RECENT TRENDS IN ANTI-MONOPOLY IN GREAT BRITAIN AND CANADA

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ABSTRACT

RECENT TRENDS IN ANTI-MONOPOLY IN GREAT BRITAIN AND CANADA

by M. E. Mahon

The thesis seeks to examine, evaluate and interpret changes in anti-monopoly legislation, and in administrative practice in Great Britain and Canada, and to assess their significance in the general scheme of anti-combines activity in both countries. It attempts to assess the extent to which the most recent developments modify the existing corpus of anti-trust theory and practice in each country. The areas of significant recent developments are those of resale price maintenance and mergers and monopolies, and the major part of the thesis is devoted to examination of these areas.

Anti-trust achievement in Canada and Great Britain has, until recent years, been limited to the control of restrictive agreements or true combines. These have been proceeded against more vigorously than other forms of monopoly, possibly because they appear to combine all the defects of other forms, with none of the advantages, and it is in this area that each country shows its best

and most significant achievement. The approach in Canada is very different from that adopted in Great Britain. In Canada, control is by a legal prohibition, dating from 1889, formerly contained within both the Criminal Code and the Combines Investigation Act, now amalgamated in the Combines Investigation Act, Section 32; these declare combines in general illegal if they "unduly" limit competition; in practice they operate against any agreements which substantially limit competition. There is no need to show public detriment. The British control is by means of a Restrictive Practices Court, set up in 1956 after investigations into a number of major industries under the Monopolies and Restrictive Practices (Inquiry and Control) Act in 1948 had revealed the wide-spread nature of restrictive practices. Industries operating restrictive agreements must register them with the court, and then seek to obtain permission for their continuance by showing evidence of resulting public benefit under specified headings. The tribunal here is an independent administrative one, and the approach is empirical and case-by-case. Generally speaking, in their different ways, the Canadian and British authorities have secured satisfactory control of restrictive agreements.

Two large areas remained free of control until recently. The first of these was resale price maintenance, or the restriction of competition at the retail or wholesale level by the manufacturer's insistence on a fixed or minimum price being maintained. This practice, and its economically harmful effects, are examined in detail. It is shown how gradually pressure to abolish the practice was built up in Great Britain and Canada; finally legislation to abolish price maintenance was passed in 1951 in Canada, being amended in 1960, and in Britain in 1964. This legislation continues the distinction between the approach to anti-trust shown in the two countries. The Canadian control is via an absolute legal prohibition, whereas the British prohibition gives scope for exemption to be granted on grounds of public benefit, the onus being on the individual firm to establish grounds for these. The defects and advantages of both methods are examined. An analysis is also given of the clauses granting exemption in case of "loss-leading" in either country.

The second area which shows significant recent developments is that of mergers and monopolies. In Canada, control is again by the legal prohibition of the Combines Investigation Act. Case-law is of major importance in determining how the Act is to be interpreted. Recent court decisions, e.g., R. v Canadian Breweries Limited and R. v British Columbia Sugar

Refining Company Limited (both 1960) indicate that only if it secures virtually complete elimination of competition will a merger or monopoly be successfully prosecuted. This interpretation of the law is unsatisfactory to the Combines Investigation Board, which considers control of far less degree to be worthy of investigation. Great Britain had no legislation at all to control monopolies and mergers until 1965, except for the proviso that single firm monopolies were subject to investigation and possible control under the 1948 Act. The 1965 Act provided that mergers resulting in monopoly control of more than one-third of the goods, or the acquisition of assets of more than five million pounds worth should be subject to investigation and remedial action. Proposed mergers would be halted pending investigations: the Bill also made special provision for newspaper mergers. The British legislation is again subjected to detailed comparison with the Canadian method of control.

The final chapter of the thesis examines the problem of the degrees of concentration and competition which can be considered an optimum; the merger and monopolies question is merely one facet of the general problem, and the determination of its optimum control can be viewed only in the context of workable competition. Mergers and monopolies should ideally, it is suggested, have to pass two qualifying tests. First, a 'justification' test, based on the need for concentration in a particular industry and expressed largely in terms of technical requirements. Secondly, a 'behaviour' test, showing that no public detriment has resulted from the merger or monopoly. This will be concerned largely with the effect of the monopoly on prices, costs and output, and a profitability test will be the main test operating. Control should preferably be by means of an independent administrative tribunal, with possible provision for appeal on substantial grounds to the law courts.

PREFACE

The purpose of this thesis is to examine and evaluate recent changes in anti-monopoly legislation and administrative practice in Great Britain and Canada, and to assess their significance in the general scheme of anti-combines activity in both countries.

The thesis will attempt to assess the extent to which the most recent developments modify the existing corpus of anti-trust theory and practice in each country: to this end, some initial examination of the anti-trust provisions in either country will be given. This preliminary survey and examination will be no more than cursory, because the anti-combines legislation and practice in both countries has been the subject of exhaustive comment and analysis by both economists and lawyers at all stages of its history, and in particular when any change or innovation has been introduced.

Detailed analysis and research will be restricted to the two fields where significant changes have occurred. The first of these is in the sphere of resale price maintenance, a practice which was subjected to initial legislation in Canada in 1951, and to amendments in the law in 1960, but was not made the subject of legislation in Great Britain until 1964. The second field is that of mergers and monopolies: in this sphere, the law in Canada first introduced in 1910 appears to have been adequately clarified by two court decisions made in 1960, and is therefore apt for comparison with the first British legislation on mergers and monopolies introduced in 1965.

The intention of the writer is that the thesis should be a genuine comparative study: in other words, it is hoped that the assessment of recent trends in the two countries will serve to make clear the strong points and shortcomings alike in the theory and practice of both, and hence lead to a discussion of the ideal nature and scope of anti-monopoly activity.

Following the detailed examination of the two major fields of recent innovation, it is intended to conclude the thesis with a brief discussion of the ideal method of controlling monopoly, and of the optimum degree of competition.

The writer considers that there is ample scope for a thesis evaluating the significance of recent movements in anti-trust activity. Very few comparative studies of this nature have been done in recent years, and any work which has been done on this topic has automatically been rendered out-of-date by the British legislation of 1964 and 1965. The topic appears to be of considerable scope and importance, and one which is of interest to economists, lawyers, politicians and businessmen in both countries alike.

The legislation and practice of the United States of America has been deliberately excluded from the scope of this thesis, although they have frequently influenced the nature of anti-monopoly activity in other countries, especially Canada. In the opinion of the present writer, an examination of the influence of United States activity would be a subject for a separate dissertation.

The writer has relied as far as possible on such first-hand material as (for both countries) the texts of Acts of Parliament, Government Papers, Reports of Government Departments or Commissions, official legal reports of law cases, reports of Debates in the Houses of Parliament (Hansard) and, for statistical information, the reports of the Board of Trade (for Great Britain) and the Dominion Bureau of Statistics (for Canada). Some secondary sources have also been consulted and are quoted where relevant.

The author wishes to express thanks for help received to the following:

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CHAPTER I

ANTI-TRUST ACHIEVEMENT IN CANADA AND GREAT BRITAIN

The Canadian and British systems of control of monopoly[1] are characterized by sharp differences, the most important of which are well-known to economists, since they have filled many pages in academic and legal literature. Monopoly control in Canada operates through a legal system, which was first enacted in 1889, and has been since modified by changes in the legislation, by decisions in case law which are binding in future cases (unless reversed), and by changes in administrative practice. It starts from a flat prohibition of all combines, a law which like all legal fiats has been the subject of much later discussion and interpretation. The British control system, which was not initiated until 1948, is an empirical system. It began with the setting up by the government in 1948 of an investigatory and fact-finding body (The Monopolies and Restrictive Practices Commission)

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[1]Monopoly is here used in its widest sense, signifying any imperfection of restrictive practice.

to enquire into the prevalence of imperfections in specific major industries, and went on to set up an administrative tribunal, the Restrictive Practices Court, in 1956 to examine restrictive practices in industry and to prohibit those which could show no justification for their existence.

Both systems, it is probably true to say, were created because the common law, hitherto the only regulator of restraints of trade, was found to be quite inadequate for that purpose. It purported to make contracts in restraint of trade unlawful, but in fact simply made them unenforceable; this meant that attempts to weaken such contracts were restricted to those occasions when one of the parties attempted, unsuccessfully, to enforce the agreement by an appeal to the courts. Gosse[2] regards the Canadian anti-combine system as merely an attempt to enforce and clarify the common law. The British system, although also initiated because of the defects in the common law, deliberately departed from a legal structure altogether; the approach was consciously empirical, laying stress first on investigation and research, and later, when the Restrictive Practices Court was set up, on the factual examination by a tribunal composed of professional men, of each individual practice, in each industry, in

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[2]R. Gosse: The Law of Competition in Canada (Toronto, Carswell Co. Ltd., 1962).

the context in which it was operated. Britain was almost fifty years later than Canada, however, in passing anti-trust legislation. Two reasons may be cited for this: first, there did not exist in Britain the climate of implacable hostility to trusts which could be observed in North America at the end of the nineteenth century, possibly because the agglomerations of power were not so striking nor so threatening: secondly, it is probable that the depression conditions of the twenties and thirties encouraged a permissive attitude to combines in Britain, the attitude being that, without restraints of trade, many businesses would not survive at all. It is not clear why this attitude should have prevailed in Britain but not in Canada and the United States; possibly the reason is that anti-monopoly legislation was by then firmly established in the two latter countries.

It is probable that it is in the field of restrictive practices, of "combines" in the strict sense, that anti-trust activity shows its best and most typical achievements, in either country. In both Canada and Britain, such combinations have been the most firmly attacked of all monopoly practices, primarily perhaps because they are thought likely to have most of the disadvantages and few of the possible advantages of other forms of imperfection. They include common price fixing, exclusive dealing agreements, quotas, restrictions of supplies, loyalty rebates and collective boycotts of various types. The restrictive agreement is universally disliked because of the elements of coercion, exclusiveness and forcible restriction of entry necessary to ensure its enforcement, and the secrecy and underhand dealing which often accompany it.

Possibly for this reason combines and restrictive agreements have been, theoretically at least, fairly successfully dealt with in both countries. In Canada, all such combines are liable to prosecution (and to penalties which may include a fine or imprisonment) if they "unduly" restrict competition.[3] The word "unduly" has been the subject of much legal argument; in practice any agreement or practice which substantially reduces competition is regarded as limiting it "unduly" and therefore is per se unlawful. An important feature of the Canadian legislation against combines is that no criterion of public detriment is imposed (apart from any that may be held to be implicit in the word "unduly"). Restraint of competition is automatically harmful, whether or not any specific detriment can be shown. The legislation on this aspect is therefore thorough, and the only

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[3]Section 32, Subsection 1, Combines Investigation Act at Appendix A.

salient criticism[4] of it which has been made, even by the most severe commentators, such as Rosenbluth and Thorburn,[5] is that the investigation and prosecution of offenders has not been carried on sufficiently vigourously. This in essence is an administrative and political criticism; the degree of vigour with which anti-combines activity is prosecuted depends primarily on the attitude to anti-trust of those in power, and on the funds which they are prepared to allocate to the investigation work. It is not really a comment on the law as it stands. In any case, reviews of the administrative machinery in 1952 and increased allocations of funds to anti-trust activity have helped to remove the main grounds of this criticism.

The law against combines in Canada is therefore basically satisfactory. Its main weakness is that as it stands, it is unable to touch agreements made by tacit or implicit collusion or by tacit agreement to follow a price-leader in an oligopolistic situation. While the authorities can do their utmost to watch for verbal or written communications between suspected parties for evidence of

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[4]G. Rosenbluth and H.G. Thorburn: Canadian Anti-Combines Administration 1952-60 (University of Toronto, 1963).

[5]The legislation is sometimes criticized for not giving sufficient weight to the beneficial aspects of some restrictive agreements. Such criticisms refer to the details of the working of the Act; the number of cases involved seems likely to be small.

explicit agreement, and to survey open-price agreements, exchanges of information and other communications which could serve as a basis for collusion, they can do little about the basic situation of tacit collusion. The theory of oligopoly, based on the kinky demand curve,[6] teaches that implicit collusion of this kind is natural market behaviour, given the oligopolistic situation;[7] it is therefore impossible to force on the oligopolist a competitiveness which the situation makes inherently unprofitable. Minor weaknesses in the Canadian control of combines might be more easily remedied; for instance, price agreements in service industries are not covered by the Act, and those subject to some degree of government regulation appear to be immune.

The British legislation, in its different way, has been equally satisfactory in its control of restrictive practices. The first Act, the Monopolies and Restrictive Practices (Inquiry and Control) Act in 1948 set up a commission which was merely an investigatory and fact-finding body; it examined a number of major industries

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[6]Paul Sweezy: "Demand Under Conditions of Oligopoly", Journal of Political Economy (1939).

R.L. Hall and C.J. Hitch: "Price Theory and Business Behaviour", Oxford Studies on the Price Mechanism, ed. T. Wilson and P.W.S. Andrews (Oxford University Press, 1951).

[7]The oligopolistic situation is chosen as being the most common market structure in the contemporary scene, v. P. Sylos-Labini: Oligopoly and Technical Progress (Harvard University Press, 1962).

(twenty in all) for evidence of monopoly or restrictive agreements, finding in the majority of cases evidence of a great number of restrictive practices and condemning those monopolies and restrictive practices which operated against the public interest. In 1956, the Restrictive Practices Act was passed, largely as a result of the reports of this Commission on individual industries, and also of the report on collective discrimination, single-firm monopolies continuing to be investigated as before by the Commission. A Restrictive Practices Court (an administrative tribunal, but one which followed broadly legal procedure) was set up to enquire into restrictive practices in specific industries. All such agreements had to be registered with a Registrar of Restrictive Trading Agreements, and had to be defended before the court by the industry in question. The grounds of possible defence were, firstly, any of seven specific benefits to the public (usually known as the seven gateways) secured by the agreement, and secondly, a claim of overall public benefit. The industry had to pass on both counts, and in most cases it was and is extremely difficult for an agreement to meet both requirements. The legislation is distinctive in insisting not merely on no public detriment, but on positive public benefit: that is, neutral agreements are not acceptable. Theoretically, it is flawed by the fact that no system of precedent was built up, so that an unfavourable decision on one industry's practice need not necessarily deter another industry with a similar agreement from fighting its case before the court; this case-by-case approach is probably a recognition of the fact that in no two industries are the conditions, and therefore the justification for agreements identical. In fact, an adverse decision usually does influence other industries with similar agreements to withdraw them or to modify them substantially. The Registrar of Agreements reported that by June, 1961, 78 agreements had been the subject of decisions (unfavourable in all but two cases) of the court, 590 agreements on the register had been brought to an end by the parties, and 475 had been revised so as to remove the restrictions, in addition to a number of agreements for a limited time period which had been allowed to lapse.[8] It would seem that any adverse decision by the court does have a multiple effect: the great majority of the agreements registered (and abandoned) dealt with price-fixing.

The efficacy of the British court obviously depends to a great extent on how stringently the criteria of public benefit are interpreted (there is some indication that in recent years the interpretation has been somewhat lenient). For example, the second of the seven 'gateways', by which a practice may be shown to be in the public interest, is

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[8]Report of Registrar of Restrictive Trading Agreements 1st January, 1960 to 30th June, 1961. (H.M.S.O. London), Cmnd. 1603.

that its removal would deprive consumers of some substantial benefits; it is likely to be a matter of opinion just how substantial any benefits actually are, and therefore to what extent they would justify the practice. In addition, the impact of the legislation is somewhat blunted by delays, a defect which is purely administrative. Apart from these weaknesses, the Act appears to be extremely efficacious. Like the Canadian legislation, its main weakness is that it cannot control tacit collusion and information agreements. In the British case, this weakness is the more striking, in that an industry may until recently have operated, say, a restrictive price-fixing agreement quite lawfully (which was not, of course, possible in Canada) so that, although the formal arrangement has had to be abandoned, the industry has merely to carry on, by tacit collusion, the kind of agreement which was formerly explicit.

As the law against combines and restrictive practices became increasingly effective in both Canada and Great Britain, it had the effect of drawing attention to two large areas which remained either untouched or ineffectively controlled by the legislation, and which therefore weakened the force of the anti-trust provisions as a whole.

The first of these was Resale Price Maintenance, or the restriction of competition at the retail and wholesale level by the manufacturer's insistence on the distributor's maintaining fixed or minimum selling prices. Sometimes, the system served to buttress tacit or (formerly) open price agreements among manufacturers, so that a rigid price system operated at all stages of the transfer from the manufacturer to the public. At other times, competition at the manufacturing level remained, but competitive efforts of manufacturers were focussed on the margins and the additional services which they could offer to the distributors. In either case, the system served to reduce the possibility of the public's securing lower prices through competition among distributors. Therefore, the price maintained system represented a major flaw in the legislation aiming at promoting competitive conditions generally.

Provisions to control Resale Price Maintenance were instituted in Canada in 1951 and amended in 1960. In Britain, legislation was not introduced until 1964. The second chapter of this thesis will examine in detail the problem of Resale Price Maintenance, and the efficacy of the measures adopted in either country to deal with it.

The second major area not hitherto satisfactorily dealt with is that of mergers and monopolies. In Canada, it might appear that the legislation was satisfactory, since mergers and monopolies, in common with other combines, have been declared unlawful; in their case, however, a criterion of public detriment operates. A stringent interpretation of the legislation might have been satisfactory (although the problem of assessing detriment, especially by purely legal standards, would never have been easy) but, as will be shown, the legal decisions on this topic have been such as to exclude from prosecution any merger or monopoly which stops short of virtually complete control of the market. From an economist's viewpoint, this appears to be a decided weakness. In Britain, as has been stated, monopolies (and this included mergers tending to monopoly), were originally subjected to investigation by the Monopolies and Restrictive Practices Commission, but no remedial action was in general undertaken. After the setting up of the Restrictive Practices Court, the work of the original Commission was confined to single-firm monopolies, and again, it was only in exceptional cases involving considerable detriment that any effective action resulted. Again, there was no provision for enquiry into mergers before these had resulted in substantial monopoly.

This weakness in the British legislation was rectified by the Act of 1965 regulating mergers and monopolies. In Chapter III of this thesis, the question of mergers and monopolies will be subject to full discussion, and the British legislation examined in comparison with the Canadian legislation as at present defined by case law. In a final chapter, optimum methods of controlling monopoly and mergers in a modern context of workable competition are discussed.

CHAPTER II

AREAS OF SIGNIFICANT RECENT DEVELOPMENTS
RESALE PRICE MAINTENANCE

1. (a) Theoretical Analysis

Resale Price Maintenance is the practice, on the part of retailers and wholesalers, of adhering to that price for resale of a product which has been laid down by the manufacturer. All sellers of the product at the retail or wholesale stage will offer the goods for sale at the (respective) common price indicated by the manufacturer. It follows that there will be uniform gross margins on that product, and that if the sale of price-maintained goods form a high proportion of traders' turnovers, prices and gross margins of the whole range of goods will show little variation.

R.P.M. (as Resale Price Maintenance will in future be termed for brevity) in most trades became the accepted practice as a result of the organized actions of groups of retailers.[1] In many cases, this action was made in response to vigorous price-cutting. R.P.M. was regarded as the sole means of preventing such competition and of securing uniform

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[1]For an account of the historical origins of R.P.M. see B.S. Yamey: The Economics of Resale Price Maintenance. (Pitman, London, 1964).

and stable margins. Retailers implicitly recognized that, with the occasional exception of the true monopolist, such as the sole bookseller in a small town, the condition of the retailer was similar to the firm under monopolistic competition, that of an oligopolist, the market facing any given retailer being determined by such aspects as location, class of goods sold, and income range served. In accordance with the rules of monopolistic competition, price cutting would involve early retaliation, with consequent benefit to none of the cutters.[2] The remedy was price agreement, and in view of the structure of the distributive trades, this was most effectively secured by an arrangement whereby the manufacturer enforced the resale prices. The manufacturers' motives for compliance may have been mixed. Some may have thought that the practice promoted stability in distribution and therefore in demand; others, while basically indifferent, may have thought it advisable to maintain the favour of powerful groups of retailers. Some again may have viewed R.P.M. as an important buttress of price agreements among manufacturers.[3]

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[2] For a thorough theoretical examination of retaliation by competitors, see E.M. Chamberlin: Theory of Monopolistic Competition. (5th ed.)(Cambridge, Mass., 1946.)

[3] A.D. Neale observed in Anti-Trust Laws of the United States that R.P.M. was a curiosity among restrictive practices in that the manufacturers who operate it, and the traders who take part in it often have quite different interests to promote. (Cambridge University Press, 1960.)

The manufacturer, then, not the retailer, is usually the enforcer of price maintenance. The method used may be individual enforcement, where the single manufacturer either exercises a legal right to enforce his contract with the seller, or withholds his supplies from the traders who cut prices below those laid down. Since the latter measure tends to be an ineffectual remedy in an age of many competing substitutes, successful enforcement has usually implied collective enforcement, namely action by an organized group of manufacturers of identical or similar products to enforce the prices suggested by each. Disciplinary action here may involve the withholding from the offending trader of supplies from the whole group of manufacturers. If their supplies form a high proportion of the shopkeeper's stock-in-trade, placing him on the 'stop-list' may involve the loss of his livelihood.

