets tend to be monopolised, and we shall observe the contribution that the merger method of expansion has made to the concentration of industry in Canada and Great Britain. From the discussion, it is hoped that appropriate policy goals for society will emerge that seem capable of curbing the threat to the competitive system presented by certain mergers and acquisitions.

What is it that we want from the economy, and specifically, what fruits do we expect the competitive market economy to bear? Firstly, as to product, we require cheapness and cognate benefits, which for the economy as a whole means that productive resources are efficiently used; that is, the achievement of the largest bundle of desired outputs from the available bundle of resources. Secondly, we require progress in the form of growth in total output and output per capita and development of new, cheaper production methods and new improved products. Thirdly, we hope to attain stability in output and employment; that is, growth at a stable rate rather than with large fluctuations. Fourthly, we desire an equitable distribution of income, which implies the passing along of the fruits of efficiency and progress to consumers.[1]

1. C. Kaysen and D.F. Turner: "Anti-Trust Policy." (Cambridge: Harvard University Press 1959) p.11.

Not all of this quartet of virtues are connected to the functioning of markets in an equally intimate way. However, efficiency and equity in income distribution will result where the competitive market forces bring prices down to costs, while progress will result in attempts by competitors to "build a better matchbox". The competitive system should also help us toward certain more general social and political conditions concerned with opportunity, mobility and the absence of concentrated power.

At this stage it is necessary to distinguish between some different interpretations of "competition". We begin by exploring the rigorous, static model of the perfectly competitive market which results in each seller acting as if his own decisions had no influence on any significant market variables, such as price, supply, the number of other sellers, etc. This is brought about because sellers are many in number and individually of insignificant size relative to the total market; the product of any seller is a perfect substitute for that of any other; and new sellers enter and old ones leave freely and quickly in response to profits and losses. The model also gives rise to a definition of economic efficiency in terms of the relations between costs and prices; resources, in response to consumer demand are employed in the most efficient manner as a result of the prescribed market structure and the logic of profit maximisation.[2] Consequently, the system produces "ideal" results for society.

Obviously, in the real world with very few exceptions, these conditions will not hold. Economies of size, both at the plant level and the firm level over some output range, means that firms will not be insignificant in relation to the market; the geography of production and consumption means that for many products there are regional markets in which

2. IBID p.7

the number of sellers is relatively small and are isolated from other markets by barriers of transport costs; product differentiation, advertising and local differences among sellers destroy the homogeneity of product premise; barriers to entry, ranging from large capital requirements to high advertising costs and closely patented technology vary from industry to industry.

In the dynamic setting of the real world, the static interpretation of "competition" is hardly relevant. If the economist is to help formulate a definition of competition and to lay down a set of criteria that is to be considered worthy of promotion by public policy, then a much more realistic approach is required. The result has been the development of the concept of effective or "workable" competiton which was initiated by J.M. Clark and J. A. Schumpeter.

There are many definitions of this subjective idea of "workable" competition, but the underlying factor is that from a prescribed market structure, results are forthcoming, which approach the predicted results of the model of perfect competition as closely as could be expected or closely enough for "all practical purposes".

Numerouss writers have laid requirements for the market structure in order that the performance of the industry be acceptable. Bladen and Stykolt insist that there must be several alternative sources of supply between which the buyer can choose freely; that there are no long-run barriers to entry so that the established firm's price policy is framed with potential competition from new entrants in mind; that there is evidence of technological progress, new products, new processes, new administrative procedures; that the evidence suggests that the advantages of such progress have been passed on to the public. Such effective

"workable" competition would be "workable" from the point of view of the producers and "effective" from the point of view of society.[3]

Stigler has made only the minimum concessions to realism, for he denotes the market as workably competitive where there are a considerable number of firms selling closely substitutable products in each market; where there is no collusion between these firms; where the long-run average-cost curve for a new entrant is not materially higher than that for an established firm.[4] Clearly many industry-patterns in the real world would fail to pass these tests.

Other writers have preferred to make inferences about the industrial structure from the performance of the industry. J. S. Bain[5] would conclude that the structure of the industry is defective where, for example, a profit-rate is being made consistently above the normal return on investment; where many firms in the industry have grown to a scale outside the optimal range; where chronic excess capacity prevails; where selling-costs bear an abnormally high proportion to total costs; where the industry responds slowly to technical changes. However, the great problem of using performance rather than structural tests is that a subjective judgement needs to be made about what is the norm, and endless controversy is the inevitable result.

J. M. Clark[6] has suggested that the best results in terms of industrial efficiency may arise from a structure with a moderate number of large, strong and growing concerns with a fringe of smaller specialist manufacturers. Another authority concludes that competition is but one

3. V.W. Bladen and S. Stykolt: "Combines Policy and the Public Interest" "Anti-Trust Law: A Comparative Symposium" (Ed.W.Friedman) (London: Stevens 1956) p.66.
4. G.J.Stigler: "The Extent and Bases of Monopoly" A.E.R. Vo.32, No.2, Part 2, June 1942. p.1.
5. J.S.Bain: "Workable Competition in Oligopoly" A.E.R. Vo.40, No.2, May, 1950 p.35.
6. J.M.Clark: "The Orientation of Anti-Trust Policy" A.E.R. Vo.40, No.2, May, 1950. p.93.

means to ensue the mobility of factors to employments of maximum utility, and he sees the promotion of such mobility as the central economic problem that societies have to face.[7]

One distinguished antagonist of the traditional conception of competition and the proclaimed virtues of price competition was J. A. Schumpeter. In the real world oligopolies, "effective" competition means "the competition from the new commodity, the new technology, the new source of supply, the new type of organization - competition which commands a decisive cost or quality advantage and which strikes not at the margins of the profits and outputs of the existing firms but at their foundations and their very lives."[8]

To Clark and Schumpeter, this technological advance will ensure the long-run competitiveness of the economy. In the short-run, above "normal" profits earned by the innovator should be tolerated by society as the reward for the risk and uncertainty of undertaking a new venture. However, these profits will be destroyed in time by the "perennial gale of creative destruction" as competitors adopt the innovation. This is what Clark called "neutralisation". "If a potential innovator expects neutralisation to be complete before he has recovered the costs of innovation, his incentive vanishes."[9]

Here then, is the dilemma: long-run competitiveness is necessary to promote innovation and to ensue that the public enjoys the cheapness and plenty, which is the product of such innovation: yet some restriction of competition in the short-run is essential if innovation is to be induced in a system of free enterprise.

7. A.D. Neale: "The Anti-Trust Laws of the U.S.A." (Cambridge University Press 1960) p.490.

8. J.A. Schumpeter: "Capitalism, Socialism and Democracy." (New York: Harper 1942) p.84.

9. J.M. Clark: "Competition and the Objectives of Government Policy" in "Monopoly and Competition and their Regulation" (Ed. E.H. Chamberlain) (London: Macmillan 1954) p.327.

But how much monopoly is compatible with our idea that economic decisions should emerge from the impersonal market forces? In other words, how much monopoly is tolerable, or conversely, how much competition should we seek to promote? What is monopoly and how is it recognizable? What has society to fear from its presence?

We should note the differences between the "political" and "economic" aspects of monopoly. In a political or power sense, monopoly can refer to situations which provide a concentration of privileges or advantages in making and enforcing the effective rules of society. It is generally recognized that in our type of society, if someone is to have power, it is less intolerable if vested in the state (or in private persons who are regulated by the state) than if arbitrarily asserted by private individuals.

The essential precondition of economic monopoly (as opposed to the competition of the 'perfect' model) is that a firm can significantly affect price by varying its output. This implies an elasticity of demand significantly below infinity with the consequence that the firm can set output such that marginal costs persistently tend to differ from price. The outcome is that output of the product is "too small" in relation to demand conditions and the conclusion is that society's scarce resources are misallocated. This wasteful use of resources means that total national income is smaller than it would be in the absence of monopolistic restrictions of output.

Other possible manifestations of monopoly power may include: extortionately high prices and low quality of products: by eliminating the penalty which competition involves for inefficiency and inertia, management is inefficient yet leads 'a quiet life': restriction of output leads to underutilisation of society's productive potential: the existing inequality in income distribution is aggravated through excessive profits

and concentration of wealth: through monopoly's rigid prices, adjustment to economic change is obstructed and industrial instability is intensified.[10]

A number of tests for identifying monopoly power have been offered by the academic economists, but none is readily acceptable. Lerner's formula of price minus marginal cost divided by price, suffers from lack of adequate data for marginal costs. Rothschild's measure, the ratio of the elasticity of the industry demand curve to the elasticity of the firm demand curve at the prevailing price, cannot be used directly with available empirical data. Bain's test of profitability is difficult to apply, because of the vagaries of asset valuation and accounting measures of net income and because monopoly power may exist without monopoly gains, while high rates of return may result from efficiency, temporary gains of innovation and windfalls without monopoly being present.

However, although these measures of monopoly cannot be used in mechanical ways, they are useful in enabling economists in individual situations to make judgments of the effects on competition of certain monopolistic restraints.

Because there are no unambiguous definitions of "monopoly" and "competition" we are forced to rely on estimates of the long-run elasticity of demand for individual firms. A high elasticity, in the absence of effective collusion, is a sufficient condition for competitive behavior; a low elasticity is a necessary, but not a sufficient condition for monopolistic behavior. The decision as to how low elasticity must be to make monopolistic behavior probable is essentially arbitrary. As we have seen, in making such a decision we must guess as to how much deviation from the "ideal" results of competition can be tolerated within the limits of workable competition, and as to how low elasticity of demand must be before behavior beyond tolerable limits can be expected to occur.

10. F. Machlup: "The Political Economy of Monopoly". (Baltimore: Johns Hopkins University Press 1952) p.73.

Since little progress has been made in directly estimating demand elasticities, we must rely on indirect evidence. This involves studies of the structure of industries, in terms of the number of firms and the concentration of output or assets or employment. Broadly defined, the structure of a market consists of these stable features in the environment of a business firm which help determine or condition the firm's decisions. In examining the market structure, we seek ultimately to determine whether or not the structure is such as to compel competition from the firms in the market, where competition means certain kinds of economic results and the impersonal process which leads to them.

On the basis of such structural evidence as the number of firms and the concentration of control, an industry can be considered workably competitive if no firm produces more than a small proportion of total output, provided that there are no effective collusive arrangements among firms of the industry. If any one firm produces a substantial proportion of total output, the industry can be considered effectively monopolistic.[11] However, it should be obvious that concentration of output becomes a tenuous indication of monopoly if industries are poorly defined in terms of either product group or market area.

Where an industry is broadly defined to include a large group of products, for example, "electrical machinery apparatus and supplies", concentration in industries more narrowly defined is hidden, for the chances are greater that firms which control only a negligible proportion of the whole production of the broadly defined industry, produce a large proportion of the output of one particular article. And this article may not directly compete with any other product of the industry. The broader the definition of

11. G. W. Nutter: "The Extent of Enterprise Monopoly in the U.S.A. 1899-1939" (Chicago: University of Chicago Press 1951) p.8.

industry, the greater the likelihood that the group includes some specialized firms, and so the concentration index for the industry would never reveal this monopoly power.

Again the figure representing national concentration of control may be low and yet regional and local monopolies in the product group may be prevalent.

Usually, the concentration index includes only the share of domestic producers in the supply from domestic sources. An industry with a high degree of concentration may be much exposed to competition from imports and as a result be much more competitive than another industry with less concentration of control but less competition from abroad.

As Stigler has said: "An industry should embrace the maximum geographical area and the maximum variety of productive activities in which there is strong long-run substitution. If buyers can shift on a large scale from product or area B to A, then the two should be combined. If producers can shift on a large scale from B to A, again they should be combined. Economists usually state this in an alternative form: All products or enterprises with large long-run cross-elasticities of either supply or demand should be combined into a single industry".[12]

The fact that a high degree of concentration of output seems incompatible with the concept of workable competiton, and since the degree of concentration is amenable to numerical measure, such ratios provide us with a starting point for the detection of monopoly power. Our thesis is that a high degree of concentration of output, together with other structural evidence, is prima facie proof of monopoly power, and that most cases of monopoly power will be found in trades with high concentration ratios.

12. G.J. Stigler: "Introduction" in "Business Concentration and Price Policy". Op Cit. p.4.

If the above definitions of competition and monopoly appear somewhat arbitrary, then this result is the consequence of the absence of definite studies of this problem and general agreement on conclusions.

The critical question now becomes one of assessing whether market power is increased by business mergers, and if so, what part can be attributed to merger and acquisition in promoting high concentration in Canadian and British industry. Our approach must be illustrative and no attempt at a comprehensive explanation of high concentration can be made.

Do mergers within a particular industry tend to concentrate the control of assets and output in that industry? Markham[13] observes that mergers free entrepreneurs to create new firms with new assets. But the fact that they leave the industry and go elsewhere while the number of surviving firms is reduced, inevitably means that the total assets in the industry have been concentrated.

To attempt an assessment of the effects of mergers on overall concentration in industry would be fruitless. Quite a number of important mergers would have to take place in the already highly concentrated and heavily capitalized industries before the overall level of industrial concentration was affected. And intense merger activity can hardly be expected in industries where only a relatively few small competitors still remain for purchase. Meanwhile, it is possible for "low-capitalized" industries such as foods and textiles to become almost completely monopolized through mergers without significantly affecting the concentration index for manufacturing as a whole.

The central issue thus unfolds to be one of assessing the effects of mergers on concentration ratios and other structural indicators in particular industries and on particular products.

13. J. W. Markham: Op. Cit. p.145

In Canada, "few of the leaders of industry reached their present positions by (internal) growth alone, and most of them are the result of a merger or a succession of mergers."[14] The following are examples of "mergers of mergers": Dominion Steel and Coal Corporation, Canada Cement, Canada Packers and Canadian Canners. The two leading distillery firms are Distillers Corporation - Seagram's Ltd., and Hiram Walker-Gooderham and Worts Ltd., are both the result of merger in 1928 and 1927 respectively. Dominion Textiles is the leading cotton firm and was founded in 1905 as a merger of four companies, and subsequently acquired further properties in its growth. Imperial Tobacco of Canada dominates the tobacco industry and is the successor to a company formed in 1895 as a merger of several smaller firms. Mergers are also a prominent feature in the history of the leading companies in pulp and paper, gypsum products and coal tar distillation.[15]

The high concentration ratios in a number of Britain's industries at the present time can be attributed to the unprecedented series of mergers which took place in the closing years of the nineteenth century, and which was analogous to the First Merger Movement in the U.S.A. The wallpaper, cement and salt trades became highly concentrated at that time and in 1951 remained amongst the most concentrated trades in Britain, although over the years they undertook further amalgamations in response to the vicissitudes of the trade. The tobacco and cotton thread industries remained highly concentrated, a feature also attributed to the large scale merger activity of the last century.[16]

In certain trades the stage may be reached where the industry consists of a few large concerns and yet increased concentration takes place

14. L. G. Reynolds: Op. Cit. p. 176.

15. G. Rosenbluth: "Concentration in Canadian Manufacturing Industries", (Princeton: Princeton University Press 1957) p.71.

16. R. Evely and I.M.D. Little: Op. Cit. p.52.

by further mergers and acquisitions. By 1920, the match industry had reduced through mergers to three large groups and in 1922, through further consolidation, the British Match Corporation remained as the sole producer.[17]

However, the process of concentration may be more protracted than in the case of the overnight consolidation of large numbers of small concerns, or the merger of a small number of larger concerns. The distillers company was formed through merger in 1877 and by a process of piecemeal acquisition had obtained 80 per cent of the whisky trade by 1925.[18]

We are stressing the tendency for high concentration, once attained, to persist. This can be attributed to a number of reasons: first; stagnation or a decline in trade activity: second; barriers to entry of newcomers and the ability of the established concerns to absorb such newcomers. However, for the great majority of the highly concentrated trades, the long-term trend of demand has been rising, so that the explanation of the maintenance of high concentration must be sought in the operation of the production and market factors restricting entry and limiting the growth of the smaller firms in these trades.

It has been suggested that the 1898-1903 merger movement in the U.S.A. gave "to American industry its characteristic Twentieth Century concentration of control."[19] As we have seen, such an observation would find sympathy when applied to Canadian and British industry.

As we saw in the previous chapter, the causes and consequences of mergers are complex and diverse. In turning now to the framing of a public policy committed to the maintenance of a "workably competitive"

17. IBID p. 119

18. IBID p. 121

19. P.T. Homan: "Trusts: Early Development" Encyclopedia of the Social Sciences. XV (1935) p. 114.

economy, the broad implication of this conclusion is obvious. If we are to continue to rely on the market rather than on the social conscience of corporate management to give us the kind of business performance we want, the structure of markets must be such as to enforce acceptable competitive behavior. In other words, there must be limits to the permissible degree of market power. And this means that while those mergers which are socially desirable should be encouraged, those mergers which tend to increase market power and industry concentration beyond a certain point and which might constitute monopolizing, should be discouraged.

The choice is not whether to condemn or sanction all mergers, but how to design appropriate criteria for judging which is which. "A judgement concerning market power is of the essence of merger policy. A policy that forbade all mergers would be nonsensical. But, if some are to be permitted and others forbidden, the dividing line must turn on conceptions of market power."[20] And it has been said: "The most fruitful field for the application of a market power standard, however, is merger policy."[21]

Applying this market power concept, the two main issues for public policy become: first; should the present degree of industrial concentration be reduced through dissolutions? Second; should future proposed mergers be subject to effective government review and control?

As we have observed, the major merger activity of the large firms in the industries with the current high levels of concentration took place very early in the existenee of the companies. One possible solution that has been advocated would involve an "unscrambling of the industrial omelet" which implies a policy of dissolution and divestiture. The justifica-

20. E.S. Mason: "Economic Concentration and the Monopoly Problem". (Cambridge: Harvard University Press 1957) p.400.

21. IBID p.81

tion comes from ascertions by some writers that "all of the technical economies of scale are achieved at the level of the plant rather than of the firm", [22] while the existence of multi-plant operations in many firms provides a technological basis for separation into individual units, without the possibility of efficiency losses. Some critics have suggested that where economies of size are claimed and where structural re-organization would involve significant performance losses, the burden of proof should be placed on the defendants. Doubts would be resolved in favor of reducing market power rather than maintaining performance.[23] Others would make no exceptions and would claim that such social losses should be willingly accepted as the price for automaticity and impersonality in our economic system.

Corwin D. Edwards would hope that as part of a thorough attack upon excessive concentration, dissolution and divesture would be the principal means of action in an effort to recover lost ground and clear away existing concentration of power.[24] However, Weston questions whether the breaking up of each of the four largest firms controlling 80 per cent of output into six or eight small firms would result in more competitive behavior by the industry. "Economic theory has not provided an answer to this question either on a priori grounds or by factual data."[25]

The second of our public policy issues, in effect, is a substitute for dissolution, offering prophylactic proceedings rather than cures. If broad authority is granted to an administrative body to rigorously control future mergers, the need for dissolution as a remedy is correspondingly less. And reducing market power by controlling future mergers has a

22. C. Kaysen and D.F. Turner: Op. Cit. p.6.

23. IBID p.81

24. C.D. Edwards: "Maintaining Competition" (New York: McGraw-Hill 1949) p.154.

25. J. F. Weston: Op. Cit. p. 90

very important advantage over the dissolution remedy: dissolution, viewed as a punishment for success, is seen by many critics as having a disincentive effect on the firm's initiative for efficient operations.

If it is accepted that controlling future mergers would help to reduce the degree of economic concentration in particular industries, the critical question becomes: How much market power before public policy draws a halt to its extension by witholding permission for a proposed merger?

Edwards has said: "A rule of law should be established which forbids acquisition of any substantial part of the capital assets of a business enterprise.....if the effect will be to increase appreciably the size of a great concern. It would be appropriate to consider specifying a range of acquisitions that would be forbidden unless the enterprise desiring to make the acquisition successfully assumed the burden of proof that the public interest would be served rather than injured thereby."[26]

Irving Brecher, recognizing that merger may involve a reasonable possibility of improved technology and increased productive efficiency and that the structural restraints inherent in merger may be offset by an overall strengthening of the competitive process, has suggested that any merger authorizing body should consider: the number and relative size of firms in the particular industry; the growth pattern of the merging companies; the history of anti-competitive practices in the industry; the intent and design of the acquiring company ; the gains in efficiency arising from the merger; the conditions of entry into the industry.[27] His observations underline our earlier discussion of the difficulties for any authority of definition, measurement and judgement.

Kaysen and Turner spell out criteria of market limits and for

26. C.D. Edwards: Op. Cit. p.143.

27. I. Brecher: "Combines and Competition" 38 Canadian Bar Review (1960)

predicting the effects of merger on competition. They define the market broadly: "Two products belong in the same market if a small change in price (a product) causes a significant diversion in a relatively short time of the buyers' purchases or the sellers' production from one product to another."[28] In predicting effects they endorse our earlier proposition that, "reliance would have to be placed on structural evidence, since behavioral evidence would normally be available only for the market as it existed in the past."[29]

Their "benchmark" is that any horizontal or vertical merger where the acquired firm's share of themarket is 20 per cent should be prima facie illegal. Also, any merger of competitors who together constitute 20 per cent or more of the market should be prima facie illegal.

However, they suggest that the prima facie illegality could be rebutted where conclusive proof is offered that the acquired company is failing or the acquisition will yield substantial economies of scale that cannot be feasibly effected in any other way. Alternatively, they suggest that a merger could be barred even if the competitive firm would have less than 20 per cent of the market, where, for example, entry is difficult or the acquired firm had had an active influence on prices.

They propose no action against "conglomerate" mergers, that is, business activities that sprawl across unrelated functions (except acquisitions by giants where the concentration of wealth would be huge) since, in view of their stringent ban on vertical and horizontal mergers, they feel a concession to the advantages of mergers as entry-facilitating devices is justified.

28. C. Kaysen and D.F. Turner: Op. Cit. p. 27

29. IBID p. 133

Their reasoning for such a hard position on mergers is that, "any expansion of a firm by merger is less competitive in its effects than would be the corresponding expansion made by new investment.....new investment adds to supply and capacity; the merger does not immediately, though it may lead to such addition in the long-run."[30]

Stigler believes that few mergers are truly conglomerate and this suggests that he has broad market limits in mind. The critical concentration of output ratio for Stigler is 20 per cent, for he proposes that a merger giving a firm this share of the market be illegal. However, the enforcement agencies should decide to act when the market share is less than 20 per cent if the industry has a history of collective activity. He would restrain vertical mergers where a firm with one-fifth of the industry's output acquires a supplier or customer firm with more than 5 or 10 per cent of the volume at its level. He fears vertical mergers because they may inhibit entry.[31]

H. C. Simons, as part of his positive program for liberal economic policy, proposed "limitations designed to preclude the existence in any industry of a single company large enough to dominate that industry."[32] He suggested that no one firm be allowed to control or produce more than 5 per cent of the total output. His rule, in attempting to prevent absolute concentration beyond a certain level would be applied to growth by internal expansion as well as by external expansion.

However, rules for a ceiling on size have been criticised by one writer because of their impracticability. He claims that the boundaries of an industry are too difficult to define to apply a rigid percentage figure; that early pioneers would require special treatment; that the economic effect

30. IBID p. 135

31. G.J. Stigler: "Mergers and Preventive Anti-Trust Policy" University of Pennsylvania Law Review Vo. 104 Nov. 1955, p. 178-184.