The proportion of domestic consumer goods subject to price maintenance has varied considerably from country to country and in different trades. The (British) Lloyd Jacob Committee on Resale Price Maintenance (1949) calculated[4] that immediately prior to the Second World War, about 30 per cent of domestic expenditure was on price-maintained goods. The percentage, it was estimated, had possibly risen since

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[4] Report of the Committee on Resale Price Maintenance. (H.M.S.O. London, 1949, Cmnd. 7696.)

that date.[5] The McQuarrie Committee (Canada) in its Interim Report on Resale Price Maintenance (1951)[6] was of the opinion that it was unlikely that the practice was as comprehensive in Canada as in Britain, but considered, nevertheless, that it was of significant and growing proportions.[7] In both Canada and Britain, however, significant areas of trade have always been free from the practice; butchers and greengrocers have not maintained prices, and in the grocery trade, price maintenance was found to be generally unenforceable, and therefore applicable to a small proportion of goods (15 per cent in the British grocery trade) only.[8] L. A. Skeoch calculates[9] that in Canada (prior to abolition of R.P.M.) the practice was of importance in six trades only.[10]

This limitation of scope may possibly constitute one reason why, in both Britain and Canada, R.P.M. was the last

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[5]Resale Price Maintenance in Britain was declared illegal in July, 1964.

[6]Department of Justice: Interim Report on Resale Price Maintenance by the Committee to Study Combines Legislation. (King's Printer, Ottawa, 1951).

[7]Resale Price Maintenance was abolished in Canada in December, 1951.

[8]See 'Fair Trade' (pamphlet) by P.W.S. Andrews and F.Q. Friday. (Macmillan, London, 1960.)

[9]L.A. Skeoch: "The Abolition of Resale Price Maintenance", Economica. (August, 1964).

[10]The six trades mentioned were books, confectionery and tobacco, hardware, radio and electrical, chemists and drugstores, jewellery.

restrictive practice to be outlawed. In Canada, other price agreements had been subject to control since the first legislation against combines in 1889. R.P.M. was not declared illegal until sixty-nine years later. Britain did not initiate legislation to control restrictive practices until 1948, but R.P.M., although frequently criticized, was not abolished until July, 1964. To the observer, this exemption of price maintenance from the general pattern of legislation against price-agreements may otherwise seem striking. One reason may be that considerable areas of trade were not subject to the practice. Another reason may be in the particular features of the distributive trades, which led some critics to believe that abolition of price maintenance would be detrimental to retailers, manufacturers and consumers alike.

In order to examine this possibility, it is necessary to make a brief theoretical examination of Resale Price Maintenance.

The main arguments for and against R.P.M. may be briefly enumerated as follows:

First, the legal/ethical argument. It is sometimes alleged that the manufacturer has some right to exercise control over the sale of his own branded product. This is unsatisfactory, since it could as easily be maintained that he relinquishes his control over the goods when he sells them to the wholesaler or retailer, who is not his agent. In any case, there is no reason why an apparent right should not be abrogated if the public interest seemed to require this.

Secondly, there is a presumption that under the system, gross margins are higher than need be.[11] Fixed gross margins must cover the cost of the least efficient (i.e. the marginal distributor); they are therefore unnecessarily high for the more efficient, and, further, because they are guaranteed, remove incentives to increase efficiency. The system therefore increases unnecessarily the share of national output channelled into distribution; not only are the inefficient cushioned, but more retailers than are really needed are attracted into its ranks. At the same time it is harder for the dynamic independent retailer to gain a footing or to expand, since, although his methods may be superior in efficiency, he cannot, through lower prices, give customers a solid inducement to try his establishment. Scope for innovation of all kinds is reduced, since no reward in extra custom through price reductions will accrue. The concentration of units needed for modern efficient selling is delayed or prevented.

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[11]It is often alleged that R.P.M. thereby helps to produce inflation. This may be the reason why agitation for its removal is often greatest when prices are rising.

The overall effects of R.P.M. may therefore be described as (1) enforcing needless rigidity of structure upon the distributive trade and retarding economically justified concentration, (2) increasing unnecessarily the cost of distribution, (3) subsidizing, and maintaining in business, the inefficient retailer.

The second argument is the weightiest advanced against R.P.M. and no effective reply to it has ever been produced. It is sometimes urged that distribution is efficient, on the whole, and that margins, which in a price-maintained market range from about ten per cent to thirty-five per cent in different sections, are not excessive. This argument, however, does nothing to destroy the assumption (in the foregoing analysis) that the elimination of price maintenance and the return of competition would reduce margins. More to the point is the contention that reductions in margins would be short-term. The theory here is that the large multiple or chain-store, having driven out the small independent by the lower prices made possible by superior purchasing power, will then proceed to re-raise prices with impunity. The argument, however, presupposes that greater concentration will involve abolition of effective competition, which is unlikely. Units may be reduced in number, but the concentration process is also likely to make the remaining competitors more efficient, in their turn, and therefore likely to offer more powerful rivalry. All will gain economies of scale, and therefore all can reduce gross margins by the amount of the reduction in costs while still retaining adequate profits. Even if competitors were temporarily eliminated, the comparatively low costs of entering retailing (compared with manufacturing, for example) would ensure that new entrants would be attracted in the long-run: high margins would increase the likelihood of this.

The question is sometimes bedevilled by a sentimental attachment to the interests of the small retailer. While the effect of ending other forms of price restriction may be to increase or decrease the number of business units; depending on the particular circumstances, it is virtually certain that the ending of price maintenance increases concentration and eliminates many small retailers. Much of the opposition to abolition in Great Britain centred on the danger to the livelihood of the small shopkeeper. The fact remains that unless the small retailer can justify his continued existence through greater adaptability and efficiency (that is, can offer something in a competitive situation), his elimination is inevitable and essential. This is the normal process of vigorous price competition, and there is really no good reason why distributive trading should be viewed as an exceptional case. The small independent shopkeeper admittedly has a very difficult task to compete with the larger chains, which have all the advantages of bulk-buying, with the usual rebates: his remedy must be to lower his own prices either through voluntary co-operative buying schemes, or by partial integration with other firms. Of course, he may be subsidized individually, but as R. Harris and A. Seldon have pointed out,[12] if it is desired to retain the non-economic small shopkeeper on sociological or humanitarian grounds, this is best done by granting him special privileges, such as de-rating,[13] or alleviation of taxation.[14] There is no good case for forcing the consumer to subsidize him through higher prices.

Thirdly, R.P.M. is considered to result in a proliferation of unwanted services and additional sales expenditure. Since retailers are precluded from competing in price, the only way

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[12]R. Harris and A. Seldon: Advertising in a Free Society (Section "Price Control or Competition"). (Institute of Economic Affairs, London, 1957).

[13]De-rating is a British term meaning the valuation of premises for local taxation (i.e. rating) purposes at some fraction of the assessment which would otherwise obtain (or, alternatively, in practice the imposition of the taxation at the same fraction of the existing rate).

[14]Harris and Seldon referred specifically to rescindment of British Sct. A tax for small retailers. This tax has now been generally abolished.

in which the low-cost distributor can attempt to secure additional trade is to use his cost-savings to provide more services, such as pre-sales information, after-sales service, delivery and credit services, amenities and rest-rooms in his establishment and so on, or to increase his advertising and other sales expenditure. The result is that his costs tend to be pushed to the level of the former higher-cost distributor, thus ensuring that all costs are uniform.[15] Of course, the customer, in the one case, gets the additional services for the same money, but it is possible that he may not want these, and would prefer a lower price with fewer services. Under R.P.M. it is impossible for the low-cost distributor to pass on his savings to his customers in lower prices. As the (British) Government White Paper of 1951 pointed out,[16] the salient criticism here is that the consumer has not the choice between high cost with additional service, or low cost minus service. A more rational method would be a system of varying prices, with corresponding varying degrees of service.

The objection to this has been voiced by P.W.S. Andrews

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[15]This point is made by S. Pollard and J.D. Hughes in their article "Costs in Retail Distribution in Great Britain, 1950-57", Oxford Economic Papers (June, 1961).

[16]British (Labour) Government: A Statement on Resale Price Maintenance. (H.M.S.O. London, 1951, Cmnd. 8274.)

and F.A. Friday. In a pamphlet with the somewhat weighted title, Fair Trade,[17] they argue that many of the specialist retailers, who provide valuable services, would be driven out by larger units offering lower prices without services, and that too late, the disappearance of the services formerly taken for granted, would be regretted.

"Services" as used here does not mean the often unwanted luxuries described earlier as being one of the results of overhigh margins but to the provision of genuinely valuable skills. Examples are the technical skills needed in many electrical trades, by watch and clockmakers or dealers in high class furniture or paintings, and the specialized knowledge and information shown by good book-sellers, travel-agents and wine-merchants.

The argument is partly unsound, since price maintenance in itself does not ensure that the provider of services, especially pre-sale services, necessarily gets the reward of the consumer's purchase; in part it is tending to move out of the sphere of economics altogether. Economically speaking, consumers' wishes have no meaning apart from their expression in purchasing choices. If shops disappear from lack of customers, this is because the consumers did not desire their services, at least to the point of paying for them. In terms

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[17] P.W.S. Andres and F.A. Friday: op. cit.

of economics, no meaning can be attached to a statement that the elimination of shops was regretted. Economically, this cannot be substantiated, and even in non-economic general terms, it is difficult to produce any satisfactory evidence for such a statement. Under freely competitive conditions, the diminution of the number of distinctive outlets cannot be regarded as a disadvantage, since their disappearance can be the result merely of insufficient demand.

The fourth question is the case as it concerns the manufacturer. As with the seller, fairly uniform gross margins (which in turn imply fixed stable supply prices) help to maintain a non-competitive situation, with a consequent rigidity of structure. Lack of price competition at the wholesale or retail level reinforces price agreements, expressed or tacit, at the manufacturing level. As is the case of the more efficient retailer, it follows that the more enterprising manufacturer is led to compete in fields other than price: again, many of these competitive efforts, such as advertising or other sales promotion, ancillary services etc., are wasteful and cost increasing. Professor G. C. Allen has pointed out that, if gross margins were pared down by the ending of R.P.M., manufacturers might be forced, by the pressure of retailers, to lower supply prices, a reduction which would force them to channel their energies into efforts at lowering cost rather than (as under price maintenance) to the provision of often unnecessary extra services or sales promotion.[18]

It is urged, however, that stability for the manufacturer ultimately benefits the consumer. Orderliness in distribution and reasonable stability of output, it is held, enable the manufacturer to distribute with maximum efficiency and low cost. Price-cutting under a free pricing system would lead to considerable fluctuations in sales and disruption of the distributive system, and the resultant higher prices would be passed on to the consumer. Provided that price-cutting stops short of "loss-leadership" (i.e. the prices still leave a margin of profit to the retailer) these fears seem exaggerated. Cuts will probably be temporary offers for a limited period (this is certainly the situation prevalent in Canada at the moment) and the only reasonable likelihood seems to be a temporary boost in sales. This will probably be slight, since different shops are unlikely to select the same brand for cutting. The manufacturer's fear is apparently that other shopkeepers will be dissuaded from stocking the brand, and that his distributive outlets will be blocked. If cuts are moderate and for a limited period this is unlikely to happen, and it can reasonably be contended that,

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[18] Monopolies Commission: Report on the Supply of Cigarettes and Tobacco (Dissenting), Recommendation of Professor G. C. Allen. (H.M.S.O. London, 1961).

if there is no longer any maintained price to set a standard, and fluctuations of varying magnitude are common, none will in itself seem spectacular, certainly hardly to the extent of creating a prejudice against a trader who is stocking at a slightly higher price. The contemporary Canadian scene, which is one of frequent but usually short-lived price-cuts, supports this contention.

It is not contended that there would necessarily be no detriment if the practice of "loss-leadership", otherwise price-cutting to an extent which excludes any reasonable margin of profit over cost of acquisition, were common. This appears to be a question which could best be examined in isolation in a separate section. It is sometimes maintained that it cannot be divorced from the general question of price maintenance: since, however, both Canadian and British legislation abolishing R.P.M. single it out for special enactments, it seems justifiable to attempt to isolate it.

The analysis just given highlights one point: that the manufacturer is to some extent dependent on the attitude of retailers towards his product. He relies on the retailer not merely to stock his goods, but to 'push' them by active salesmanship, suitable display and so on. If the market is highly competitive or, if he is a new entrant, his reliance on the distributor is increased. His sole means of interesting and rewarding the shopkeeper is the margin he can offer. The offer of a high margin is therefore a competitive action against producers of identical or similar products. Even if the move is subject to retaliation by one or more producers of identical goods, the higher margins on all the goods strengthen their position, as far as the retailer's favour is concerned. Therefore the competitiveness of manufacturers here seems always to push up gross margins. This is merely another proof of the fact that, if manufacturers cannot compete in price-reducing, they must alternatively compete in ways which tend to be price-increasing; since the manufacturer is not led to compete, through price-reductions for the consumer's favour, he is forced to compete, through increased margins, for the retailer's favour.

It appears then, that as it concerns the manufacturer, price maintenance tends to exert an upward pressure on prices and margins. Against this can be set only the possibility of some fluctuations in output, and as has been shown, this is likely to be slight.

<u>Fifthly</u> and finally, there is the consideration of the purchasing public. It seems clear that the result to the consumer of the abolition of R.P.M. will be overwhelmingly one of gain: lower margins, and therefore prices, and greater efficiency in retailing may confidently be expected. Never-

theless, it has been urged that purchasers, especially busy housewives, do not want to spend time and trouble in "shopping around" and comparing prices, but prefer the certainty of uniform prices, which allow a budget to be confidently planned in advance. Evidence to this effect was given by representatives of the women's organizations before the Lloyd Jacob Committee.[19] As the later (Labour) government White Paper commented,[20] it was, however, hard to believe that most housewives would not welcome the possibilities of reductions in prices as a result of competition, with the consequent possibility of a lower overall budget. It was suggested that the witnesses to the Lloyd Jacob Committee had little experience of the advantages of competition: their experience was related to the war-time and post-war eras of controlled prices, and did not extend as far back as the freely competitive pre-war period.

It is also contended that shoppers have not sufficient knowledge and information on products and brands to equip them to evaluate properly the goods offered. The growth of consumers associations, the dissemination of information, and the granting of certificates of quality or of guarantees

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[19]Report, _op. cit._

[20]British (Labour) Government Report: _A Statement on Resale Price Maintenance Presented by the President of the Board of Trade_. (H.M.S.O. London, 1951).

by organizations of standing, make this objection increasingly invalid.

In any case this objection has little real relevance, since the abolition of R.P.M. does not impose on any consumer the task of "shopping around" and comparing prices and qualities if he does not wish to undertake this. There is nothing to prevent his continuing to purchase all his goods in the shop which he formerly patronised if he wishes to do so. It is likely, too, that in any shop prices and margins will be lower under competitive conditions than would be the case under R.P.M. Therefore competitiveness, and consequent reduced margins, tend to benefit all purchasers.

To sum up, it appears to have been shown that the interests of the consumer demand that price maintenance should not be permitted. The practice may be in the interests of some traders and manufacturers in that it offers them a quiet life, free from the threat of competition, but it is likely that it is the most inefficient and unenterprising who reap the benefit here. Professor B. S. Yamey said,[21] prior to the abolition of R.P.M. in Britain, "The real issue which confronts legislators today is whether it is desirable to outlaw a restrictive practice which is against the interest of consumers." For the consumer R.P.M. is likely to mean higher prices, the subsidizing of the less efficient traders, and a multiplicity of services and

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[21] B. S. Yamey: op. cit.

expenditures which he may not want.

(b) Empirical Data

In spite of, or perhaps because of the fact that they cannot offer a very convincing theoretical case for it, the supporters of price maintenance appeal to empirical data to support their contentions. Their assertion is that whatever may theoretically be supposed to happen, in fact the abolition of R.P.M. does not tend to lower gross margins, that the evidence shows, on the contrary, that margins rise when price maintenance is outlawed. Andrews and Friday[22] supply a table[23] showing the increase or decrease in the margins obtained in thirteen major divisions of retail trading between the years 1950 or 1951 and 1956 or 1957 in both Canada and the United Kingdom. (The years 1950 and 1957 are given for the United Kingdom, as Census of Distribution figures compiled by the Board of Trade, are available for those years; in Canada relevant data from the Dominion Bureau of Statistics is supplied biennially, and therefore either of the years 1950 or 1951 and 1956 or 1957 has to be given.) Since the legislation forbidding price maintenance was passed

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[22]P. W. S. Andrews and F. A. Friday: *op. cit.*

[23]This table (Table I) is supplied on the following page.

TABLE I

RETAIL GROSS MARGINS IN THIRTEEN SELECTED TYPES OF BUSINESS

	Type of Business		CANADA 1950 or 51	CANADA 1956 or 57	CANADA Change on 50/51	U.K. 1950	U.K. 1957	U.K. Change on 1950
1	Grocery	Ind.	14.4	14.8	+0.4	14.3	14.4	+0.1
		Chain	15.5	15.5	--	18.1	17.3	-0.8
2	Meat	Ind.	16.1	19.6	+3.5	20.3	19.4	-0.9
		Chain	15.8	20.2	+4.4	23.6	23.0	-0.6
3	Confectionery & Tobacco	Ind.	17.9	18.9	+1.0	12.8	14.6	+1.8
4	Greengrocers & Fruiterers	Ind.	17.5	19.4	+1.9	18.4	19.1	+0.7
5	Men's Clothing	Ind.	28.3	29.5	+1.2	28.5	31.9	+3.4
		Chain	28.8	32.1	+3.3	24.1	27.9	+3.8
6	Women's Clothing	Ind.	27.9	30.1	+2.2	23.8	27.6	+3.8
		Chain	28.3	34.4	+6.1	24.2	26.1	+1.9
7	Footwear	Ind.	29.7	31.5	+1.8	25.4	26.5	+1.1
		Chain	31.6	34.0	+2.4	26.7	31.3	+4.6
8	Hardware	Ind.	26.4	26.4	--	25.8	26.0	+0.2
9	Furniture	Ind.	27.1	26.1	-1.0	26.2	28.7	+2.5
		Chain	30.7	36.7	+6.0	31.5	36.8	+5.3
10	Radio & Electrical	Ind.	27.8	25.6	-2.2	27.8	28.5	+0.7
11	Chemists	Ind.	31.2	31.6	+0.4	30.6	28.5	-2.1
		Chain	33.7	34.3	+0.6	32.2	33.5	+1.3
12	Jewellery	Ind.	40.3	42.5	+2.2	30.2	32.4	+2.2
13	Variety Stores	Chain	37.8	38.6	+0.8	27.3	31.6	+4.3

SOURCES: Canada: Dominion Bureau of Statistics: Biennial Operating Results.
U.K.: Census of Distribution compiled by the Board of Trade for 1950 and 1957 (as quoted by P.W.S. Andrews and F.A. Friday: op. cit.)

Results for each trade in Canada are supplied every two years only. Therefore, for Canada, the figures for any particular business are given for either of two consecutive years: for example, for 1950 or 1951, but not for both.

in Canada at the end of 1951, the table is supposed to show what happens in a country where price maintenance is abolished compared with one where it is retained. The results appear to be that average gross margins increased in Canada by about 1.9 per cent and in the U.K. by about 1.7 per cent; that is, in spite of abolition, Canada showed steeper increases than did Britain.

The method of calculation adopted can certainly be criticized: for instance, the figures given for margins are the simple average of all the trades listed, with no attempt at weighting: the results can hardly be more than an approximation, and are made more so by the fact that where separate figures for independents and chains are given for any type of business (as with meat, for example) the trade in question gets a double weighting as compared with one for which only one set of figures is supplied (as, for instance, greengrocers and fruiterers, which are all independents). The figures given for margins for independents in Canada are also in themselves suspect, since the Dominion Bureau of Statistics tables give separate results for the incorporated and unincorporated stores, and the combined figure supplied by Andrews and Friday seems to be the simple mean of the two figures, again without any weighting. These perhaps are mere minor crudities. A far more substantial criticism is that to compare increases in margins for all fifteen types of business is invalid, since R.P.M. applied in Canada to only five of the trades listed in 1951.[24] L. A. Skeoch,[25] who pointed this out, shows that if the Canadian figures are broken down into two groups, one of ten non-price-maintained trades, the other of the five price-maintained, and simple averages are again taken, the non-price-maintained group shows an increase from 1950/51 to 1956/57 of 2.4 per cent on an average gross margin of 25 per cent, i.e. an increase of about 10 per cent, while the price-maintained group shows an increase of 0.3 per cent on a gross margin of 29.5 per cent, i.e. an increase of about 1 per cent. These results, he claims, showing, as they do, substantially smaller increases for the price-maintained group, point to the influence of newly released competitive forces in diminishing margins.

If this kind of analysis is to be adopted, the findings given above can be amplified by other results. For instance, it is useful to compare the margins obtained in the five price-maintained trades in Canada in the years 1950/51, 1956/57 and 1959/60, to see how results alter after the first impact of competitive conditions may be assumed to have spent itself. Table II shows that the average increase from

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[24]The five trades are Confectionery and Tobacco, Hardware, Radio and Electrical, Chemists and Jewellery.

[25]L. A. Skeoch: Loc. cit.

TABLE II

CANADA - GROSS MARGINS OBTAINED

No.	Ind. or Chain	Type of Business	1950 or 1951	1956 or 1957	Change on 1950/51	1956 or 1957	1959 or 1960	Change on 1956/57
A	Ind.	Confectionery & Tobacco	17.9	18.9	+1.0	18.9	19.9	+1.0
B	Ind.	Hardware	26.4	26.4	--	26.4	27.4	+1.0
C	Ind.	Radio & Electrical	27.8	25.6	-2.2	25.6	27.5	+1.9
D	Ind.)	Chemists	31.2	31.6	+0.4	31.6	32.3	+0.7
	Chain)		33.7	34.3	+0.6	34.3	33.9	-0.4
E	Ind.	Jewellery	40.3	42.5	+2.2	42.5	41.6	-0.9
		Total	177.3		+2.0	179.3		+3.3
		Average	29.5		+0.3	29.9		+0.6

SOURCE: D. B. S. Biennial Operating Results: 1950 or 1951, 1956 or 1957, 1959 or 1960.