32. H. C. Simons: "A Positive Program for Laissez Faire" (Chicago: University of Chicago Press 1948) p. 20.

of a stated percentage would vary with the technology of the industry, the nature of demand and cost functions and the relative ease of entry into the industry.[33] Obviously, no uniform limit upon size would be equally appropriate to a glove manufacturer, a steelmaker, a food chain and a building contractor. And an unfortunate result of the given percentage rule may be that as the maximum percentage is approached, the incentive to increase sales through charging lower prices would be reduced.

Our foregoing discussion has established that if society finds intolerable the weilding of large-scale market power by private individuals and firms, then some control over mergers, as one clear road to building such market power, is required. We have seen that as a quantifiable measure, the concentration ratio, together with other structural features, provides a first guide to the strength of power in the market. We have observed some of the policy proposals by the distinguished economists but we must conclude that no one all-pervasive rule can be applied. "The attack upon excessive power must consist in a series of proceedings against examples of such power. The development of such an attack necessarily involves discovery of standards for determining whether or not excessive power is present or imminent in particular cases."[34]

In the chapters which follow we shall explore the policies of Canada and Britain in dealing with the problem of mergers and compare the standards that each has employed to determine when market power is excessive.

However, we must appreciate that a merger policy is but one section of a general 'anti-trust' program, and before we deal with the part, it is appropriate to devote a short space to the whole. In the next chapter, we shall view the similarities and differences in the approaches of Canada and Britain to the whole problem of monopoly.

33. J. F. Weston: Op. Cit. p. 97.

34. C. D. Edwards: Op. Cit. p. 121.

CHAPTER THREE

THE BACKGROUND TO MONOPOLY LAW IN CANADA AND BRITAIN

In this chapter we shall be attempting to supply a brief outline of the Canadian and British approach to the monopoly problem as a background against which merger policy must be seen. Our view here is of the global problem before putting merger policy in the respective countries under the microscope for detailed observation. In order to distinguish the outstanding differences in general approach, we shall need to sketch the evolution of monopoly control in both countries, so that the position that has now been reached will be comprehensible.

Throughout the law on monopolies and restrictive practices there runs a basic conflict. On the one hand, the right of every member of the community to carry on any trade or business that he chooses and in such a manner as he thinks most desirable in his own interests, with a corresponding obligation, not to interfere with another's freedom; and on the other hand the freedom to contract, which implies the freedom to combine with some against others, and the freedom "to contract in restraint of this freedom."

Starting from the point that all contracts in restraint of trade were against public policy and consequently void, the common law of England gradually introduced the issue of 'reasonableness'. The desirability of enforcing certain contracts in restraint of trade was first recognized in connection with covenants to protect the value of intangible property which had been sold. The vendor of a business might reasonably be expected to refrain from competing with the purchaser in a way that would diminish the value of what he had sold. Hence, a covenant which restrained the seller from competing with the buyer, within a given radius and for a certain period of time, was considered reasonable and held by the courts to be enforceable. Over the years a wider range of cases came before the courts and the principles governing the enforceability of contracts in this field became clearer. -

It became established that in contracts between firms, the firms themselves were the best judges of their own interests and of what was reasonable as between themselves. In theory, the courts still considered the 'reasonableness' of contracts in the light of the public interest and would hold a contract to be unforceable if they believed it to be "calculated to produce a pernicious monopoly" and "to enhance prices to an unreasonable extent." As Lord Haldane said, "The onus of showing that any contract is calculated to produce a monopoly or enhance prices to an unreasonable extent will be on the party alleging it" and once the court is satisfied that "the restraint is reasonable as between the parties, the onus will be no easy one."[1] Hence, in practice, the courts gave little attention to the public interest.

The legal concept of "conspiracy" refers to an act, otherwise lawful, which becomes unlawful if two or more persons combine to take action with intent to injure; and the injured party has a remedy through civil action for damages or an injunction. For example, the use of collective economic power to drive a rival out of business by means of persistent undercutting would look like wilful damage, while an embargo on supplies to competitors would seem to be almost certainly a conspiracy on which action could be taken. However, at the high tide of laissez-faire sentiment in the latter half of the 19th Century there emerged the interpretation that such actions "did not pass the line which separated the reasonable and legitimate selfishness of traders from wrong and malicious acts."[2] Thus, the public policy developed that however severe the damage sustained by a third party, as a result of any of the above actions, no liability attached, unless the person or companies concerned combined wilfully or maliciously to

1. N.W. Salt. Co. v. Electolytic Alkali Co. Ltd. (1914) A.C. 471.
2. A. Hunter: "Competition and the Law". Manchester School, Jan., 1959, p.54

damage. The respondents need only demonstrate that the predominant motive of the combination was to protect or promote legitimate trading interests and the case was secure.

A ruling of some interest was that which precluded evidence by trade, technical or other expert witnesses of actual or likely economic consequences flowing from an agreement. The feeling of the courts was that they were not suitable bodies to deal with matter of this kind.

As Professor W.A. Lewis has suggested, the courts took the view that not only had they "no legal power to suppress monopoly" but that monopoly might be presumed to be in the public interest.[3] And there are many instances of where judges have suggested that competition is not in the public interest when it proves ruinous to the firms concerned. In 1815, Ellenborough, C.J. stated that a price-fixing agreement was "merely a convenient mode of arranging two concerns which might otherwise ruin each other"[4] and nearly a century later, Lord Haldane stated that competition, which led to unremunerative prices and which might "drive manufacturers out of business, or lower wages and so cause unemployment and labour disturbance" was not in the interest of the public.[5] In 1928, Laurance, L.J. thought that it was only the unreasonable raising of prices that was against the public interest, but there was no necessity to assume that prices in practice would be raised to such a level. It "would be highly improbably that the seller in his own interest would want to fix unreasonable prices."[6]

In addressing themselves to the public policy involved in contracts in restraint of trade, the courts have thus conferred in effect, the fiat of

3. W.A. Lewis: "Overhead Costs" (London 1949) p. 160-162.
4. Hearn v. Griffin (1815) 2 Chitty 407.
5. N.W. Salt Co., Op. Cit. 467.
6. Palmolive Co. (of England) v. Freedman (1928) 1 Chancery 264.

the common law upon industrial trusts and combines and trade associations, and upon contractual arrangement tending to reduce competition. Agreements to rig tenders, tying clauses, exclusive dealing arrangements, pre-auction bidding agreements, agreements to share out trade in a particular region and agreements not to compete, agreements to restrict output, pooling agreements, and resale price maintenance agreements have all been adjudged to be in "reasonable" restraint of trade. The only exception would be where an attempt was made to damage the business of another concern and the actions were motivated by pure malice. The monopolist and trade association could be as ruthless as they chose, even though the interests of others were damaged, so long as they were not activated by malice.

The general feeling that "when the question is one of the validity of a commercial agreement for regulating their trade relations entered into between two firms or companies.....the parties are the best judges of what is reasonable as between themselves."[7]; and the belief that the regulation of prices and supply by combines and trade associations may be part of the general price which has to be paid for ensuing a relatively stable level of trade and employment, has rendered the common law and the doctrine of the restraint of trade quite useless as a public safeguard against the abuse of monopoly power.[8]

In the period between the World Wars a number of official reports were published in Britain which were not slow to point out the possible dangers to the public interest from the concomitant growth in restrictive agreements. The boost given to the formation of monopolistic arrangements by the First World War resulted in the appointment of two committees to study the problem.

7. N.W. Salt Co., Op. Cit.

8. P. Guenault and J.M. Jackson: "The Control of Monopoly in the U.K." (London: Longmans 1960) p. 15.

The Committee on Commercial and Industrial Policy said: "In all important industries there should exist strong, comprehensive and well organized associations which should be clearing houses of information and should be competent to voice the opinions and needs of their respective trades as a whole.....We are far from suggesting that unrestrained competition is necessarily desirable in all cases and we recognise that combinations with a view to its limitation while naturally welcome to the producer may not always be to the ultimate disadvantage of the consumer."[9] However, it readily acknowledged the danger that combines might adopt undesirable practices, exploit the consumer and injure the national interest. A similar view was taken by the Committee on Trusts.[10] Both committees recognized the need for continuing government investigation of the activities of combines and associations and recommended the establishment of investigation machinery - but neither of them recommended the type of legislation which had been used in America and Canada.

The Balfour Committee reported in 1929 and observed the tendency for the alleged growth of monopoly and discussed the argument for its control.[11] The constructive suggestions of the Committee went no further than a proposal for establishing an investigatory tribunal; it rejected anti-trust laws and thought that any machinery for controlling prices or interfering with business conduct stood little chance of acceptance.

Two other reports of the inter-war period also indicated the hesitant view taken of certain important business practices.[12] They supported the investigation of specific cases where abuses were suspected but rejected as impractical any comprehensive system of price control by a government department.

9. Report on Commercial and Industrial Policy CMD 9035 (1918) para. 165.
10. Report of the Committee on Trusts. CMD 9236 (1919)
11. Report of the Committee on Industry and Trade. CMD 3282 (1929)
12. Sub-Committee on Fixed Retail Prices CMD 662 (1920) AND Report of the Committee appointed by the Lord Chancellor and the President of the Board of Trade on the Restraint of Trade (1930).

What is evident from these reports is an inability to agree that monopoly and restrictive practices constituted any grave danger to the public or that any general anti-monopoly legislation was justified. However, it was admitted that some practices could be dangerous and where abuses were discovered, some action should be taken, presumably action that seemed appropriate to the particular situation. Hence, the recurrent suggestions, which were never acted upon, for appointing investigatory tribunals. It seems that the issues at stake were not thought to be of sufficient importance to take even the mild measures which were proposed.

Meanwhile, the "rationalization" of British industry was taking place whereby the reorganization of the industrial structure was fostered and encouraged through industrial combinations, as a means of securing economies of production and distribution. The government itself was initiator and even organizer of various restrictive practices, which included price-fixing, quota and market-sharing schemes and "had practiced a standard ignorance of similar private enterprise activities."[13]

The Second World War accelerated the growth in these arrangements and in 1948, the first attempt was made in Britain at controlling monopolies, in spite of the attention the problem had received over many years by both individuals and influential bodies. This delay in legislation may have been partly attributed to the depressed condition of Britain's trade during much of this period, when the desire to control monopoly was weakened by depression and overshadowed by a succession of urgent problems, and the consequent fears of uncontrolled competition. But, it must also be in part attributed to the deep-rooted belief that beneficial control could not be based on any sweeping generalizations regarding monopoly. "There was no basis in British thought

13. A. Hunter: Op. Cit. p. 58.

for any anti-trust legislation following the American pattern, no dogmatic belief in laissez-faire or free unrestrained competition. All that seemed to exist was a conviction that potentially dangerous situations should be investigated and dealt with, not in the light of any dogmas that might exist, but according to the merits of each particular case."[14]

When, in the post-war period, the need for action was recognized, the measures adopted appeared to follow closely the recommendations made by many of the committees that considered the problem in the inter-war years. In 1948, the Monopolies and Restrictive Practices Commission was established as an extra-judicial body specifically charged with the task of discovering the nature and scope of the problem by means of inquiries into industries and trades. The Act made no attempt to define or condemn monopolies or restrictive arrangements. Certain minimum conditions (control of one-third of the supply of a good by arrangement or agreement) were laid down before any enquiry could be initiated by the Board of Trade. The interpretation of the public interest was to be left to the Commission while the only guiding element was a listing of all the text-book requirements of a flexible, progressive economy as desirable criteria.

The powers of control were neglible for in making its report the Commission only recommended appropriate remedies to the Government and the Government then made a statutory order if it felt so inclined. Thus, the control element had a purely ad hoc application at official discretion and in practice, was exercised only once in twenty cases.[15] Informal approaches to industry were preferred. In sum, the bias of the Act was mainly towards fact-finding.

14. P. Guenault and J. M. Jackson. Op. Cit. p. 24.

15. The one case was in the Report on the supply of Dental Goods.

The general report on Collective Discrimination made by the Monopolies Commission provided the essentials of the new enactment of 1956. The government itself was against employing "the stigma of the criminal law" while it could not ignore the criticism that re-examination of the practices case-by-case would be a slow and cumbersome affair and repeat to a large extent work already done by the Monopolies Commission. Nor could it neglect the fact that the judicial tradition of independence and objectivity, and the publicity of the law courts would carry more weight in the world of business than would an administrative tribunal.

The Restrictive Trade Practices Act of 1956 introduced a strong ruling in favor of competition and set up the machinery for registration of restrictive agreements and arrangements, such as price-fixing and quota schemes, as the first stage of procedure. In the second stage, all agreements are challenged by an independent government agent, the Registrar of Restrictive Trade Practices, before a "superior court of record", the Restrictive Practices Court. The Court is made up of Judges and lay members "qualified by virtue of their knowledge of or experience in industry, commerce or public affairs."

The presumption of the Act is that all registerable agreements operate against the public interest. The task of the Court is relatively restricted: to decide from the facts placed before it in the pleadings of the Registrar and the respondents whether or not an agreement escapes the presumption by coming within the circumstances of one or more of seven "gateway" clauses. These categories include restrictions, which are "reasonably necessary.....to protect the public against injury", confer on the public "specific and substantial benefits", are "reasonably necessary" to counteract a dominant competitor who is restricting competition, are "reasonably necessary" to enable fair negotiation with a dominant seller or purchaser, are likely to

prevent "a serious and persistent adverse effect on the general level of unemployment" in the area where the industry affected by the restrictions is situated and are likely to prevent a substantial reduction in the export business. The 'tailpiece' then requires the Court to be further satisfied that the restriction is not unreasonable having regard to the balance between the circumstances of the exemption and any detriment which the general public may suffer as the result of its operation.[16]

The Act requires that considerable factual knowledge of the detriment to the public resulting from the operation of the restriction be made known to the Court, rectifying a major defect of public policy under the common law.

The present legislation would appear to have secured the best of both worlds; there is no outright prohibition of restrictive practices enforceable by criminal law; but there is a form of review to examine the nature and effects of all practices which are registerable as restrictions and to determine their future legal standing. And for the reviewing functions, normally the work of an administrative tribunal, the government has secured the service, together with the independence, authority and dignity, of a legal tribunal which carries the standing of a division of the High Court.

The overall effect of the judgements so far made has been to create a climate of opinion in which trade agreements are no longer respectable; and to this extent at least, the present legislation is a marked improvement on that which it superseded.

Meanwhile, the old Monopolies Commission looks at agreements no longer registerable with particular reference to agreements and arrangements solely concerned with exports; where one-third of the supply of goods is

16. Restrictive Trade Practices Act, 1956 4 and 5 Eliz.2 c.68 S.21(1) (a)to(f).

produced by one concern or a group of related concerns; and the Commission may be required to investigate and recommend on the situation where two or more firms, together responsible for more than one-third of the supply of a good, prevent or restrict competition otherwise than by means of a registerable agreement, for example, through a "gentlemen's agreement."

It should be noted here that the legislation of 1956 contained no specific provision for the control and prohibition of mergers in British industry.

We have seen how Britain's solution to the problem of monopoly has passed from the "do nothing" attitude as found in the common law interpretations of the English courts to the flexible, pragmatic and empirical approach of the present day. In North America, as we shall see presently, the basic concern has been with the sheer possession of economic power, whereas the possession of such power arouses a much lesser degree of resentment in Britain.

When it became recognized that regulation was required, the British opinion was much more open-minded than American and Canadian about the choice between judicial enforement of rules of law and some for of administrative supervision. Since it is less concerned about the mere existence of private economic power, British opinion has focused on the way in which the power of monopolists is exercised; and this is essentially an economic matter. In Britain, much more hangs on the economic pros and cons of an agreement.

Hence the principle now employed in the Restrictive Trade Practices Court that agreements and monopolies need not be inherently bad (although the presumption is that they operate against the public interest), but at most suspect and subject to inquiry and possible prohibition. An attempt is made at balancing economic arguments in an enlightened courtroom and much weight is attached to the Schumpeterian views on technological advance and innovation by the Court.

Behind the enactment and enforement of the anti-trust laws in the United States are two sets of values. Firstly, there is a basic concern with the sheer possession of economic power; secondly, the belief in the desirability of competition as a regulator of the economic process. And as one authority has suggested: "The general approach to the problem of monopolistic and other restrictive trade practices by American and Canadian law is almost identical."[17]

In general, the common law tradition was equally operative in Canada and the United States; but different conditions soon accounted for the efforts in both countries by 1889-90, to provide a new basis in law for the regulation of monopolistic arrangement. The North American statutes emerged out of the English common law from the vital differences in North American society, differences of an economic, social and political nature. The Canadian legislation, like the United States Sherman Act, which followed in 1890, represented the protest of still predominantly agrarian society against the abuse of economic and political power by industry and business. The legislation coincided with the formulation of the "national policy" of tariff protection for native industries and was intended to prevent abuse of the immunity from effective foreign competition enjoyed by many industries. "Tariff policy, the frontier, the egaliterian climate and the fear of the farmer-pioneer of suffering from unequal terms of trade in contrast with the protected manufacturer, artisan and townsman, all of these were factors pressing upon legislatives to move more positively than did the common law to define the rules of the competitive game."[18]

17. W. Friedmann: "Monopoly, Reasonableness and the Public Interest in Canadian Anti-Bombines Law" 33 Canadian Bar Review (1955) p. 142.

18. M. Cohen: "Towards Reconsideration in Anti-Combines Law and Policy" McGill Law Journal (1962-63) p. 84.

In the leading Canadian case in this subject, Weidman v. Shragge,[19] the common law was held to be irrelevant in certain respects: conspiracy with intent to injure was not applicable; neither was the test of reasonableness between the parties; but the question of what was reasonable in the interests of the public was considered essentially relevant. It was in this case that Duff J. laid down the basis of the law today when he said:

"I have no hesitation in holding that as a rule an agreement having for one of its direct and governing objects the establishement of a virtual monopoly in the trade in an important article of commerce throughout a considerable extent of territory by suppressing competition in that trade, comes under the ban of the enactment."[20]

Thus, before there is a violation of the law, competition must be virtually eliminated.

The courts have felt that the purpose of the legislation has been to protect the public interest in the common law right of the individual subject to enter into competition with his fellows. And they have determined that the public interest is only affected when the object or effect of a combination is to suppress competition. The philosophy of the judiciary in Canadian combines legislation is expressed in the pronouncement: "Destroy competition and you remove the force by which humanity has reached so far."[21]

The state of the Canadian combines law today owes a great deal to the fact that the Supreme Court has leaned on the common law of England in interpreting the legislation. This has been due to a number of factors which included the tradition and rule of precendent, and the lack of adequate

19. Weidman v. Shragge (1912) 46 S.C.R.
20. IBID at 37.
21. IBID 2 D.L.R. 734 at 752.

statutory direction by Parliament on the meaning of "unduly" and of what was to be contrary to the public interest. The offence of Section 32(1) (c) of the Combines Investigation Act reads:

"Everyone conspires, conbines, agrees or arranges with another person to prevent, or lessen, unduly, competition in the production.....or supply of an article.....is guilty of an indictable offence and is liable to imprisonment for two years."

It has been suggested that discrimination between harmful and harmless cases was implied in Canadian law by the inclusion of the word "undue" to mean "significant" or "important."[22] And in 1923, the Prime Minister, W.L. Mackenzie King stated that the Canadian legislation was directed only at "bad" combines and that "good" combines which operated "in a reasonable way" would not be interfered with.[23] However, this has not been the interpretation in the Courts.

The shape of Canada's approach to mergers was determined in the Combines Investigation Acts of 1910 and 1923, both of which were fashioned almost single-handedly by Mr. MacKenzie King. It was clear from the vagueness of the clauses of his legislation, that Mr. King had no serious intentions against mergers in 1910 or even in later years. Mergers were thrown into the package with monopolies and trusts, the three being considered without distinction as merely one form of the larger category of combines.

The Act of 1910 introduced the princple of investigation and report, which has remained a prominent feature of Canadian combines administration. Mr. King appeared to suggest that combines were not to be

22. J.N. Wolfe: "Some Empirical Issues in Canadian Combines Policy" in Canadian Journal of Economics and Political Science (1957) p. 116.

23. D.G. Blair: in "Anti-Trust Laws: A Comparative Symposium" (Ed. W. Friedmann).

automatically treated as criminal and were to be judged on the basis of behavior.

The new legisltaion was ineffective and was lost sight of in the problems created by the onset of the First World War. Two outstanding weaknesses were apparent. No permanent agency was established to enforce it and individuals were reluctant to set the complicated and costly machinery of investigation in motion. Although the legislation was never tested in the courts, there was some doubt as to its constitutional validity, since it did not fit the classic definition of criminal legislation in the sense of being a general condemnation entailing sanctious.

The inflation which followed the War, resulted in a somewhat different approach to the problem. A Board of Commerce was appointed under the new enactment and was to determine whether a combination was being operated "to the detriment of or against the interest of the public". The Board was empowered to issue a "cease and desist" order where it found an unlawful combination existed. However, in 1921 this legislation was declared ultra vires the Federal Parliament, since it lacked the quality of generality of application of principles and sanctions that was required in criminal law.

The Act of 1923, which took the place of the 1919 legislation, repaired the defect of the 1910 enactment by providing for a permanent Registrar to administer the Act. He was empowered to make preliminary enquiries into suspected combines upon direction of the Minister or formal application of six persons, or on his own inititative. A decision after the preliminary enquiry that a formal investigation was necessary, meant that the case was entrusted to a special commissioner.

A number of investigations were commenced under the Act of 1923, but the onset of the depression contributed to a search for other methods of controlling business practices. In 1935, legislation comparable to the

1919 experiment was enacted and purported to give an administrative tribunal the power to regulate the operation of combines by administrative direction. Again, these provisions were declared to be ultra vires the Federal Parliament.

"The judicial decisionshave been assumed to demonstrate the apparent impossibility of framing constitutionally valid legislation for the regulation of combines on an individual basis and emphasize that they can only be dealth with on the basis of prohibitions of general application."[24]

During the period of wartime control of the economy anti-combines activity was suspended, but was undertaken with renewed vigor after the war. In 1950, the MacQuarrie Committee was appointed to review the anti-combines legislation and recommended such changes as would "make it a more effective instrument for the encouraging and safeguarding of our free economy". Certain important suggestions were made by the Committee, not the least of which was the recommendation to abolish resale price maintenance, which was given immediate effect. The Report also advocated the division of the functions of investigation and report, formerly exercised by a single Commissioner, between the Director of Investigation and Research responsible for initiating inquiries and gathering evidence, and the Restrictive Trade Practices Commission, an independent tribunal, created to appraise the evidence so gathered and make a report to the Minister of Justice for publication. It also recommended the creation of a judicial restraining order to restrain the continuation of combines offences and to dissolve illegal mergers and

24. IBID p.15

monopolies. These changes recommended by the Committee were duly incorporated in the Combines Investigation Act of 1952.

As one authority has pointed out, in Canada there has been a "virtual ignoring of American anti-trust experience."[25] However, in common with the United States and as opposed to Britain, Canada has made combines control a matter of criminal law, relying on the legal process and judicial remedy rather than on administrative remedy. The North American principle has been one of comprehensive prohibition of all forms of restrictive agreements tending to eliminate competition. The courts have insisted that in any agreements to fix prices and share markets, it is the "agreement" to combine, that is the gist of the offence. Hence, the per se doctrine emerges which holds that it is evidence of the "agreement" per se, independently of effective execution and independently of any specific economic effects on prices, profits and alleged efficiency that is the basis of the offence. This doctrine therefore, relieves the court of the kind of detailed economic analysis (which was also the case in English common law as we have observed) that some critics argue should be essential to the findings, whatever may be the court's technical familiarity with economic policy.