1950-51 to 1956-57 was 0.3 on 29.5, or approximately 1 per cent, while that from 1956-57 to 1959-60 was 0.6 on 29.9 or approximately 2 per cent; when the fact that the time-period for the second increase was only half as long is taken into account, the results are as we might expect: margins increase more sharply after the interim period of steep price-cutting is over, but competition remains vigorous, sufficiently so to keep increases moderate. Perhaps the most interesting single result is that for radio and electrical goods (including television), a type of business in which loss-leading was widespread in the immediate post-abolition period. Here the actual decline in margins caused by the price cuts has been converted into a modest increase; the figures offer evidence of how brief the era of extreme reductions was to prove.

If the aim is to compare trends in Canada and Britain over the period 1950/51 to 1956/57, it is still useful to do as for the five trades in which price-maintenance in Canada still prevailed in 1951 (and in which, in Britain, R.P.M. was to a large extent present over the whole period). If this kind of comparison is valid at all, it is certainly more informative when applied to the five types of business for which it is relevent than over the whole field of fifteen trades. In Table III the figures show that the increase in the five trades in Canada over the period immediately following the abolition of price-maintenance was 0.3 on 29.5, or approximately 1 per cent, while in the same trades in Britain, where price maintenance still largely applied, the increase was 0.8 on 26.6 or approximately 3 per cent. In other words, the increase in the price-maintained area was three times as great as in the newly-freed area. This represents a reversal of the results which were obtained by Andrews and Friday in a comparison of all fifteen types of business.

While it is satisfactory to show that results, even by

TABLE III
GROSS MARGINS

No.	Ind. or Chain	Type of Business	Canada 1950 or 51	Canada 1956 or 57	Canada Change on 50/51	United Kingdom 1950	United Kingdom 1957	United Kingdom Change on 1950
A	Ind.	Confectionery & Tobacco	17.9	18.9	+1.0	12.8	14.6	+1.8
B	Ind.	Hardware	26.4	26.4	--	25.8	26.0	+0.2
C	Ind.	Radio & Electrical	27.8	25.6	-2.2	27.8	28.5	+0.7
D	Ind.	Chemists	31.2	31.6	+0.4	30.6	28.5	-2.1
	Chain		33.7	34.3	+0.6	32.2	33.5	+1.3
E	Ind.	Jewellery	40.3	42.5	+2.2	30.2	32.4	+2.2
		Total	177.3		+2.0	159.4		+4.1
		Average	29.5		+0.3	26.6		+0.8

SOURCE: (a) Canada: D.B.S. Biennial Operating Results 1950 or 51, 1956 or 57.

(b) U.K.: Board of Trade. Census of Distribution. 1950 and 1957.

these criteria, are not unfavourable to R.P.M., it would be a mistake to assume that the criteria themselves are satisfactory. Comparisons based on changes in gross margins alone are unreliable, quite apart from the approximation and averaging used in their composition. (The odd thing is that every authority on either side of the argument appears to agree that gross margins are not in themselves adequate indications of efficiency (although they may serve as signposts), yet figures for gross margin changes continue to be offered as evidence, as shown above: possibly this is because they form the only valid, if inconclusive evidence. Margins are determined by a number of forces, which may work in opposing directions. The forces may include various competitive pressures which, by theoretical analysis, tend to reduce margins, but are certainly not limited to them. Other reducing factors, such as the gradual elimination of labour by self-service or high-volume operations or new selling methods (all efficiency factors) will tend to operate. Against these will come into force a number of expense incurring factors which will push the margin upwards: rises in the real wage level, capital expenditures on retail establishments, increases in metropolitan land values and rent, or the rising cost of money.[26] A single operation, such as the alteration of a store from assistant-service to self-service, will set in motion pressures in both directions, the capital expenditure of the alteration tending to raise the margin, while the saving in labour costs tends to reduce it: the additional expense is short-run, but the gains long-term. Equally important is the composition of sales; the addition of new lines, of the less staple variety, with a

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[26] J. B. Jeffreys and D. Knee: Retailing in Europe: Present Structure and Future Trends. (Macmillan, 1962).

more inelastic demand curve, and typically carrying higher margins, will tend to push up the margin: it is a matter of common observation that new lines of food, household appliances and other goods are increasingly appearing: R. Holton points out that the income elasticity of demand for these non-staples is greater than that for the staples: consequently the sales of the non-staples will increase more in an era of rising personal incomes.[27] What all the facts point to is that the ultimate effect on the margin will depend on the composite effect of the combined forces operating in both directions at any given time, rather as a fulcrum, originally balancing at its mid-point, will tilt one way or the other depending on the size of the weights hung at different points on either side. While only the most tentative guesses can be given as to which way the fulcrum will swing, it is likely that in a time of expansion, when the forces pushing upwards are on the whole greater, a slight increase in percentage margins must be expected. This is all the more true if the period is also one of concentration, and of adaptation of shops to wholesale as well as retail functions; the capital expenditure involved, or the fact that the wholesaler's function as well

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[27] R. Holton: "Price Discrimination at Retail", Journal of Industrial Economics. (October, 1957).

See also G. Borts: "The Recent Controversy Over Resale Price Maintenance", Journal of the Royal Statistical Society (Part 2, 1961).

as the retailer's must be covered, expands the margin, in spite of the economies of scale which are secured.[28] It is possible to hazard a guess that the reason for Canada's overall greater increase in margins compared with the United Kingdom is that she has shown both greater expansion and greater concentration and integration activity in the period from 1950 to 1961. But it would be pointless, even if it would be possible, to try to quantify the various forces operating on the margin.

To sum up, it appears to have been adequately shown that the theoretical case for the abolition of R.P.M. is not vitiated by any factual data relating to the immediate post-abolition period in Canada. On the contrary, such evidence regarding gross margins as can be adduced (always with extreme caution) serves only to lend some support to the theoretical view that free competition, with its resultant pressures and demands, can serve only to exert a downward influence on margins.

2. (a) Loss-Leading

Loss-leading is merely extreme price-cutting, or the offer of goods by a shopkeeper at so great a reduction from

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[28]See in this connection Margaret Hall and John Knapp: "Gross Margins and Efficiency Measurement in Retail Trade", *Oxford Economic Papers* (1955).

the normal or suggested price as to carry little or no profit on each item and therefore to be in itself uneconomic. (Seasonal reductions or clearances of out-dated stock at low prices naturally do not fall within the definition.) Sometimes the dealer hopes to make his profit by greatly increased sales of the reduced item or items, making up by quantity sold for the small profit obtained on each unit; this will probably involve the seizure of his competitors' trade in the items reduced, a fact which explains the indignation which the practice arouses. More often, he expects little or no profit from the sale of the loss-leader, and is not concerned with the volume of its sales, but hopes that the spectacular offer will serve to advertise the shop, and result in a much greater volume of sales of other profit-making items. The offer is usually of a well-known and established brand of goods, whose normal price will be well-known to the consumer, who can therefore appreciate the full value of the bargain he is receiving.

The near-hysterical hostility which loss-leading has sometimes aroused in both retailers and manufacturers rests on four assumptions (which are usually stated without being proved). These are:

i) that the practice is 'unfair' to competing retailers;

ii) that it is invariably successful;

iii) that it ultimately involves detriment to the customer;

iv) that it involves detriment to the manufacturer.

These assumptions require some examination.

i) The contention that 'loss-leading' is unfair (i.e. to other retailers) involves the assumption that there is a collusion or agreement among retailers of identical goods, and that therefore the price-cutter is a form of blackleg, guilty of 'unfair' trading practices. Such an analysis ignores the realities of competition. From the retail distributor's viewpoint, he is acting perfectly rationally in extreme price-cutting, given a competitive situation. The whole of his goods, not one brand or section, represents his stock-in-trade, and if he can increase his overall gross profit by using some of the goods as, virtually, advertisement, he is justified in doing so. He is certainly being aggressively competitive, but then he must be expected to be vigorously competitive in a competitive situation; his natural aim is to attract custom from other shops by some means.

It is unfortunate that the larger distributor, especially the chain store, has an advantage over the small retailer here. This is an inevitable result of the greater buying power and financial resources of the larger firms. As with more general price-cuts, the small shopkeeper can maintain his position only by obtaining countervailing buying-power through voluntary organization with other independents, or by offering alternative services, longer hours of opening, or other advantages to his customers. The firm suppression by governments of such restrictive practices as the granting of discriminatory terms or discounts (other than quantity discounts) in favour of the more powerful buyers will also aid the small retailer.

(ii) Again, it is often assumed that the practice of loss-leading usually succeeds in its aims. This is by no means true. Frequently the move is countered by retaliation of competitors, who also reduce the same or similar goods. The allocation of custom to all the cutters remains unchanged, none increase their volume of sales, and all merely lose through the low price obtained, the only people who reap any benefit being the consumers. The danger that it may initiate this kind of unprofitable price-war is another reason for the denunciations of 'loss-leading'. The pitfall is often avoided by judicious selection of the 'leader'; staples are not a very good choice, since, although most certain to attract the housewife's custom, they are also the most likely to invite retaliation in self defence if competitors are not to lose a significant volume of sales. The margin, on these is usually lower than for non-staples, and therefore cannot easily be subject to cutting without actual loss. Suggestion goods (that is, goods which the consumer might well consider buying if the thought were prompted by suitable advertising, especially if a real bargain were offered, but which do not form an essential part of his normal purchases) may be more suitable, since they may escape retaliation altogether.[29] Yet however careful the choice of goods, there is still no certainty that 'loss-leading' will achieve its aim. New customers may take advantage of the bargain offer without making any other purchases, or without making a sufficient number of compensatory purchases of other profit-making articles, and existing customers may buy the bargain offer without increasing the volume of their other purchases. Reports made by retailers to the (Canadian) Committee of Inquiry Into Loss-Leader Selling reveal that this is what in fact happens. Consumers were not induced by the loss-leader to buy significant quantities of other goods. In such cases, loss-leading does not justify the high costs involved and the risk taken, and the offer will probably be quickly withdrawn. Loss-leading more often than not, is quite unsuccessful.

The only exception to this general rule is likely to be the case where the consumer buys other goods, as well as the loss-leader, solely for reasons of convenience (to avoid the trouble of going to another shop). As has been pointed out earlier, the department store or supermarket tends to acquire a monopoly once the consumer is in the

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[29]See in this connection W. G. McClelland: "Pricing for Profit in Retailing", Journal of Industrial Economics (October, 1958). (Mr. McClelland's opinion is of especial interest since, prior to returning to academic life, he was Managing Director of Laws Stores, Limited.)

store. But in such a case, the consumer is merely exercising a preference for saving time and energy; he is not in any sense deceived by the leader into thinking that the other items bought are bargains.

(iii) No effect of loss-leading has been more exaggerated than the possible detriment to the consumer. Prima facie, it would seem that he stands to benefit; he has at the least the opportunity of securing the odd good bargain, and possibly a general lowering of prices on some articles if competitors retaliate. It is alleged, however, that he is merely duped by the bait of the loss-leader; that he is influenced by the distributor into buying other goods whose prices are raised in compensation, or that he is deflected by the salesman from buying the bargain which attracted him, or, alternatively, informed by the latter that stocks have run out. The implication is that, disappointed of his original object, he buys whatever alternatives the salesman suggests.

Such arguments assume a quite unbelievable gullibility on the part of most shoppers; those who employ them display too great a contempt for the wits of consumers in general, clearly believing that anybody who knows nothing of cost-push or demand-pull theories of inflation, or who cannot distinguish between the works of Cezanne and Sisley, is also incapable of making effective assessments and comparisons of the values of goods. In fact, the average person is usually very perceptive on such matters; housewives, for instance, frequently exchange information on price, quality and condition of goods in different shops. (Of course, even the observant may be deceived by offers which are not genuine reductions at all; but this is an example of the quite different problem of misleading advertising or misrepresentation). Usually, therefore, the loss-leading trader does not succeed in his aims; fears for the consumer are therefore groundless. As J. B. Jeffreys and D. Knee have commented: "It is a curious historical fact that it is never the consumer nor the consumers' organizations that complain of loss-leading."[30]

iv) There remains the question of detriment to the manufacturer whose product is selected for price-cutting. The argument is that he inevitably loses, since, although sales of his product in the price-cutting establishment are increased, this gain is more than offset by the fact that competing traders, who can no longer secure a satisfactory margin on this product, give prominence and sales effort to rival brands, or even cease to stock the product at all. In this way, the manufacturer finds his system of distribution completely disrupted, and his total sales decline.

It is true that this can and does happen; instances of it have been freely quoted. (The argument is possibly the most

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[30] J. B. Jeffreys and D. Knee: op. cit.

convincing one that can be produced against loss-leading.) But the likelihood of its occurring frequently are remote. Such extreme price-cutting is most likely to occur in conjunction with two events, the first of which often leads to the second: first, a grossly inflated supply of goods (and of brands) in the particular field, leading retailers to make slashing reductions as the only method of clearing stocks: secondly, the abolition (or break-down) of the resale price maintenance system, where the maintained price still serves as either a theoretical or the most recently observed standard against which the full extent of the price reduction can be seen. The disruption of manufacturer's outlets may be real, but it is also likely to be temporary (retailers will normally begin to re-stock once the price-cutting spell is over), and in its most extreme form, tends to be a once-for-all phenomenon; when price maintenance has been abolished for some time, and fluctuations in price (often considerable) are the norm, extreme cuts are likely to make comparatively little impact. Outbreaks of extreme price-cutting are likely to be sporadic and localized, and probably of short duration, and, in the nature of things, it is likely that different brands will be selected for cutting, and that the effects, among different manufacturers, will cancel each other out.

Loss-leading, then, appears to be a vastly over-emphasized danger; it has sometimes been termed a red herring in the discussion. It has been dealt with at this length precisely because it is the most frequently discussed and widely publicized aspect of free price competition. Many critics have opposed abolition of R.P.M. on this ground alone. Others stipulate that abolition must be accompanied by legislation to deal with loss-leading; the first group is doubtful as to how legislation which would prove satisfactory could in practice be formulated.

The difficulty is largely one of definition: when does a price-cut cease to be merely a competitive reduction and become loss-leading? The Canadian legislation, which exempts a dealer from prosecution for failure to supply if he can show evidence of loss leading, defines this as "using articles supplied . . . not for the purpose of making a profit thereon but for purposes of advertising" and "not for the purposes of selling at a profit, but for the purpose of attracting customers to his (the seller's) store in the hope of selling them other articles."[31] The British clauses covering loss-leading show a similar wording.[32] Such rules are not in practice easy to apply. The 'advertising' criterion is in itself insufficient, since any price-cut, whether a true loss-leader or not, will probably be advertised considerably

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[31] Combines Investigation Act. Section 34 (First Enacted 1951) Sub-Section 5, paragraphs (a) and (b) at Appendix B.

[32] Resale Prices Act, Chapter 58, Section 3 (1964) at Appendix C.

in the hope of attracting customers to the store, usually in the expectation that they will also buy other goods. The legislation therefore really stands or falls on the criterion of "not for the purpose of making a profit" and the question which remains is "what is a profit"? Clearly, any article sold at a price which equals, or is below acquisition cost is non-profit-making, but the definition gives no guide as to what amount of mark-up would be regarded as making a profit. A fixed sum or percentage is not a satisfactory yardstick, since margins in different classes of goods vary greatly: a margin fixed by reference to the usual margins obtainable for that class of goods is equally unsatisfactory, since mark-ups vary in different kinds of stores and localities, and with different levels of service. A number of Cambridge economists, giving evidence to the Lloyd Jacob Committee,[33] suggested that, in such cases a Central Price Regulation Committee should fix the lowest margin for a class of goods, on which any trader could possibly operate successfully, even when giving the absolute minimum of service, any possible error to be in the downward direction. This suggestion, while

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[33]Statement submitted to the (1949) Lloyd Jacob Committee by Miss R. Cohen, Mr. R.F. Kahn, Mr. W.B. Reddaway and Mrs. J. Robinson. Reprinted in <u>Bulletin of the Oxford University Institute of Statistics</u> (May, 1964).

better than no effort at all, is still not entirely satisfactory. What such a committee would be doing would be to determine what contribution any particular class of goods should make to overheads, a matter which it is really the prerogative of a retailer to settle.

In practice, the question does not seem to have arisen frequently in Canada; loss-leading, with the necessity of establishing its meaning, has not often been cited as a defence in cases of alleged failure to supply. It has been pointed out earlier that true loss-leading is a risky and costly practice, and one therefore not likely to be used frequently.

To sum up, although loss-leading is not an easy matter to define precisely, the prevalence of the practice and its possible harmful effect to dealer and consumer alike appear to have been grossly exaggerated. The only aspect of loss-leading which can genuinely be regarded as involving any real detriment is its effect on the manufacturer's system of distribution, and, consequently upon his sales: even here, it is likely that there has been considerable exaggeration, and that the outbreaks of extreme price cutting are usually temporary and short-lived.

(b) Empirical Data

Much publicity has been given to the spate of loss-leading, with resultant dislocation of outlets and markets and losses to individual manufacturers, which is supposed to have broken out on the abolition of R.P.M. in Canada in 1961. In some cases, the reports were apparently totally incorrect: for instance, the allegations of extreme price-cutting in books or department stores in Montreal, which were referred to in the (British) Restrictive Practices Enquiry Into the Net Book Agreement as an example of what would happen if price maintenance were abolished in the book trade, were not supported by any evidence. No complaint or submission was made to the Combines Investigation Branch, when the general enquiry into loss-leader selling was initiated, and the personal enquiries of one Canadian economist produced denial from the Montreal department stores and supermarkets.[34] In other cases, severe price-cutting certainly did occur (although some manufacturers tended to give the term 'loss-leading' to any strong price-cut or even sometimes to any reduction from suggested price), and complaints were made, details of which can be found in the _Green Book_, a compilation of material made by the (Canadian) Director of Investigation and Research in 1954, preparatory to the loss-leader enquiry. The field of electrical appliances, particularly of the most popular brands, was particularly subject to cuts: Sunbeam and General Electric Company alleged that the reductions (amounting to

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[34] L. A. Skeoch: _op. cit._

22 per cent on the five most popular G.E.C. items), induced many retailers to cease stocking their products, with a consequent disruption of their distribution system and a resultant decline in sales. This kind of evidence has been quoted by Andrews and Friday as an example of the detriment to manufacturers which occurs when R.P.M. is abolished. There were, of course, many complaints by manufacturers of losses in outlets and sales from extreme price-cutting.

All the evidence indicates either that the complaints were unfounded, or that the alleged conditions were exaggerated. For instance, Sunbeam could produce no satisfactory evidence to support its claims, while in the case of G.E.C., the facts showed that the company's sales had actually risen in the two years following 1951, and that the losses complained of were based on experience in British Columbia since 1953, that is, much later than the immediate post-abolition period. The Report of the Inquiry certainly gave little support to the manufacturers' claims of detriment: what the manufacturers, it found, were generally complaining of was not so much sporadic price-cuts as generally competitive conditions and lowering of margins, the benefits of which to the consumer were clear: some manufacturers showed no disposition at all to adapt to the new conditions, their reaction to any reduction from suggested price by competitors being a demand for the restoration of price maintenance.[35]

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[35]See Restrictive Trade Practices Commission: Green Book. Presented May, 1954, especially pages 82, 165 (Queen's Printer, Ottawa).

It is certainly probable that there was some dislocation, and some excessive cuts, with hard-luck results to a few manufacturers, especially in a few large metropolitan areas. In a time of transition from price maintenance it could hardly be otherwise. In part, this was a natural temporary phenomenon, which could be expected to work itself out after a sufficient period of transition; in part, the extreme price-cuts (such as those in the field of electrical appliances) could be regarded as the reaction to a grossly over-stocked market; once again, temporary cuts in prices and reduction in outlets were the means of adjusting supply to demand: retailers who had temporarily ceased selling the lines subject to cuts usually re-stocked when the worst extremes of the cutting were over. In general, too much attention was probably given to the complaints of those manufacturers who were hurt by the transition; one rarely sees quoted the opinion of those who held contrary views. For example, Canada Safeway Limited, a dynamic chain of supermarkets, suggested that competition, not restrictive legislation, was the best corrective to loss-leader selling; the retailer in the opinion of this firm frequently lost by the practice and the cost was often prohibitive. Nor, surely, has sufficient attention been paid to the consumer, who benefitted considerably from lower prices, especially in such fields as electrical appliances and television.

It is at least significant that the Commission's enquiry into loss-leading, which had the advantage of being able to consider all the evidence submitted on both sides, found no proof that the abolition of R.P.M. had led to practices or conditions detrimental to the public interest.[36]

3. Canadian History and Practice

Resale Price Maintenance in Canada became a live issue only after the Second World War, when the question was also becoming the subject of enquiry in a number of European countries. The issue in Canada, however, concerned individual price maintenance only; collective price maintenance had been illegal since the initiation of anti-trust in 1889. The distinctive feature of Canadian treatment was that collective R.P.M. was subject to all the severe provisos of Canadian anti-trust legislation, including liability to criminal proceedings. This was not because it was the subject of any specific enactment: it was sufficiently covered by the general prohibition against conspiring to prevent or lessen competition unduly in (*inter alia*) the sale or supply of commodities, a provision which was first laid down in the 1889 Act. Collective R.P.M. was merely

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[36]Department of Justice: *Report on an Inquiry Into Loss-Leader Selling*. (Queen's Printer, Ottawa, 1955).

one of a number of restrictive practices, any of which might reinforce each other: the connection between common price-fixing and collective R.P.M. was for instance clear.

Rising prices after the First World War led to the appointment of a Special Commission of the House of Commons in 1919; the committee recommended the setting up of a permanent board to administer legislation dealing with trade combinations and monopolies as well as with profiteering and hoarding, and the resulting Act specifically mentioned fixing a resale price as an indictable offence. The first function of the board was the investigation and restraining of combines, including combinations, monopolies, trusts and mergers, which operated or were likely to operate to the detriment or against the interests of the public: the definition of combine included fixing a common price, or a resale price, or a common rental, common cost of storage or transportation, or enhancing the price, rental or cost of an article, or of rental, storage or transportation. The duration of the Board was short, however, as its powers, after becoming the subject of a constitutional trial, were declared to be beyond the competence of the Federal Government to enact. The succeeding legislation of 1923, 1935 and later left the legislation regarding collective R.P.M. basically the same as that of 1889; this was identical with the present Section 32 (sub-section 1) of the Combines Investigation Act.[37]

Between 1925 and 1951, R.P.M. was investigated, together with other restrictive practices, in five important investigations: only two of these date prior to the war, a period in which there was very little anti-combine activity, owing to lack of enthusiasm on the government's part and to a resulting low allocation of funds to the Investigation Commission. The cessation of activity emphasizes the point that there are two main aspects of anti-trust: first; the legislation; second; the conviction with which the law is enforced. In Canada, prior to the Second World War, the stringency of the first aspect was to a great degree offset by the permissiveness of authority and general lack of vigour in enforcing the regulations. It is possible that this was not accidental: that indeed an over-severe and all-embracing prohibition required very lenient application in practice if it was to be tolerable. The implication is that the law was not enforced because it was too strict, in the sense of being too absolute in its prohibitions, in the same spirit that led juries to refuse to convict on charges of trifling thefts in days when such convictions carried a death penalty.

[37]At Appendix A.

The investigating commissions in all five cases reached roughly similar conclusions: that of detriment to the public. In the first enquiry, that made into the Proprietary Articles Trade Association (i.e. the association which controls the supplies of druggists and chemists), two reports were published in 1926 and 1927, in which the conclusion was expressed that the Association's system of price-fixing reinforced by price maintenance was against the public interest. A similar conclusion was reached in the tobacco enquiry in 1938,[38] where it was stated that five main associations of wholesalers and jobbers, by enforcing resale price maintenance through the usual disciplinary measures, had succeeded in almost completely eliminating competition in the principal classes of tobacco products throughout Canada. In addition, one firm occupied a dominating position; the Imperial Tobacco Company which (with its subsidiary companies) controlled approximately three-quarters of the output of the whole industry, was already a price-leader by virtue of its monopoly position. Imperial insisted on a stringent written price maintenance agreement with all wholesalers and retailers, and in addition to this individual enforcement, secured collective enforcement by requiring all its dealers to

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[38]Department of Labour: Investigations Into An Alleged Combine in the Distribution of Tobacco Products. (King's Printer, Ottawa, 1938).

maintain the prices of all other manufacturers' products. Since the agreement forbade the granting of an allowance, rebate, inducement (such as coupons, matches or free gifts), present or future bonus or discount of any kind, it effectively maintained absolute rigidity in the tobacco products trade. The consumer, deprived of any choice of prices and services (although there were few such opportunities for a service appeal) was the ultimate loser, all the more so because cigarettes were often sold in conjunction with other goods which carried a lower margin, the tobacco purchaser therefore subsidizing these low-cost goods through the inflated margins maintained.

The three post-war enquiries held prior to 1951 came to roughly similar conclusions. In the Dental Supplies Enquiry[39] (1947), it was found that the Canadian Dental Trade Association had managed to eliminate price competition throughout almost the entire trade in dental supplies across Canada: a system of common prices had been kept in force by agreed quantity rates, common discount rates to agreed classes of customers, and uniform terms of sale. Agreed margins over wholesale prices were shown to be substantial, and to have been fixed regardless of the efficiency of the individual distributor. In the Optical Goods Enquiry (1948) one dominant company had

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[39]Combines Investigation Commission: Investigation Into the Distribution of Dental Supplies (King's Printer, Ottawa, 1947).

contrived to control prices and types of goods, and the channels of distribution. An important factor here was the extreme difficulty in securing alternative goods not subject to price maintenance.[40] In the bread-baking industry, which formed the subject of enquiry by a Special Commissioner (1948) it was found that one chain of bakeries (Western Chain) used its dominating position in the industry in Saskatchewan, Alberta and British Columbia to fix wholesale and retail prices and to make general agreements to maintain resale prices.[41] The bakeries had taken advantage of the agreements entered into (with government advice and approval) in wartime to give effect to their own later peacetime agreements. As a result, one price for bread tended to prevail in any particular area, regardless of the efficiency of the bakery which produced it or of the means of distribution whereby it was supplied. In this particular trade, it was shown that R.P.M. effectively led to a widening of margins, since the producers sought the retailers' goodwill and sales assistance by offering higher margins than could be expected under normal competitive conditions. In all these cases, the defence

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[40]Department of Justice: Investigations into an Alleged Combine in the Manufacture and Sale of Optical Goods in Canada. (King's Printer, 1948.)

[41]Report of H. Carl Goldenberg, Special Commissioner, of an Investigation Into an Alleged Combine in the Bread-Baking Industry in Saskatchewan, Alberta and British Columbia. (King's Printer, November, 1948.)

was that the resulting prices were not unreasonable, and that, consequently, no public detriment could be shown. Such a defence is not, in itself, likely to be acceptable to the Combines Investigation Department. There is, it is true, some indication of a wish to consider questions of detriment to some extent, and this kind of evaluation would normally operate at the administrative level: the decision whether to continue or to drop an investigation would be subject to this kind of assessment (in addition to other factual questions such as the likelihood of being able to obtain sufficient evidence, on the magnitude of the operations involved). But, normally, to show that prices are not unreasonable is not a sufficient defence; the presumption is that, under competition, they would be lower, only genuinely competitive conditions being sufficient to eliminate the unnecessary elements in cost. It would be necessary usually to point to some particular conditions or results in the trade to support a claim that there was no detriment as a result of R.P.M. These cases, although interesting as examples of how R.P.M. can re-inforce other restrictive practices and conditions, or as examples of anti-restrictive activity, do not help to advance or clarify the position of price maintenance itself. All these enquiries involve collective price maintenance, and all those concerned in the cases were judged guilty of infringing already existing regulations regarding collective restrictive practices. There was no advance in legislation or procedure as a result. In particular, the position of the individual manufacturer who enforced price maintenance was no clearer; such an arrangement remained a private agreement, which would probably be upheld by the courts in that capacity unless public detriment could be clearly shown. The Tobacco Report contained in an Appendix on the Law of Resale Price Maintenance, which noted that the legal position of the policy insofar as it concerned the individual manufacturer, was obscure.[42] This was in 1938 and no subsequent attempts were made to clarify it.

After the war, the rapid rise in prices, added to wartime inflation, made an investigation into prices inevitable. Canadian prices had risen 58 per cent between 1939 and 1948; in particular, since 1927, Canadian prices rose much more rapidly than those in the United States.

In 1948 there was appointed the first of a series of two committees on prices whose findings were to be instrumental in leading to the outlawing of individual resale price maintenance. A Special Committee on Prices was set up by the House of Commons during the 1947/48 session, and its minutes of evidence provide detailed memoranda of price rises and

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[42]Report: op. cit.

changes during the war and post-war years.[43] A large number of representatives of official and industrial bodies gave evidence, including the head of the Dominion Bureau of Statistics and the chairman of the Wartime Prices and Trade Board. Most important for its influence on the resale price question was the statement of the Commissioner of the Combines Investigation Act, Mr. F. A. McGregor. The Commissioner pointed out that agreements and concerted action on the part of producers and distributors had been common during the war, when the crisis had made it essential to suspend competitive conditions, and had been carried out with the approval of government: the important point, however, was that the ultimate control had rested with the government. It would be a matter of concern if industry attempted to carry over such agreements into the different conditions of peace-time, when in addition government control would no longer operate.[44] Of particular concern was the fact that R.P.M. as a practice was growing; to the single manufacturer of a particular product, the establishment of a wholesale or retail fixed price might seem unimportant, but when this became the common practice in a particular field, whole segments of trade could be

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[43] 1947/48 Session of the House of Commons: Report of The Special Committee on Prices (1948).

[44] Evidence of Commissioner, Combines Investigation Act, p. 158.

insulated from competition, with the consequent maintenance of higher prices to the consumer. Mr. McGregor referred in particular to attempts to secure price maintenance in the supply of bread, a proceeding which was currently the subject of an enquiry.[45]

Two coercive forces in particular were the subject of the Commissioner's comment. One was the probable unwillingness of large suppliers (even acting individually) to continue to supply a retailer who sold below the prevailing level, once R.P.M. was strongly established. The other was the pressure of associations of distributors which, when supported by the manufacturer's policy, would make any retailer reluctant to adopt a selling policy at variance with his associates in the trade.[46]

Mr. McGregor was uncompromising in his assertion that the motive of most dealers who were pressing for R.P.M. seemed to be not only that of eliminating extreme price-cutting, as they alleged, but all price competition in the particular products. "If this is not their motive," he added, "it would seem to be the effect of their proposals." Experience in other countries seemed to show what further deleterious effects were likely to result: demands for

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[45]*Ibid.*, p. 257.

[46]*Ibid.*, p. 161.

restriction of entry into the trade would follow in order that the advantage of the high margins need not have to be shared with others who were attracted into the industry by them: the result would be effectively, a closed system of guaranteed profits.[47]

The statements contained in this last paragraph were quoted with approval by the Royal Commission on Prices, under the chairmanship of C. A. Curtis, which reported in 1949.[48] This Commission, while it did not find monopolistic practices (including R.P.M.) to be the major factor in the rise in prices during the post-war period,[49] nevertheless considered the question in detail, and quoted the Special Committee's Minutes on this aspect with approval on a number of occasions. The tendency, it found, was towards less rather than more enterprise and competition. Much concern had been expressed to the Commission: for instance, the Canadian Association of Consumers and the National Council of Women in their joint brief both referred to "the growing practice" of R.P.M. as a matter of grave concern, and the Commission certainly felt that, in some sectors at least, the practice was having an

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[47] Ibid., p. 161.

[48] Report of the Royal Commission on Prices. (3 Vols.) (King's Printer, Ottawa, 1949).

[49] Ibid.

appreciable effect on prices.[50] Bread was the most obvious example. Individual resale price maintenance was becoming generally more extensive, and, in view of this, the Commissioner recommended that the Combines Investigation Commission give careful study to the problem with a view to devising measures to deal with it.[51] Collective R.P.M. was considered to be effectively covered by the existing anti-combines legislation.

One factor which the Commission noticed was the strong link between fixed mark-ups and resale price maintenance.[52] Fixed mark-ups were becoming the rule, and this in itself virtually ensured common prices at retail. One of the most unfortunate aspects, especially in a period of rising prices, was that the mark-ups were, ostensibly because of easier accounting, on a percentage rather than a "dollar-and-cent" (fixed increase) basis: a rise in the supplier's price therefore resulted in a retail increase which more than covered the additional supply price. Of course, in a time of generally rising prices, the retailer might have to face additional retail costs; nevertheless, it was admitted that,

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[50] Ibid., p. 257.

[51] Ibid., p. 41 (Conclusion).

[52] Ibid., pp. 237, 238.

generally, the method involved increased profit in inflationary periods. (In some cases, it was alleged that the extra profit was needed to compensate for decreased sales during winters of low demand.) The fact that net profits during the period in general showed increased returns on the shareholders' equity was in any case a strong proof of the effects of the system.[53] Unfortunately, in the Commission's view, this method was so firmly established that most witnesses were unable to offer a defence of it, or indeed to think in any other terms.[54]

These two reports, in spite of their warning against attributing too great importance to the effects on prices of monopolistic practices, appear to have triggered off the decision to hold a full investigation into anti-combines legislation and activity: monopoly always threatens to become a subject of enquiry in eras of rising prices: possibly this is because not only is anti-trust an obvious vulnerable target, action against which tends to be popular, but also because it seems to offer scope for the application of practical measures. It is not easy to think of other straightforward ways (that is, methods which do not carry the possibility of injurious results) of attacking the more

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[53]*Ibid.*, pp. 247, 248.

[54]*Ibid.*, p. 246.

fundamental causes of inflation. At all events, the result was the setting up of the Committee to Study Combines Legislation, usually known as the McQuarrie Committee, and the publication of its Report in 1952.[55] Examination of the whole scope and method of Canadian anti-combines activity was beyond the committee's scope; its task was to suggest improvements in the existing system, and its recommendations were in the main administrative, the principal positive suggestion being the separation of the functions of investigation and research from those of appraisal and report. This is not the place to analyse the committee's observations and suggestions in detail; what is relevant here is the first (interim) report of the committee (1951) which was devoted entirely to the question of resale price maintenance.[56] This report gave a very thorough presentation of the theoretical arguments both for and against price maintenance. In its findings the report showed the influence of prevailing attitudes and needs in leaning heavily towards criticism of price maintenance. The influence of the two British reports, the Lloyd Jacob Report of 1949, and the (British) Labour Government Report of 1951 was clear; the latter, with its stronger set of proposals,

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[55] Department of Justice: Report of the Committee to Study Combines Legislation. (King's Printer, Ottawa, 1952).

[56] Department of Justice: Interim Report on Resale Price Maintenance. (King's Printer, Ottawa, 1951).

was quoted the more frequently.[57]

The committee, while unable to quote figures, reported that the practice of R.P.M. was widespread, that it covered whole classes of goods, and that, if not quite as comprehensive as in the United Kingdom, it was yet of significant and growing proportions. The committee therefore asked two questions: first, did the existing system place the determination of prices under social control, or did it set up a system of control by private law or agreement; and secondly, how did the retention of R.P.M. affect prices, production, distribution and consumption. A great many briefs, setting forth very divergent opinions, were received; in general, the associations representing manufacturers, wholesalers and retailers favoured price maintenance, while co-operatives, trade unions, farmers' and consumers' associations expressed opposition.

The committee's findings were not uniformly adverse to price maintenance. Some beneficial results of the practice were admitted, but they were invariably outweighed by the detrimental effects. Thus, there was some evidence that R.P.M. contributes to price stability: on the other hand, the general level of prices was considered likely to be higher than otherwise. It was on the low-cost distributor

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[57] See sub-section 4 of this chapter.

that the practice placed an undue restriction. It was true, too, that price maintenance helped, in the committee's view, to prevent two possible forms of monopolistic practice which affected prices: the use of monopoly power at the retail level, and the "loss-leader" device. But these beneficial results were exaggerated: for instance, as far as the "loss-leading" argument was concerned, the Committee thought that more direct and desirable methods of controlling this could be found. On the whole the committee was of the opinion that the detrimental results of R.P.M. were paramount: the elimination of price competition, the support given to effective horizontal agreements, both open and tacit, among manufacturers, and the encouragement given to proliferation of retail outlets. While the committee admitted to some extent the argument that some protection was afforded to the specialized dealer, it was not convinced by the theory that R.P.M. also protects branded goods, which would otherwise suffer.

The whole discussion had, of course, been on the question of individual price maintenance; collective price maintenance was considered to be effectively covered by the existing anti-combines legislation. The committee's final recommendations came out strongly against price maintenance. It recommended that it should be made an offence for a manufacturer or other supplier to suggest or prescribe a <u>minimum</u>

retail price, or to refuse to sell, to withdraw a franchise or to take any other form of action as a means of enforcing minimum retail prices. Suppliers would still be free to suggest or enforce maximum prices, and to issue price lists, provided it was made clear that the price mentioned was not prescribed or recommended as a minimum.

The legislation enacted on December 29, 1951, outlawing resale price maintenance, was the outcome of the McQuarrie Committee's recommendations. This legislation formed Section 34 of the Combines Investigation Act, and carried the usual liability to criminal proceedings, with penalties of a fine or up to two years imprisonment (or both) for infringement. The law forbade a dealer "to require or induce or attempt to require or induce any other person to resell an article or commodity:

(a) at a price specified by the dealer or established by agreement,

(b) at a price not less than a minimum price specified by the dealer or established by agreement,

(c) at a markup or discount specified by the dealer or established by agreement,

(d) at a markup not less than a minimum markup specified by the dealer or established by agreement, or,

(e) at a discount not greater than a maximum discount specified by the dealer or established by agreement."

It was also an offence to refuse to sell or supply goods to a person refusing to carry out the requirements specified in (a) to (e) above.[58]

The procedure for enforcing the resale price legislation is similar to that laid down for dealing with any other restrictive practice or monopoly activity. The provisions are enforced through three agencies: The Director of Investigation and Research, the Restrictive Trade Practices Commission and the courts. The Director has the duty of commencing an inquiry wherever he has reason to believe that an offence under the Act has been or is about to be committed, or whenever he receives a formal written complaint by six Canadian citizens, or whenever he receives a direction by the Minister of Justice. The Restrictive Trade Practices Commission, consisting of not more than three members, is responsible for examining evidence submitted to it by the Director, hearing the case presented by the parties against whom the charges are made, and making a report to the Minister of Justice, who may refer the case to the Attorney General if he thinks fit. The courts may be ultimately concerned if the Attorney General decides to institute legal proceedings. Wide powers are granted to the Director and the Commission regarding obtaining of information and examining of those charged or other witnesses.[59]

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[58]See Appendix B.

[59]See Report of the Director of Investigation and Research, Year Ended March 31, 1964. (Queen's Printer, Ottawa).

can scarcely lodge a complaint with the Combines Investigation authorities unless he has tangible proof of the manufacturer's real motives in withholding supplies. In many cases, manufacturers normally restrict their sales to one or two sellers of the product, especially if the market is, say, a small town: this is especially frequent in the case of goods where before or after-sales service is important; in such cases, it is easy for the manufacturer to change his agent on some grounds of greater suitability, and to conceal the fact that the former vendor is dropped because of price-cutting.

The difficulty of enforcing the legislation is well illustrated by the enquiry into the alleged instances of resale price maintenance in the distribution and sale of television sets in the Toronto district, on which the Report of the Director of Investigation and Research (Combines Investigation Act) appeared in 1954. R.C.A. Victor in Toronto, who appointed franchise dealers for radios, television and home appliances, disfranchised Lawson's Appliances, a retailer, immediately following cut-price sales of television sets by Lawson's. In reply to Lawson's allegation that supplies were withdrawn because of failure to maintain suggested list price, R.C.A.'s defence was to list aspects of Lawson's behaviour considered to be unsatisfactory. Lawson's was alleged to be perpetually overdue in its account, and to be a poor credit risk because of low volume of sales.

R.C.A. also charged it with using the sponsored advertising to dispose of other merchandise, and with making misleading claims in the advertising. Inevitably, the Commission was forced to find that there was no proof of the charge that the franchise was refused because of the price-cuts offered on the R.C.A. models: it could hardly do otherwise since R.C.A. Victor had not at any time suggested resale prices to Lawson's, and since it had produced a number of other reasons for cancelling the franchise. (The point was not whether, objectively speaking, the charges against the retailer were justified, for Lawson's denied this, but whether R.C.A. could have thought that they formed good ground for refusing to supply.) Yet the immediacy with which the disfranchisement followed the price-cuts could leave no reasonable observer in doubt that this was what had prompted R.C.A.'s decision. The difficulty is that, although the motive was transparently obvious, it could not be proved: the Commission could only add a rider criticizing R.C.A. Victor for ending the franchise abruptly and without prior warning, or without giving Lawson's a chance to conform to their standards.[61]

Resale price maintenance has not been a subject of very frequent inquiry by the Commission: as has been said, the

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[61] Report Covering Alleged Instances of Resale Price Maintenance in the Distribution and Sale of Television Sets in the Toronto District. (Queen's Printer, Ottawa, 1954).

distributor's interest usually lies in maintaining good relations with the manufacturer; where he does cut below a level to which the manufacturer tacitly agrees, and supplies are withdrawn, he has to consider whether the advantages gained by a complaint and possible inquiry are worth the time and anxiety involved, and the risk of alienating other manufacturers in the trade: often it may be easier to seek supplies elsewhere, if he is not prepared to make his peace with the manufacturer. Only a few cases of alleged R.P.M. are investigated each year; some of these enquiries are discontinued, owing to the inability of the complainant to come forward, lack of sufficient evidence, or indications that public detriment is likely to be insufficient to justify further public expenditure. It is possible that given a more co-operative public attitude, and a larger allocation of funds, and therefore of staff, to the Investigations Department, a much greater number of cases would be both opened and completed.

Largely because of the considerable agitation aroused by price-cuts, and because of resultant pressures by some distributors and manufacturers, the anti-R.P.M. legislation was modified in 1960 to provide that loss-leading by the dealer was a sufficient defence by a manufacturer for failure to supply.[62] The exemption referred only to the supplier's

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[62] Chapter 45, Section 14 of the Statutes of Canada, 1960, now Sub-section 5, Section 34, Combines Investigation Act, at Appendix B.

own products (i.e. not to similar goods from other suppliers). This legislation was passed in spite of the findings of the Enquiry into Loss-Leader Selling that no evidence could be found that loss-leading, true examples of which appeared to be infrequent and of short duration, was detrimental to the public. It appears to be both a weakening of the Act, and to be unnecessary, and the maintenance of full competition at the retail level would appear to require its repeal.

Recent enquiries show a high level of successful action against resale price maintenance in those few cases that were brought to a conclusion. A company which attempted to enforce price maintenance in the sale and distribution of surgical rubber gloves, and (by a contract system) in the sale of surgical blades manufactured by another company, was successfully charged (on appeal), convicted and fined (1959).[63] Two different manufacturers of cameras and other photographic equipment were (in 1961) restrained by court prohibition orders from attempting to enforce R.P.M.[64]: in

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[63]*Report Concerning the Sale and Distribution of Surgical Rubber Gloves and Certain Other Surgical Supplies*. (Queen's Printer, Ottawa, May 1959).

[64]*Report Concerning Alleged Attempts at Resale Price Maintenance in the Distribution and Sale of Camera and Related Products*. (July, 1961.)