The fact that the Canadian courts have the last word has greatly influenced the approach of the other authorities concerned with combines control. The Director of Investigation and Research is charged with undertaking a particular investigation and conducting preliminary enquiries before his prepared statement of evidence is presented to the Restrictive Trade Practices Commission. The latter body hears evidence of the parties and determines the facts of alleged infringements and drafts reports outlining

25. R. Gosse: "The Law on Competition in Canada" (Toronto: Carswell, 1962) p. 220.

the facts and its evaluation of them. The Commission is expected to "appraise the effect on the public interest of arrangements and practices disclosed in the evidence" but, has based itself almost entirely on the tests previously laid down by the law courts. And, as we have seen, such tests amount to the assertion that any restriction of competition is presumed to be against the public interest. Hence, a discriminating analysis by the Commission involving an examination of the merits of the agreement and the evolution of standards of reasonableness, in terms of efficiency, prices, profits, wages and other relevant factors and a balance of economic arguments, has been ruled out by the legalistic approach of the courts.

This rigid legalism has received much criticism from economists who have urged that some form of "workable competition" be taken as a guide-post. Bladen and Stykolt quote the MacQuarrie Report's statement on effective competition which it said, requires "the existence of large number of sellers and buyers so that no one exerts any observable influence on the market but, is in fact controlled by it."[26] This view is criticised as being unrealistic and not the relevant criteria for effective competition. Bladen and Stykolt argue that if the commission is to "appraise" the effect on the public interest, then the reports should be markedly different and they urge that it is 'effects' and not 'forms' that should be examined. But, as we saw in the previous chapter, there are no universally acceptable standards of behavior.

The legalistic approach in Canada has resulted in a neglect of the research function. Since the goal of the Commission and the Director of Investigation and Research is a conviction in a court of law, the evidence collected is of the type to which courts are accustomed. This neglect of research has meant that no great knowledge has been built up about the structure

26. V.W. Bladen and S. Stykolt: Op. Cit. p. 52.

of industry in Canada to form the basis for policy-making in the combines field.

In introducing the Combines Act of 1910, the then Minister of Labor, Mr. Mackenzie King, appeared to suggest that combines were not to be automatically treated as criminal and were to be judged on the basis of behavior, while he appeared to feel criminal prosecution would be secondary to investigation and publicity as the most effective method of combines control.[27] In the Canadian and American "purist" systems, where a generally and strictly defined offence is the basis, the only possibility of mitigating the harshness and occasional injustice is the substitution, in suitable cases, of civil or administrative procedures for criminal prosecutions. In the United States, this is carried out by the Federal Trade Commission using civil remedies, but in Canada, as we have observed, the distribution of powers between the Dominion and the Provinces makes "civil remedies constitutionally precarious if not completely impossible."[28] The only alternative to criminal prosecution is a decision by the Minister of Justice, following the investigations and reports, not to take the case any further. This cannot be a very satisfactory situation.

Our scene is of both countries recognizing the dangers of monopoly and restrictive practices: of Britain employing the independence and dignity of a quasi-judicial body, equipped to review economic evidence; of Canada using a somewhat idealistic set of values in the rigid criminal court room; and of both countries living in the same intensely competitive economic world.

This is the setting for our examination of the merger policies of Canada and Britain.

27. D. G. Blair: Op. Cit. p. 10.

28. W. Friedmann: Op. Cit. p. 542

CHAPTER FOUR

CANADIAN MERGER POLICY REVIEWED

From our earlier discussion of the motivations and consequences of mergers for the market economy, it is clear that mergers can never be considered as per se offences. In particular cases, the liklihood that a merger will result in detriment to the public through its effects on concentration and competition is very often counterbalanced by possibilities of benefits, with the result that in discussions of mergers, the desirability of a selective policy is implicit. Here, it is proposed to survey the reports of the Restrictive Trade Practices Commission and the case law on mergers in an attempt to investigate how selective Canadian merger policy has been.

The main stream of anti-combines legislation in Canada between the Combines Investigation Acts of 1923 and 1960 was duplicated in two separate enactments, each of which prohibited the same set of offences, but attached to it seemingly different standards of legality. The actions prescribed by the Criminal Code were illegal if done "unduly"; those in the Combines Investigation Act if done "to the detriment or against the interest of the public". This dichotomy became an anomaly in Canadian law for it constantly posed for the courts, the question of whether "unduly" and "to the detriment of the public" were meant to convey the same or different meanings. As for mergers, the offence was of being "a combine" by way of a "merger, trust or monopoly" and this offence appeared only in the Combines Investigation Act and therefore was subject only to the criterion of public detriment.

However, in 1960 the legislation was amended whereby the then Section 411 (1) of the Criminal Code was brought into the Act as Section 32 (1) and the 'combine' definition was dropped. This section dealt with agreements, which are considered to be illegal per se, such as price-fixing and market

sharing, while the provisions dealing with mergers and monopolies were retained by making it an offence to be a party to either. As was the case with 'a combine', it is only those mergers and monopolies which are or are likely to operate "to the detriment or against the interest of the public" which fall within the Act.[1]

In examining the present merger provisions of the statute, those cases under the now-repealed 'combine' offence may be relevant in shedding some light on what the courts have considered is or is not detrimental to the public interest, and they should indicate to what extent the judiciary considered the case law on the Criminal Code Section (now Section 32 (1) of the Act) had a bearing in 'combines' prosecution under the Act. What these cases say in these respects will, presumably, determine how the "new" merger requirements of the statute will be interpreted. 'Merger' now means the acquisition or control of the business of a competitor whereby competition is or is likely to be lessened to the detriment or against the interest of the public.

To date, the efforts that have been made to apply the merger provisions have been conspicuously ineffective. A total of eight investigations of the possible detrimental effects of a merger has been made under the Act; five of them since the Second World War, and of that total, four have resulted in prosecution in the courts.[2] Of the other four, the Restrictive Trade

1. Section 2(e) and (f) and Section 33 of the Combines Investigation Act, 1960

2. R. v. Canadian Import Co. (1933) 61 C.C.C. 114; (1935) 3 D.L.R. 330 (C.A.)
R. v. Staples (1940) 4 D.L.R. 699:
R. v. Canadian Breweries Ltd. (1960) 32 C.R. 1:
R. v. British Columbia Sugar Refining Ltd. (1960) 32 W.W.R. 577; (1960) O.R. 601.

Practices Commission found no action necessary in two cases;[3] it recommended in one that prosecution be considered,[4] and it concluded in another that no effective action against the mergers in question was possible.[5] In all four of the court cases, the Crown was totally unsuccessful in proving that an offensive merger had taken place.

The elements of misconduct in the pre-1954 cases of R. v. Staples and R. V. Eddy Match Co. (which was a monopoly case involving mergers) shed very little light on the court's approach to a merger case lacking in extensive predatory practices, with the consequence that our attention will be centered on the post-1954 court cases and reports of the Commission.

How have the courts viewed the question of public interest in merger cases? Has the bench examined the actual economic advantages and disadvantages to the public of each 'combine' that has been brought before it?

On the whole, the courts have been very conservative and refused to move away from the line established in the Criminal Code cases. In a number of cases brought under the Code, some judges, by the middle of the 1950's, had deduced that an agreement must virtually eliminate competition before it becomes 'undue' and had further (under the Combines Act as it applied to mergers) interpreted 'detriment to the public' in the same way as they did 'unduly'. The first of these deductions respecting the necessity of a virtual elimination of competition was given its most widely-quoted formulation by Cartwright, J.

3. Report Concerning the Manufacture, Distribution and Sale of Yeast (1958) and Report Concerning the Production, Distribution and Sale of Zinc Oxide (1958).

4. Report Concerning the Meat Packing Industry and the Acquisition of Wilsil Ltd. and Calgary Packers Ltd. by Canada Packers Ltd. (1961). This case has now been dropped.

5. Report concerning the Manufacture, Distribution and Sale of Paperboard Shipping Containers and Related Products (1962).

in a minority judgement in the Howard Smith case in 1957. He said that previous decisions:

".....appear to me to hold than an agreement.....becomes criminal when the prevention or lessening agreed upon reaches the point at which the participants in the agreement become free to carry on those activities virtually unaffected by the influence of competition, which influence Parliament is taken to regard as an indispensable protection of the public interest".[6] The decision in this case was that once it was established that the agreement eliminated competition then ".....injury to the public interest is conclusively presumed....."[7] Economic effects were irrelevant.

However, a different line of reasoning has emerged in British Columbia where in R. v. Morrey, the B.C. Court of Appeal disagreed with the trial judge who told the jury that, once they found that competition had been lessened beyond a certain point, public detriment could be presumed. However, in the Court of Appeal, Smith, J.A. stated:

".....the Act speaks for itself; preventing or lessening competition is not enough. The Crown must go further with its proof and show the activities complained of.....were.....to the detriment.....of the public."[8]

The judge was able to conclude that the ecomomic effects of an agreement were material in interpreting detriment to the public under the Act. The effects of every agreement that lessened competition were not necessarily detrimental to the public.

6. Howard Smith Paper Mills Ltd. v. R. (1957), S.C.R. at 426.
7. IBID. 8 D.L.R. p. 473.
8. R. v. Morrey (1957) 6. D.L.R. at 118.

These uncertainties regarding the interpretation to be given to the public interest have been reflected in the two recent merger cases to come to court. In R. v. Canadian Breweries, McRuer C.J.H.C. declared that the words in the public interest provision,

".....for the purposes of the prosecution.....have substantially the same meaning as the word 'unduly' as used in its context in Section 411....."[9]

He adopted Cartwright, J's exposition of the law in the Howard Smith case, finding that the merger had not

".....conferred on the accused, the power to carry on its activities without competition, or substantially without competition....."[10]

However, in the case of R. v. British Columbia Sugar Refining Co. Ltd., an attempt was made to reconcile this exposition with that in R. v. Morrey. Williams, C.J.Q.B. agreed with McRuer's analogy in the Canadian Breweries decision, in calling in the Code cases to assist in the interpretation of the Act. Williams, C.J.Q.B. said:

".....the Crown in this case must not only establish that as a result of the mergers, the accused acquired the 'power' referred to in the cases under.....the Criminal Code: It must also establish excessive or exorbitant profits or prices. The Crown has not attempted to establish exorbitant profits; its attempt to establish exorbitant prices fails."[11]

He added:

"The Crown must also establish a virtual stifling of competition. This, it has not done."

9. Op. Cit. (1960) 33 C.R. 1 at 6.
10. IBID at 43.
11. Op. Cit. (1960) 32 W.W.R. at 633.

Thus, according to Williams, C.J.Q.B., the prosecution must, in order to prove "detriment to the public" in merger cases show, firstly: that competition has been 'unduly' lessened according to the case law on Section 32 (1), and secondly: that excessive or exorbitant profits or prices result. By combining the different approaches of the Howard Smith case and the Morrey case, the Judge requires proof of suppression of competition and actual detriment in the form of excessive profits or prices. This has led one writer to suggest:

"More is required of the Crown in a merger prosecution than under Section 32 (1). In a merger case it is not to be presumed that a virtual monopoly will enhance prices. Thus, the possibility of there being a conviction for a merger detrimental to the public becomes less likely than ever!"[12]

Generally, the courts have looked upon the interest of "the public, whether consumers, producers or others" as the public as a whole. It is the public as an abstract entity that is entitled to the benefit of free competition while this overall position of the public is used as the criteria. However, in the Sugar Refining case, Williams, C.J.Q.B. viewed the question of the public interest largely from the viewpoint of the "producers" and he considered that "producers" meant beet-sugar growers rather than refiners.

This has been the substance of the judicial interpretation of the public interest in merger cases. The weight of opinion favors the view expressed in the Canadian Breweries decision where it was decided that all that matters is whether competition is suppressed and actual detriment need not be demonstrated. Thus, the Section 32 (1) cases have been followed in determining the meaning of public detriment.

We now turn to review the reports on mergers that have been made by the Restrictive Trade Practices Commission. The Commission was brought

12. R. Gosse: Op. Cit. p. 192

into being in 1952, "seemingly with the intent of making some assessment of economic effects and possibly of establishing, over time, a body of accumulated economic jurisprudence as the basis for informed policy making".[13] The Commission's report "shall review the evidence and material, appraise the effect on the public interest of arrangements and practices disclosed in the evidence and contain recommendations as to the application of remedies provided in this Act or other remedies".[14] It is hoped that the review of the reports now to be undertaken will show how the Commission has dealt with the 'public interest' and establish the approach of the Commission to the basic economic issues involved.

In 1955, the Commission reported on an alleged combine (by way of a 'merger, trust or monopoly') in the Manufacture, Distribution and Sale of Beer in Canada. The Commission found that from the time of its incorporation in 1930, Canadian Breweries Ltd., had "pursed a deliberate planned program designed to place the company in a dominant controlling position in the brewing industry".[15]

The company over the years had acquired twenty-three brewing firms in the province of Ontario and in 1952 it acquired the multi-plant firm of National Breweries Ltd., for many years the largest producer in Quebec. Through its controlling interest in Western Canada Breweries Ltd., a holding company owning or controlling five breweries and maintaining a substantial financial interest in four others, the influence of Canadian Breweries Ltd. had spread to Western Canada. The five breweries controlled by Western Canada Breweries accounted for one-third of sales in Manitoba, Saskatchewan and British Columbia.

13. W.G. Phillips: "Canadian Combines Policy - The Matter of Mergers" in The Canadian Bar Review, March, 1964 p.89.
14. Combines Investigation Act 1960 S. 19 (1).
15. Report Concerning an Alleged Combine in the Manufacture, Distribution and Sale of Beer in Canada 1955

The result of such expansion was that Canadian Breweries Ltd. had emerged by 1955 as the dominant firm in the industry as the following table shows:-

Canadian Breweries Ltd. % of Total:[16]

Area	Capacity	Production	Sales
Ontario and Quebec	64	59	60
Canada	51	48	49

The result of such expansion was that in Quebec the chief competing suppliers of beer were reduced from three to two, although Canadian Breweries still had much less than one-half the business in Quebec, while in Ontario, Canadian Breweries had more than one-half of capacity, production and sales.

It was alleged by the Director of Investigation and Research that Canadian Breweries Ltd. was a 'combine' and evidence in support of this contention was forthcoming from Canadian Breweries' payments of excessive amounts for merged firms, which it was said:

"has not been confined to those which were desired primarily for the purpose of assimilating them into the merger, but extended to plants which were desired primarily for the purposes of removing them as competitors".[17]

It was claimed that the policy of acquiring and closing down plants and of the basic policy of changing the whole structure of the industry resulted in freedom of entry into the brewing industry being restricted. Apart from such elimination of competition by absorbing others, Canadian Breweries had prevented a lessened competition further by making market-sharing and price-fixing agreements with the remaining beer producers.

16. IBID p.3.
17. IBID p.4.

Canadian Breweries Ltd. "by reason of the substantial contrd that it has acquired over the brewing industry in Canada; by reason of the manner in which it has been exercised and is likely to be exercised" constituted in the eyes of the Director a 'merger, trust or monopoly' which either substantially or completely controls, throughout any particular area or district in Canada or throughout Canada, the class or species of business in which he is or they are engaged.[18]

The gist of the Company's defence to these charges was that the mergers were carried out with full knowledge of the provincial authorities; provincial control of the brewing industry was sufficiently extensive to preclude detriment to the public; increased concentration of output in the industry was a natural development dictated by considerations of productive efficiency; reduction in the number of competitors meant more competition, not less, the large surviving breweries being better equipped to sustain a vigorous rivalry; and Canadian Breweries had performed a public service by reducing excess capacity and raising standards of marketing for the entire industry.

In its conclusions as to the public interest, the Commission found public detriment in the following respects: the mergers were objectionable because of the purpose behind them and the methods adopted for bringing them about; by reason of the planned program and consequent arbitrary elimination of competition, the consumer public was deprived of the benefits which otherwise might have been expected to flow from the normal interplay of competitive factors in the market, more particularly, from the competitive activies of the breweries thus artificially removed from the market; the public had been deprived of opportunity to choose from a wide and diversified

18. Combines Investigation Act 1960. S. 2(f).

range of brands, types and qualities of beer, the number of brands acquired in Ontario having been reduced from some 150 to 9 only.[19]

In the Commission's view it was Canadian Breweries' merger program, and not natural economic developments which produced the increased concentration in the brewing industry. Nor was it proper for a private company to assume the public duty of enforcing desirable standards of conduct throughout the industry.

The over-riding point for the Commission's conclusion was that Canadian Breweries' acquisitions constituted a clear-cut historical pattern of intent to monopolize. In the Commission's findings, the mergers and closure activities were monopolistic in their nature and not in the public interest.

However, the commission felt that notwithstanding the monopolistic purpose of the company, it was not...

".....in either substantial a complete control of the brewing industry either throughout Canada or throughout any important area or district in Canada, to the detriment or against the interest of the public".[20]

Thus, the Commission maintained that vigorous competition continued to exist from Labatt's in Ontario and Molson's in Quebec and that in addition, Canadian Breweries did not have the power to set prices, which in fact were set by the respective Provincial Liquor Boards. To allay anxiety about the possible future expansion of Canadian Breweries, the Commission suggested that the company be prevented from acquiring, directly or indirectly, either

19. Report p.101.
20. IBID p.102

the assets or the controlling interest in the capital stock of any of its competitors, and that it be prevented from entering into any agreement with any of its competitors for the purpose of lessening competition.

In effect, the Commission was saying that "effective" or "workable" competition remained in the industry and was likely to increase as a result of additional plant investment by the three major competitors. The Commission stated its belief that:

"There is no occasion at this time to consider such a step as the division of the Canadian Breweries organization into several units owned and operated independently of each other".[21]

It is of some interest to note that early in 1961, Canadian Breweries' control was further extended by the acquisition of Calgary Breweries.[22]

In attempting to relate the Commission's approach to some of the criteria of "workable" competition that were outlined in Chapter Two, we see that the Commission has concentrated mainly on the structural approach to 'workable' competition. It is the increased concentration of control by Canadian Breweries Ltd. that concerns the Commission. However, such concentration of output by Canadian Breweries whereby they had obtained 60 per cent of output in Ontario and Quebec and 49% in all of Canada, in the eyes of the Commission did not constitute monopoly. Such high market shares as held by Canadian Breweries in the respective regional and national markets would not be consistent with the concept of 'workable' competition held by some of the economists referred to earlier. Simons suggested the market share should rise to no more than 5 per cent of output, while Kaysen and Turner's 'benchmark' was 20 per cent.

21. IBID P.104.
22. G. Rosenbluth and H. G. Thorburn: "Canadian Anti-Combines Administration 1952-60". (Toronto: University of Toronto Press 1963).

The Commission makes no reference to the allegation by the Director that freedom of entry into the brewing industry had been curtailed by the policies of Canadian Breweries. We have observed that freedom of entry and potential competition is central to any concept of 'workable' competition, but appears to have been ignored in this instance. While we have underlined the difficulties of employing performance criteria for 'workable' competition, we should note the absence of any evidence that the Commission attempted a balancing of any improvement in efficiency and lowering of real costs in the industry flowing from the mergers against the increased concentration resulting from the mergers. There seems little of the Schumpeterian approach to 'effective' competition by the Commission. As Phillips has said:

"The Commission's preoccupation with the legalistic was in fact, all too evident in the Canadian Breweries report, in its enchantment with intercepted telegrams, confidential memoranda and letters, which really never should have been written, to the virtual exclusion of economic analysis!"[23]

The next important report to be examined is that which concerned the proposed acquisition of the Manitoba Sugar Company Ltd. by the British Columbia Sugar Refining Company Ltd. (B.C.S.R.). While B.C.S.R. refined cane sugar and its wholly owned subsidiary Canadian Sugar Factories Ltd. refined beet sugar, the group had almost a complete monopoly of the sale of sugar in Western Canada. In fact, B.C.S.R. and its subsidiary were the only Canadian suppliers in British Columbia and Alberta and until 1953, were virtually the only Canadian suppliers in Saskatchewan.

The Manitoba Sugar Company refined only beet sugar and was located

23. W.G. Phillips: Op. Cit. p.89.

in an area where the markets of the Eastern refiners and B.C.S.R. overlapped. Each of the markets was characterised by a rigid price structure of its own. However, as the Director pointed out in his Statement of Evidence, because the selling activities of Eastern and Western refiners met in Manitoba and Saskatchewan, more competition was possible here than elsewhere throughout the country.[24] And Manitoba Sugar Company as the third factor in the area kept alive a considerable amount of competition to a degree disproportionate to its mere size. Indeed, as a result of increased capacity and production, by 1953, Manitoba Sugar Company had penetrated the Saskatchewan market to the extent of seven per cent of sales by Canadian refiners and in Manitoba itself, the company accounted for an average of 51 per cent of sales over 1950-54, compared with 19 per cent for B.C.S.R. and 30 per cent for the Eastern refiners.

Another feature of the market was the basing-point system of pricing used by B.C.S.R. with Vancouver as the basing-point. The price at the refinery was maintained at the highest level allowable by potential competition of foreign suppliers. However, the tariff was high enough to insulate the industry from most foreign competition. But, the basing-point system was made less effective by the competition from Manitoba Sugar Company since it resulted in lower prices in parts of eastern Saskatchewan than those resulting from the basing-point system used by B.C.S.R.

The Director of Investigation and Research alleged that the proposed merger was a combine within the Combines Investigation Act and "which has operated or is likely to operate to the detriment or against the interest of the public". He believed that the opening of the St. Lawrence Seaway, together with increased production in Eastern Canada, would en-

24. Report Concerning the Sugar Industry in Western Canada and a Proposed Merger of Sugar Companies. 1957. p.6.

courage increased shipment of Eastern sugar into Manitoba, with the effect forcing Manitoba Sugar to seek outlets further west and making it a still more important competitor in relation to B.C.S.R.. Thus, the elimination of Manitoba Sugar Company as an independent organization would prevent the increased competition, which was likely to be effective in the future. The Director believed that the acquisition of Manitoba Sugar by B.C.S.R. would remove the downward pressure on prices and costs exerted by Manitoba Sugar and would protect the price level, already insulated from competition to an unusual degree by the basing-point system and the Canadian tariff.

B.C.S.R. justified the take-over by suggesting that it would enable the firm to meet the expected increase in competition from the Eastern refiners as a result of the new reduced freight rates on the St. Lawrence Seaway; while B.C.S.R. had surplus funds and thought the acquisition would be a sound investment. The Company argued that the beet sugar plant in Winnipeg would be operated more efficiently.

In its Report, the Commission recognized that:

"In any market in which a homogeneous product is sold, all suppliers play their part in determining the level of prices".[25] The Commission was acutely impressed with the large-scale shift in market shares, which would be effected by the proposed merger, since the new enterprise would be the only supplier of sugar in British Columbia, Alberta and Saskatchewan and would control 75 per cent of the market in Manitoba. The point was vital in determining the Commission's conclusion that:

".....the control of Manitoba Sugar by B.C.S.R. has the effect of removing competition between the two companies on a price basis and that this is likely to lessen competition in Manitoba and Saskatchewan to a degree which would not be in the public interest.....that control of Manitoba

25. IBID p.179

Sugar by B.C.S.R. will close off for the future any opportunities for the public to benefit from lower prices brought about by competition between B.C.S.R. and Manitoba Sugar in the Saskatchewan market".[26]

Significantly, for the first time in the history of Canadian anti-combines policy, the Commission asserted that "the proposed merger should be renounced";[27] and that if Manitoba Sugar were to remain independent, with no direct or indirect control over or interest in it by any other Canadian Sugar refinery, the public interest would be thereby best served.