Report Concerning Alleged Attempts at Resale Price Maintenance in the Distribution and Sale of Cameras and Related Products (Gurlick Films Limited) (Queens Printer, Ottawa, October, 1961).

both cases, the manufacturers had been subjected to pressure from some of the dealer customers, and the object in securing the orders was to ensure that no repetition of this could ensue: in one case, a defence of loss-leading was examined, and the Commission found that there was no evidence that the dealers complained of were using the photographic equipment as loss-leader items: on the contrary, the evidence clearly showed that the advertising was intended to produce a larger volume of sales of the articles featured. In another case concerning alleged resale price maintenance in the distribution and sale of electric appliances, prosecution proceedings have been instituted.[65]

To sum up, the preceding chapter has attempted to show the development of anti-resale price maintenance in Canada. This began with early legislation prohibiting collective price maintenance, together with other restrictive practices. As regards individual price maintenance, a long period of uncertainty and permissiveness regarding this practice in the pre-war years and during the Second World War, was followed by the post-war era of enquiry stimulated by rising prices. Following recommendations of committees, legislation outlawing individual price maintenance was formally passed

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[65]Report Concerning the Distribution and Sale of Electric Appliances, Electric Shavers and Accessory Products. (Sunbeam Corporation (Canada) Limited) (Queen's Printer, Ottawa, October, 1962).

in 1951, although this was modified nine years later by a clause allowing exemption for loss-leading. But an examination of the contemporary scene in distribution leads one to conclude that, while price-cutting, even to extremes, is common in some fields, in the sphere of more expensive consumer durable items and other sizeable goods, the influence of manufacturers is often sufficient to maintain suggested prices. The conclusion is that while the legislation in Canada is absolute and uncompromising, in practice considerations of interest and maintenance of good relations operate to reduce its impact. The work of the Combines Investigation Division can touch only a very limited number of cases of infringement. Nevertheless, it is probable that over a wide range of small price products, the legislation has helped to maintain a competitive situation.

4. British History and Practice

In Britain, collective resale price maintenance gradually grew up in different areas of retail trade in the later years of the last century, and the early years of the twentieth. In most cases, it was the shopkeepers, usually organized in powerful trade associations, who took the initiative in asking the manufacturers to enforce maintained prices. Usually this step was taken as a measure against price-cutting, some of which had been ruthless enough to force traders out of business: in the stationery trade, for example, extreme price-cutting and the use by large stores of stationery goods as loss-leaders, was alleged to have reduced the profit of retail stationers to a very low level, and to have eliminated some. Securing of resale price maintenance restored the margins, until the satisfactory level of 33-1/3 per cent was regained. Similar results were obtained in a great many other trades, R.P.M. being strongly entrenched in such varied fields as the book trade, chemist's goods, motor vehicles and accessories, radio goods and dental goods, but prevalent to some extent in nearly all fields by the thirties.[66]

A feature of the practice was the thoroughness with which, once prevalent, it was enforced. Previously, forms of individual price maintenance had not been unknown; adherence to the manufacturer's list price was often a clause in the individual contract between manufacturer and distributor. This method left many loopholes for evasion. If the goods passed through more than one distributor, it was almost impossible to pass on the price maintenance requirements through each stage. Enforcement was difficult; the manufacturers had to be prepared to undertake a court case against an offender, and only the wealthier and more powerful could contemplate such action. Individual stoppage of supplies

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[66]For brief historical data, see B. S. Yamey, op. cit.

was always possible, but the only result was that the price-cutter switched to other brands: from the viewpoint of other non-aggressive retailers, this was no remedy. It was therefore to ensure that there were few loopholes that the collective schemes were maintained. Premises of shopkeepers were policed by the relevant manufacturers' associations; price-cutters were arraigned before private trade courts, and subjected to various disciplinary measures, varying from warnings, fines or loss of discounts or rebates, to the extreme penalty of withdrawal of supplies. In the latter case, the offender's name was placed on a "stop list" which was circulated to all the allied manufacturers, thus ensuring that all members refused him their products. This penalty either destroyed the offender's business or drastically curtailed it. The supervision of the associations was not limited to the actual retail selling prices; the opportunity of the retailer to give a concealed price rebate was vitiated by strict supervision of his rebates, the amounts granted on 'trade-ins' of old models, where appropriate, and even of such schemes as deferred dividends or gift coupons.

The general acceptance of such aggressive restrictions can be explained only by the conditions of the twenties and thirties. In an era of high unemployment and deficient demand, restrictive practices of all kinds tend to secure approval, as the only fair means of sharing the market and keeping up prices or margins; R.P.M. was considered indispensable as a defense against the extreme forms of price-cutting which were needed in order to tempt the public to buy.[67] In the prevailing climate of opinion, those committees which did subject the practice of R.P.M. to critical analysis reported in its favour. The 1920 Sub-Committee of the Standing Committee on Trusts supported price maintenance in its Report,[68] subject to the proviso that a tribunal should be set up, under the Board of Trade, to investigate specific complaints of excessive charges on the part of monopolies, trusts or combinations. The 1930 Committee on Restraint of Trade also reported favourably; there was no reason to think that the public interest would be better served by abolition of R.P.M., with all its admitted disadvantages.[69] Neither major political party made any complaints; the Labour Party, which was by tradition firmly opposed to any forms of restrictive practices, and whose left-wing at least, always showed a deep distrust of what was termed 'monopoly capitalism'[70] accepted the situation as quietly as did their opponents.

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[67] This point was referred to in the British (Labour) Government Report, 1951.

[68] Report of the Sub-Committee of the Standing Committee on Trust. (H.M.S.O. Cmnd. 662, 1920).

[69] Report of Committee on Restraint of Trade (H.M.S.O., 1931).

[70] Emile Burns: Op. cit.

During the Second World War, supplies and prices of goods were subjected to almost universal control. In 1944, as the war was nearing its conclusion, the existing (coalition) government published its White Paper on Employment Policy setting out proposals for the economy for the post-war period.[71] The maintenance of full employment and of a high and expanding level of demand and output were given priority. Restrictive practices of all kinds were to be investigated, as being practices which might bring advantages to sectional producing interests, but might also work to the detriment of the country as a whole: the main object was not really to eliminate exploitation of the consumer, but to prevent such practices from constituting a serious impediment to the expansion of the economy. R.P.M. did not escape attention; under a Labour Government, a Committee on Resale Price Maintenance, usually known as the Lloyd Jacob Committee from the name of its chairman, was set up, and began the customary procedure of receiving and considering statements and viewpoints from a great number of interested parties, including manufacturers' and retailers' associations, public bodies of all kinds, professional economists, and representatives of the consuming

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[71]British (Coalition) Government: White Paper on Employment Policy. (H.M.S.O. Cmnd. 6527, 1944).

public. In 1949 the Committee published its report.[72]

The Lloyd Jacob Report gave the theoretical case both for and against R.P.M. plainly enough. Price maintenance is a subject, however, in which the few arguments on either side are unvarying: conclusions differ only insofar as judgements or the peculiar circumstances of the time vary. By present-day insistence on dynamic expansion and low-cost efficiency, the Committee's approach appears unenterprising; the importance of stability, planned outputs and budgets, and assured outlets and services was stressed. Great weight was attached to the "loss-leader" argument, and on the basis of past experience, its dangers were perhaps over-emphasized. The stress, as the loss-leading question underlines, was perhaps too much historical and too little forward-looking; there was little evidence in the Report that times could change. Nevertheless, the Committee did not ignore, or play down, the disadvantage of R.P.M. in exerting upward pressure on margins, discouraging efficiency, and preserving an undesirable rigidity in retailing; these defects were criticized so thoroughly that advocation of fairly disastrous remedies might have been expected. As the Economist commented, "The Committee

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[72]Report of the Lloyd Jacob Committee: op. cit.

proceeds to demolish the case for fixed distributive margins with such force that the reader could be forgiven for expecting strong recommendations to follow."[73]

In the event, the recommendations were mild and somewhat confused. The Report's main recommendation was that collective enforcement should be prohibited. Possibly the inconclusiveness of this was the result of the conflict of viewpoints noted above, yet it was unsatisfactory. If individual R.P.M. was to be allowed as the means of retaining stability, collective enforcement was the sole means of making this effective; the Committee's opposition to the latter was based on the policing, use of private courts and misuse of trade associations which appeared to be its inevitable accompaniments.

The main recommendation's force was considerably reduced by the qualifying recommendations which accompanied it: in some ways, they rendered it meaningless. The Committee considered that producers were not entitled to use R.P.M. to obstruct the development of new methods of trading, to impede the distribution by another manufacturer of competitive goods, nor to deprive the public of the benefits of improvements in distribution. In other words, while permitting price maintenance, the Committee was nevertheless implicitly

[73] Economist: June 11, 1949.

condemning its actual results. Public policy, it thought, required that the benefits of low-cost distribution should be passed on to the consumer in price-reductions, and it recommended that the appropriate government departments should invite consultations, to secure this, with the principal national organizations in trade and industry.[74] Here the Report envisaged precisely the kind of changes which its main recommendation seemed designed to prevent.

Only one dissenter, Mr. Henry Smith, an expert on retailing, made a positive condemnation (in a separate memorandum)[75] of price maintenance, whose harmful effects on margins and prices he described as 'continuous and actual'. He was induced to agree with the Committee's recommendation only because of the "loss-leader" danger: separate legislation against loss-leadership would not, he considered, be 'easy to frame nor practicable to operate'.

It is permissible to surmise that the Report was a disappointment to the Labour Government, which would probably have welcomed stronger recommendations. Two years later, the government published its own report,[76] presented

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[74] Report: op. cit., paragraphs 114, 164, 165.

[75] Report: Dissenting Memorandum of Mr. Henry Smith, a Member of the Committee.

[76] British (Labour) Government Report: op. cit.

by the President of the Board of Trade on the grounds that the recommendations of the Lloyd Jacob Report had not been implemented. This report re-examined the theoretical arguments, but with the tone now strongly biased against the practice. Collective enforcement was considered to be intolerable in view of the activities of extra-legal courts, and the penalties which they could impose without right of appeal, and even individual R.P.M. was now condemned, the arguments regarding raising of margins, rigidity of structure and limitations on consumers' choices of services and costs being considered paramount. New legislation was justified by the fact that trade associations had indicated that they were not prepared to alter their proceedings in accordance with the Lloyd Jacob proposals. The government had sent a letter in December, 1949, to all known trade associations, enquiring what action they intended to take regarding collective sanctions. It was evident from the replies that the associations intended to continue without modification; subsequently, various pamphlets issued on their behalf showed that they regarded these schemes as being in the public interest. A further letter had been sent by the government in 1950 to many organizations, asking for their constructive proposals for a more flexible approach to R.P.M. in general. The associations had been un-cooperative in their replies: none could suggest any means of making provision for price reductions justified by low costs:

many sought to emulate Pilate in hand-washing, stating that they did not concern themselves with their members' activities in this respect.

The conclusion of the (Labour) government was that both collective and individual R.P.M. must be made illegal. 'Loss-leading' was considered to be an exaggerated danger, on the grounds that this had been prevalent mainly in years of deflation and unemployment and that, in any event, the question assumed the existence of price maintenance and would cease to be valid in its absence; a proviso was added that, should experience show that abuses occurred, it would be for the government and Parliament to deal appropriately with them. The government's proposal therefore was that (with no exceptions made for loss-leading), it should be illegal for a manufacturer to indicate resale price unless this was clearly stated to be a maximum. The succession of a Conservative Government at the General Election later in the year prevented this proposed legislation from ever being enacted, but it remained as an official statement of Labour Party policy.

Since the Labour proposals were never implemented, the Lloyd Jacob Report remained as the formative influence on official thinking in the years after 1949. In a number of enquiries into specific industries which took place under the Monopolies and Restrictive Practices Act of 1948, price maintenance, in conjunction with other restrictive practices, was examined: following the Lloyd Jacob Report's lead, the findings in most of these cases condemned collective enforcement, but made no recommendations regarding the individual manufacturer's position. Thus in 1951, in the Dental Goods Enquiry,[77] abolition of collective boycotting, together with exclusive dealing, was recommended, and the Electric Lamps Enquiry Report,[78] while advocating the continuance of a common price system, also recommended the abolition of collective R.P.M. as enforced by means of sanctions, fines and stop lists. Apart from the Lloyd Jacob influence, the reason for the concentration on the collective enforcement aspect was that this system served to reinforce most of the other restrictive practices, such as common price agreements, exclusive dealing, aggregate quantity rebates and discount schemes of various kinds, which were also subjected to enquiry. An interesting exception to the general pattern was the Pneumatic Tyre Industry Report,[79] in which price maintenance in all its forms was condemned, on the grounds

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[77] Monopolies Commission: Report on the Supply of Dental Goods. (H.M.S.O., London, 1951).

[78] Monopolies Commission: Report on the Supply of Electric Lamps. (H.M.S.O., London, 1951).

[79] Monopolies Commission: Report on the Supply and Export of Pneumatic Tyres. (H.M.S.O., London, 1955).

that, in that particular sector, it effectively prevented all price competition. This remained exceptional; the more typical attitude was that of the Report of an Enquiry into Collective Discrimination,[80] which stated that, in the view of the Committee, the general effect of price maintenance as a whole was outside its scope, but that it was satisfied that collective enforcement of the kind examined did not provide a solution which was consistent with the public interest. This Report (1955) had considerable weight, possibly because it was an examination of general conditions, not those of one industry alone: the passing of the Restrictive Practices Act[81] in the following year probably owed much to its influence. Apart from its provision for regulating restrictive agreements in industry, the Act specifically outlawed collective price maintenance; in compensation, or possibly as a _quid pro quo_ to industry for accepting the restrictive practices measures, legal support was given to individual enforcement. This, however, did not prevent price maintenance from being examined in the whole context of a situation where either

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[80]Monopolies and Restrictive Practices Commission: Collective Discrimination: _A Report on Exclusive Dealing, Collective Boycotts, Aggregated Rebates and Other Discriminatory Trade Practices_. (H.M.S.O., London, 1955).

[81]Restrictive Trade Practices Act. (1956, 4 & 5, Eliz. 2, C.68.)

pure monopoly or restrictive practices elements prevailed, under the 1948 Monopolies Act or under the Restrictive Practices Court procedure set up by the 1956 Act. In these cases, the fact that verdicts on particular cases differed might have been regarded as a reason for doing nothing further. The Monopolies Commission, for example, in its enquiries into electrical equipment for motor vehicles and wallpaper respectively, condemned R.P.M. in these industries, as tending to prevent any pressure being brought to bear on manufacturers' profit margins, yet in its Report on Cigarettes and Tobacco, in spite of this identical argument being repeated by Professor G. C. Allen in his dissenting memorandum,[82] it decided that here, price maintenance was not against the public interest, the dominant arguments apparently being those of the low rate of profit (about ten per cent for retailers buying direct), and the exceptional likelihood of such a popular product being used for "loss-leading". In a number of cases examined under the Restrictive Practices Act, R.P.M. was also held to involve no public detriment.

In spite of these findings, opinion slowly hardened against the continuance of price maintenance. Possibly

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[82]Monopolies Commission: (Dissenting) Recommendation of Professor G. C. Allen, op. cit.

this was because the results of the abolition of collective enforcement were not very striking. In industries containing a large monopoly element, the decision of a dominant firm, or of a number of the largest, to continue individual price maintenance meant that rigidity continued to exist. For example, the Imperial Tobacco Company, which at the time of the Monopolies Commission Report (1961) held over 60 per cent of the market, effectively prevented widespread reductions in cigarette and tobacco prices by deciding to continue its price maintenance policy; there were few cases of infringement, and those which occurred were effectively dealt with by securing injunctions. Again where, as often happened, all important suppliers in a given industry continued to practice price maintenance, the fact that they were no longer able to impose collective sanctions did not leave the shopkeeper much freer. The widespread reduction in margins hoped for did not occur, and pressure for total abolition slowly mounted. The Cohen Council on Prices, Productivity and Incomes recommended abolition as a means of reducing price lvels. A Board of Trade Enquiry into R.P.M. was held in 1960; its findings were never published, but it was widely believed that this was because they were adverse to price maintenance, and the (Conservative) government did not wish to raise this question, which was certain to be a controversial one, at that time. In any case, the fact that the enquiry was held at all indicated disquiet. A government-appointed Consumer Council also declared in 1963 that, subject to safeguards, R.P.M. should be made illegal.

It was inevitable, given the continuous agitation, that R.P.M. should become the subject of additional parliamentary legislation. Early in 1964, Mr. J. T. Stonehouse (a Labour member) proposed to introduce a Private Member's Bill to abolish it: the proposed bill was to allow possible exemption for cases where it could be shown that no public detriment was involved, and also for cases of loss-leading.[83] The bill did not pass its second reading, probably because the stage had to be left clear for the official measure proposed by Mr. Heath, Secretary of State for Industry, and President of the Board of Trade. The Conservative Government, in addition to considering the measure overdue, may well have been anxious to pass legislation in good time before the General Election scheduled for the summer or autumn; otherwise a victory for Labour, generally foreseen as a possibility, would leave the initiative in this field in enemy hands. On 15th January, 1964, Mr. Heath informed the House of

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[83] Parliamentary Debate, House of Commons, 17th January, 1964, Columns 580-680.

the proposed legislation.[84] R.P.M. was to be presumed to be against the public interest unless, in any particular case, the contrary could be proved to the satisfaction of a judicial tribunal. The Bill had a far from easy passage, but finally went through by a small majority: in spite of a three-line Whip (the most stringent effort at Party discipline), 21 Conservative members voted against it, and 25 abstained: the whole Labour Party abstained *en bloc*. A few of the Conservative opponents of the Bill were in effect taking up the cudgels on behalf of the small shopkeeper: most, however, were critical chiefly of the terms of the Act, some wanting price maintenance to be assumed to be permissible unless proved to be detrimental, instead of the onus being the other way, others considering that the Bill did not go far enough in its provisions. The measure finally became law in July, 1964.

In its final form, the British Resale Prices Act, 1964,[85] provides that it shall be unlawful to maintain a minimum resale price, either by contract or agreement, or by notifying or otherwise indicating such a price (Section 1, Chapter 58). Section 2 (Sub-Section 1)

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[84]Parliamentary Debate, House of Commons, 15th January, 1964, Column 225.

[85]At Appendix C.

prohibits a supplier from withholding goods from a dealer on the grounds that he has sold them, or is likely to sell them below a specific resale price; the definition of the term "withholding supplies" (given in Sub-Section (3) of Section 2) is wide, the phrase including not merely outright failure to supply, but both refusal to supply except at significantly less favourable terms than to competitors, and giving significantly less favourable treatment in respect of times or methods of delivery, or other relevant matters. By Sub-Section 5, causing or procuring any other supplier to withholding supplies also comes within the definition. Section 3 of the Act provides an exception for a supplier who has reason to believe that a dealer has been using any goods of the same or a similar description (whether obtained from him personally or not) as loss-leaders during the previous twelve months. The definition given of a loss-leader, in Sub-Section (2) of Section 3 is a resale of the goods effected by the dealer, not for the purpose of making a profit, but for the purpose of attracting to the establishment at which the goods are sold customers likely to purchase other goods, or otherwise for the purpose of advertising the business of the dealer. Genuine clearance sales are considered to form an exception, as also are price-cutting sales of goods carried out with the dealer's knowledge and approval.

The similarities to the Canadian legislation are noticeable: since Canada was the earlier country to frame such legislation, it was natural that the Canadian Act should serve to some degree as a guide to British legislators. The British Act gives the more careful definition of the term "failure to supply", and is careful to include unsatisfactory delivery and other matters in the term. It might of course be urged that this is covered by the separate Canadian legislation of Section 33A of the Combines Investigation Act, which forbids discrimination by a supplier among dealers in respect of any discount, rebate, allowance, price concession or other advantage, but it is more satisfactory both to have the prohibition actually embodied within the resale price framework, so that it forms an integral part, and also to have delivery and supply conditions explicitly mentioned rather than somewhat vaguely covered by the phrase 'any advantage'. The most striking similarity is observable in the loss-leader provisions, where the British clearly follows the Canadian pattern; the wording is in part identical. Unfortunately, this means that the British phrasing has all the disadvantages of the Canadian. 'Not for the purpose of making a profit' is a definition which begs numerous questions. What strikes the observer is the practical difficulty of applying many of the criteria: it is, for instance, very difficult in practice to show that tardy delivery is a result not of one of the many holding-up factors which can cause delay to a single buyer in a particular locality, nor to sheer inefficiency on somebody's part, but of deliberate intent by the seller. Again, it is almost impossible to lay down a rule as to where exactly a very low profit becomes no profit at all, particularly in the case of goods where the margins secured show steep variations among traders. What is especially unsatisfactory is that this point of no-profit cannot be defined in advance, when it could serve as a legal guide to a shopkeeper. However, if Canadian experience is any criterion, it seems unlikely that the need to define will in practice arise frequently: R.P.M. cases investigated yearly by the Combines Investigation Branch in Canada are in themselves very few, and these are invariably concerned with direct pressure or withholding of goods, rather than with the indirect method of late supplying. Loss-leading also is very rarely put forward as a defence for failure to supply. True loss-leading, where the goods are unambiguously sold either at a loss, or making little or no contribution to overhead, is rare: the British Act may well be criticized for making provision for it, and thereby watering down the legislation unnecessarily. No doubt this was to avoid the Canadian experience, to which much publicity has been given, of a temporary flood of price-cuts, with resultant short-term dislocations and distortions. There remains a strong case for reviewing the legislation after a stabilizing interval of three to five years, and for giving consideration then to abolishing the loss-leader provisos. By this time, considerable fluctuations in price will be the normal experience, and the price-cutting which secures its impact by contrast with fixed maintained prices will be avoided. The Canadian mistake was possibly to allow the distributive trades to vary prices and to make loss-leading cuts at one and the same time; a chronological time-lag is a prudent precaution.