Thus, it was the price competition in which the commission said the public had a vested interest, that proved decisive in the Commission's assessment.

The Yeast Report concerned the merging of two of the three Canadian producers of baking yeast, Standard Brands Ltd. and Best Yeast Ltd.. In 1955, Standard Brands accounted for some 76 per cent of yeast production and sales in Canada, while Best Yeast Ltd.'s share was 9 per cent. The remaining 15 per cent derived from Lallemand Ltd., while in Eastern Canada, Best Yeast's share was considerably greater and Lallemand's smaller. Lallemand's sales were concentrated in Quebec and consistituted a small factor in other areas. Despite moderate tariff rates, the level of yeast imports was negligible.

It was largely on the basis of these structural facts that the Director alleged that Standard Brands' acquisition of Best Yeast was a "merger, trust or monopoly" operating against the public interest. He did not believe that the changes in market structure "involve any such economies of production or disbribution as would compensate for the elimination of

26. IBID P.182.
27. IBID

competition between the two companies."[28]

Having decided that the acquisition was a'merger, trust or monopoly' within the meaning of the Combines Investigation Act, the Commission then considered whether it "has operated.....to the detriment of the public". The Commission found that Standard Brands had not shown any history of monopolistic intent; it had not pressured Best Yeast to sell nor was the selling price excessive; there was no suggestion that Standard Brands had taken advantage of its position to raise prices with a view to monopoly profits; the Commission agreed with the company that the acquisition was motivated by sound business reasons since the result was likely to provide needed and anticipated expansion of capacity and to reduce freight costs by having plants better located to supply portions of the market.

The Commission considered the conditions of entry into the yeast industry and said that raw materials appeared to be available, enormous capital was not required and those technical skills that were required were readily at hand from qualified personnel. The conclusion here was that there were no unusual difficulties of entry present and that they were only "those that are normal in an established industry".

The Commission was recognizing that a merger may result in economies from which the public would benefit and which should be balanced against the detriment or likelihood of detriment flowing from decreased competition. In this yeast case, the Commission believed some economies and improvements in the efficiency of production and distribution had been effected and said:

"In total, these may have been substantial, but on the evidence before us, we are quite unable to assess the value of the improvements that

28. Op. Cit. Report 1958 p.4.

have occurred or may yet occur."[29] Neither could the Commission say whether any part of the benefits resulting from such improvements had been passed on to the public.

Against these possible benefits the Commission recognized that the concentration of output had been increased and the Commission believed that if the provisions of the Combines Investigation Act relating to mergers were interpreted in the same manner as the law relating to agreements (as we have seen, such was the interpretation in the Beer case), then a finding adverse to Standard Brands would follow. However, this case never went to court to see if the Commission's speculation would be correct.

The Commission was concerned at the reduction in competitors and believed the public interest would have been better served if Best Yeast were to be sold to a buyer other than Standard Brands. However, since no other buyer was found, and in the absence of intent on the part of Standard Brands to eliminate Best Yeast as a competitor, the Commission was not convinced that the public interest had been so affected as to justify recommending a dissolution of the merger. However, the Commission believed that Standard Brands should not be permitted to acquire its remaining competitor, Lallemands, nor to acquire any new competitor that might enter the field.

In its conclusions, the Commission seemed to be distinguishing the Yeast Report from both the Beer Report, where there was predatory intent, and from the Sugar Report, in terms of the comparative extent of competition in the industry before and after the merger. The Commission appeared to say in the Yeast Report that in the presence of monopolistic intent, public detriment could be established by a showing of substantial lessening of competition: and

29. IBID

that without monopolistic intent, the merger must be shown both to have reduced competition substantially and to have left the industry in a state precluding competition.

In general, the Commission's approach in the Report was one of 'workable' competition, and in approving the duopoly in the industry after a weighing of the performance and structural merits and defects, the Commission was using the mode of approach advocated by its critics. However, the Commission paid lip-service to possible economies flowing from the merger and balanced these possibilities against the increased concentration in the industry, although the evidence did not permit an evaluation of the economies. The economic evidence used by the Commission here was spotty and meagre.

The Zinc Oxide Report[30] concerned a similar market structure to that of yeast whereby a three firm industry was reduced to two. Zinc Oxide Ltd. purchased Durham Industries Ltd. which in 1956 meant that the combined companies controlled 90 per cent of the zinc oxide capacity in Canada, and accounted for 86 per cent of production and 80 per cent of sales of the Canadian market. However, the Commission's report concentrated on the price war activities of Zinc Oxide Ltd. which had been pursued with the object of eliminating one or both of its former competitors and with the discriminatory price concessions given by its supplier of Zinc. The Commission paid little attention to the merger, even though it took place within this three firm industry setting. The Commission refrained from making recommendations on the dissolution or the modification of the merger and its only structural recommendation called for the consideration of the removal of the tariff on refind zinc.

30. Op. Cit. Report 1958.

The Vancouver Newspaper Report in 1960[31] concerned the newspaper market in the Vancouver area, which before the merger had consisted of one morning and two evening newspapers, each independently owned. The morning newspaper was "The Herald" which was purchased by the Southam Company, which resold it to the Pacific Press Ltd.. Subsequently, the paper became unprofitable and was closed down. One of the evening newspapers, "The Province" was purchased by the Pacific Press and switched from evening to a morning newspaper. The other evening paper "The Vancouver Sun" was also purchased by the Pacific Press from the Sun Publishing Company Ltd., and later became the only evening paper in Vancouver.

To obviate any single-firm monopolistic management the arrangements were that the publisher of "The Province" would be appointed by The Sun Publishing Company even though both publishers were in the employ of Pacific Press. The owners of "The Province" and "The Sun", the Southam and Sun-Publishing Companies respectively, were to continue to control their respective editorial, advertising and circulation departments by contract. Nevertheless, the entire daily paper publishing business in Vancouver was brought into the ownership of one single firm, Pacific Press Ltd., on whose board of directors sat the publishers of the two remaining papers.

The Director of Investigation and Research alleged that these arrangements operated or were likely to operate to the detriment of the public because the public had been deprived of a choice among independent, competitive newspapers. While the monopoly position had enabled Pacific Press to enforce arbitrary rules requiring certain classes of advertisers to purchase space in both newspapers if they wished to advertise.

The Director held that the collateral arrangements for the

31. Report Concerning the Production and Supply of Newspapers in the City of Vancouver and Elsewhere in the Province of British Columbia. 1960.

appointment of publishers were insufficient to prevent detriment from resulting because they were liable to be changed with the result that Pacific Press could become single manager as well as owner. The arrangements by their very nature, and particularly because of the mutual financial interests of the parties, were unlikely to result in any substantial degree of competition. He concluded that Pacific Press was a combine because it had acquired control over the business of others; it controlled the business of publishing daily newspapers having general circulation in Vancouver; and because the merger had operated or was likely to operate to the detriment of the public.

The Commission emphasized the special position of newspapers and their contribution to the maintenance of a well-informed public opinion, and therefore it was central to the democratic process. The Commission stressed that ideally, there should be several newspapers competing for attention in every large centre of population; not that large numbers of people would read more than one, but that those members of the public of more enquiring minds would have the opportunity of reading two or more newspapers; that from the competition in newspapers, active discussion is stimulated, this being an essential element in a free society; that from such competition, each would likely be a better newspaper as a result of the battle for the goodwill of the public.

The Commission believed that a newspaper, serving the public in a competent manner, should undertake to cover news and views of a comprehensive nature on a world-wide scale --- a newspaper of many pages with extensive sources of information and a well-balanced editorial staff. It recognized that to serve the public in this manner, the publisher of the newspaper would need large revenues from advertising which are dependent upon a large circulation. And, to print a large newspaper every day for a wide circulation re-

quires heavy capital investment in plant and machinery.[32]

The opinion was expressed that the big newspapers with big circulations in the larger cities, with a corresponding decrease in the number of dailies, was not only inevitable, but was desirable in providing the kind of newspaper envisaged. The crucial question was whether the gains in more comprehensive news coverage stemming from large-scale though costly investment and operations, might outweigh such risks as inadequate, inaccurate and biased news reporting and managerial inefficiency, which might well occur under a monopolistic press. This was the test for 'workable' competition. "When the point is reached, however, that one newspaper gets a monopoly in a sizeable city, or when all the newspapers in a city come under single management, then the dangers of a single channel of communication, which we have described, become clearly evident".[33]

The Commission accepted the point that the arrangements for the continued existence of "The Province" and "The Sun" were no safeguard for the public interest in a variety of independent newspapers. Successors to the present policy-makers might decide that the continued publication of separate newspapers would not be in the interests of the company. Therefore the commission recommended that the parties be restrained from modifying or abandoning the agreement without court approval.

The Commission felt that the requirement that general advertising be placed in both newspapers operated to the detriment of anyone wishing to advertise in only one, and this regulation was subsequently revoked.

The only competition that remained after the amalgamation concerned a variety of non-price competition, which was a species of "Salesman-

32. See the account of the special problems of the newspaper industry by T. J. Kreps in "The Structure of American Industry" (Ed. W. Adams) (New York: Macmillan 1961) p. 509-532.

33. Report Op. Cit. p. 171.

ship". However, in the law courts, competition in quality, service and salesmanship had been considered irrelevant. In the Container Materials case, the Court of Appeal Judge had said:

"Competition from which everything that makes for success is eliminated is not the free competition that.....(the section).....is mainly designed to protect.[34] However, the Commission did not follow this argument, but in its conclusions, it considered legal, a merger which economically and legally became a virtual monopoly, but competition remained at the publishing level.[35]

One must applaud the search for the public interest and the flexible, empirical analysis of the Commission in the newspaper merger. However, if significant economies of scale had accrued to Pacific Press and major news benefits had accrued to the public from the merger, could it be said that freedom of entry remained available to potential publishers in the Vancouver area? In effect, what should be the relevant Vancouver market? Should, for example, the recent establishment of a printing plant for the "New York Times" on the West Coast of the U.S.A. and the air transportation of an edition to Vancouver be considered in defining the boundaries of the market.[36] The relevant market turned out to be Vancouver, but the Commission ignored this potential new competition.

In 1961, the Commission reported on conditions in the meat-packing industry with emphasis on the effects of the acquisition of Wilsil

34. Container Materials Ltd. v. R. (1941) 3 D.L.R. 145 at 167-168.
35. It is of some interest that a new daily newspaper "The Vancouver Times" will begin independent publication on September 5, 1964.
36. R. Lyon: "Recent Canadian Anti-Combines Policy" in University of Toronto Law Journal. 1963.

Ltd. and Calgary Packers Ltd. by Canada Packers Ltd.[37] The latter company slaughtered more than 33 per cent of the meat of the country and unlike the smaller firms, it maintained a wide distribution system embracing all regions, as well as operating relatively large plants. Canada Packers itself had been formed in 1927 as the result of several mergers and subsequently it purchased three leather-producing firms and in 1958 its tanneries controlled 40 per cent of cattle-hide production.

The Director was concerned with the "conglomerate" mergers of Canada Packers into vegetable oil production, fertilizers, processing of poultry, marketing of eggs and butter and the operation of food and vegetable canneries. The Director alleged that Canada Packers' economic power was not reflected by the degree of concentration. Canada Packers' control of substantial storage holdings gave the company additional influence over price while its importance in the industry varied from area to area and prices often varied from area to area depending on the amount of competition present, and not reflecting the cost of shipping between the markets. And of some concern to the Director was the minority holding by Canada Packers in Dominion Stores Ltd., which he alleged gave Canada Packers an advantage unrelated to efficiency over other meat packers.

The Director believed that the acquisition of Wilsil gave Canada Packers control of its main competitor in Quebec while Calgary Packers was "a troublesome and aggressive competitor" in the purchase of livestock in Southern Alberta and in the sale of meat far beyond the bounds of the local market, particularly in Montreal and Vancouver. The Director believed that the acquisitions could make no significant contribution to greater efficiency. Economies of scale in the meat-packing industry are limited by geographically scattered markets and sources of raw materials, by the relatively limited amount of mechanization which is pratical and

37. Report Op. Cit. 1961.

by the fact that relatively small plants can make effective use of by-products. The Director's conclusion was that Canada Packers was a combine under the Act, operating or likely to operate to the detriment of the public.

The Commission, after a most thoroughly detailed analysis of the economic facts concluded that Canada Packers would be able to enjoy economies in the operation of relatively large size plants in different regions in Canada, while there were advantages to be derived from the nationwide distribution system. Other advantages accruing to the national operator included an ability to utilize by-products more intensively and the ability to offer a full-line of meats and related products. However, both firms were large enough to affect economies before the acquisition and they operated at scales satisfactory to the Commission. After the acquisitions, under Canada Packers' ownership, no significant economies were demonstrated, reportedly because of the administration of its individual plants and divisions as separate units. The Commission concluded that the operations of Canada Packers in connection with fertilizers, poultry, eggs, butter produce and canned goods did not significantly affect the position of the Company in the meat-packing industry. The Commission believed that the Company's minority interest in Dominion Stores Ltd. had not resulted in undue considerations to this food chain.

The Commission thought that Canada Packers' acquisitions significantly reduced the competition in the local livestock markets of the two firms and in view of their regional and national markets, could be expected to lessen competition in other Canadian markets as well. The Commission admitted that "although the process of amalgamation in the meat-packing industry has not yet brought about as great a degree of concentration as exists in some other industries, it would appear to be

desirable in the public interest to maintain as large a scope for competitive activity in such an essential food industry as is consistent with efficient operations."[38] Thus, in the opinion of the Commission, the acquisitions were contrary to the public interest as being likely to lessen competition in the industry in a substantial way and so deprive the public of the benefits of the competition which otherwise would prevail.

The amended legislation of 1960 defined 'merger' as an acquisition which "lessened competition" to the detriment or against the interest of the public, while the previous legislation, it will be recalled, defined a combine as a "merger, trust or monopoly" which operated or was likely to operate to the detriment of the public. The conclusion posed a question for the Commission: should the assumptions of the Beer and Sugar cases be considered to be applicable in the Meat Packing case under the new legislation? Since the post-merger market power of Canada Packers did not give it a monopoly or allow it to exercise monopolistic control, the Commission felt that if the assumptions of these cases were to apply, Canada Packers' activities would not be covered thereby.

The uncertainty of the interpretation of the new legislation, led the Commission to recommend an inquiry into the possibility of a court order under Section 31 (2) with the objective of dissolving the merger; and in the event that it were found that such remedy could not be sought, an inquiry into the possibility of a court order to prohibit Canada Packers from further reducing competition through additional acquisitions.

Since the Commission found that competition had been reduced and

38. IBID p. 428.

was unable to find any important gains in economies flowing from the merger to balance against this reduction in competition, the Commission believed the new definition of merger, with its emphasis on "lessening competition" embraced the meat-packing situation. Also of interest, is that whereas previous reports, for example, on Beer, Yeast, Zinc Oxide and Newspapers tended to de-emphasize the decline in the number of competitive independent firms, this investigation stressed the need to maintain such firms as a public interest factor.

However, the Department of Justice eventually did not think it worthwhile to take the case into court, and it has been dropped recently.

We conclude our brief survey of the work of the Commission with a short note on the Report on the Manufacture, Distribution and Sale of Paperboard Shipping Containers.[39] The Report dealt with an industry which produces protective boxes, made of containerboard grades of paperboard in which goods are shipped by common carriers.[40] The Director was concerned with price-fixing by the few integrated manufacturers of paperboard and shipping containers and by the large number of mergers in the industry between 1945 and 1960. Prior to 1945 the great part of the container industry was in the hands of independent companies, but by 1960 the great majority of these companies had passed into the hands of a few paperboard companies or integrated companies, which already were manufacturers of both paperboard and shipping containers.

The Commission was fearful of the way the whole structure of the shipping-container industry had been radically changed. The Commission thought that the effects of integration through the many acquisitions

39. Report 1962.
40. IBID p.42.

would be to discourage new entrants at both board and container levels of production. The belief was that because of the legal uncertainty and because of the difficulties of unscrambling the mergers, dissolution would not afford a practical solution. The Commission, therefore, felt that the elimination of the tariff on board and containers would prove the most effective and long-range remedy to deal with the situation that had developed in the industry. The result would be to restore competitive conditions to both the board and container levels of the industry and from which the public would derive benefit in the form of lower prices.

The purpose of our synopsis of the work of the Restrictive Trade Practices Commission in the merger field has been to point out the fundamental problem for anybody having to pass judgement on a particular merger. The Commission has recognized that under some circumstances the structural restraints inherent in merger may be offset by an overall strengthening of the competitive process. But since the earliest days, all the agencies of anti-combines enforcement in Canada have understood their basic responsibility to be the maintenance of competitive markets.

The problem for the Commission has been to determine in each investigation how far the economic data on market concentration and market structure warrant an inference of a decline in competition sufficient to affect the public interest adversely. Where the Commission found that the public interest was not adversely affected, this has implied that the merger resulted in significant gains in efficiency or economy, which otherwise would not have been realized and in the transfer of such gains in price, quality or service to the public.

Clearly, the Commission's approach to mergers has been one of "workable" competition, which implies that attention has been focused on

at least three general benchmarks: firstly, the scope of the relevant market. In no case has the relevant market been identified without reasonable care; in newspapers it was defined as local, in beer as regional, in meat-packing as national and in zinc as international. The second benchmark revolves around a balancing of economic facts concerned with compensatory cost reductions and productivity gains. In no cases have the facts on market concentration been accepted as a sufficient criterion for assessing impact on the competitive process. Before making its recommendations, the Commission has considered such economic factors as economies of scale (in beer and meat-packing), accessibility of new firms (yeast and newspapers), competitive imports (sugar), the volume of capital required for modern efficient operations (sugar and newspapers) and the psychological factor of intent (yeast and meat-packing). The third benchmark concerns the expansibility and accessibility of old and new firms respectively. One writer has urged that in future investigations, more analysis of the potential growth pattern of the merged firm and the legal and economic conditions of entry into the industry should be made.[41]

The Commission has inevitably been criticised by some writers. It has been suggested that in merger cases, "the Commission's discussions have been narrow and legalistic and have not adequately explored the basic economic issues. Like a court, it has generally confined itself to the consideration of the evidence presented by the Director and the opposing parties".[42] It may be that the earlier reports lacked economic analysis, especially that concerning the beer industry, but as we have seen, there has been much improvement in later reports. And, if the Commission's

41. R. Lyon. Op. Cit.
42. G. Rosenbluth and H.G. Thorburn Op. Cit. p.103

"orientation has remained legal rather than economic",[43] it is maintained that this has been the consequence of the criminal setting for anti-combines in Canada, and a lack of a clear definition of the public interest by Parliament. Since the goal for the Director must be criminal prosecution, inevitably there are legalistic undertones in the Commission's reports.

The Commission has pointed the way to that selective policy, which most critics claim is essential for a public policy for mergers. And as one writer has said:

"The principal obstacle to the development of a selective policy in Canada has been the virtually complete assimilation of the matter of mergers into the main stream of combines law for the past half-century".[44] Clearly, the implementation of a truly selective public policy is beyond the normal scope of a court of law. Such a policy must depend on judgements of an almost exclusively economic nature, while the courts have eschewed any balancing of economic issues. Their position is aptly summed up in Sir Frederick Pollock's famous dictum, much quoted by his judicial colleagues that "Our Lady of the Common Law is not a professed economist". However, some critics have suggested that the judges have in fact become committed to economic theories of dangerously narrow dimensions. We have earlier seen how the judges have interpreted the public interest in the two merger cases that have recently come to court. Professor Gosse believes that the court's conception of "competition" is that of the law of the jungle and is not only over-simplified, but also inconsistent since agreement or merger is permitted to the point of virtual monopoly.[45]

43. W.G. Phillips. Op. Cit. p.90
44. IBID p. 97.
45. R. Gosse Op. Cit. p.207

In the Breweries Report, it will be recalled, the Commission believed that Canadian Breweries had a monopolistic purpose, but it was not in substantial control in any market in Canada. Thus, if the findings of the Commission were accepted, a merger offence would have been committed by the company provided that objective would be the sole criterion. However, if the test were the effect of the mergers, then there would seem to have been no contravention since there was still strong and increasing competition in the industry.

However, in court, McRuer C.J.H.C. said:

"It is not the motive of the merger that is important but what is important is whether it has operated to the detriment or against the interest of the public, or is likely to do so."[46] It was the effect, and not the purpose of the merger that went to the root of the matter. In applying the "unduly lessening competition" cases, the result was that if the effect of the merger was to suppress competition, then an offence had been committed. Thus, the key question was whether Canadian Breweries could carry on its business without competition. The Judge accepted the conclusion of the Commission and found that Canadian Breweries had no monopoly in any market in Canada.

It is of some interest to speculate as to at what point McRuer C.J.H.C. would have convicted. Since Canadian Breweries' 60.9 per cent share of the Ontario market was not monopoly, would there have been a conviction if Canadian Breweries had had 95 per cent? "Presumably, there would be a violation when the court could find that the accused had attained the power to carry on business without substantial competition.

46. R. v. Canadian Breweries Ltd. Op. Cit 1 at 23.

How this would be determined, we are not told".[47]

In any case, the fact that prices in the industry were subject to government regulation meant that the kind of competition open to the brewers presented a further problem to the courts. In the competitive fields of quality, taste, services and packaging the Judge felt that there was unrestrained competition.

The evidence brought by the Crown with respect to alleged agreements with competitors on prices, market quotas and trade practices were held to be irrelevant by the Judge. The evil, it was said, must flow directly from the merger and not from these collateral acts.

The Canadian Breweries case could have been a landmark in Canadian jurisprudence. Actual detriment to the public in several respects had been found by the Commission resulting from the merger, while the court would not consider these actual injuries to the public, but was only concerned with whether or not the effect of the merger was to give the accused a monopoly. The only form of public injury that was relevant was the possible damage to the "public interest in free competition." One writer has suggested that the Beer case "stands for the proposition that the economics of merger has yet to find its way into Canadian law."[48]

In the Sugar case, the Judge followed the McRuer line of reasoning and said the Crown must prove the merger resulted in a monopoly, but he also added that the Crown, in order to obtain a conviction, should establish actual detriment in the form of "excessive and exorbitant profits or prices". The Crown had proved neither.

47. R. Gosse Op. Cit. p.207
48. I. Brecher Op. Cit.

The economics that Williams C.J.Q.B. allowed into his judgement would appear to be obscure and confused. The relevant market for sugar, he said, was not provincial, not even national, but international. "Bearing in mind that we are here dealing with a world commodity, world-wide production, the effect of a world price and the situation existing throughout Canada, I would be of the opinion that the prosecution must be looked at in that respect, and cannot be confined to a consideration of the one particular area (Manitoba and Saskatchewan)".[49] But the whole Canadian sugar market was being supplied almost entirely by Canadian producers, with the aid of a tariff.