The main feature which distinguishes the British legislation is the provision that the Restrictive Practices Court may, on application, exempt from the Resale Prices legislation any class or classes of goods if it can be shown that public detriment would result to the public as consumers or users. Detriment to the public is listed under five possible heads, under any of which exemption can be claimed:

(a) Substantial reduction in the quality or the varieties of the goods available for sale.

(b) Substantial reduction in the number of establishments selling the goods.

(c) Long-run increase in retail prices.

(d) Sale in conditions where there is a danger of misuse by the public with resultant threat to health.

(e) Cessation of, and substantial reduction in, necessary services to the public.

(Loss-leading is not allowed as an exemption clause, since the manufacturer has the option of withholding supplies on this ground.)

In addition to a proof of public detriment under any of these headings, it must be shown that the resulting detriment would outweigh any detriment to the public resulting from the maintenance of minimum resale prices in respect of the goods. The public in both cases is defined in their capacity as consumers or users: as Professor Yamey[86] has pointed out, this seems to rule out consideration of the effect on the prices or supplies of other goods, and cross-subsidization arguments are irrelevant. The government in fact specifically refused to widen the scope of the legislation by adding a general gateway (i.e. a criterion of any other benefit to consumers).

There exists a clear parallel, however, between these exemption clauses and the provisions, usually known as the seven "gateways", for securing exemption for restrictive

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[86]B. S. Yamey: Resale Price Maintenance and Shoppers' Choice: (Hobart) Paper, Revised ed. (Institute of Economic Affairs, London, 1964).

practices. The initial prohibition exists, together with the tests for exemption, to be applied by an administrative tribunal before which both the state and the claimants for exemption, backed by legal, economic and industrial experts, can state their case. The Resale Price exemption clauses have been criticized for their wideness (as were the restrictive practices "gateways"), although it was realized that some were designed to secure exemption for specific trades: for example (e) was clearly intended to allow an escape for specialized service dealers. The fear is that almost everybody might seem to have a case for exemption: in fact these fears are probably groundless: a large number of possible grounds for exemption have been named, yet the experience with restrictive practices seems to suggest that the tests applied will be severe, and that not many applicants are likely to emerge successful. Meanwhile, administrative difficulties certainly remain. Since nearly all manufacturers and associations think that they have a claim to exemption, there is a danger that the tribunal may be swamped by a flood of applicants. The case-by-case approach has the disadvantage too that one adverse decision does not imply that others in similar circumstances will also be adverse; it is possible, however, that trade associations, rather than individual manufacturers, will apply, with a consequent speed-up in dealing; it is also hoped that, as happened with restrictive practices, an adverse decision will in practice lead those with similar contentions to abandon their cases: it was noticeable that the decision of Gillette to abandon R.P.M., following the passing of the Act, effectively killed price maintenance in razor blades.[87]

The British Act exemplifies the well-known and much discussed distinctions between the Canadian and the British attitudes to anti-trust. Its approach, like that of the Restrictive Practices Act, is empirical and flexible; an initial presumption of public detriment is made, but it is admitted that exceptions may exist, and each case must be judged on the individual circumstances and effects. For this reason, the Act also follows the usual British tradition in expressly declaring that no liability to criminal proceedings exists.[88] The great value of this approach lies in the fact (it is one which is sometimes the object of envious comment by Canadian economists) that an attempt, however tentative and exploratory, is at least made to consider probable effects

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[87]See _The Economist_, 15th August, 1964.

[88]_Resale Prices Act_, Section 4.

in individual cases. Inevitably, the accompanying disadvantages are also present. The areas of uncertainty are somewhat large. No methods or measures of judging whether or not a particular class of goods meets the exemption tests can be laid down, certainly none in advance. Manufacturers might well complain that they are left to make enlightened guesses as to whether or not their own particular cases have any chance of success in the Court; the worst of the matter is that there is a natural bias, when in doubt, towards trying one's luck with the Court, with a resultant proliferation of the cases. Even when the proceedings before the Court finally take place, there exist no inflexible rules or standards to which either side may appeal. Economists called on either side may present conflicting analyses. The discussion must proceed largely in terms of analysis of likelihoods and probabilities. Findings will never be embodied in any resultant laws or even rules for guidance, and so can never serve as more than a rough signpost to other manufacturers: the contrast to the uncompromising prohibitions of the Combines Investigation Act is noteworthy.

These disadvantages, however, are merely the usual concommitants of the empirical approach in this field. It remains to be seen how the Act will work in practice;

what is hoped is that provision will be allowed for genuine exceptions, without weakening the general force of the Act. Since, however, existing arrangements are exempt from the legislation until made the subject of an adverse decision, it will be some time before the Act has any real effect, and therefore before the success of its aims can be estimated.

CHAPTER III

AREAS OF SIGNIFICANT RECENT DEVELOPMENTS

MERGERS AND MONOPOLIES

1. Theoretical Analysis

Mergers are normally a feature of increased imperfection in an industry. A merger may be either an amalgamation of two firms on equal terms, or, more frequently, a "take-over" of a weaker firm by a stronger. Since the number of competitors in a given market is diminished by a merger, there exists therefore a *prima facie* assumption that mergers diminish competition and so should be subject to anti-trust activity. Such an assumption will need to be examined later. Provisions against mergers are frequently included with those relating to monopoly in anti-combines provisions, since at the limit, where a considerable degree of concentration already exists, a merger may have the result of conferring a substantial degree of monopoly on the firm taking over.

This does not imply that this result is necessarily the main purpose of the merger. Sometimes the motive may be an improvement of market position; examples in action would include the taking over by a firm of a strong competitor representing a threat to sales or to the acquisition of raw materials, or the securing, through amalgamation, of additional power against existing competition. But in other cases, the acquiring firm may be interested primarily in its own growth. The firm taken over may be desired as a source of finance or hidden reserves, of raw materials, markets or productive services, and in such cases a merger may be regarded as a means of minimizing the risks of expansion, particularly if the aim is to enter new fields of activity.

It may well be difficult, even for the participants, to disentagle the motives. Weston[1] considers that a recent survey of merger motives shows that no single motivation predominates, although the bias in earlier years was towards market aims. Miss Penrose, in her study of the growth of the firm,[2] stresses the expansion motive at the expense of the market control aim. H.G. Manne, in an article suggests a criterion for distinguishing between mergers taken for expansion or increased efficiency, and those taken to acquire market power. By his analysis,

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[1]J.F. Weston: The Role of Mergers in the Growth of Large Firms. (University of California Press, 1953).

[2]E. Penrose: Theory of the Growth of the Firm. (New York, Wiley and Sons, 1959).

if the former motive is paramount the value of the acquiring company tends to be deflated by the union, and of the acquired to be inflated; the shares of the former therefore increase in value, and those of the latter decrease. If, however, the merger is motivated by a quest for market power, or for reasons of economies of scale, then the price of shares of each company should increase on the announcement of the merger terms. It is not obvious, however, that such an analysis of motives is always helpful.[3] From the anti-trust viewpoint, any fine discussion of motives has not necessarily any great significance, since, whatever the aims, the effects in practice may be indistinguishable.

The attitude of the sellers, or merged firms, may also vary. In many mergers, the management of the weaker firm accedes willingly to the amalgamation. If reasonably strong, the merged firm may hope to share in expansionary gains. If a weak competitor in the business struggle, it may be glad to secure the protection of a stronger firm; a typical example would be a firm in a weak financial position, especially one unable to meet tax burdens. In other cases, the management or controlling family may wish to retire for personal reasons, such as age, infirmity

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[3]Henry G. Manne: "Mergers and the Market for Corporate Control", _Journal of Political Economy_ (April, 1965).

or incapacity. In the case of a public company, the decision nominally rests with the shareholders, but in fact the influence of the management is usually so great, and the role of the shareholders so inactive, that the wishes of the former are likely to prevail.

Where the management is unwilling to merge, the bidding company may seek to win over the shareholders by attractive offers for the shares (usually in terms of their own stock or shares) plus possibly other financial inducements. If resistance continues, the offers may be increased. The management of the weaker company, if it wishes to fight the case, will offer competitive inducements, such as improved management, or wider fields of enterprise, most of which may be expected to result in higher future dividends. The result will depend on the strength of the rival offers, allied to the shareholders' degree of faith in their own company.

An important feature of merger bids is that, whatever their outcome, they tend, in accordance with the analysis given above, to raise the value of stock or shares of the acquired company. Therefore, once the news of a proposed merger is made, capital gains may be made by shareholders.

It would appear that, for anti-trust purposes, a valid distinction can be drawn between the two classes of merger: those where management and possibly shareholders willingly accede, and those where the proposed take-over is resisted. In the former case, a take-over may have the undesired effect of strengthening the market position of an already too dominant firm. Yet it can scarcely be considered as a step to be prevented outright, since the acquired firm is in any case unlikely to survive as a genuine competitive force; if it does not fail completely, it is likely either to continue as an inefficient organization, or to make a voluntary closure: either of the two last eventualities will lead to misallocation of resources. In any case, the gains, especially market gains, accruing to the buying firm must be limited in size. The case is very different, however, where a dominant firm makes determined efforts to take over a strong competitor which wishes to continue its independent existence. Here it may be expected that market gains will be substantial, and the lessening of competition serious. A recent example is the unsuccessful bid in 1961, in Great Britain, by Imperial Chemical Industries, a giant chemical and multi-product company, to take over Courtauld's Limited, its major rival in the field of man-made fibres. Public opinion was roused both by the ruthless and subversive methods adopted by the larger company, and by the realization that the move, if successful, would give I.C.I. ninety per cent of the market in these fibres. Under existing legislation, the British Government had no power to intervene. General indignation at its powerlessness was probably largely instrumental in bringing about a change in British monopoly legislation.

A discussion of the circumstances in which mergers should be permissible involves an examination of the assumptions of any given society about workable competition, and the degree of concentration permissible in any given industry. Some attention will be given later to this aspect. One circumstance, however, in which in theory and in practice, little importance is attached to mergers is where these consist of amalgamations of small firms in highly competitive markets. In such cases, the units involved are too small, and the remaining competitors too numerous for the take-over to represent any significant threat to competition. Here the mergers may act as a form of weeding-out of the inefficient in accordance with the normal processes of the market, or a move towards a degree of concentration which modern conditions may render desirable.

Such mergers of a number of small competing units may be expected to be numerous in the early years of an industry, when fierce competition weeds out the weaker, and enables the stronger firms to consolidate their position. Records show that the end of the nineteenth and beginning of the twentieth century was an epoch of great merger activity, when consolidations took place in a large number of industries. Subsequently, great growth took place in the years 1900-1905, yet the present levels of industrial concentration, and the relative position of firms is accounted for mainly by the merger movements at the turn of the century.[4] There is an implication that an effective degree of concentration might not have been possible without these early mergers, although whether the degree of concentration reached exceeded the optional is a matter of opinion. The extent of merger activity at this time in Canada is indicated by the fact that anti-merger provisions were early included (in 1910) in Canadian anti-trust legislation. Yet it may be doubted whether these provisions, while designed to prevent further consolidation, would necessarily have intended to operate against the earlier movements, if this had been chronologically possible. Only mergers and monopolies described as harmful were subject to the provisions, and it is doubtful whether any substantial degree of detriment could be shown to have resulted from the early amalgamations, though it might be feared that detriment would ensue if the merger movements continued unchecked.

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[4]J. F. Weston: op. cit.

These conclusions are reinforced by studies of the role of mergers in the growth of firms. Weston, Miss Penrose, Jewkes,[5] and others calculate that mergers appear to have been of some significance in the growth of firms. It is difficult to estimate exactly how much growth can be attributed either to internal or external expansion: however, the consensus of opinion among these writers is that, while internal expansion played the major role, the growth through external acquisitions was nevertheless not negligible. Weston, for example, estimates that one-quarter of the growth of large firms was achieved by acquisition; if, as sometimes seems justified, part of later internal growth can also be attributed to the merger, estimates of this kind would have to be increased.

Mergers then appear to have played a crucial role in the consolidation of many firms. A discussion of anti-merger legislation therefore hinges on the question of the precise point at which mergers become dangerous. First, it would be best, however, to examine the history and present state of anti-merger activity in Canada and Great Britain.

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[5]J. Jewkes: Lecture series delivered at Oxford, 1963.

2. Canadian History and Practice

Specific measures against mergers, as distinct from inclusion in general anti-trust legislation, date from 1923, when the legislation which forms to a considerable extent the basis of the present Combines Investigation Act was passed. The 1923 legislation made it an offence to be a party to a combine whose activities were detrimental to the public interest, and mergers and monopolies were specifically included in the definition.

Several features of the legislation are worthy of comment. Firstly, the anti-merger prohibitions are, in common with Canadian anti-combines legislation generally, legal prohibitions. Until 1960, "combines", including mergers and monopolies, were chargeable both under the Criminal Code[6] and under the Combines Investigation Act:[7] since 1960, mergers and monopolies have been chargeable in an individual section under the Act only.[8] Infringement of the Act, however, remains a legal offence, and the change appears to be of purely technical legal interest.

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[6]Criminal Code, Sections 411 and 412.

[7]Combines Investigations Act, Chapter 314, Sections 2 and 32.

[8]Section 33 of the present Combines Investigation Act, together with Section 2, paragraphs (e) and (f) at Appendix D.

Secondly, and most important, legislation against mergers has always been subject to a proviso of public detriment. This might seem to remove the reproach often levelled at Canadian anti-combines provisions: namely, that they consider certain activities of businessmen to be *per se* bad, and neglect to consider the practical results, and particularly the economic results, of any individual combine. Yet the wording of the provision need not necessarily mean that the application of the legislation is characterized by a very empirical approach. How the legislation *does* work in practice will be examined through individual cases. To the extent that the approach is empirical and individual, it runs the danger of leaving businessmen without a sufficiently clear-cut guide: they may well operate in uncertainty as to whether their activities are illegal or not.

The third feature worthy of note is that mergers and monopolies are mentioned together in the legislation. To a certain extent, this is realistic in that the formulation recognizes that the majority of mergers likely to be the subject of investigation will be those which result in a considerable degree of monopoly power. Yet such a formulation may have the disadvantage of appearing to pre-determine the issue of public detriment. There is a danger that it may seem to imply that it is only when they result in a substantial degree of monopoly that mergers are worthy of note. There exists perhaps an implication in the wording that amalgamations of sufficient magnitude to merit prosecution could be proceeded against either as mergers or as monopolies, and that those not on a scale to qualify under the monopoly aspect scarcely merit attention under the merger provision either.

One very obvious weakness of the Act, insofar as it relates to mergers, was the limit of the effective penalties prescribed. The usual penalty under the Act is a fine:[9] typical amounts imposed might range from twenty-five thousand to a hundred and twenty thousand dollars. This provides no real disincentive to a powerful firm; a businessman might easily calculate that the additional gains which could be realized through a merger would far outweigh in magnitude the worst penalty likely to be incurred.

In 1952, an attempt was made generally to stiffen anti-combines legislation by providing it with stronger powers;[10] in particular, an attempt was made to strengthen

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[9]Although Section 33 of the Combines Investigation Act does provide for imprisonment for two years.

[10]Elizabeth II c.39, S.14 (1), An Act to Amend the Combines Investigation Act and the Criminal Code. (1952)

anti-merger provisions by providing powers for the compulsory dissolution of mergers declared illegal. This kind of provision although an attempt to undo damage, appears to ignore the complexity of modern industry; it may be extremely difficult to unscramble the egg, if, for example, factors such as plant or personnel have been effectively integrated. It could be argued, of course, that firms merged should be forced to dissolve, any damage or disintegration resulting representing part of the penalty for illegal activity. The legislation provides that firms subject to a dissolution order should be required to report on their progress, but it is not certain that there is always a vigorous "follow-up" to ensure compliance. The whole procedure, representing a tardy attempt to undo amalgamations actually carried out, is unsatisfactory, and it would appear that the Combines Investigation authorities should be given the power to order the temporary cessation, pending enquiry, of any merger movement likely to form the subject of future prosecution.

Very little activity against mergers has taken place in Canada since the legislation was enacted. In only five cases were court proceedings in respect of merger activities completed, and all were unsuccessful. In one case, Regina v Abitibi Power and Paper Company, et. al. (1960-61),[11] the merger charges formed merely part of a general anti-combines conspiracy charge of collusion and price-fixing; the company was convicted on the collusion charges, but acquitted on the merger counts. Case law, however, has been mainly shaped by the other four merger cases, and of these the last two cases, which occurred after the Second World War, remain the arbiters of official attitude towards mergers. The rule as laid down by these cases seems to indicate that no merger resulting in less than near complete monopoly is likely to be successfully prosecuted, although it leaves some doubt as to what percentage exactly of the market would be sufficient to be regarded as virtually a monopoly.

In Regina v Canadian Import Company (1933-34),[12] the case was a complex one involving charges in respect of conspiracy in restraint of trade and price-fixing in addition to merger activity. The company in question was alleged to have formed a combination of importers of Welsh anthracite with the object of competing effectively with importers of American anthracite. It was stated to

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[11] R. v Abitibi Power and Paper Company Limited, et. al., 1960-61. 131 C.C.C. 201.

[12] R. v Canadian Import Company, 1933, 61.C.C.C.1141.

have acquired control over and interest in the business of a number of other companies in a manner likely to operate to the detriment of the public. Agreed wholesale and retail prices were fixed; the Canadian Import Company itself acquired control of another company by acquiring the majority of shares through a nominee, the two firms together then controlling most of the market. Both firms also owned some of the retail outlets, and had acquired in addition docking facilities by rental. The three last activities brought the company within the scope of the merger provisions.

Although the company was convicted on conspiracy and price-fixing charges, it was acquitted on the merger counts. The trial judge held that the incorporation of companies by the accused did not amount to acquisitions within the meaning of the Act, that the acquisition of retail firms was not an offence, since they were not made for the purpose of acquiring control, and since the number of retail firms in the particular market (Montreal) was large enough to ensure that the acquisitions would have little effect on competition, and that the acquisition of docking facilities at a time when nobody else applied for them, and when the accused required them for an expansion of business, was not unlawful. The case of the acquisition of shares of another company was acquitted on a technicality.

Three points of interest, for future guidance (other than purely legal technicalities) emerged from the case:

First, that mergers were not likely to be liable where a substantial degree of competition remained.

Secondly, that the question whether or not a merger was made with a view to acquiring control was of importance.

Thirdly, that the acquisition of facilities for extension of business where there was no demand for these by others was not a contravention of the Act.

These points emerged in relation to vertical integration, but could presumably apply by extension to other forms of integration. However, a consideration of public detriment could result in a conviction even though a company was acquitted under the second and third points; the question of whether or not a merger was automatically permissible when a substantial degree of competition remained was not stated decisively, but was left to be clarified in future cases.

In Regina v. Staples (1940)[13] the question was whether the purchase of one-half of the shares of another company

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[13] R. v Staples, 4 D.L.R. 699 (1940).

constituted a merger within the meaning of the Act. The charges were based on the purchase by a wholesale fruit selling company, of one half of the shares of a fruit growing company in the Okanagan Valley. There was a distinct advantage to both, the wholesale sellers being assured of supplies, while the growers secured guaranteed sales outlets. It was held that the acquisition was not a merger, the main factor in the decision being the fact that a fifty per cent holding of shares was held not to give a controlling interest. The attempt of the prosecuting counsel to maintain that the ownership of half the shares gave at least a negative control which could prevent the company from acting at all, was not accepted. Control was held by the trial judge to mean the power to act positively, and to mean therefore holding of more than fifty per cent of the shares. It is possible that this conclusion might not always be applicable; a holding of much less than half might be sufficient to maintain control in some corporations. In any case, the question appears to be purely one of fact, to be examined on the data available, and has little significance as an indication of merger law.

Important facts also contributing to the decision were that the fruit-growers' company had no reverse interest in the sellers, so that discriminatory rebates were unlikely, and that the purchase of the shares appeared to have been only to facilitate supplies, and as a financially sound investment. These aspects were again merely factual enquiries as to whether a true merger had actually occurred.

In the two principal cases, R. v Canadian Breweries Limited and R. v British Columbia Sugar Refining Company Limited, the issue turned on two main points: the degree of market control resulting from the mergers, and the actual or potential detriment to the public.

In R. v Canadian Breweries Limited (1960)[14] the case concerned a brewery firm which embarked on a policy of taking over other brewing companies, some of which, but not all, were closed down from 1930 onwards. By 1958, the company's share of the national market was high, while in Ontario and Quebec, where they had their greatest predominance, they now controlled sixty per cent and almost fifty-two per cent respectively, of the market: in the four Western provinces, they also increased their share. In all provinces, however, there still remained vigorous competition from Molson's and Labatt's breweries, which together held most of the remainder of the market.

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[14]R. v Canadian Breweries Limited, 33 C.R.1 (1960).

The mergers were made the subject of a Report by the Restrictive Trade Practices Commission in 1955.[15] The Commission found that Canadian Breweries Limited had, from the date of its incorporation, pursued "a deliberate planned programme designed to place the Company in a dominant controlling position in the brewing industry". In 1960, the company was charged in the courts with forming a "merger, trust or monopoly" operating or likely to operate to the detriment of the public, but secured an acquittal.

The main ground on which the trial judge based his decision was the substantial degree of competition which remained in the industry. He specifically stated that, as long as there existed strong competition in the market notwithstanding the merger, the merging of competing companies did not come within the standard of proof required in a criminal case. The judge did not say what percentage control of the market would be regarded as extinguishing this "strong competition"; as will be seen in a moment, the implications of other aspects of the case are that the merger would have to secure a virtual monopoly before it would become liable.

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[15] Report Concerning an Alleged Combine in the Manufacture, Distribution and Sale of Beer in Canada. (Queen's Printer, Ottawa, 1955).