In considering potential competition, Williams C.J.Q.B. said:

"There is nothing that I can see to prevent others including the eastern refiners or some of them, entering the field of sugar refining in Manitoba at any time. There would seem to be no economic reason, except perhaps the effects of over-production to prevent them."[50] What better reason could there be to prevent them?

The Judge found that the merger had not destroyed competition, and went on to add that it had not "even limited competition". This could hardly be reasonable, bearing in mind the facts of the case and the market shares of B.C.S.R. in Saskatchewan and Manitoba after the merger!

Other questions, such as the basing-point system and the tariff on sugar, were dismissed as irrelevant and the essence of the case rested on the merger and its competitive and public interest effects.

49. R. v. British Columbia Sugar Refining Ltd. Op. Cit. at 637.
50. IBID at 635.

From this discussion, we must conclude that merger jurisprudence in Canada is at the crossroad. Both the Beer and Sugar cases illustrate how difficult it is for the Crown to obtain a conviction in a merger case. Although Canada is in possession of a strongly-worded statute pertaining to mergers, she is virtually without an enforceable mergers policy. The Commission and the Courts seem to be working at cross purposes. The legislation fails to define the offence unambiguously, the judiciary remains rigid in its thinking while the Commission and the Judges do not apply the same set of criteria. In criticizing the Courts, we must condemn their exclusive emphasis on competition, and the dangerously simple conception of it which they have accepted. Their approach is out of keeping with the approach needed for a selective mergers policy.

The Beer and Sugar decisions were unsophisticated from an economic point of view and the green light was given to prospective mergers, unless they were to result in a monopoly. We can only puzzle over how to reconcile the interpretations of the law preferred by C.Js. McRuer and Williams and the arguments of "workable competition" preferred by the Commission.

The Commission had hoped that the Canadian Breweries and Sugar Refining decisions were wrong in law or that they were no longer applicable in view of the 1960 revision of the mergers definition. As we have seen, the Commission in its Meat-Packing Report believed that the new definition of the offence, namely mergers which are likely to lessen competition in the industry in such a way as to prejudice significantly the public interest in free competition, would embrace the meat-packing industry. However, the Department of Justice recently decided to drop the case, while as we saw, in the very recent Paperboard Shipping Containers

Report, the Commission renounced any hope of proving an offence under the Combines Investigation Act.

Canada has had a unique opportunity of combining both an ad hoc approach to mergers in the Reports of the Commission, weighing all the factors involved from the standpoint of the public interest: and the strictly legalistic approach of the Courts. However, it would seem that the Commission and the Courts have been working with different criteria, and our conclusion must be that Canada today seems to be further than ever from any selective and discriminating policy for mergers.

CHAPTER FIVE

THE EVOLUTION OF A BRITISH MERGER POLICY

The following analysis will attempt to account for the British approach to mergers against the general setting of monopoly control, as it was described earlier in the essay. We shall trace and offer some explanation of the evolution of British policy from pre-War days to the stage which has been reached at the present time, when new legislation on mergers is pending. In effect, what is required is an explanation of why the British have failed, until now, to take any steps to control mergers, even though their monopoly and restrictive practices legislation is 16 years old. The answer lies partly in the characteristic British tolerance of monopoly, partly in the economic circumstances of the period and partly in the fact that only as experience was gained of the workings of the post-War legislation could efforts be made at attacking further characteristics of monopoly.

There has not been that same dogmatic belief in Britain in the evils of monopoly power as found in the United States and monopolies were bestowed on such enterprises as the East India Company as long ago as Elizabethan times, through the use of Royal Charters. The mere existence of monopoly power has aroused no great protest, but what has been viewed with concern has been the possible abusive use of such power.

We have already noted that in the inter-War years the British Government positively fostered the cartelization of industry, with its encouragement of trade associations and mergers. Of over-riding concern to the Legislative during these years was the depressed condition of the economy with its social evils in the form of mass unemployment, and the concurrent loss of Britain's share of world export markets. No monopoly

legislation could be considered appropriate at this time and there was even less concern for just one aspect of monopoly control, that which deals with mergers.

A number of other factors contributed to increased concentration in British industry from 1935 onwards. The dislocation and disturbance of the war years left a permanent mark on the structure of many industries, particularly the grain milling, tinplate, building bricks and textile finishing trades. Among the more normal factors affecting concentration, technological changes took pride of place and contributed to increased concentration in such trades as tinplate, watches and clocks and mineral oil refining. Such changes as had occurred were noted by the authors of the 1944 White Paper on Employment Policy, in which the Government pledged itself to "take appropriate action to check practices which may bring advantages to sectional producing interests, but work to the detriment of the community as a whole".

The 1948 legislation providing machinery for the investigation of monopolies and restrictive practices in industry meant that, in little over a decade, policy had switched from controlling the wastes of competition, or depression economics, to controlling the power of monopolies created in its stead. The pragmatic approach of the Monopolies Commission resulted in attention being focused on securing the technological benefits of large-scale production, while minimizing the danger of exploitation which such advantages might make possible.

The Act of 1948 was passed at a time when the need to increase production, especially that required in heavy industry as well as that for secondary manufacturing industry constituted the outstanding national

1. [illegible], No. 4, 1963 p.467.

priority, and the relevance of this is that, in general, the preoccupations of the legislators explain the shape of the legislation. If increased production were the aim, then restrictive practices were logically the immediate target. As a result of this preoccupation, 19 of the 22 reports of the Monopolies Commission were concerned with restrictive practices. There was no effort made to deal with mergers at this time since there appears to be no a priori reason to believe that a merger will result in an artificial restriction of output, as is the case with a restrictive agreement.

This first attempt at dealing with monopoly was enacted by a Labour Government, which in theory, was well placed to deal with monopoly and monopolization, but which may have been hamstrung in practice by its beliefs. On the one hand, those in the party who foresaw a rapid transition to a socialist economy were perhaps not greatly interested in a particular defect in the existing system. On the other hand, those who most strongly advocated the setting up of large public corporations may have regarded the consolidation of large private units as a necessary preliminary to the eventual nationalization by the state. Others may have felt, on purely economic grounds, that there was a strong case to be made out for monopoly, whether private or public, and none for restrictive practices.

The Restrictive Trade Practices Act of 1956, although introducing new and important quasi-judicial machinery, was again pre-occupied with the problem of restrictive practices. There was no specific provision for the control of mergers, while the reconstructed and deflated Monopolies Commission was charged with investigating situations of monopoly in specific industries. The definition of monopoly was exactly similar to that used in the 1948

legislation, and embraced situations in which one or more firms in collaboration, controlled more than one-third of the output of an industry. The result was that merger control was non-existent, for only after an amalgamation that gave the new enterprise more than one-third of the output could the Commission investigate. The ultimate responsibility for taking action on the report rested with the Government.

In the meantime, something akin to a "merger movement" was taking place in British industry. Although there are no recent studies of concentration indices in Britain, there is prima facie evidence that concentration in some industries has increased and is increasing. Between 1954 and 1961 quoted companies spent nearly £1,600 million in acquiring control of other companies. The larger concerns have been the most active in take-overs, since the 98 very big companies that in 1960 had net assets of £25 million or more, accounted for nearly one-half of all expenditure on acquisitions. At their peak in 1959-61 mergers accounted for one-fifth of the investment activities of quoted industrial companies. Between 1954 and 1959, £100 million was spent annually on acquisitions, but in later years there has been a very sharp increase. In 1959, £300 million was devoted to such acquisitions while for each of the years 1960 and 1961, this amount rose to £330 million.[1]

For some time the interests of some of the larger British companies such as Dunlop, Unilever, Pilkington, I.C.I. and Courtaulds have extended far and wide, but in recent years, technological developments have given added impetus to these firms to gain control both over sources of supply and over market outlets. New uses have been found for existing end products and we noted earlier how the chemical and oil

1. 'The Economist', May 4, 1963 p.467.

companies have become interested in the development of the plastics and synthetic fibres industries.

The growth of the holding company and its diverse interests can be readily seen in bricks, pottery, glass and cement. In particular, one should mention the formation of the British Motor Corporation in 1952, which resulted from a merger between the Austin Motor Company and Morris Motors Limited, in the belief that unified control would not only lead to more efficient and economical production, but would also concentrate research facilities and further the export drive, particularly as respects manufacture and assembly abroad. For over two decades the combined Austin and Morris share of the domestic market had been falling while that of the two American-controlled companies, Ford and Vauxhall, had been steadily increasing. While in 1929, the English companies between them had 60 per cent of the market, the American companies had only 5 per cent. However, by 1935 the Austin-Morris share had fallen to 54 per cent and the Ford-Vauxhall share had risen to 25 per cent, and by 1950 the figures were 40 per cent and 36 per cent respectively.[2] The latest figures show that the B.M.C. sales in the home market amount to 40 per cent of the total, so that the earlier decline has been halted, and no doubt the consolidation has played no small part in B.M.C's success.[3] Until 1958, Courtaulds was a specialist producer of man-made fibres, but since then it has spread its interests, mainly by the acquisition of other companies, into the fields of paint, plastics, wood-pulp, engineering, packaging and finished textiles.

Of particular concern to public policy makers must have been some

2. P.L. Cook: "The Effects of Mergers" (London: Allen and Unwin, 1958) p. 380.
3. 'The Economist' June 13, 1964 p. 1257.

of these recent mergers, which clearly pointed the way to greater concentration. One can mention the acquisition in 1957 by Courtaulds of British Celanese, its only major rival in the field of rayon production, while in 1961 it acquired British Enka, another rayon competitor. British Ropes amalgamated with Hood Haggie to form a unit which produces over one-half the national output of hemp and wire rope. Tube Investments in acquiring Raleigh gained control of some 85 per cent of bicycle manufacturing. United Dairies has merged with Cow and Gate and acquired Aplin and Barrett to dominate the processed milk and cream industry. Flour-milling and retail bread distribution are among others that have seen a growth in concentration in recent years.

Some mergers have raised important social considerations, especially in the newspaper publishing industry. The "News Chronicle" was taken over by the 'Daily Mail', while the 'Daily Herald' will shortly cease publication. The result is that inside five years, the British public will have lost the benefits of two national newspapers. Meanwhile, such 'Press Lords' as Lord Thompson and Mr. Cecil King have come to dominate the ownership of British newspapers. The Labour Party has suggested that the closing down of newspapers is a threat to civil liberties and the State should have the power to veto a newspaper merger it considers undesirable. Lord Shawcross has suggested that a Press Amalgamations Court be established, which would agree to a merger of newspapers only if it were shown to be in the public interest "in the accurate presentation of news and the free expression of opinion".[4]

The Government itself has remained active in promoting certain mergers, and in 1960, the Minister of Civil Aviation used the power of government patronage to promote the consolidation of the British aircraft industry

4. 'The Observer' December 1, 1963. p.1.

into two rival groupings. Recently, the Board of Trade has been very active behind the scenes in the wave of cotton amalgamations and now seems to be prepared for similar action in wool.

Some of these 'conglomerate mergers' present special difficulties for the statisticians and their attempts to infer whether a merger is for business concentration or for diversification. For example, when Courtaulds acquired the Pinchin Johnson paint company, on normal statistical classifications, this would represent a diversification in terms of Courtalds' textile interests, but since it already had interests in the paint industry, this acquisition in fact represented increased concentration in paints.

'The Economist' has felt that for each of the mergers aimed at diversification, recent years have brought several aimed at concentration. The paper cites the brewing, paper, printing and publishing and clothing industries as being most active in the recent 'movement' while the degree of concentration has increased sharply in the radio and electronics fields.

Behind the 'movement' there appears to have been several special influences at work. Firstly, the British market was frozen into a peculiar rigidity during the period of war-time and peace-time controls. When these controls were finally loosened and relaxed, the established concerns had an incentive to consolidate and increase their hold on the market by defensive mergers with others, while newcomers found that they could gain and widen distributive contacts with the market most readily by buying up other companies less aggressive or weaker than themselves. Secondly, it was no accident that the waves of mergers began mainly in the distributive trades, which were ripe for rationalization. Marks and Spencer led the way in strengthening the distributor against the manufacturer, by integrating backwards. This altered

the balance of countervailing power in the British market away from dominance by the manufacturer. However, in its turn, it has increased the incentive for another kind of defensive merger among manufacturers.[5]

One widely held explanation for the timing of the recent merger wave is that an important effect of curbing restrictive practices is to stimulate more mergers. The Act of 1956 has tended greatly to curtail collective price maintenance,[6] with the result that when businessmen have been prevented from agreeing on prices, they have found an incentive to merge their interests. The impulse to merge in the cable and copper industries appears to be attributed by one established authority to the Reports of the Monopolies Commission on these respective industries.[7] Another observer has said: "The success of the Registrar and the Court in dealing with restrictive practices has almost certainly been one of the elements contributing to the continuing wave of mergers in Britain of recent years."[8]

The basic inadequacy of public policy with respect to mergers was clearly demonstrated during the famous I.C.I. proposed take-over of Courtaulds in 1962. Both companies were giants and it was reckoned that I.C.I. was among the first four largest British industrial concern, while Courtaulds ranked amongst the first thirteen. On a sales basis, I.C.I. ranked twenty-second among world companies and Courtaulds ninety-fifth. Both companies had been "merger-minded" and we have already referred to the

5. 'The Economist' July 4, 1959.
6. According to Dunning and Thomas, Op. Cit. p. 202, of the first 380 agreements scheduled by the Registrar for court proceedings, 250 were abandoned.
7. 'The Times' April 29, 1959. p.20
8. 'The Economist' February 11, 1961 p. 579.

diversification activities of Courtaulds, while I.C.I. had been created by one of the most dramatic company amalgamations of the 1920's. Although I.C.I. had subsequently grown more by direct expansion than by amalgamation, it had taken an occasional 'gobble'.

Courtaulds were said tobe the largest producer of man-made fibres in the world while I.C.I. already was the second largest chemical group after DuPont. Together I.C.I. and Courtaulds would be little smaller than DuPont in total assets by book value. It was presumed that Courtaulds would take in all the fibre interests of the combined group. The 30 per cent of its assets outside fibres would add substantially to I.C.I.'s capacity for sulphuric acid, carbon disulphide and plastics film, and give the new group about a quarter share of the British paint market. The chairman of I.C.I. openly admitted the motive for the merger; it was to strengthen command of the British manufacture of fibres. Although the main result of the merger, apart from increasing concentration in chemical and paints, would have been to make I.C.I. a virtual monopolist in fibres in Britain, this monopolistic position was defended by the chairman by citing potential competition from other large chemical and fibre producers abroad.[9]

During the ensuing 'battle' between the directors of I.C.I. and Courtaulds the British Government began against its will to get involved, when many people voiced cries of "monopoly" at I.C.I. However, the Government decided that it could do nothing. Under the 1948 legislation, it was realized that the Government could take no action against the potential monopoly, but could only reserve the right to examine the resulting monopoly

9. E. P. Learned, F. J. Aquilar and R.C.K. Valtz: "European Problems in General Management" (Homewood: Illinois 1963) p. 468-506.

once it had gained more than one-third of the market. The Government effectively "washed its hands of the affair", as observers commented.

There can be little doubt that Britain's expected entry into the European Economic Community at this time led many people to take a liberal view of the merger wave of the period, since it was expected that Britain's competitive position vis-a-vis its European competitors would be strengthened. With the abolition of the internal tariff in E.E.C., no firm would be free of overseas competition in its domestic market. In effect, the expected outcome was one of 'workable competition' in an international setting.

However, when the attempt to enter the E.E.C. eventually had to be abandoned, the 'merger movement' gained a new perspective and led to a fresh outcry for "something to be done about mergers". The I.C.I. - Courtaulds 'battle' convinced critics of the inadequacy and loop-hole in the 1956 Act, in the context of a Britain outside the E.E.C.. The argument was that since only monopoly positions --- as defined in the Act --- could be investigated, and bearing in mind the difficulties and reluctance of governments to dissolve established monopolies,[10] then emphasis should be placed on the more practicable method of preventing the establishment or growth of undesirable monopoly positions by disallowing particular mergers.

Hence, proposals for setting up machinery for the screening of new mergers and the establishing of criteria for judging the desirability of any particular merger have been offered from a number of interested parties. However, as we have already observed, there can be no all-pervasive criterion for the judging of a particular proposed merger. And in the British setting,

10. The Monopolies Commission in its reports on Single-firm monopolies has not yet proposed the dissolution of any monopolistic firm. Meanwhile, the Government rejected the Monopoly Commission's recommendation that Imperial Tobacco be required to sell its shareholding in Gallaher.

there is a further dilemma.

Since the British have been concerned with the use of monopoly power, the approach of the Monopolies Commission has been a pragmatic and an empirical one. This has meant that the Commission has studied the monopolistic firm in action, before making its judgement as to whether the public interest has been injured. The result has been that attention has been focused on the performance of the firm in such matters as prices, profits, efficiency and exports.

However, public policy dealing with mergers and employing a 'performance' approach runs into insurmountable difficulties. It is very difficult to elicit sufficient relevant information from the firms themselves to show, beyond a reasonable doubt, that a completed merger has not resulted in scale economies. In the case of contemplated mergers, it could be that the individual records of the merging concerns might be examined with respect to various facets of economic performance, but this would involve prolonged enquiry and the delay would likely inhibit both desirable and undesirable mergers. And this approach would not get over the basic difficulty that, at least in terms of market power and freedom of action, the new whole would be different from each part taken separately or all separate parts added together.

A possible way out of these difficulties for the British in establishing a public policy for mergers would appear to be to break with the traditional 'performance' approach. Already, the tradition has been broken in the attitude taken with respect to restrictive practices, where the presumption is that they work against the public interest. The alternative would be to jettison the judgement made on the basis of performance and to replace it with a judgement made on the basis of the expected

reduction in the degree of competition. This involves taking account of the structural aspects of the market. We earlier examined the advantages of the structural approach over the performance criteria.

In 1960, one observer was advocating the setting up of a Monopolies Court on the same lines as the Restrictive Practices Court.[11] The onus, he argued, should be on those proposing the merger to convince the Court that the merger would bring positive benefits to the public. In the case of a finding adverse to the respondents, the Court would then ban the merger.

By 1961, 'The Economist' was offering a two-tier solution to the problem.[12] Where a merger was liable to engross some larger share of the market, for example, one-half or two-thirds, the presumption should be that the merger would be contrary to the public interest and should be forbidden. However, the paper argued that the parties ought to be given the opportunity of justifying it in a Monopolies Court as offering some of a set of specified over-riding benefits to the public. The second tier involved a merger which would bring only one-third of a market under a single control. Here, the proposal would be investigated by a short procedure similar to that followed by the Monopolies Commission, and if this suggested prima facie that this too, should be forbidden as being against the public interest, the parties would again have the chance to justify it before the Court.

However, these proposals were taking place during a period when the Government's over-riding concern was with the very slow growth rate in the British economy. There were mounting labor disputes and recurring balance of

11. P. Hutber: "Wanted -- A Monopoly Policy", Fabian Society Research Series, No. 219.
12. 'The Economist, February 11, 1961. p.579

payments and sterling crises. The insistent emphasis in official circles was on exports and export performance and had been so, during most of the Post-War years, so that proposals for a new approach to mergers did not commend themselves to the legislators. "It is probably as well to accept that interest in doing anything about monopoly is as weak and flickering among politicians as among the public".[13]

But, by 1962, the politicians were showing some concern and Sir James Pitman unsuccessfully introduced a Private Member's Bill that would give the Board of Trade the power to require a company to divest itself of shares in any wholly or partly owned subsidiary or associated company, where the Monopolies Commission had ruled that the ownership of such shares was monopolistic in character and harmful to the public interest. Such power would prevent the President of the Board of Trade from being able to plead in such a case as Imperial Tobacco and its holding in Gallaher that he had no power to compel divestiture.

By 1963, the Conservative Party had set up a committee to look at the problem of mergers and in its report it suggested that a Registrar of Monopolies be established and charged with the responsibility of referring cases to the Monopolies Commission. It was proposed that any merger concerning a company with net assets of more than £1 million or affecting a combination of net assets likely to exceed £1.5 million should be registered with this new officer. If he should think the merger liable to set up a dominant position in any industry or trade, he could at his discretion refer it to the Monopolies Commission to advise "whether the proposal is on balance calculated to bring

13. IBID

gains to the public interest not obtainable in other ways, sufficient to outweigh the public interest in maintaining competition." [14]

Obviously, the Gowermment was undertaking some new thinking on the subject of merger control and with the emphasis on maintaining competition, the traditional approach was in jeopardy.

Later in 1963, J.B. Heath in his Hobart Paper entitled: "Still Not Enough Competition?" proposed similar measure to plug the gap in the 1956 legislation. He suggested that a newly constituted Registrar for Monopolies should be appointed and mergers involving assets of over a certain amount should be referred to the Registrar. The critical monetary figure for Heath was £5 million. His proposal further required that if the Registrar thought the merger would reduce competition without demonstrable counteracting advantages, he should refer the case to the Monopolies Commission for consideration. The President of the Board of Trade could then act on its recommendations if he chose.

However, by this stage, 'The Economist' which over the last few years has consistently call for action in the merger field, was advocating even more radical steps. [15] The journal criticized Heath's proposals for not providing the speed of action that would appear indispensable when intervention is envisaged in a big-business deal. It felt that the Monopolies Commission was not the fit body to adjudicate on such important issues, but should continue to delve into the facts of existing monopolies.

In fact, 'The Economist' was calling for the use of the similar structural criteria for merger that have been proposed by some American economists and which we discussed earlier. The paper suggested that there should be a

14. 'The Economist' February 23, 1963 p.722.
15. 'The Economist' July 20, 1963. p.276.

clear presumption that mergers were not permitted if they produced a firm that would hold more than a given share of any major, market --- and the critical figure for 'The Economist' was 30 per cent. Exceptions would be allowed where the parties concerned could establish before a court similar to the Restrictive Practices Court that the merger was in the public interest. 'The Economist' also felt that there should be scope for the Registrar to refer cases to the Court where they did not produce the degree of monopoly specifically defined, but where the size of the companies concerned were such that a merger might produce overweening economic power. In effect, the paper was advocating that public policy attack "conglomerate" mergers for the first time.

The Court would have to consider "whether it was, for example, reasonable to argue that the potential economies of scale in an industry are so great and the British market so small that firms can only attain the optimum size by combining, or whether a monopoly, which is by definition less pressed to make short-term profits, can better afford to, and would, do long-term research and whether these results of a merger would be likely to benefit the community."[16]

'The Economist' was pressing for a complete break with the traditional approach to monopoly. Not only should the preservation of competition be uppermost in the minds of the adjudicators, but the last word in each case of a proposed merger would rest with a body other than the Government, in fact, with the Monopolies Court.

In March of this year, the Government eventually issued a White Paper in response to these proposals, in which it advanced new measures to control mergers.[17] Inevitably, the new proposals compromise some of the

16. IBID
17. 'Monopolies, Mergers and Restrictive Practices' March, 1964 CMD. 2299.

suggestions referred to above. The legislators do not envisage a break with the traditional approach to monopoly:

"The Governement.....reaffirm their view that it would be wrong to introduce into the law any presumption that monopoly is in itself undesirable, without regard to the conditions under which it operates, or to the manner in which it conducts its business. It follows from the basic approach that judgement should only be reached on a particular monopoly after investigation into the way in which it is in fact operating..... The Government propose therefore not to make any alteration in the basic principles of the law on monopolies."[18]

After paying lip-service to the advantages that can flow from mergers, the Government proposes that an enlarged Monopolies Commission, working in groups on several enquiries at the same time, should be empowered, at the direction of the Board of Trade, to enquire into any proposed or recently completed merger which would result in a monopoly (in the sense of control of at least one-third of the market) or would increase the power of an existing monopoly. Furthermore, the Government contemplates directing the Commission's attention to certain considerations to which it should have regard in particular cases in assessing where the public interest lay, particularly with respect to efficiency, technical and technological advance, industrial growth and competitive power in international trade.[19]

Thus, the traditional approach will be applied to the question of proposed mergers, since the last word in each case will rest with the Government. No doubt a proposed merger, however dominant the resulting firm might become, would be treated leniently by the Government where it

18. IBID para. 8 p.2
19. IBID para. 23-24 p.4

could be shown that exports would be increased as a result of the amalgamation.

However, the Government stresses that the role of the Commission will be "to report on whether the merger was against the public interest, and if so, in what respects. It would have to evaluate the evidence available on such questions as the extend to which competition would be reduced and the benefits to be expected from the larger scale of operation, which the merger would permit."[20]

The Commission will, therefore, perform the act of balancing the reduction in competition, which it is assumed is adverse to the public interest, against the benefits to the public flowing from the merger. Such a process is the essential element in a selective public policy for mergers, and as we have observed, no such a balancing takes place in the Canadian criminal court-room. Although there are no set limits to the market share that a firm might hold, presumably, the greater this market share increases as a result of a merger, the greater the benefits to the public will need to be, in order to be acceptable to the Commission.

The Government will take such action as it believes appropriate, in the light of the Commission's Report. A completed merger would be treated as a monopoly and the proposed powers for dealing with monopolies would be enforced. These new powers involve an investigation by a newly appointed Registrar of Monopolies, who is to be responsible for making the investigation into the facts of the monopoly and for setting out for the Monopolies Commission, the questions and issues involved. Where a merger has not been

20. IBID paragraph 26 p.4.

completed, the Government proposes to seek powers to prohibit it or to attach conditions to its completion.[21]

The Government gives great importance to the Registrar of Monopolies and hopes that industry will discuss any doubtful mergers with him and thus make formal inquiry unnecessary.

The Board of Trade will have the power to order one company to divest itself of an interest in another as it was unable to do with Imperial Tobacco and Gallaher. However, one doubts that many such actions would be undertaken by a British Government.

What is the main criticism of these new proposals for a mergers policy? When the Government says that it does "not intend to seek powers to hold up a proposed merger while it is being investigated",[22] it appears to be underestimating the difficulties of 'unscrambling' a group of firms that has been consolidated into one. The experience and sparseness of dissolutions in the United States is illustrative of the difficulties. Will the consolidating firms agree to hold up the merger while an investigation is being undertaken, when such firms know that if they carry through the process of amalgamation, the Government will be most reluctant to order a dissolution in the event of an adverse Monopolies Commission Report?

With respect to the advocates of a judicial rather than an administrative approach to merger control, one must conclude that the arguments favor the latter. It is the Monopolies Commission and not the Restrictive Practices Court that has had the experience of investigating monopolies and would appear, on balance, to be the better equipped in-

21. IBID paragraph 27 p. 5
22. IBID paragraph 25 p. 4

stitution for carrying out a selective policy for mergers. In a Court, there would inevitably be lengthy arguments over what constitutes 'overweening' power and about whether a merger would give control over 30 per cent of the market. Canadian and American experience is illustrative of the difficulties of a legalistic approach.

In general, the new proposals on mergers conform with the pragmatic and empirical approach to monopoly which has been inherent in British thinking on this subject. The White Paper must be seen as part of a renewed attack on vested positions in British industry and as a part of a design for making British business more competitive. Already this year, amid great controversy, individual resale price maintenance has been rendered illegal, and this venture is seen as the other part of the grand design for promoting more competition.

However, it is generally accepted that on the whole, for all the possibilities of abuse, British industry is still too fragmented and needs more mergers rather than fewer. Illustrative of this contention, one can cite the building industry, which is made up of thousands of small firms, and which has been recently condemned by the National Economic Development Council in its remarks that: "By falling short it may hold back the expansion of the economy as a whole". The machine tool industry's research and development activity would almost certainly benefit if there were fewer firms. Meanwhile, 'The Economist' as the staunchest advocate of a merger policy, has very recently been suggesting that there are too many makesof automobiles and that the British industry could benefit from a merger between the B.M.C., Jaguar and Rover concerns.[23]

23. 'The Economist', June 13, 1964 p. 1257.

Here is the basic dilemma of any merger policy --- how to encourage those desirable mergers yet disallow those which are potentially exploitive. The dangers of abuse have been recognized in Britain, and in general, one must applaud the new proposals in the unique British setting, as a step toward a truly selective policy for mergers.

CHAPTER SIX

MERGER POLICY IN THE UNITED STATES AND EUROPE

We shall now devote a short space to the attempts of the U.S. and European countries to institute a merger policy. It is hoped to suggest answers to such questions as: What motivates merger policy in these countries? How developed and how effective is this public policy compared with Canada's and Britain's both of which are under-developed? What economic criteria are used in the judgements of mergers?

It is essential to emphasize here that anti-trust enforcement in the U.S. is more than a theorem in law and economics; it is also a proposition in social psychology and constitutional law. Distrust of all sources of unchecked power can be seen in many spheres of American life and it underlies many of the political and constitutional arrangements in that country. It is expressed in the theories of "checks and balances" and of "separation of powers". Any holder of power, political or economic, it is hoped, will be subject to the threat of encroachment by other authorities and at the same time, that any authority which seeks to encroach on another's power will be strenuously resisted and held in check.

Anti-trust is the projection of these traditional American beliefs into the economic sphere. The result is that the U.S. has by far the most developed and exhaustive anti-trust law. At one with this basic motivation is its reliance on the legal process and judicial remedy rather than on administrative regulation. Although the prohibitions of the Sherman Act create ciminal offences, it is possible for the Department of Justice to institute proceedings in equity to restrain violations of the law. The significance of this

lies in the fact that a court of equity can regulate the future conduct of businesses found to be in violation of the law by laying down detailed injunctions. Meanwhile, the Clayton Act does not create criminal offences and the Federal Trade Commission, a quasi-judicial administrative tribunal, as a result of its hearings in respect of suspected violations, can issue 'cease and desist' orders against further infringement.

Running parallel to these political and psychological antagonisms to concentrated power is the economic faith in the virtues of the free and competitive market. The maintenance of competition is felt to supply an important psychological stimulus to productive efficiency and to technological advance and is at odds with the Schumpeterian viewpoint that a firm may need a monopoly position in order to engage in expensive research and capital expenditures. In effect, the concept of 'workable competition' is an attempt to accomodate and reconcile this belief in 'free competiton' with Schumpeter's thesis.

This American devotion to the promotion of competition and the belief that the most desirable economic and social consequences flow from its institution is evidenced by the relatively long history of anti-trust enforcement. Emerging from the Sherman Act of 1890, there has developed a long-line of per se offences including price-fixing, market-sharing, exclusive-dealing, collective boycotting and other restrictive agreements. As in Canada, there is a basic presumption in favor of competition and the prosecution has only to prove as a matter of fact that a restrictive agreement has been in operation, and judgement must follow.

However, our concern is with merger policy and we shall now turn to Section 2 of the Sherman Act and Section 7 of the Clayton Act on this subject.

One way of building up market power or creating a monopoly is to consolidate previously competing companies. Such horizontal integration of this kind may be a method of monopolizing and this is specifically dealt with under Section 2 of the Sherman Act. The Act itself does not prohibit 'monopoly'; to monopolize is not simply to possess a monopoly, but the word implies some positive drive, apart from sheer competitive skills, to seize and exert power in the market. And the job of the courts under Section 2 of the Act is to isolate and define the elements of positive drive that constitute monopolizing, which means identifying the intent of a firm in undertaking a merger.

The outstanding example of a case of monopolizing through merger under the Sherman Act is that of U.S. v. Columbia Steel[1] which took place in 1948. There, the Government sought to bar U.S. Steel Corporation from purchasing the assets of an independent steel maker, Consolidated steel, on the Pacific coast, on the grounds that it was an attempt by the U.S. Steel group to monopolize the market in certain fabricated steel products. The Government's strongest evidence was that U.S. Steel took 13 per cent of the orders for structural steel in the western market while Consolidated Steel took 11 per cent, so that the merger would bring 24 per cent under the group's control.

1. U.S. v. Columbia Steel Company (Supreme Court 1948). Other important cases include:
Northern Securities Company v. U.S. (Supreme Court 1903)
Standard Oil Company of New Jersey v. U.S. (Supreme Court 1911)
U.S. v. American Tobacco Company (Supreme Court 1911)

However, in using these figures, the Supreme Court found that the amount of competition eliminated was too small to involve a significant restraint of trade. The Court did not believe that 24 per cent of the market gave U.S. Steel monopoly power in the western market, and in order for the Government to establish a charge of 'attempting to monopolize' it would require a showing of 'specific intent' to monopolize. The Court accepted the acquisition as reflecting a 'normal business purpose' rather than as showing a specific intent to monopolize.

The 24 per cent degree of concentration in the western market could not confer power over price nor did it tend to exclude competition. Accordingly, the court found that since U.S. Steel neither sought nor obtained monopoly power, the acquisition did not violate the Sherman Act.

Originally, Section 7 of the Clayton Act was referred to as the 'holding company' section and the law-makers in 1914 seem to have envisaged it as a means of preventing important concerns in an industry from growing into 'trusts' by buying up stock in competing concerns and exercising industry---wide control through a holding company. But in the course of time, because of loopholes in the formulation of the provisions and the manner in which the courts interpreted them, the section came to be regarded as ineffective. The courts were inclined to look for a substantial effect on competition in the industry at large and dismissed cases in which the business of the acquiring and acquired companies was largely done in different market, or in which although competition between the acquiring and acquired concerns was eliminated, there was evidence of strong competition from outside the group. And since the wording of the section did not cover the acquisition of the physical assets of a competing company, this meant mergers could continue on a

grand scale.

Meanwhile, the legal standards provided by the Sherman Act require proof of either a specific intent to monopolize or restrain trade, or the actual achievement of market control sufficient to be deemed unreasonable in terms of injury to the public. The result was that in 1950, the Celler-Kefauver Act was passed with the intention of checking mergers and not merely secret stock holdings. Section 7 of the Clayton Act was revised to read: "No corporation engaged in commerce shall acquire..... the whole or any part of the stock or other share capital.....of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly".

The legal standards provided by the new section for the evaluation of mergers and intercorporate stockholding require proof only of a reasonable probability of a tendency toward or a substantial degree of the market control that constitutes illegality under the Sherman Act. But, the problem of economic analysis in Section 7 cases is not only that of providing insight into the relationship between particular market structures and the existence or absence of public injury, but also that of providing some basis for ascertaining the probability that a particular merger or stock acquisition will have the effect of bringing about a market structure or pattern of behavior which is not quite, but in the direction of, the sort of situation that is unlawful under the Sherman Act.

In order that we may appreciate the economic analysis and criteria now used in the U.S. in judging whether a merger is to be disallowed, it is necessary to examine a recent judgement, in which, for the first time, the Supreme Court decided a case requiring a detailed analysis of the 1950 amendments of Section 7.

The Brown Shoe case was decided in the Supreme Court in June, 1962 and the judgement is undoubtedly one of the few truly landmark anti-trust decisions on close-knit combinations. The Court confirmed the fact that the Celler-Kefauver Act constitutes a major substantive change in public policy toward the allowable degree of centralization of corporate control and not just a mere plugging of a loophole in the 1914 legislation.

At issue in the Brown Shoe-Kinney merger was the vertical aspects of the merger, the horizontal effects of the merger in a substantial number of local retail markets for shoes, and in connection with the latter, by indirection it was concerned with the effects of a form of conglomerate merger. The Government did not appeal the lower Court's decision that there was not a "substantial lessening of competition" in the manufacturing of shoes in which both Brown and Kinney were engaged.

Brown was the fourth largest U.S. shoe manufacturer in 1955 producing a little less than 4 per cent of the total shoe output of the industry while Kinney's share was 0.5 per cent. The largest 24 companies together accounted for only about 35 per cent and the 4 largest companies shared 23 per cent of the market.[2] Shoe-retailing is even more decentralized than shoe manufacturing, there being over 70,000 retail outlets, while the six firms with the largest number of retail shoe store outlets owned 18 per cent of such stores and the top 13 firms owned 21 per cent. Kinney was the largest family shoe chain retailer with 1.2 per cent of all retail shoe sales. Therefore in both shoe production and shoe retailing, a few firms were large relative to the great number of smaller firms, but the degree of concentration was low compared with such industries as tobacco,

2. D. Martin: "The Brown Shoe Case and the New Antimerger Policy" in A.E.R. 1963. p. 341.

petroleum, aluminum and steel, in which important Sherman Act cases dealt with the basic question of market structure.

The question before the Supreme Court was not whether Brown had monopolized the shoe industry, but whether the acquisitions violated the Clayton Act. The Court believed that Congress not only intended to make asset acquisitions subject to the Clayton Act's provisions, but also intended to change the standard of illegality contained in Section 7. The Court felt that Congress intended to apply the statute to vertical and conglomerate as well as horizontal acquisitions; that Congress intended to erect a barrier to the rising tide of economic concentration; that Congress rejected the application of Sherman Act standards in Section 7 cases; that the two examples of acceptable mergers were mergers of small companies making possible more effective competition with dominant firms, and acquisitions of failing companies no longer able to compete effectively in the market; that Congress indicated that a merger must be viewed in the context of its particular industry, taking into account market structure, changes in market structure and the condition of entry; that Congress intended the word "may" to indicate a concern with probabilities rather than certainties.

There were three basic issues on which the Court must decide: "the lines of commerce" or the product market; "the sections of the country" or the geographic market; the probable impact of the merger on competition.

With respect to the first of these issues, the defense gains in a merger case if the relevant markets are defined in such a way that the merger has no impact on competition. If a narrow definition of markets is used, it may be shown that the merging firms have no markets in common,

whereas a broad market difinition may show the merging firms are but two small firms among so many others that any impact is negligible.

The Court accepted a cross-elasticity or reasonable change-ability criterion as the proper determinant of the outer boundaries of a product market. And the court accepted that subcategories included within a broader line may also be considered relevant. Thus, in interpreting "any line of commerce" for Congress, the Court believed that a merger would be proscribed if the probable impact were found in any one of such economically significant sub-markets. A sub-market would be identified by using qualitative evidence, such as indicia of the trade practice, channel of distribution and difference in level of price sorts, in estimating the degree of cross-elasticity on the demand or supply side.

In applying these principles in the Brown Shoe case, the Court defined the relevant lines for both the horizontal and vertical parts of the case as men's, women's and children's shoes. These product lines were recognized by the public, manufactured in separate plants, they had peculiar characteristics making each one generally non-competitive with the others, and they were directed toward distinct classes of customers.

Parallel issues were involved in the interpretation of "section of the country" or geographic market and the line-within-a-line concept was extended to include a section-within-a-section of the country. The Court recognized that a relevant geographic market may be as extensive as the whole nation or as small as a single metropolitan area. The whole nation was used for the vertical part of the Brown case, and cities over 10,000 in population and their environs in which both Brown and Kinney had stores were used for the horizontal part.

The third question for the Court to decide, that involving a judgement on the competitive impact of the merger, resolved itself into an appraisal of the effect on both the vertical and horizontal aspects of the merger. The Court defined "vertical arrangements" generally as "economic arrangements between companies standing in a supplier-customer relationship". The Court quite properly emphasized that the primary evil in a vertical acquisition stems from foreclosure of a share of the market, so that the magnitude of the market share forclosed is an important consideration. However, the court did not adopt some specific, quantitative market share but decided to depart from this proceedure and to appraise other factors for the answer. The Court looked at the nature and purpose of the merger, the trend toward concentration in the industry and the merger's probably effects upon the economic way of life sought to be preserved by Congress.[3]

The Brown-Kinney merger was neither an acquisition of a failing company nor the combination of two small firms attempting to compete with large dominant companies. Kinney was the largest independent chain so the potential foreclosure was as large as possible with a merger of an independent retailer and a manufacturer, and the Court decided that foreclosure was the purpose of the acquisition. It was held that this vertical acquisition was inherently anti-competitive, for shoes that would not have been bought by an independent, Kinney were forced into its stores. In support of its conclusion, the Court found a trend toward concentration. Although the overwhelming portion of the shoe outlets remained available to the other 865 manufacturers, and the claim made by the defendants ".....that the industry is dynamically competitive" because of the ease and high rate of entry, the Court responded that ".....remaining vigor (of competition) cannot

3. IBID.

immunize a merger if the trend in that industry is toward oligopoly".[4] This conclusion was held to be substantiated by the fact that in 1945, two of the large shoe manufacturers, International and Brown, had no retail outlets, but by 1956 International had 130 and Brown had 845 outlets, while by 1958 Brown had over 1800 outlets. Between 1950 and 1956, nine independent shoe firms became subsidiaries of large firms, the acquired companies having operated 1,114 of the nation's 22,000 shoe stores.[5]

The vertical aspect of the merger was decided basically by the philosophy that: "Congress appreciated that occasional higher costs and prices might result from themaintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization".[6] However, the Court's position was not the result of a blind adherence to a small - business doctrine, but was based on the facts of the case. The trend toward concentration through acquisition proved important while offsetting economic or competitive advantages were considered insufficient to outway the structural changes.

In formulating criteria for evaluating the probable impact in the relevant markets of the horizontal aspect of the merger, the Court provided a more stringent prohibition of horizontal acquisitions by accepting much smaller market shares than under the Sherman Act. That the combined Brown-Kinney share in 32 retail markets ranged from 20 to 57 per cent and from 10 to under 20 per cent in over twice that number of cities was deemed adequate basis for predicting a substantial lessening of competition in those markets.[7] Also of concern to the Court was the possibility of subsequent

4. Brown Shoe Company v. U.S. 30 L.W. p.4573
5. D. Martin: Op. Cit. p. 345
6. Brown Shoe Company v. U.S. Op. Cit P.4576
7. R. B. Heflebower: "Corporate Mergers: Policy and Economic Analysis". Q.J.E. 1963. p. 547.

mergers by other firms. "If a merger achieving 5 per cent control were now approved, we might be required to approve future merger efforts by Brown's competitors seeking similar market shares. The oligopoly Congress sought to avoid would then be furthered and it would be difficult to dissolve the combinations previously approved".[8]

The court found this merger to be the "appropriate place at which to call a halt", that is, the Court introduced an incipiency doctrine requiring the prohibition of mergers that in and of themselves do not appear to have the effect of public injury.

It seems that the Court will disallow mergers in order to prevent relatively large firms from getting larger market shares through merger, irrespective of the magnitude of the share. The shares of the relevant market united by the merger is relevant, but the standard of legality is to be multidimensional, so that no specific percentage is to be used either to condemn or to condone a merger. Several other factors must be considered in order to evaluate the merger.

The Brown Shoe case also offered the beginning of a rationale for an attack on conglomerate mergers. The Court recognized that a firm operating in many markets could lead to unbalanced market power, which might serve to inhibit competition and promote price leadership. A specific share of a market in the hands of a firm also operating in many other markets need not be as large to be unlawful as the same share in the hands of a firm operating in only the particular market. "In this fragmented industry, even if the combination controls but a small share of a particular market, the fact that this share is held by a large national chain can adversely affect competition".[9]

8. Brown Shoe Company v. United States Op. Cit. p.4576
9. IBID

However, there still remains doubt about an attack on this type of conglomerate merger. Since the Brown Shoe case, the Federal Trade Commission has allowed the very large dairy, NationalDairy Products, to keep firms acquired in several markets in which it had not previously sold.

What then, in summary, is the present state of merger law in the U.S? Clearly, the Sherman Act requirement of proof of the achievement of power to enhance price and exclude entry has been replaced by the incipiency doctrine. The Court must now look, not into the past intent of a firm, but to the future and it must undertake to forcast in broad terms, the probable effect on the structure and performance of an industry in the case of a particular merger being allowed.

As for market definition, the Court's recognition of markets within markets means that there cannot be one and only one right market definition. Defendants will gain little by arguing for the market definition that minimizes the percentage of each firm's business done in competition with the other. The result is that market share statistics have been relegated to a subsidiary role since the market definition on which such shares are computed is less crucial.

Many proposed mergers in recent years have been disallowed or abandoned in the light of the 1950 Act. In 1958, Bethlehem Steel, the second largest company in the iron and steel industry, was prevented from merging with Youngstown, the sixth largest company. Both companies had grown by the merger method of expansion. Bethlehem had 16.3 per cent of the total industry capacity while Youngstown had 4.6 per cent, so that the combined 20.9 per cent of capacity of the two companies was large enough for permission to be refused for the merger. The District Judge said in this case:

"(Congress) made no distinction between good mergers and bad mergers. It condemned all which come within the reach of the prohibition of Section 7".[10] Again, it was the threat of setting into motion a chain reaction of further mergers by the other, but less powerful companies in the industry that was decisive.

In 1962 and 1963, two major moves to consolidate the U.S. airline industry were shelved, when the American and Eastern Companies, and Pan-American and T.W.A. proposed to merge, since they could not get the necessary government approval.

In 1963, the U.S. Government issued a report of an Interagency Committee on Transport Mergers, which presented a statement of the general criteria, which would in future be applied to mergers in the railroad and airline industries. The ten criteria are:

(1) Will the proposed merger restrict effective competition in the provision of transportation services in the areas affected?

(2) Will the proposed merger permit an economically more efficient use of resources, through fuller utilization, over a period of time, of plant and equipment and/or reduction in direct costs per unit of output, which will reduce costs while maintaining or improving the general quality of services offered to users?

(3) Can the economies by the proposed merger by achieved by alternatives more easily revocable which promise to be of comparable effect in accomplishing the improvement in overall efficiency?

(4) Will the cost and quality benefits resulting from the merger be reflected in benefits to be public?

10. Quoted in I.M. Stelzer: "Selected Anti-Trust Cases" (Homewood, Illinois: R. D. Irwin 1955) p. 106.

(5) Will the proposed merger, with the increased market power of the merged carrier, have substantial undesirable repercussions on other carriers in the industry?

(6) Will the proposed merger serve the long-run interests of both the public and carriers concerned, or is it merely an attempt to meet a short-run crisis arising either because of unfavorable economic conditions in general or a particular transitory problem?

(7) Is the merger proposed, in part, because of the imminent failure of one or more of the merging carriers, and is it the most appropriate solution to this difficulty?

(8) Are the legitimate interests of the existing creditors and equity holders of the merging carriers adequately protected?

(9) Does the merger provide adequate protection and assistance to affected employees and take into account community employment effects?