The motive of a merger was specifically held to be immaterial; what mattered was whether it operated to the public detriment, and this was not so in the present case. The case was, of course, differentiated from others in that the most obvious criterion of public detriment (the price criterion) could not operate, since prices and other matters were fixed by provincial regulations. In the court's view, the requirements of the public as regards quantity were being fully met; while as regards quality, there was some evidence of this having improved: in the other minor areas of competition, the evidence was that the firms remaining competed vigorously. The prosecution in the case alleged public detriment; for example, from the narrowing of the choice of brands, the dictation of agreements, and the prevention of new entry into the industries, largely by means of heavy advertising; but the judge ruled that where detriment had occurred, it flowed from collateral acts, and not from the mergers themselves and was therefore irrelevant: restriction of entry, to give a single example, could have occurred without the merger's having taken place. In any case, the court expressly disclaimed interest in other economic effects, stating that it was merely interested in the extent to which competition was restricted: a disclaimer which at first appears to conflict to some extent with the detriment criterion, but is in fact merely a statement of the general attitude of the Canadian legal system on anti-trust.

The law, as interpreted by the case, showed that mergers were to be regarded as unlawful only insofar as public detriment resulted, and the judgement showed that the lessening of competition in itself was not regarded as detrimental. Only results such as raising of prices, restriction of supplies, deterioration in quality, or in standards of supplying would count as detriment: therefore, although the court did not specifically lay down the degree of market power which would make a merger unlawful, it seemed to imply that only a virtual absolute monopoly would qualify: this implication arose not so much from the stricture that strong competition must prevail, since the term "strong" is not quantitative, as from the fact that it is only such a virtual monopoly that has the power to cause such detriment to the public without fear of retaliation from its competitors. Where reasonably strong firms remain as competitors, even with a relatively strong share of the market, the dominating firm could not risk detrimental practices without risking a sharp decline in its share of the market.

The case of the British Columbia Sugar Refining

Company is very similar.[16] In 1960 the B.C. Sugar Refining Company and B.C. Sugar Refinery was charged with forming mergers in Western Canada, a merger with the Manitoba Sugar Company being the chief subject of the charge. It was alleged that the mergers gave the company a complete monopoly of the sugar industry in Western Canada. Other restrictive practices were also alleged, but were not admitted, either because they had not been cited in the original indictment, or, as in the Canadian Breweries case, because they were held to flow not from the merger itself, but from collateral acts.

The company again was acquitted, the case hinging on two questions: first, the extent of the market, and secondly, the question of freedom of entry. In this case, there was no doubt that the merger had resulted in virtual control of the industry in Western Canada; the Crown therefore alleged that the industry through the merger, operated as a monopoly, and that it was likely to operate so as to limit competition unduly. The judge, however, considered that the company was subject to competition from eastern refineries; that is, he insisted on considering the market as a national one, and attached little importance to control in a limited area. As regards operation to

[16] R. v British Columbia Sugar Refining Company Limited, 32 W.W.R. 577 (1960).

limit competition, the judge pointed out that there was nothing at any time to prevent others from entering the field. Whether this was economically possible or likely, or became less likely as a result of the merger, was not considered by the court.

One interesting point in this case was the contention of the prosecution that the whole of the accused's operations before the merger were admissible as evidence to show what action after the amalgamation was likely to be, and therefore whether it was likely to operate to the detriment of the public. Implicit in this argument was the insinuation that the merger gave the accused power to continue detrimental operations. The judge refused to accept this contention, declining to consider the behaviour of a company before amalgamation, and deliberately narrowing the sphere of the court's interest by limiting attention only to the effects of the merger.

In one case, that of Regina v. Eddy Match Company,[17] where merger activity over a quarter of a century had resulted in complete control of the market, the company was charged under the monopoly definition in the Act, and not under the merger. The company was found guilty, and this finding upheld on appeal. The court laid stress

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[17]R. v Eddy Match Company Limited, et. al. (1952). 104C.C.C. 39: Eddy Match Company Limited et. al. v The Queen (1954) 109.C.C.C. 1 (Appeal).

on the complete market control exercised by the company, its record of successfully and intentionally eliminating competition by means of fighting brands, temporarily sustained losses and other predatory tactics, and its existing power of preventing entry. Because of these facts, there was an overwhelming presumption of detriment to the public, and, in fact, there already existed an example of such detriment in the raising of prices which occurred after the elimination of certain competitors. The public was in a helpless position in the face of such power. The result of this trial was gratifying to the anti-trust authorities, yet since the conviction seemed to rest on absolute market power and the complete elimination of competition, it was of little help in strengthening their position in dealing with monopolies which were less than complete.

The results of the merger cases themselves must be considered unsatisfactory from any economist's standpoint. They appear to indicate that, only if a merger virtually eliminated competition, with the resultant likelihood of obvious detriment to the public, was it likely to be successfully prosecuted. The Combines Investigation Branch carries on continual enquiry, both of a preliminary and of a more formal nature, into mergers and monopolies: a typical number in one year is ten to twelve preliminary enquiries, and seven to ten formal enquiries.[18] Invariably, however, even where the merger or monopoly has been subjected to a complete formal enquiry, the Commission is forced to find that, on the basis of existing jurisprudence, the merger does not constitute an offence against the Combines Investigation Act. The authorities constantly hope that a new court decision may reverse the position and render mergers more easily liable. A case of current interest is the prosecution of two sellers of propane in British Columbia for the acquisition through mergers and combination of ninety-seven per cent of the market. The charge here is in respect of alleged merger, alleged monopoly, and alleged combination. The case has been referred to counsel with instructions to institute proceedings unless he comes to the conclusion that the evidence is insufficient.[19]

The whole procedure adopted for the judgement of mergers and monopoly is unsatisfactory in its approach. Public detriment is considered only in its narrowest sense of clearly deleterious results, and the lessening of competition (short of complete extinction) does not

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[18] See, for example, Report of the Director of Investigation and Research for the year ended March 31st, 1964, and March 31st, 1965.

[19] Report for year ended March 31st, 1964, pp. 26-30.

in itself constitute detriment. Economic evidence as to the harmfulness of the lessening of competition in any given circumstances, or the likelihood of such harm ensuing is not admissible; courts normally refuse to consider economic effects at all, and those who preside and who argue in them are not qualified to understand fully economic arguments. As interpreted at the moment the legislation, in its rigidity and narrowness makes little contribution towards the intelligent control of merger and monopoly; in particular, it is powerless to control amalgamations which are of substantial enough size to cause anxiety to anti-trust authorities, yet which fall short of threatening, as yet, to acquire total market control.

3. British History and Practice

The British industrial scene, like the Canadian and American, showed a history of steady concentration from the beginning of the twentieth century. The movement increased during the inter-war period, the depression encouraging firms to merge or to operate restrictive agreements in order to avoid spoiling the diminished market.

After the Second World War, there was another widespread movement towards concentration, in this case explicable by technical requirements. Again, if one studies the growth of individual firms, this is characterized by both internal and external expansion: Evely and Little[20] consider external expansion to have been the more characteristic method in Britain, however. The highest degrees of concentration occurred, mainly for technical reasons, in the chemical and allied trades industry, the engineering and electrical goods industry, and the vehicles (including private car) industry.

As Evely and Little point out, the degree of monopoly, if the harmfulness of monopoly is to be measured solely by market power, cannot necessarily be equated to the degree of concentration. This will depend on other factors, such as the nature of the industry, and the degree of competition remaining. The motives for mergers will be of some significance also: in the British field, Evely and Little draw a distinction, which could be significant for anti-trust purposes, between amalgamations involving a large number of firms and prompted by severe price competition (generally to pattern of the depression years); mergers between firms which were already relatively large; and piecemeal acquisition by one or more firms

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[20]See R. Evely and I.M.D. Little: Concentration in British Industry (Cambridge University Press, 1960).

until they obtained a position of dominance in their trade, either as a single-unit monopoly, or as dominant firms in an oligopolistic situation.

As has been stated earlier, combines in Britain were not subject to any significant degree of legislation until after World War II; mergers and monopolies, in particular, were completely unregulated, since they did not fall within the scope even of the common law provisions. The British approach to the whole anti-combines problem was, in any case, much more tentative than the Canadian. Labour's attitude was more hostile than the Conservative: in the Labour view, monopoly was one of the more objectionable features of capitalism, and it should be subject to effective control, if not replaced by public monopoly.[21] The Conservative approach was more to consider each case on its merits, and to suggest appropriate remedies. The first positive attempt at control came in 1948, under a Labour Government, when the Monopolies and Restrictive Practices Commission was set up.[22] It is permissible to suppose that the Labour Party wished to bring the legislation safely through before the Conservatives

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[21]See E. Burns: op. cit.

[22]Monopolies and Restrictive Practices (Inquiry and Control) Act. (H.M.S.O., London, 1948).

should have a chance to introduce similar legislation: the legislation was, in any case, supported by the Opposition.

The Commission was, in its day-to-day work, a virtually independent administrative body, free from outside political interference: it consisted of a barrister-at-law, an accountant, businessmen and academic economists. It was essentially a fact-finding body, which examined each industry for evidence of any forms of monopoly or restrictive practices (there was no attempt to define in advance the terms "monopoly" or "restrictive practice"). The assumption was that these were not necessarily bad in themselves, but threatened ill results if not restrained. The scope of the Commission was defined in terms of market conditions, jurisdiction extending where at least one-third of the market for goods (but not services, or labour) was supplied to or bought by one seller or one buyer (the terms including collusive groups of buyers or sellers). This criterion was probably fixed simply as an attempt to expand the Commission's limited time on the most concentrated industries, but it had the unfortunate effect of suggesting that this extent of market control formed a yardstick of effective monopoly, irrespective of the nature of the industry.

Two main types of investigation were undertaken. In the first, the Commission simply investigated whether monopoly conditions prevailed, and in what manner or to what extent. In the second type, it, in addition, investigated whether the monopoly conditions in practice operated or could be expected to operate against the public interest. There was no attempt to draw any general conclusions from the Act, and no provision was made for any periodic review by the Commission of evidence accumulated in a number of cases. Only in one case (dental goods) was an order[23] issued under the Act, restraining the industry from the restrictive practice in question. Otherwise, the work of the Commission was confined to noting whether public detriment had occurred, or was likely to occur, as a result of the practice: in cases where detriment existed, the authorities' tactics were to try to abolish the practice by suggestion and consultation; a great deal of reliance was placed on the unfavourable publicity which resulted from the publication of each report.

Twenty major industries were examined prior to 1956, and exhaustive findings made the subject of reports: the industries dealt with included matches, tyres, sand and gravel, linoleum, and metal doors and windows. Common

[23]The Dental Goods Order, 1951).

price agreements and exclusive dealing agreements were found in nearly all the industries investigated; collective resale price maintenance was also common.

As a regulator of monopolies, and still more of mergers, the work of the Commission was of significance only because of the information it provided. The Commission examined the degree of monopoly in each industry, or in each market of an industry, and the degree of detriment which appeared to result in each case, but it nowhere suggested any suitable legislation for regulating monopoly, or any suitable objective criteria for measuring it. Again, in examining mergers, the Commission examined the significance of specific mergers in the attainment of concentration, and the motives for merging, but made no recommendations regarding legislation for mergers.

In 1956, restrictive practices agreements were removed from the scope of the Commission and made subject to a separate court;[24] the Commission (then styled the Monopolies Commission) was limited in scope virtually to the examination of single firm monopolies. Here again, its reports provided a good deal of information on the structure of, and concentration in an industry, but were limited in their scope by the restricted terms of reference.

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[24] Restrictive Trade Practices Act (H.M.S.O., London, 1956).

same features as Canadian legislation. British practice, however, continued to keep anti-monopoly activity outside the criminal sphere.

One other interesting case which deserves mention was the enquiry into the match industry in 1952:[26] the Commission noted the reality of the power here conferred by vertical integration, which gave the dominant firm greater real power than its share of the trade would suggest. The development of competition was hampered by the practice of the British Match Corporation of charging its competitors higher prices for certain materials of which it controlled the distribution.

When restrictive practices were removed in 1956 from the work of the Commission (which was then re-named the Monopolies Commission and virtually restricted in scope to single firm monopolies), the number of members was reduced from twenty-five to ten. This somewhat restricted the work of the Commission; it continued to examine monopolies and the mergers which helped to establish them, again without, however, making any positive suggestions for their prevention. The lack of effective action was the subject of considerable criticism, which, however, did

[26] Monopolies and Restrictive Practices Commission: Report on the Supply and Export of Matches and the Supply of Match-Making Machinery (H.M.S.O., London, 1953).

The report on the cigarette and tobacco industry indicates some of the strengths and weaknesses of the Commission's approach.[25] The report, brought out in 1961, notes the dominating position of the Imperial Tobacco Company, which controlled over sixty-three per cent of the sales, a rival firm, Gallaher's, coming next with over twenty-nine per cent, and five others taking the major part of the remainder of the market. The Commission therefore found that Imperial formed a monopoly in the terms of the Act. The company defended the degree of concentration by the four following main contentions:

First, that the condition of the industry demanded this.

Secondly, that the powers conferred by monopoly were used wisely. Prices were reasonable, and considerable research undertaken. Profit margins were between the reasonable figures of eleven and thirteen per cent. (All these defences amounted to a claim of no public detriment.)

Thirdly, that the monopoly helped to substitute the use of Commonwealth tobacco for American brands.

Fourthly, that fierce competition still remained in the industry.

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[25]The Monopolies Commission: Report on the Supply of Cigarettes and Tobacco and of Cigarette and Tobacco Machinery. (H.M.S.O., London, 1961).

The Commission, in its conclusions, found that Imperial, while it did not set out to monopolize the United Kingdom market, deliberately enlarged its share in order to resist American encroachment; it considered generally that Imperial had shown responsibility and restraint in the use of its monopoly position, but that it had not been compelled to exert maximum efficiency until its major rival, Gallaher's, succeeded in taking part of its trade. The effect of this competition was lessened, however, by the fact of Imperial's financial interest in Gallaher's, and the Commission thought that the continuation of this might be against the public interest.

The limitations of the Commission's approach were exemplified by the fact that it nowhere examined Imperial's defensive points in any depth. Thus, it never got to grips with the contention that the conditions of the industry demanded the existing degree of concentration, nor did it consider fully whether the American threat justified the amalgamations which secured this. To do so would have involved an economic analysis of a thoroughness outside the existing scope of the Commission. An examination of what the optimum market structure might have been was also excluded. The findings, which were unadventurous, appear to have stressed public detriment and the degree of competition remaining, and to that extent underlined the not become widespread until a number of mergers in the first years of the 1960's chanced to hit the headlines of the daily press. Ironically enough, the very effectiveness of the Restrictive Practices Court increased the number of mergers: as firms were forced to abandon collusive agreements as a means of limiting competition, they turned increasingly to the merger as an unrestricted means of securing the same ends.

Two cases in particular secured widespread attention. As mentioned above, the unsuccessful bid by Imperial Chemical Industries to take over Courtauld's in late 1961 and early 1962 caused widespread disquiet because of the magnitude of the assets and market control involved.[27] Since the daily and weekly press skilfully played up the moves and counter-moves of each side, and the personalities involved,[28] the concern was not restricted to that section of the public which normally followed the movements of industry and the stock market and the economic issues became widely known. Another (successful) merger bid which caused alarm was the take-over by the Daily Mirror newspaper group of Odham's Press, which published the

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[27]See the Economist (London) editions of January 13th, 1962; January 20th, 1962; February 3rd, 1962.

[28]See The Observer (London) editions of March 18th, 1962, March 25th, 1962, April 1st, 1962, especially articles by R. Jenkins.

Daily Herald and a number of high-circulation women's magazines: here the concern was not primarily economic, since the merger, which would result primarily in economies of scale, did not threaten any near-monopoly in either the newspaper or women's magazine markets. Public attention was focussed on the social issues involved: the undesirability of restricting the number of outlets of opinion, and the danger of concentrating the considerable power of the press in a very few, not always responsible, hands.[29]

The result was a (Conservative) Government White Paper in March, 1964:[30] here, the government, while stressing the fact that, in the modern industrial context, monopoly was not always an evil, and that therefore the approach should remain pragmatic, nevertheless advocated stronger powers against those monopolies found to be operating to the public detriment (again, no definition of this was given in advance, and whether or not a monopoly was harmful was to be a question decided on investigation). Instead of relying solely on persuasion coupled with publicity, the report advocated giving the government power to force a monopoly power to divest itself of its interest,

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[29]See the Economist (London) edition of February 4th, 1961.

[30]Monopolies, Mergers and Restrictive Practices (H.M.S.O., London, 1964, Cmnd. 2299).

although this was clearly intended to be a "last resort" power.

The Paper also advocated some needed reforms in the administrative machinery of the Act. In order to avoid the charge that the Commission was weakened by having to act as "both judge and prosecutor", it was suggested that the enquiry procedure should be divided into two distinct stages: the first, to be carried out by a newly appointed Registrar of Monopolies, would consist of the preliminary collection and arrangement of the relevant facts: the second would consist of the judgement by the Commission of the degrees of monopoly, its justification or otherwise, and the amount of detriment involved. This change made the proceedings more similar to those of the Canadian authorities.

The Paper's most important suggestion was one for the effective control of mergers:[31] again, it was not contended that all mergers were necessarily harmful: there was merely a presumption that, if any merger resulted in a monopoly within the meaning of the Act (i.e. in the sense of control of at least one-third of the market), it required investigation to ascertain that there was no public detriment. The Commission was to be

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[31] Ibid., Sections 21 to 27 (page 4).

entitled to enquire into any proposed or recently completed merger; oddly enough, the Paper did not suggest that power should be granted to hold up a proposed merger, an omission which appeared to rob the section of most of its force.[32] This defect was the subject of much (Labour) Opposition criticism. Other Opposition criticisms of the weakened strength of the Commission were to be met by a proposal to enlarge the numbers again from ten to twenty-five, an increase which would be justified by the additional merger work.

The Paper also advocated the extension of the monopolies legislation to services (including labour), which had previously, somewhat illogically, been excluded from the provisions.

In October, 1964, the Labour Party was returned to power before the Conservatives brought in the legislation advocated in the Paper, and brought in its own Monopolies and Mergers Bill in March, 1965.[33] The Labour legislation was even stronger than the proposed Conservative measures; it included provision for the "freezing" of proposed mergers which could work against the public interest, and for monopolies and mergers to be dissolved, reserved

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[32] Ibid., Section 25.

[33] Monopolies and Mergers Act, 1965 (H.M.S.O. London). Section 6, Sub-Sections 1 and 2 of this Act at Appendix E.

power to fix prices where the Monopolies Commission criticized industries for charging excessive prices included services in the scope of the legislation, and introduced special provisions for newspaper mergers. It also provided for an increase in the number of members of the Commission to twenty-five.

1. The bill provided that a merger or proposed merger could be referred to the Commission where it would lead to or strengthen a monopoly (again defined as one-third or more of the goods or services) or where the value of the assets taken over would exceed five million pounds. The Board of Trade could refer the matter to the Commission, and the Commission could take remedial action if it found the merger to be against the public interest (Sections 6 and 7).

These provisions could be criticized on the grounds that the defining lines of resultant control of one-third of the goods, or acquisition of five million pounds assets represented too arbitrary, and possibly too lenient a yardstick. For example, the merger of two firms in an oligopolistic industry composed of eight or nine firms dividing the market in approximately equal proportions could be regarded as representing a significant threat to competition, even though it would not bring the acquiring firm within the scope of the Act. Possibly these arbitrary limits were imposed merely to give attention to the mergers of greatest magnitude: such a limit could be justified in the short-run on grounds of limited time and resources, but are unsatisfactory as criteria.

2. Interim powers for arresting a proposed merger were granted. The Commission would be required to report within six months as to whether a merger could work against the public interest; meanwhile, a stand-still order could be issued (Section 6, Sub-Sections 6 and 7). This provision represented a sensible, common-sense recognition of the fact that it was far better to halt a potentially harmful merger before completion than to undertake the much more complex task of dissolution after amalgamation.

3. Provision was made for mergers and monopolies to be dissolved where necessary. The safeguard of a resolution in Parliament was, however, declared to be essential (Section 3 and Section 6, Sub-Section 10). The terms of the wording of this provision seem to indicate that it was not envisaged that very many amalgamations would be subjected to dissolution.

4. The Bill reserved the power to fix prices where the Monopolies Commission criticized industries for charging excessive prices (Section 3, Sub-Section 4). This measure implicitly recognized the fact that it was not always practically possible, or even desirable to

dissolve existing monopolies: those formed by the taking-over of bankrupt or nearly failed competitors would come into this category. The Commission's attitude here was that since it was not always possible to regulate the degree of market control, it was at least feasible to prevent the public detriment likely to arise from the monopoly.

5. Special provision was made for newspaper mergers (in addition to their being subject to the general provisions for mergers). The transfer of daily or Sunday papers or newspaper assets would require the consent of the Board of Trade if a merger would create control over an aggregate weekly circulation, in the United Kingdom, of three million or more copies (Section 8). This proviso recognized the fact that, where newspapers, with their considerable influence on public opinions and attitudes were concerned, more stringent measures against mergers were desirable, in order to prevent newspaper owners wielding an undesirable degree of influence. The question was necessarily no longer the purely economic one of the extent of market control, or the degree of competition remaining, but the desirability, on social grounds, of retaining as many outlets of opinion and comment on public issues as possible: in fact, the suggestions followed closely the recommendations of the Royal Commission on

the Press.[34] Exemption was sensibly provided for in those cases where the newspaper taken over was in a weak financial position, or where the average circulation per day of publication was not more than twenty-five thousand copies, a negligible circulation by contemporary standards.

This legislation marked a distinct step forward in British anti-monopoly legislation, in that for the first time it introduced a specific measure to control mergers. Its most noteworthy features were the provisions made for holding-up potentially harmful mergers, the quantitative criteria of what mergers could be considered potentially detrimental, and the provision for empirical investigation into potentially harmful mergers.