(10) Will the proposed merger serve other objectives of public policy, including a reduction in public subsidiaries?"[11]

More recent Supreme Court rulings bear out the policy as outlined in the Brown Shoe case. The Court has disapproved of the 1956 merger between Continental Can and Hazel-Atlas Glass and ruled that Continental's cans and Hazel's bottles were not in separate industries, but were all part of the "competitive overlap" in the packaging industry. Meanwhile, it has been held that Alcoa violated the anti-trust laws by its 1959 acquisition of the Rome Cable Corporation even though Rome had only 1.3 per cent of the aluminum cable market as against Alcoa's 27.8 per cent. The

11. S. Wheatcroft: "Air Transport Policy" (London: Joseph. 1964) p. 110.

principle used in these anti-merger cases was again expounded as: "If concentration is already great, the importance of preventing even slight increases in concentration is correspondingly great."[12]

As Mr. Martin has said: "In essence the new policy is simple: both vertical and horizontal mergers are likely to be held illegal unless the companies can demonstrate clearly that the mergers are likely to increase competition and thus promote the public interest. Unless a company is able to so demonstrate, any vertical or horizontal acquisition in any significant market is particularly subject to challenge if a trend toward concentration exists."[13]

In turning to Europe, we find that there has been little or no definitive action with respect to the institution of a merger policy, either within individual states, or through the European Economic Community.

Article 86 of the Treaty of Rome declares that it is prohibited "so far as the trade between Member States may be thereby harmfully affected for one or more enterprises to abuse a dominant position in the Common Market or any substantial part thereof." However, unlike the British Monopolies Act of 1948, The Treaty does not attempt a definition of a "dominant position". A rough test which has been suggested by the Commission of the Community itself is that an enterprize occupies a dominant position in a market if it can act in it without needing to take account of the reactions of its competitors. Such generalizations offer little to a policy enforcing authority.

12. 'Time' July 3, 1964. p. 65.
13. D. Martin: Op. Cit. p. 357.

However, having collected for registration a vast array of business agreements which restrict competition, and having recognized the importance of "dominant positions" the Commission's department concerned with competition has turned to the question of the means of achieving single-firm monopoly, that is, through merger. It is at the stage of trying to devise policy to deal with mergers. Two independent studies have commenced, one of which is looking into the question of whether the possession of single-firm dominance could be made compulsorily registrable and the notification of mergers obligatory. The other study has been asked to appraise the inter-relation of E.E.C. activity regarding restrictive agreements and the occurrence of mergers; since firms that are forced to give up conspiracy together will often find it convenient to merge.[14] Thus, E.E.C. has recognized that a merger problem for public policy may be present, and we must await further developments from Brussels.

If the E.E.C. itself has no merger policy at this present time, then neither has most of the constituent members of the Community. In Germany, 'concerns' or holding companies "are as important as cartels in the organization of contemporary economic enterprise".[15] But, as distinct from the State control of cartels, any state control of 'concerns' has never been developed beyond rudimentary beginnings.

Germany has consciously refrained from declaring monopolies or monopolization illegal. The Act of 1957 provides for the reporting of mergers to the permanent supervisory authority, the Kartellbehorde, provided participating enterprises thereby achieve a market-share of 20 per cent or more, or one of the participating enterprises holds such share even without the merger. However, the Act does not provide for any measures against

14. "The Economist" July 13, 1963. p.166.
15. W. Friedmann: Op. Cit. p.145.

such mergers, for the Cartel Authority may merely call the parties concerned and discuss the matter.[16] This provision is meant to be only a preliminary move, for it is hoped that the experiences gained from the merger reports will enable some objective criteria to be established, in accordance with which could be determined the optimum size of firms still allowing conditions of healthy competition, and the degree of concentration impairing such conditions.

Neither the Netherlands nor France has yet attempted to enact special provisions for mergers.[17]

Where does the public policy of Canada and of Great Britain stand with respect to that of the U.S.A. and Europe?

Clearly, Canada has shared some of the basic values common to North America: an egaliterian outlook and fear of privately held power. Although Canada's antitrust laws are similar in content and provide for an analogous enforcement process, merger policy in Canada is relatively under-developed compared with that which has evolved in the U.S. in recent years. On the other hand, Britain has shared with Europe the general tendency to limit competition by associations or agreements, which influence the market. In some ways, the new British policy for mergers envisaged in the recent White Paper is stepping down an unexplored lane, although its setting is still in the empircal tradition.

In the chapter which follows, we shall underline the rationale for the Canadian and British positions on mergers as they exist at this time, and then offer some speculation on possible future developments in this field.

16. Organization for Economic Co-operation and Development: "Restrictive Business Practices: Comparative Summary of Legislations in Europe and North America" (Paris 1964) p.71. And Organization for Economic Co-operation and Development: "Guide to Legislation on Restrictive Business Practices" Volumes I and II (Paris 1962).

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CHAPTER SEVEN

PROSPECTIVE DEVELOPMENTS IN THE MERGER POLICIES OF CANADA AND BRITAIN

It is now appropriate to recapitulate the economic and policital rationale for the merger policies at present in operation in Canada and Britain. In effect, we shall need to stress once more, the unique circumstances which have led each country to the present stage in public policy. This will set the scene for some tentative suggestions for future changes in the merger policies of Canada and Britain, as each country prepares to survive in the intensely competitive economic world of the second half of the 20th Century.

Earlier, we observed that Canada's anti-combines law evolved out of the Common Law of England, but in sharing the particular set of ideals of the North American continent, the initial enactments together with their interpretation in the courts have resulted in a uniquely Canadian jurisprudence. The judiciary, working within the context of criminal law, has been bound to the economic philosophy of competition, carrying with it supposedly innumerable virtues. But the actual court decisions hardly reflect such a philosophy. Nowhere is this clearer than in the Combines Investigation Act as it has been applied to mergers. The courts have proceeded almost exclusively on the assumption that the purpose of the combines law was for "the protection of the specific public interest in free competition", with the result that any considerations of performance have been shunned. And consistent with their disavowal of any truck with economic theory, the courts have refrained from refinement or clarification of their notion of competition. This result is no more clearly portrayed than the economically meaningless position taken in the Beer and Sugar merger cases, whereby competition is in effect, anything short of virtual monopoly of the industry.

However, the courts cannot be burdened with the whole blame for the paradoxical situation that has grown up. They did not receive from Parliament any clear indication as to what was in the public interest and what was against it, with the result that they turned to this narrow and rigid interpretation of the public interest. And any balancing of economic arguments, the courts have considered to be outside their jurisdiction, since their concern is to interpret and not to make legislation.

The implications for Canadian public policy are clear. If the courts are to take the economic consequences of mergers into account, and to attempt a balancing of the economic pros and cons of a particular consolidation, a consideration which is essential for a selective mergers policy, then Parliament must give the judiciary statutory direction that the courts should examine these economic implications and on what basis. Parliament must make some attempt to define what is beneficial and adverse to the public interest or at least provide a formula, as has been the case in Britain, under which the courts can consider the public interest realistically. The enforcement authorities require a mandate, which allows them to determine the public interest in the light of all objectives comprising the public interest, and not of competition alone.

In Canada the criminal nature of the combines legislation has meant that the judiciary has proceeded with caution. The courts have not lightly held businessmen to be criminals under legislation which has failed to define the offence clearly. The result has been the increasingly legalistic conception of merger policy and the impasse of recent years.

Another unhealthy result of the judicial interpretation of the vaguely defined legislation is that uncertainty pervades Canadian merger law.

The R. v. Morrey case in British Columbia required specific proof of injury to the public, while to McRuer C.J.H.C. in the Canadian Breweries case, the offence was the lessening of competition, regardless of economic consequences. Meanwhile, Williams C.J.Q.B. in the B.C.S.R. case in addition required a demonstration of excessive or exorbitant profits. A Canadian industrialist contemplating a merger has every right to be confused. If the purpose of a legal enactment is to demonstrate unequivocally what is permissible and what is socially offensive, and therefore to provide a deterrent to the potential law-breaker, then clearly, in the case of mergers, Canadian provisions are ineffective.

The further corollary of this excessive legalism in Canadian merger policy is found in the reports of the Restrictive Trade Practices Commission. However, we have already noted the improvement in economic analysis in the latest reports.

In Britain, the vicissitudes of the economy and a lack of concern with the holding of monopoly power have reigned supreme. Only when it appeared economically necessary to implement anti-monopoly legislation in the post-war world did the Government believe it opportune to act. The process whereby restrictive agreements are prima facie illegal, but considered justifiable if they pass through the statutory "gateways" has proven effective, and the investigations undertaken by the Monopolies Commission should prove invaluable experience for its proposed new role in balancing economic factors in large-scale mergers.

How could the present Canadian public policy be improved?

The 1960 amendments offer encouraging possibilities of improvements, whereby mergers and monopolies were separated from the broad cate-

gory of combines offences, and where the criterion for an offence was changed from a merger which has operated to the detriment of the public, to one which lessens competition to the detriment of the public. This may be a too narrow definition of the public interest, but at least it may resolve some of the uncertainty in merger law. In 1961, a separate merger section was set up within the Combines Branch and it has been advocated that such a deconcentration of responsibility should be extended to the Restrictive Trade Practices Commission, whose activities presently still cover all types of offences under the Act. Other critics maintain that if the combines policy were not so legally orientated, then neglect of the essential research required for a study of the structure of Canadian industry might be overcome.

Other onlookers express hope that the exclusive use of the Exchequer Court may contribute to a greater expertise in combines control. But this provision is greatly weakened by the proviso that no case can be tried there without the consent of the accused.

It would indeed be difficult to offer suggestions as to radical improvements in the British approach to mergers at this stage, since the policy has still to be enacted. However, the outstanding defect in the proposals is the lack of authority by the Board of Trade to hold up a potentially offensive merger, while an investigation is being undertaken, bearing in mind the extreme difficulties of 'unscrambling' a completed amalgamation.

What challenges do the respective policies in Canada and Britain face in the future?

In Canada, there are a number of factors which, in total, amount to a clarion call for a radical change in policy. Firstly, business pressure has renewed its running objection to the place of anti-trust law as a part of criminal law. The businessman has distaste for a regulatory mechanism that places him in the dark for what, in his view, is a question of business taste, judgement or tactics, and we have mentioned that this may have had its influence on the leniency of the judiciary.

Secondly, there has been pressure from special pleaders in Canada for a revision of combines law. The co-operatives have claimed exemption from the law; the trade union movement has asserted the unique character of its collective defence against the rigors of the bi-lateral contract in a capitalist society and has succeeded in gaining exemption; fishermen have claimed consideration of their joint needs to determine prices and marketing arrangements; finally, the small businessman has sought additional protection against the rigors of superior competitive power in advertising, marketing and bulk buying.[1]

The third and greatest threat to the anti-combines law is that which challenges its basic philosophy and the efficacy of its enforcement. Critics have urged that the 'purist' approach in Canada is an outmoded concept and should be replaced by a new set of values. At the present time, the whole framework of world trade is under review and Canada's role in its reconstruction is uncertain. Some observers have suggested that this change in the balance of power in the world economy and Canada's place in the intense race for competitive competence means that combines policy should make a more positive contribution to the efficiency of industry. They argue that Canadian business should be permitted to organize itself so as to achieve the size required for the "true efficiency" necessary to meet this competition.

1. M. Cohen: Op. Cit. p.85-86

These critics point to the fragmentation of Canadian manufacturing industry and urge that some consolidation and rationalization is required to meet these competitive conditions of the future. However, such fragmentation to some extent reflects an over-representation of foreign-controlled firms which is itself, a legacy of Canada's traditional commercial policy of protection aimed at developing a manufacturing base in the domestic economy. If mergers are to be promoted to meet this competition from the new regional trading blocs, then the relationship between combines policy and commercial policy should be reviewed. One outspoken advocate of a readjustment in Canadian commercial thinking suggests that "with the international competition that low tariffs or free trade would encourage, it would no longer be necessary for the combines administration to keep a suspicious eye on co-operative efforts by Canadian industry to adjust to economic change".[2]

W. G. Phillips has pointed out that the incidence of multiple-use plants is widespread in Canadian manufacturing. Influences, such as a limited market size and market pressure for "full-line" production over a range of complementary products, have inhibited plant specialization.[3] He suggests that in a merger which brings together a number of such multiple-use plants, making possible the specialization of these into single-use plants with the same combined output as before, a considerable saving could be realized in the avoidance of costs and delays incidental to production changeovers. To the extent that such plant economies might be realized, it emphasizes further the desirability of a selective policy, since it increases the range of potentially acceptable mergers. Indeed,

2. Harry G. Johnson: "Canada in a Changing World Economy" (Toronto, University of Toronto Press 1962) p.61
3. W. G. Phillips: Op. Cit. P 91-92.

many have suggested that mergers which promote such plant economies may be one means to economic salvation for Canada.

The possibility of using tariff reductions or patent revocations was recognized in the Combines enactments, in order to promote more effective application of the present law, but these provisions have hardly ever been used.[4]

This brings us to an even more fundamental dilemma in the Canadian approach to combines controls. "Overall economic planning" is now the fashionable tool to avoid such contingencies as chronic unemployment, regional underdevelopment, unbalanced international payments, surplus capacity, the misdirection of capital investment and resource development. However, it has the quality of "positive regulation" that is alien to the spirit of "negative regulation" that characterized the kind of policy-thinking under which combines law grew and partly flourished. Obviously, a prohibited trade practice, or a merger, under the one system of ideas and values during the period of "negative regulation" may become more acceptable to the rationalizing requirements of the new era. We might ask: how far does the present Combines Investigation Act and its administration suggest an essentially durable and desirable pattern of regulation? Should there be some fundamental change in the very approach that government takes to the legal control of enterprise today?

If Canada is to follow Europe's example and institute some form of "indicative planning", how long can she afford anti-combines control to be left in the hands of the courts who may be working with an outdated set

4. Tariffs were reduced on newsprint in 1902, while in 1949 and 1953 the tariff on matches was reduced through international agreement. How direct the relationship was between the tariff reduction recommended by the Commission and the actual change negotiated at the international conference is not clear. There is no record of any use being made to nullify or vary patent and trade mark rights in connection with combines control.

of values? In any case, the criminal court is hardly the institution for a nice analysis of economic arguments. The empirical approach to monopoly, by employing a quasi-judicial body in the case of restrictive agreements and an administrative body to perform the delicate task of balancing economic considerations in merger cases, must be the more flexible approach to complement the goals of national economic policy in the new 'planning era'.

However, the constitutional problem in Canada whereby combines control must appear in criminal form and where the validity of civil sanctions remains in doubt is still unresolved. An attempt has been made to follow the "consent decree" provisions of the United States Sherman and Clayton Acts and the "cease and desist" orders under the Federal Trade Commission Act, in the 1960 amendments by providing for restraining orders before conviction and even without conviction. The application for a restraining order or for the "dissolution" of a merger or monopoly when there is neither a charge, indictment or conviction should prove whether such a provision is intra vires the Parliament of Canada.

It has often been suggested that Canada might undertake some form of automatic notification and prior scruting where a contemplated merger involves assets of more than a given amount, or would bring more than a given proportion of an industry under a single control, similar to that envisaged now by Britain. At present, the Department of Justice has virtually to rely on newspaper reports in order to decide if an enquiry is warranted as well as for knowing if a merger has taken place. However, this process of notification is the first step to that merger policy, which is selective, which also requires the institution of a quasi-judicial tribunal, a step which is constitutionally unpredictable at this time.

What emerges is that if anti-combines policy is to be related to the wider whole of economic policy and development, where it may be observed as one instrument in a many-sided approach to the "positive regulation" of enterprise in a free society, then its place in the criminal court must be reviewed.

Are the Canadian and British settings related to the American in any way? Clearly, in the present environment of advanced technology, high concentration may be warranted in particular industries, if they are to enjoy large-scale economies and remain competitive in domestic and foreign markets. However, for Canada and Britain, there can still be an intense competition with large and efficient foreign firms vying for business throughout the world. To the U.S., international trade is still, quantitatively a relatively minor economic influence and this, together with the innate fear of large-scale power, to many justifies the new "hard line on mergers". Industries participating in this new technological age can only survive on a continental scale. The British Government recognized this in forcing through amalgamations in the aircraft industry and are still finding that projects such as the V.C.10 aircraft, cannot be profitable if launched simply in the tiny British market. In effect, countries such as Canada and Britain will need an expanded concept of the "domestic market" to take account of foreign based firms and the importation of their substitute products. This again emphasizes a closer link between combines and tariff policy.

Any anti-trust law presupposes some goal or objective. In the U.S., one of the overriding goals is that of a free and competitive market economy, for its own sake. In Britain, competition is to be promoted as one means of attaining an expanding economy, with full employment, stable

prices and a sound balance of payments.[5] In Canada, the ends sought in combines policy are blurred and confused. Does Canada desire to follow the 'purist' approach of the U.S. --- indeed, can the Canadian economy afford such a high-principled approach? Or, does Canada wish to follow a selective merger policy, in which case, new administrative machinery will be needed?

Until the ends sought by the legislature in its combines policy are unambiguously defined, especially with respect to merger policy, the present impasse will continue. Only then can more definite and effective proposals for an alternative policy be made.

5. "Monopolies, Mergers and Restrictive Practices". CMD 2299 Op. Cit. para. 1 p. 1.

CHAPTER EIGHT

CONCLUSIONS

This has been a study of the public policies (or lack of policies) of Canada and Britain in their attempts to prevent the accumulation of large-scale economic power through merger. Consolidation is one sure way of achieving monopoly when it is taken to its logical conclusion, and many of the highly concentrated industries in Canada and Britain attained those positions by undertaking amalgamations in the past. The difficulty for public policy is that a particular merger can be motivated by any number of considerations and the results of mergers in general may be manifold -- some will be socially desirable and need to be encouraged, while others will be socially repugnant and need to be discouraged.

On the whole, British public policy has adhered to the first of the public policy alternatives which were introduced above.[1] The tendency has been to preserve the status quo and concentrated industries have been tolerated as long as their performance has been considered to be socially acceptable. However, the second policy alternative, that of public ownership, has been used where it has seemed likely that private monopoly would not bring forth the desired results. The 1956 Restrictive Trade Practices Act carries with it a presumption in favor of competition and is used to promote more "effective competition," the third of the policy alternatives.

Canadian combines legislation, in theory, has rejected the concept of "workable competition" since the presumption is that competition is desirable for its own sake. But, because of the interpretation of the enactments by the judiciary, attacks on monopolistic positions and mergers have

1. Supra, Introduction

been sparse and ineffective. The judiciary has rejected any performance approach and has concentrated on the structure of industry, so that even socially responsible private monopolies, in theory at least, are frowned upon. However, the promotion of "effective competition" has been eroded by the way competition has been interpreted in the courts to mean, in effect, anything short of complete monopoly.

Canada has also been prepared to take large scale enterprises into public ownership as a means of promoting competition with large private concerns. Meanwhile, the British Labour Party, as a possible future government, proposes to instal publicly owned firms in certain oligopolistic industries as a method of creating more competition.

Paramount in any discussion of merger policy we have stressed that the approach should be selective and discriminating, based as it is on the theory that prophylactic proceedings are preferable to the dissolution of established monopolies, as a means of attacking market power. In judging Canadian and British merger policies to the present day by this standard of selectivity, both have been ineffective.

From our analysis of merger control in Canada, certain criticisms emerge:-

(1) Canadian legislation fails to define the offence clearly. The public interest is in the promotion of competition (in some sense)so that the public interest in other aspects of economic policy, such as full employment, economic growth and a sound balance of payments, are not open to consideration by the enforcement authorities. Canada could well look to the British formula for the interpretation of the public interest[2] rather than persist with its present narrow and over-simplified definition.

2. See Appendix II below.

(2) The criminal nature of enforcement means that any nice balancing of economic effects is eschewed by the judiciary. The judges must take a share of the blame for the ineffectiveness of the policy since they have persisted with an over-simplified and unsophisticated concept of competition. However, judges are not to make policy, but only to interpret the expressed desires of the elected legislators, and the latter have not expressed themselves unambiguously in their enactments.

(3) The criminal nature of anti-combines enforcement has meant that the goal of the Restrictive Trade Practices Commission has been a conviction, with the result that this body has absolved itself from the balancing of economic effects which is essential in merger policy. However, improvements in the depth of analysis in the Reports have been forthcoming and the Commission has gradually set up "workable competition" as its benchmark. The result has been that the Commission and the judiciary are working at cross-purposes by using different criteria by which to judge mergers.

(4) Combines policy has failed to be assimilated into the wider whole of economic policy. Defining a market is no easy matter, but the courts have only considered the domestic market. The use of tariff changes to expand the concept of the industry to include international competition or competition from substitute products has hardly ever been used.

(5) Canadian public policy is inconsistent in having a set of detailed enactments denouncing restraints and monopolies, but whose effectiveness is limited, since agreements and mergers are allowed up to the point of virtual monopoly.

Criticism of public policy in Britain centres mainly on the lack of a merger policy until the present day. The policy cannot be accused of inconsistency, since the wide, general economic goals envisaged by the

legislation are accomodated through the use of quasi-judicial machinery. The proposed merger policy is consistent with the pragmatic approach pervading the whole of monopoly legislation, and the use of the Monopolies Commission as the adjudicating body is a step in the direction of that discriminating policy which is essential for an effective control of mergers.

For public policy in the future, the writer suggests the review and the resolution of the following problems:-

(1) Canada needs to remedy those defects in the present combines law and enforcement. The use of the Exchequer Court solely for 'anti-trust' cases offers the distinct possibility that an expert judiciary might be forthcoming in the near future.

(2) The essential agency for that selective merger policy, which we hold to be desirable is an administrative tribunal, fully conversant in the economic problems of Canada. However, the constitutional problem of instituting such a body remains unresolved.

(3) The need for controls presupposes some objective and Canada must define the ends sought by the legislation before commentators can make specific proposals for their achievement, whether it be through the use of an administrative tribunal or the present criminal law.

(4) In Britain, the search for loop-holes in the legislation by businessmen must be kept up to date by the legislators, as has been the case with 'information' agreements, which must now be registered. Plugging these gaps in the legislation will involve a continuous surveillance of business practices.

(5) The prospective legislation on mergers should include a clause giving power to the Board of Trade to temporarily halt a large-scale merger, while the Monopolies Commission carries out its investigations.

(6) However, the whole rationale for an 'anti-trust' policy, especially a mergers policy, needs to be reviewed by countries such as Canada and Britain. If large-scale tariff reductions are forthcoming in the near future, and domestic firms exposed to greater international competition, then a wider view of the domestic market will be needed.

(7) "Overall economic planning" is likely to be used more extensively in the future, as a positive instrument to direct economic activity, and this is alien to the environment in which monopoly control has grown.

(8) Finally, this writer offers a special plea to the academic economists. An evaluation of any branch of economic policy must consider the objective sought, the means considered to be appropriate and the state of knowledge concerning relationships among the variables to be manipulated and the ends to be atained. The ends to be sought will be determined by the elected representatives of the people. But it is this third area, involving the state of knowledge of relationships between market structure, business behavior, and the monopolistic and competitive consequences of structure and behavior, that is the special field of the economist. If an improvement in the choice of means is attainable, it will come largely through improvements in the techniques of economic analysis and the presentation of economic evidence. An extension of our knowledge of the relationships amongst these market variables by further study and research would greatly assist the anti-monopoly enforcement authorities, and raise the prestige of the science of economics.

APPENDICES

APPENDIX I

RELEVANT PARTS OF CANADIAN LEGISLATION

THE COMBINES INVESTIGATION ACT

R.S.C., 1952, c.314, as amended by 1953-54, c.51 and 1960, c.45.

S. 2 (e) "merger" means the acquisition by one or more persons, whether by purchase or lease of shares or assets or otherwise, of any control over or interest in the whole or part of the business of a competitor, supplier, customer or any other person, whereby competition

(i) in a trade or industry,

(ii) among the sources of supply of a trade or industry,

(iii) among the outlets for sales of a trade or industry, or

(iv) otherwise than in subparagraphs (i), (ii) and (iii), is or is likely to be lessened to the detriment or against the interest of the public, whether consumers, producers or others.

S. 2(f) "monopoly" means a situation where one or more persons either substantially or completely control throughout Canada or any area thereof the class or species of business in which they are engaged and have operated such business or are likely to operate it to the detriment or against the interest of the public, whether consumers, producers or others, but a situation shall not be deemed a monopoly within the meaning of this paragraph by reason only of the exercise of any right or enjoyment of any interest derived under the Patent Act, or any other Act of the Parliament of Canada.

S.19(1) The (Restrictive Trade Practices) Commission shall.....make a report in writing and without delay transmit it to the Minister (of Justice); such report shall review the evidence and material, appraise the effect on the public interest of arrangements and practices disclosed in the evidence and contain recommendations as to the application of remedies provided in this Act or other remedies.

S.29 Whenever, from or as a result of an inquiry under the provisions of this Act, or from or as a result of a judgement of the Supreme Court of Canada or of any superior district or county court in Canada, it appears to the satisfaction of the Governor in Council that with regard to any article there has existed any conspiracy, combination, agreement, arrangement, merger or monopoly to promote unduly the advantage of manufacturers or dealers at the expense of the public, and if it appears to the Governor in Council that such disadvantage to the public is presently being facilitated by the duties of customs imposed on the article, or on any like article, the Governor in Council may direct either that such article be admitted into Canada free of duty, or that the duty thereon be reduced to such amount or rate as will, in the opinion of the Governor in Council, give the public the benefit of reasonable competition.

S.31(1) Where a person has been convicted of an offence under Part v

(a) the court may at the time of such conviction, on the application of the Attorney General of Canada or the attorney general of the province, or

(b) a superior court of criminal jurisdiction in the province may at any time within three years thereafter upon proceedings commenced by information of the Attorney General of Canada or the attorney general of the province for the purposes of this section, and in addition to any other penalty imposed on the person convicted prohibit the continuation or repetition of the offence or the doing of any act or thing by the person convicted or any other person directed towards the continuation or repetition of the offence and where the conviction is with respect to a merger or monopoly, direct the person convicted or any other person to do such acts or things as may be necessary to dissolve the merger or monopoly in such manner as the court directs.

(2) Where it appears to a superior court of criminal jurisdiction in proceedings commenced by information of the Attorney General of Canada or the attorney general of the province for the purposes of this section that a person has done, is about to do or is likely to do any act or thing constituting or directed towards the commission of an offence under Part V, the Court may prohibit the commission of the offence or the doing or continuation of any act or thing by that person or any other person constituting or directed towards the commission of such an offence, and, where the offence is with respect to a merger or monopoly, direct that person or any other person to do such acts or things

as may be necessary to dissolve the merger or monopoly in such manner as the court directs.

S.33 Every person who is a party or privy to or knowingly assists in, or in the formation of, a merger or monopoly is guilty of an indictable offence and is liable to imprisonment for two years

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S. 2 OF THE COMBINES INVESTIGATION ACT, R.S.C., 1952, c.314 (repealed by S.C., 1960, c.45).

The "combine" definition (now repealed).

S. 2 In this Act,

(a) "combine" means a combination having relation to any commodity which may be the subject of trade or commerce, of two or more persons by way of actual or tacit contract, agreement or arrangement having or designed to have the effect of

(i) limiting facilities for transporting, producing, manufacturing, supplying, storing or dealing, or

(ii) preventing, limiting or lessening manufacture or production, or

(iii) fixing a common price or a resale price, or a common rental, or a common cost of storage or transportation, or

(iv) enhancing the price, rental or cost of article, rental, storage or transportation, or

(v) preventing or lessening competition in, or substantially controlling within any particular area or district or generally, production, manufacture, purchase, barter,

sale, storage, transportation, insurance or supply, or

(vi) otherwise restraining or injuring trade or commerce,

or a merger, trust or monopoly, which combination, merger, trust or monopoly has operated or is likely to operate to the detriment or against the interest of the public, whether consumers, producers or others.

(e) "merger, trust or monopoly" means one or more persons,

(i) who has or have purchased, leased or otherwise acquired any control over or interest in the whole or part of the business of another, or

(ii) who either substantially or completely control throughout any particular area or district in Canada or throughout Canada the class or species of business in which he is or they are engaged and extends and applies only to the business of manufacturing, producing, transporting, purchasing, supplying, storing or dealing in commodities which may be the subject of trade or commerce.

APPENDIX II

RELEVANT PARTS OF BRITISH LEGISLATION

MONOPOLIES AND RESTRICTIVE PRACTICES (INQUIRY AND CONTROL) ACT, 1948.

S. 14. In determining whether any conditions to which this Act applies or any things which are done by the parties concerned as a result of, or for the purpose of preserving, any conditions to which this Act applies, operate or may be expected to operate against the public interest, all matters which appear in the particular circumstances to be relevant shall be taken into account and, amongst other things, regard shall be had to the need, consistently with the general economic position of the United Kingdom, to achieve:-

(a) The production, treatment and distribution by the most efficient and economical means of goods of such types and qualities, in such volume and at such prices as will best meet the requirements of home and overseas markets;

(b) the organization of industry and trade in such a way that their efficiency is progressively increased and new enterprise is encouraged;

(c) the fullest use and best distribution of men, materials and industrial capacity in the United Kingdom; and

(d) the development of technical improvements and the expansion of existing markets and the opening up of new markets.

RESTRICTIVE TRADE PRACTICES ACT 1956.

S.21 (1) For the purposes of any proceedings before the (Restrictive Practices) Court under the last foregoing section, a restriction accepted in pursuance of any agreement shall be deemed to be contrary to the public interest unless the Court is satisfied of any one or more of the following circumstances, that is to say ---

(a) that the restriction is reasonably necessary, having regard to the character of the goods to which it applies, to protect the public against injury (whether to persons or to premises) in connection with the consumption, installation or use of those goods;

(b) that the removal of the restriction would deny to the public as purchasers, consumers or users of any goods other specific and substantial benefits or advantages enjoyed or likely to be enjoyed by them as such, whether by virtue of the restriction itself or of any arrangements or operations resulting therefrom;

(c) that the restriction is reasonably necessary to counteract measures taken by any one person not party to the agreement with a view to preventing or restricting competition in or in relation to the trade or business in which the persons party thereto are engaged;

(d) that the restriction is reasonably necessary to enable the persons party to the agreement to negotiate fair

terms for the supply of goods to, or the acquisition of goods from, any one person not party thereto who controls a preponderant part of the trade or business of acquiring or supplying such goods, or for the supply of goods to any person not party to the agreement and not carrying on such a trade or business who, either alone or in combination with any other such person, controls a preponderant part of the market for such goods;

(e) that, having regard to the conditions actually obtaining or reasonably foreseen at the time of the application, the removal of the restriction would be likely to have a serious and persistent adverse effect on the general level of unemployment in an area, or in areas taken together, in which a substantial proportion of the trade or industry to which the agreement relates is situated;

(f) that, having regard to the conditions actually obtaining or reasonably foreseen at the time of the application, the removal of the restriction would be likely to cause a reduction in the volume of earnings of the export business which is substantial either in relation to the whole export business of the United Kingdom or in relation to the whole business (including export business) of the said trade or industry; or

(g) that the restriction is reasonably required for purposes connected with the maintenance of any other restriction accepted by the parties, whether under the same agreement

or under any other agreement between them, being a restriction which is found by the Court not to be contrary to the public interest upon grounds other than those specified in this paragraph, or has been so found in previous proceedings before the Court,

and is further satisfied (in any such case) that the restriction is not unreasonable having regard to the balance between those circumstances and any detriment to the public or to persons not parties to the agreement (being purchasers, consumers or users of goods produced or sold by such parties, or persons engaged or seeking to become engaged in the trade or business of selling such goods or of producing or selling similar goods) resulting or likely to result from the operation of the restriction.

APPENDIX III

RELEVANT PARTS OF AMERICAN LEGISLATION

SHERMAN ACT 1890.

S.1 Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations, is hereby declared to be illegal.....

S.2 Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor.....

CLAYTON ACT 1914.

S.7 That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

CLAYTON ACT 1914 as revised by the CELLER-KEFAUVER ACT 1950

S.7 No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of

another corporation engaged also in commerce, where, in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly.

APPENDIX IV

RELEVANT PARTS OF GERMAN LEGISLATION

ACT AGAINST RESTRAINTS OF COMPETITION 1957.

S. 23 Any consolidation of enterprizes shall immediately be reported to the Cartel Authority if as a result of such consolidation the participating enterprises obtain a share of 20 per cent or more of the market with regard to a specific type of goods or commercial services, or if one of the enterprises involved has such a share even without the consolidation. The following transactions shall be considered as such consolidations:

1. Merger with other enterprises;
2. Acquisition of the net assets of other enterprises;
3. Acquisition of ownership of plants of other enterprizes;
4. Contracts providing for the use or management of plants of other enterprises;
5. Acquisition of participations of any kind in other enterprises insofar as such participations, alone or in combination with other participations held by the acquiring enterprise itself or by an enterprise belonging to a combine within the meaning of Section 20 of the Stock Corporation Law, attain a share of 25 per cent of the voting capital stock of the other enterprise.

S. 24 Upon receipt of a report pursuant to Section 23, first sentence, the Cartel Authority may summon the participants to an oral hearing or may invite them to submit a written statement with regard to the consolidation, if there is reason to expect that, through the

consolidation, the participating enterprises obtain the position of a market-dominating enterprise within the meaning of Section 22 (1) or (2), or if a market-dominating position is strengthened by the consolidation.

S. 22 (1) As far as an enterprise has no competitor or is not exposed to any substantial competition in a certain type of goods or commercial services, it is market-dominating within the meaning of this law.

(2) Two or more enterprises are considered as market-dominating as far as, in regard of a certain type of goods or commercial services, no substantial competition exists in fact between them in general or in specific markets, and as far as they jointly meet the requirements of paragraph (1).

BIBLIOGRAPHY

A. SECONDARY MATERIALS.

1. Books.

Adams, W., ed. The Structure of American Industry 3rd Edition. New York: MacMillan, 1961.

Albery, M. and Fletcher-Cooke, C.F. Monopolies and Restrictive Trade Practices, London: Stevens, 1956.

Bain, J. Barriers to New Competition, Cambridge: Harvard University Press, 1956.

_____ Industrial Organization, New York: Wiley, 1959.

Butters, J.K. Lintner, J. and Cary, W.L. Effects of Taxation -- Corporate Mergers, Cambridge: Harvard University Press, 1951.

Chamberlain, E.H., ed. Monopoly and Competition and Their Regulation. Papers and proceedings of a conference held by the International Economic Association, 1951. New York: St. Martin's Press, 1954.

Cook, P.L. and Cohen, R., Effects of Mergers, London: Allen and Unwin, 1958.

Dirlam, J.B., and Kahn, A.E., Fair Competition: The Law and Economics of Antitrust Policy. Ithaca: Cornell University Press, 1954.

Dunning, J.H., and Thomas, C.J., British Industry, London: Hutchinson, 1961

Edwards, C.D., Maintaining Competition, New York: McGraw Hill, 1949.

Evely, R., and Little, I.M.D., Concentration in British Industry Cmabridge University Press, 1960.

Friedman, W., ed. Anti-Trust Laws, Toronto: Carswell, 1956.

Galbraith, J.K., American Capitalism: The Concept of Countervailing Power, Boston: Houghton Mifflin, 1952.

Gosse, R. The Law on Competition in Canada, Toronto: Carswell, 1962.

Guenault, P.H. and Jackson, J.M., The Control of Monopoly in the United Kingdom, London: Longmans, 1960.

Johnson, H.G., Canada in a Changing World Economy, Toronto: University of Toronto Press, 1962.

Kaysen, C., and Turner, D.F., Anti-Trust Policy: An Economic and Legal Analysis, Cambridge: Harvard University Press, 1959.

Learned, E.P., Aguilar, F. J., and Vatlz, R.C.K., European Problems in General Management, Irwin, 1963.

Lewis, W.A., Overhead Costs, London. 1949.

Machlup, F., The Political Economy of Monopoly, Baltimore: Johns Hopkins University Press, 1952.

Mason, E.S., Economic Concentration and the Monopoly Problem, Cambridge: Harvard University Press, 1957.

Martin, D.D., Mergers and the Clayton Act, Berkeley: University of California Press, 1959.

National Bureau of Economic Research, Business Concentration and Price Policy: A Conference of the Universities -- National Buereau Committee for Economic Research, Princeton University Press, 1955.

Neale, A.D., The Anti-Trust Laws of the U.S.A., Cambridge University Press, 1960.

Nutter, G.W., The Extent of Enterprise Monopoly in the U.S.A. 1899-1939, Chicago: University of Chicargo Press, 1951.

O.E.C.D, Guide to Legislation on Restrictive Business Practices, Paris, 1962.

_____ Restrictive Business Practices: Comparative Summary of Legislations in Europe and North America, Paris, 1964.

Penrose, E.T., The Theory of the Growth of the Firm, New York: Wiley, 1959.

Reynolds, L.G. The Control of Competition in Canada, Cambridge: Harvard University Press, 1940.

Rosenbluth, G., Concentration in Canadian Manufacturing Industries, Princeton: Princeton University Press, 1957.

_____ and Thorburn, H.G., Canadian Anti-Combines Administration, 1952-1960, Toronto: University of Toronto Press, 1963.

Schumpeter, J.A., Capitalism, Socialism and Democracy, 3rd Edition, New York: Harper, 1950.

Simons, H. C. A Positive Program for Laissez-Faire, Chicago, University of Chicago Press, 1948.

Stelzer I.M. Selected Anti-Trust Cases, Irwin: Homewood Illinois, 1955.

Stocking, G.W., and Watkins, M.W., Monopoly and Free Enterprise, New York: The Twentieth Century Fund, 1951.

Thorelli, Hans B, The Federal Antitrust Policy, Baltimore: The Johns Hopkins University Press, 1955.

Weston, J. F., The Role of Mergers in the Growth of Large Firms, Berkeley : University of California Press, 1953.

Wheatcroft, S., Air Transport Policy, London: Michael Joseph, 1964.

Whitney, S.M. Anti-Trust Policies, New York: The Twentieth Century Fund, 1958.

Wilcox, C., Public Policies Toward Business, Irwin: Homewood, 1955.

2. ARTICLES

Bain, J.S., Economies of Scale, Concentration, and the Condition of Entry in Twenty Manufacturing Industries, American Economic Review, Volume 44, No. 1, March 1954.

_____ Workable Competition in Oligopoly, American Economic Review, Volume 40, No. 2, May, 1950.

Bladen, V.W., Competition and Monopoly and their Regulation in Canada. A Submission to the Royal Commission on Canada's Economic Prospects.

_____and Stykolt, S., Combines Policy and the Public Interest: An Economist's Evaluation in W. Friedmann's Anti-Trust Laws.

Brecher, I., Combines and Competition: A Re-appraisal of Canadian Public Policy, 38 Canadian Bar Review, 523, 1960.

Brittan, S. The Observer, March 8, 1964.

Blair, D.G., Canadian Anti-Trust Laws in W. Friedmann's Anti-Trust Laws.

Clark, J.M. Competition and the Objectives of Government Policy in Monopoly and Competition and their Regulation ed. E. H. Chamberlain.

———— The Orientation of Anti-Trust Policy, American Economic Review, Volume 40, No. 2, May, 1950.

———— Toward a Concept of Workable Competition, American Economic Review, Volume 30, June, 1940.

Cohen, M., Towards Reconsideration in Anti-Combines Law and Policy, McGill Law Journal, 1962-63.

Friedmann, W., Monopoly, Reasonableness and the Public Interest in Canadian Anti-Combines Law, 33 Canadian Bar Review, 1955.

Gosse, R., The Enforcement of Competition in the United Kingdom, 38 Canadian Bar Review 163, 1960.

Grunfeld, C., and Yamey, B.S., United Kingdom Anti-Trust Laws in W. Friedmann's Anti-Trust Laws.

Heath, J.B. Still Not Enough Competition, Hobart Papers, 1963.

Heflebower R.B., Corporate Mergers, Quarterly Journal of Economics, Volume 77 No. 4, November, 1963.

Homan, P.T., Trusts, Encyclopedia of the Social Sciences XV, Macmillan, 1931

Hunter, A., Development of Monopoly Legislation in Britain, Scottish Journal of Political Economy, 1956.

———— Control of Monopoly, Lloyds Bank Review, October, 1956.

———— The Monopolies Commission and Economic Welfare, Manchester School, 1955.

———— Competition and the Law Manchester School, January, 1959.

Hutber, P., Wanted -- A Monopoly Policy, Fabian Society, Research Series, 219, December, 1960.

Kreps, T. J. The Newspaper Industry in The Structure of American Industry. ed. W. Adams.

Lyon, R. Recent Canadian Anti-Combines Policy: Mergers and Monopoly, University of Toronto Law Journal, 15:155, 1963.

Markham, J., Survey of the Evidence and Findings on Mergers in Business Concentration and Price Policy.

Marris, R. A Model of the 'Managerial' Enterprise, Quarterly Journal of Economics, Volume 77, No. 2, May, 1963.

Martin, D.D. The Brown Shoe Case, American Economic Review, Volume 53, 1963.

Nutter, G. W., Growth by Merger, Journal of the American Statistical Association. Volume, 49, September, 1954.

Phillips, W. G. Canadian Combines Policy: The Matter of Mergers, 42 Canadian Bar Review, March, 1964.

Skeoch, L. The Combines Investigation Act: Its Intent and Application, 22 Canadian Journal of Economics and Political Science 17, 1956.

Solo, R., U.S. Attorney General's Report on the Anti-Trust Laws in Relation to Monopoly Control in Canada, 34 Canadian Bar Review 699, 1956.

Stigler, G. J., Introduction in Business Concentration and Price Policy.

_____ Monopoly and Oligopoly by Merger, American Economic Review, Volume 40, No. 2, May, 1950.

_____ Mergers and Preventive Anti-Trust Policy, University of Pennsylvania Law Review, Volume 104, November 1955.

_____ The Extent and Bases of Monopoly, American Economic Review, Volume 32, No. 2, June, 1942.

Stykolt, S., Combines Policy: An Economist's Evaluation, 22 Canadian Journal of Economics and Political Science 38, 1956.

Timberg, S., United States Anti-Trust Laws, in W. Friedmann's Anti-Trust Laws.

Wolfe, J. N. Some Empirical Issues in Canadian Combines Policy, 23 Canadian Journal of Economics and Political Science 113, 1957.

Yamey, B.S., Monopolies Commission Report on Cigarettes and Tobacco, Modern Law Review, November, 1961.

_____ Some Issues in our Monopolies Legislation, The Three Banks Review, No. 54, June, 1962.

B PRIMARY MATERIALS

1. CANADA

Report Concerning an Alleged Combine in the Manufacture Distribution and Sale of Beer in Canada. Restrictive Trade Practices Commission, Ottawa: Queen's Printer, 1955.

Report Concerning the Sugar Industry in Western Canada and a Proposed Merger of Sugar Companies. Restrictive Trade Practices Commission, Ottawa: Queen's Printer, 1957.

Report Concerning the Manufacture, Distribution and Sale of Yeast. Restrictive Trade Practices Commission, Ottawa: Queen's Printer, 1958.

Report Concerning the Production, Distribution and Sale of Zinc Oxide. Restrictive Trade Practices Commission, Ottawa: Queen's Printer, 1958.

Report Concerning the Production and Supply of Newspapers in the City of Vancouver and Elsewhere in the Province of British Columbia. Restrictive Trade Practices Commission, Ottawa: Queen's Printer, 1960.

Report Concerning the Meat Packing Inudstry and the Acquisition of Wilsil Limited and Calgary Packers Limited by Canada Packers Limited. Restrictive Trade Practices Commission, Ottawa: Queen's Printer, 1961.

Report Concerning the Manufacture, Distribution and Sale of Paperboard Shipping Containers and Related Products. Restrictive Trade Practices Commission, Ottawa: Queen's Printer, 1962.

Report of the Committee to study Combines Legislation (MacQuarrie Committee) Ottawa, Queen's Printer, 1952.

Annual Reports of the Director of Investigation and Research, 1956-1963. Ottawa: Queen's Printer.

The Combines Investigation Act. R.S.C., 1952 c.314, as amended by 1953-54, c.51 and 1960, c.45.

2. GREAT BRITAIN.

The Monopolies and Restrictive Practices (Inquiry and Control) Act, 1948.

The Monopolies and Restrictive Practices Commission Act, 1953.

The Restrictive Trade Practices Act. 1956.

Report on Commercial and Industrüal Policy, CMD 9035, 1918

Report of the Committee on Trusts, CMD 9236, 1919

Report of the Committee on Industry and Trade, CMD 3282, 1929.

Sub-Committee on Fixed Retail Prices, CMD 662, 1920

Report of the Committee appointed by the Lord Chancellor and the President of the Board of Trade on the Restraint of Trade, 1930.

Report of the Monopolies and Restrictive Practices Commission, Collective Discrimination: A Report on Exclusive Dealing, Collective Boycotts, Aggregated Rebates and other discriminatory Trade Practices. June, 1955.

The Monopolies Commission: Report on the Supply of Cigarettes and Tobacco, 1961.

Monopolies, Mergers and Restrictive Practices, CMD 2299, 1964.

3. UNITED STATES

The Sherman Act, 1890

The Clayton Act, 1914

The Celler-Kefauver Act, 1950

Federal Trade Commission, Report on Corporate Mergers and Acquisitions, Washington, 1955.

Department of Justice, Report of the Attorney General's National Committee to study the Anti-Trust Laws, Washington, 1955.

4. GERMANY

Act Against Restraints of Competition 1957.

5. NEWSPAPERS

The Observer
The Times
TIME
The Economist
The Spectator
The Winnipeg Tribune
The Winnipeg Free Press

TABLE OF CASES

Brown Shoe Company v. U.S. Supreme Court, 1962.

Container Materials Ltd. v. R. (1942) I D.L.R. 529, (1942) S.C.R. 147.

Hearn v. Griffin (1815) 2 Chitty 407.

Howard Smith Paper Mills Ltd. v. R. (1957) 8 D.L.R., (1957 S.C.R. 403.

Northern Securities Company v. U.S. Supreme Court (1903)

North Western Salt Co. v. Electrolytic Alkali Co., (1914) A.C. 461.

Palmolive Company (of England) v. Freedman. (1928) Chancery 264.

R. v. British Columbia Sugar Refining Co. (1960), 32 W.W.R. 577.

R. v. Canadian Breweries Ltd. (1960), 33 C.R. 1

R. v. Canadian Import Co. (1935), 3 D.L.R. 33 (C.A.)

R. v. Eddy Match Co. (1951) 13 C.R. 217; 18 C.R. 357 (C.A.)

R. v. Morrey, (1957), 6 D.L.R. (2d) 114.

R. v. Staples, (1940) 4 D.L.R. 699

Standard Oil Co. of New Jersey v. U.S. Supreme Court, (1911)

U.S. v. American Tobacco Co. Supreme Court (1911)

U.S. v. Bethelehem Steel Co. S.D.N.Y. (1958).

U.S. v. Columbia Steel Co. Supreme Court (1948)

Weidman v. Shragge, (1912) 46 S.C.R. 1, 2 D.L.R. 734.