At this point, before any discussion is made of what ideally should be the nature and scope of merger and monopoly legislation, a comparison should be made between what has been secured in Canada and Great Britain. The difference between the two systems is striking: the Canadian legislation, built over many years within a legal framework and largely on case law, contrasting sharply with the British provisions, newly-minted but

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[34] Report of the Royal Commission on the Press (H.M.S.O. London 1949).

maintaining the pragmatic approach which characterizes British anti-combines legislation as a whole.

From an economist's viewpoint, the British legislation, although far from perfect, has considerable advantages over the Canadian practice.

First, the British system keeps the merger and monopoly question (and other anti-combines matters) out of the sphere of criminal proceedings. This avoids the obvious injustice of applying criminal proceedings and their consequent stigma to businessmen, who however aggressive and predatory, may have been free from any intent to monopolize: as one judge in an anti-trust case (in the United States) appositely remarked "*finis opus coronat*": the successful competitor must not be turned upon when he wins and the expanding firm must not feel that its successful record will penalize it. A more practical consequence is that the early consultation and co-operation from entrepreneurs, both before and during projected amalgamations, which is hoped for by the authorities in both countries is more likely to be secured under the British system: businessmen are naturally likely to be more co-operative and to speak more freely where there is no question of any criminal prosecution or resulting penalties. There is also the point that a criminal code may in practice be forced to treat the businessman rather leniently. If criminal proceedings are instigated, then all the usual legal rules must apply, including the presumption of innocence until guilt is proved, and the proviso that guilt must be proved beyond reasonable doubt. A businessman may, by such rigid rules, escape conviction where by criteria of mere reasonable conclusion he would be found guilty.

Secondly, the British system sets quantitative criteria for examining mergers which are at least preferable to the Canadian criteria of "virtually complete monopoly". While the British yardsticks themselves may be unsatisfactory in their rigidity, they at least offer some kind of reasonable "first approximation" of what mergers are most likely to merit attention. As the Restrictive Trade Practices Commission of Canada complained,[35] the position now in Canada is that it will be almost impossible to secure a conviction in a merger case unless the merger has resulted in a complete, or almost complete monopoly in the industry, i.e. unless competition has been effectively eliminated. To an economist, the British criteria must seem preferable: for although it may be argued that the British terms of reference allow some

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[35]Restrictive Trade Practices Commission, Department of Justice: Report Concerning the Manufacture, Distribution and Sale of Paperboard Shipping Containers and Related Products. (Queen's Printer, Ottawa, 1962).

potentially dangerous mergers to escape, they are far less likely to permit a harmful degree of consolidation than the Canadian system as it at present operates. Thirdly, the British kind of examination of potentially harmful mergers or monopolies is preferable, from an economist's viewpoint, to the Canadian legal court case. The British investigation is carried on by a body on which professional economists and businessmen are represented; it seems likely that the resultant analysis must be more meaningful than the kind of examination carried out in a law court.

The difference is best exemplified by the way in which the two different systems approach the question of "public detriment". Under the Canadian system, where the legal straitjacket makes it obligatory to define public detriment under clear and recognizable headings, a court must confine itself to the kinds of monopoly power which can be listed in this way; raising of prices, restriction of output, failure to supply or discrimination in supplying, are the kinds of tangible and discernible results which could be listed. The weakness of the method is that the harmful results of a monopoly or merger may not lie in this kind of obvious and immediate detriment at all; the evils may well be long-term and of a different nature: lack of the sharp edge of competition with its spur to the trimming of costs, to increase in efficiency and to the pioneering of new methods. To assess the likelihood of long-term detriment of this kind occurring will not in any case prove an easy task, but this kind of analysis can certainly be better undertaken by the British-type group, composed of economists and other professional men, than by a law court. The British provisions are not wholly free from weaknesses either; the legislation gives no guidance at all to those whose task it is to assess detriment, and it is unlikely that professional economists, even the small number on a single committee, will necessarily be in agreement on the nature or the extent of the detriment likely to ensue. But the constitution of the British body does make it likely that the discussion and the analysis will be on relevant and meaningful lines.

In a later chapter, consideration will be given to the possibility of producing a more satisfactory form of legislation to control mergers than either the Canadian or British attempts. This will involve a reappraisal both of the nature of workable competition, and of the possible powers and responsibilities of government. The immediate question which remains is whether, given present assumptions and given the Canadian legal framework and tradition which in some way appears to embody the national attitude towards anti-trust, a method can be devised to remedy its worst deficiencies. The kind of analysis and investigation which from an economist's viewpoint is meaningful, is in fact carried on in the work of the Combines Investigation Branch. Too often, however, that body, having found after detailed analysis that a merger or monopoly is likely to prove harmful, either has its findings reversed by the legal tribunal, which is restricting itself to criteria of near-complete market control and of public detriment or (increasingly, as legal decisions prove unfavourable) is advised by its legal counsel that a prosecution is not likely to prove successful. At least one or two major merger or monopoly cases every year are discontinued on the advice of counsel, in addition to several in which the enquiry discloses no case for further proceedings, and a number, usually about six, which have not advanced beyond the preliminary enquiry stage.[36]

The remedy might possibly be to devise some way in which the Combines Investigations Branch's findings and analyses might have some kind of privileged standing in court: at present, they merely form the background of the prosecution's case, which has to be re-shaped into a legally

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[36] See, for example, Reports of the Director of Investigation and Research, Combines Investigation Act, for the years ended March 31st, 1964 and 1965. (Queen's Printer, Ottawa).

acceptable charge. The court proceedings would be more satisfactory to economists if the kind of economic analysis and interpretation carried on by the investigation authorities held a privileged position; being regarded perhaps, as findings which the defendants would have to disprove, rather than merely the material for prosecution. An alternative possibility would be to admit into court the kind of economic arguments and considerations on both sides which would previously have taken place in the Combines Investigations Branch before a report was drawn up, although this method seems to involve the duplication of considerable work and academic argument.

The disadvantage of either of these proceedings is that they attempt to introduce economic arguments into a system which is framed to consider only legal arguments and precedents: a decision on these arguments would have to be taken by a judge who, although he may possess a penetrating intelligence, will not have had the benefit of specialized economic training. It is doubtful whether the uneasy mixture of legal and empirical considerations would be successful. The only other possibility would be to remove anti-combines work from the legal courts altogether, and to entrust it to some kind of administrative tribunal, rather on the model of the British Monopolies Commission. Such a tribunal would be free to consider any economic question in all its wider aspects. It might be feared that such a change might at one sweep destroy the body of law on mergers and monopoly which has been built up over nearly half a century. This need not necessarily be the case; the findings of law could be referred to as being of especial value in that they represent past decisions. Yet it could also be maintained that recent case law takes such a narrow (and therefore over-lenient) view of both market control and public detriment that it has ceased to be in any way helpful to intelligent control of mergers and monopolies.

CHAPTER IV

SUMMING UP: OPTIMUM MERGER AND MONOPOLY CONTROL IN A CONTEXT OF WORKABLE COMPETITION

All anti-trust legislation is based on the premise that the presence of monopoly in the market is economically undesirable, and disadvantageous to the consumer. Elementary static economic theory explains this by the fact that the demand curve facing the monopolist is downward sloping, so that the entrepreneur can fix price or output at a point such that price is higher and output lower than would be the case under more competitive conditions. Price is therefore higher to the consumer, and profit higher for the firms than would normally be the case: there is also a misallocation of productive resources. A number of ancillary evils may follow from the imperfection in the market. Excess capacity may develop over long periods; research and innovation may lag because of the lack of any competitive spur; inefficient managements and firms are subsidized; there may be artificial barriers to entry, and restrictive practices of different kinds may be entered into in order to reinforce situations of oligopoly or of monopolistic competition. As has been stated, this is the analysis of static theory, and later dynamic analysis questions many of its assumptions. From the point of view of an investigator into anti-combines, the important fact, however, is that anti-combines law is usually based on the static analysis.

As has been seen in the foregoing chapters, the control of monopoly and mergers in Canada and Great Britain has been based on two main assumptions. The first is the assumption of classical and neo-classical theory that perfect competition is the ideal, and that the task of anti-combines legislation is forcibly to maintain a condition as near this ideal as possible. By this theory, the attainment of the perfectly competitive state is threatened only by the activities of predatory entrepreneurs, and anti-trust authorities, by restraining such activities as restrictive and discriminatory agreements, other unfair trading practices, and mergers between firms, can maintain a state near the optimum. The second assumption is the practical one that it is only at a certain point, in any given industry, that the restriction of competition becomes significant enough to be of importance. As has been seen, in Canada, the practical concessions made to mergers and monopoly under this head involve an assumption that no detriment exists until virtually complete monopoly has been secured, an assumption which totally undermines the first and theoretical basis of anti-trust. The British system, which is somewhat less lenient, assumes nevertheless that the possibility of significant detriment exists only when control of one-third of the market is attained, the question of whether or not detriment has occurred at that point being deemed to be a factual one. The British system, of course, never spelled out the original theoretical assumption in the way that Canadian legislators did. Nevertheless, the desirability of perfect competition was, in Britain as in America, for many years the core of economic theory on the firm and on industrial organization.

The criticism which could be made is that in both countries, and especially in Canada, the theoretical concept is exceptionally vigourous, but the practice so permissive as to make control ineffective, and to cast doubt on the validity of the original theory of perfect competition.

Classical theories on competition have been considerably modified by later theoretical work. While there still exists an assumption that a considerable degree of competition is probably desirable as a means of promoting maximum efficiency and cost-saving, it is now realized that under certain conditions of modern industry, degrees of imperfection can result in greater efficiency and thereby in savings to the consumer. Schumpeter and Galbraith in fact maintained that, for modern industry, a high degree of monopoly is desirable;[1] the gains of large-size and concentration, notably economies of scale, with consequent reduction in costs, general and administrative efficiency, and above all, technical progress and innovation, with their resultant benefits to consumers, will in their view, far outweigh their possible disadvantages. By this theory, it is Big Business which raises living standards for the general public. The simplicity of their findings, namely that imperfection in industry was always preferable, was modified by the later empirical studies, which established that a higher rate of innovation could not be absolutely linked with any particular market

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[1]Schumpeter considered mainly the theoretical aspects, while Galbraith went on to support the analysis by empirical evidence drawn from specific industries. For example, he showed that the agriculture and bituminous coal industries which are near-perfectly competitive, are characterized by a very poor record of innovation and technical progress. Work done by later writers on other industries, however, showed the fallacy of drawing general conclusions from a limited number of industries.

J. A. Schumpeter: Capitalism, Socialism and Democracy. (Harper, New York, 1950).

J. K. Galbraith: American Capitalism: The Concept of Countervailing Power (Houghton Miflin, 1953).

J. Jewkes, D. Sawers, R. Stillerman: The Sources of Invention. (Macmillan, London, 1958)

E. Mansfield: "Size of Firm, Market Structure and Innovation", Journal of Political Economy, 1963.

structure, but the core of the Schumpeterian challenge to the former theory remained: namely, that in certain conditions, the gains which accrued to the consumer through monopoly outweighed its disadvantages. Modern economic theory, influenced by Schumpeter, lays stress not on the hypothetical ideal of perfect competition but on the idea of workable competition[2] first posited by J. M. Clark (now often termed the New Competition): any discussion of workable competition revolves round the question of the mixture of monopoly with competition which modern industrial conditions make feasible: the aim is to secure as far as possible the positive benefits of large-scale enterprise without losing the spur of competitive conditions.

Granted that it is evident that the modern need for "bigness" in industry renders a degree of monopoly inevitable, the question arises as to how to decide what amount is necessary or prmissible in any given industry, and how to translate what may be a complex formula into terms suitable for legislation and administration.[3]

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[2]J. M. Clark:"Towards a Concept of Workable Competition", American Economic Review, 1940, and Competition as a Dynamic Process, Brookings Institute (Washington, 1961).

[3]One problem must be briefly referred to. Different measures of concentration exist, and none is ideal. They include the evaluation of gross output (which involves double-counting) of net output or a value-added concept, of the employment concentration ratio, which may risk under-

Assuming that one or more measures of concentration have been decided upon, the question is what degree of concentration, in its terms, can be considered feasible for any industry. The most obvious point which comes to mind is that any universal test, aiming at applying to all industries, is unlikely to be satisfactory for some at least of those industries. To take two extremes, it is unlikely that the limits of concentration which might justly apply to the confectionery industry would also be suitable for the steel industry. Weston therefore mentions[4] some of the simpler universal tests for evaluation only to dismiss them as impracticable. For instance, to limit the size of firms absolutely (by reference, say, to the amount of total assets or a maximum number of employees) would be impossible, since the permitted maximum suitable for different industries would vary. A prohibition control of more than a certain degree of the market, though

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stating the degree of concentration, since the largest units on the whole will probably be most capital-intensive, or of the number of establishments in the industry. (R. Evely and I. M. D. Little, op. cit.) All of these methods of measurement have some especial benefits for particular industries; probably the best overall measure is that of net output, although gross output is more frequently used for convenience, in spite of the double-counting disadvantage. More than one measure could, of course, be used.

[4]J. F. Weston: op. cit.

praiseworthy as being aimed at the prevention of dominance, is open to the same objection, with the added difficulty that it may prevent needed consolidation in pioneer industries. These objections operate convincingly against the present British legislation controlling mergers and monopolies, which is a mixture of both the above mentioned tests.

It is clear that optimum criteria for regulating monopoly must be far more flexible, and related to the industry's requirements. It is, in the long-run, impossible to fight against a process of concentration which the particular conditions of a given industry make essential. No legislation can prevent concentration and disappearance of firms if this is the inherent characteristic of an industry. If an industry's path is tending towards oligopoly, and some firms have already amalgamated, then the process cannot really be halted, for, as Neale[5] points out, mergers by the other firms may be essential if they are to meet the competition and survive in the company of the giants already formed by merger. In such circumstances legislation against mergers in general or against those involving specific size and concentration, if severe enough to be effective, will simply result in the failure

[5] A. D. Neale: op. cit.

and disappearance of the weaker firms: concentration will take place in any case, but by a different process. The moral is that the kind of concentration which is essential to an industry cannot be limited by any legislation.

It seems essential, then, to try to distinguish between those movements towards concentration which are inherent to the industry and should be allowed, and those which have not this justification and which are therefore the result of predatory behaviour or true "monopolization" on the part of entrepreneurs. Here the behaviour of a firm represents important evidence: the deliberate intention of ousting a competitor can be inferred from the firm's strategy: exceptionally low prices for temporary periods, fighting brands, concealed rebates all form part of the tactics of a price war designed not so much to expand a share of the market as to eliminate opposition. Yet, while some inference can be drawn from this kind of behaviour, again it is by no means conclusive. The behaviour in question may be the result of the pressure towards concentration exerted by the industry's needs, forces of which the predatory entrepreneurs themselves may be unaware. It may be useless to try to find out from the businessmen themselves why they are exhibiting aggressive tactics: many will be unaware of their motives, and even the most perceptive may be conscious only of the firm's immediate needs without seeing the underlying pattern of forces which is determining these needs. It will probably be more relevant to judge the inevitability or otherwise of concentration by two main objective criteria: the technical and structural requirements of the industry, and the particular characteristics of its markets.

The processes which lead industries inexorably towards concentration are inseparable from the main justification of mergers, which are the structural and technical requirements of the industry. These can be grouped under two main headings: economies of scale and technical progress.

Economies of scale flow only from size, but their importance may vary greatly in different industries; they will tend to be more significant in industries requiring large-scale plant and machinery, but this rule is not invariable. Some small plant operations may show considerable economies of scale, if the processes are such that they can be broken down and subjected to automation processes. The need for economies of scale, and the justification for firms merging to secure them, can only be decided by a detailed study of the processes of a given industry. It could be urged that only a convincing demonstration of economies of scale should be accepted as an adequate reason for allowing mergers.

Innovation and technical progress are tied up with scale in two ways: first, the kinds of industry in which technical progress is most important will often (although not invariably) be those which operate large-scale plant and machinery, and which will therefore tend to be fairly large-scale already; in addition, it is mainly large (large, that is, relative to the size of the market) firms which can finance more research and innovation. Secondly, the costs of such innovation may be so great that it is only through large-scale utilization of the new process that the firm can hope to recoup its outlays. A high rate of innovation in an industry will therefore exert its own pressures towards consolidation, as a result of this two-way causal connection. The nature of the market will also be of importance. A market which stresses multiplicity and variety of brands will not in general be so conducive to high concentration as one where innovation and cheapness are more important. The market for soaps will therefore tend, other things being equal, to be more fragmentized than that for cotton reels. It follows that the degree of concentration cannot be properly evaluated without considering the pressures towards cheapness, modernity and uniformity which the particular market for a commodity may be exerting at the expense of variety, individuality, and multiplicity of outlets.

It would be, however, an error to assume that the degree of concentration is the sole important aspect to consider, or that the amount of concentration can be automatically equated with the degree of monopoly. The significance of a high proportion of the market being held by one firm, for example, may depend largely on the strength and competitive power of the remaining firms. Again, a highly concentrated industry[6] need not have monopolistic or oligopolistic conditions if its products are genuinely replaceable by others;[7] the degree of substitutability may be as important as concentration in affecting competition. In addition, the degree of concentration may be offset by other factors, such as countervailing power on the part of buyers.[8]

To define the market for a given industry is not always easy. The natural market would seem to be the most natural choice for a product, yet may be unrealistic

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[6]An industry may be defined as a group of firms producing products which are perfect or close substitutes for each other. This may not always be easy to determine, since for the economists' test of cross-elasticity of products, the relevant data is not usually available. The question can only be decided by such empirical data.

[7]R. Evely and I. M. D. Little: _op_. _cit_. P. Sylos-Labini: _op_. _cit_.

[8]R. Evely and I. M. D. Little: _op_. _cit_. J. K. Galbraith: _op_. _cit_.

if the company's sales are totally limited to certain areas or provinces, or to a certain class of the national market. Here, the individual firm may secure a monopoly in the limited area or class, yet claim immunity from prosecution on the grounds that substantial competition exists outside the limited market, but in the national, or even international market. The question can be examined only as one of fact, on a basis of how practicable it is for competitors to enter the restricted market; this will depend on such factors as the nature, perishability and price of the product, and the relative importance of transportation and transportation costs.

In any case, in contemporary times, the horizontal market may not be the most relevant one to examine. Corwin Edwards[9] has noted the reality of the power conferred by vertical integration; this may include a vertical monopoly of the sources of raw materials, on which the firm's rivals as well as itself may be dependent, or control over wholesale or retail outlets. The kind of control secured by vertical integration may be significant, since the elimination of competition can extend to all levels of the productive and distributive processes.

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[9] Corwin Edwards: Maintaining Competition (McGraw Hill, New York, 1959).

In view of the prevalence of vertical integration, the market again becomes less susceptible to definition. Yet, as Neale[10] points out, professional economists may magnify the difficulties here through too great reliance on theoretical concepts. The businessman will usually know what his real market is, and limit his attempts to defeat and oust competitors to the areas which he himself has defined. It follows that the approximate extent of the market can often be empirically determined by studying the entrepreneur's behaviour, and thereby finding out what he himself considers the market to be. The theory of "monopolization" or the intent to monopolize, assumes in this connection a new importance, distinct from what it is usually given. In its more usual context, as an indicator of blameworthy activity, its importance is overrated; as has been pointed out, it is often difficult to distinguish true monopolization intent from vigourous competitive behaviour, and, whatever the businessmen's intentions, there may be little significant difference in the results of their actions. But as an indicator of what the market is, it may have exceptional importance; the businessman will not usually expend strong aggressive efforts against another firm unless the latter threatens

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[10] A. D. Neale: op. cit.

to a significant extent his own market.

What seems to emerge from the foregoing analysis is that for each industry the need for concentration must be judged by reference to the need for economies of scale, and for technical progress, and in relation to the pressures exerted by the individual market. A realistic attempt must be made to define that market, by reference to entrepreneurial behaviour rather than theoretical analysis, and the significance of concentration within that market should be assessed by considering the degree of competition offered by other products and other markets which may be nominally outside the industry's area of competition. Only in the light of this kind of analysis can it be decided, even tentatively, what degree of concentration is permissible, and accordingly at what point mergers and monopolies should be controlled.

The second criterion which now comes into operation is that of behaviour: of how monopoly power, if it exists, is used. It is required that the firm possessing monopoly power should show either that no detriment to the public results, or that, if social costs are incurred, that these are considerably outweighed by the benefits conferred by the monopoly.

To some extent, the evidence here overlaps the 'justification' criteria: a convincing demonstration of economies of scale and technical progress partly satisfies the requirements of this section: indication of gains in productivity or efficiency would also be relevant here. But it would be a mistake to assume that the advantages of a monopoly are necessarily synonymous with the benefits conferred by it on the public; one hardly needs to point out the distinction between those monopoly advantages which result in concommitant benefits to the public, and those which accrue solely to the monopolist or his shareholders. For the consumer, the most important questions are those of product price and output, and the question, for him, is whether prices are as low, and output is as high (in quantity, quality and variety of brands) as they would be under more competitive conditions. These questions in fact refer to the extent to which the benefits of the demonstrated advantages (economies of scale, technical progress) are passed on to the consumer rather than being retained by the monopoly.

While the question of output is easy enough to determine objectively (the test being that all would-be buyers are satisfied) this is not the case with problems of price and cost. Perhaps on no other single question does the economist find it more difficult to put his theoretical tools to practical use; economic theory does not, it must be re-emphasized, teach its practitioner to determine what a fair price is, or qualify him to advise a businessman on the determination of either price or output. The considerable theoretical gains in this field are of little or no practical value in helping an investigating tribunal to decide whether or not a monopoly price is too high. Too high by comparison with what? Presumably (since nobody can know what the price might have been if monopoly had not been present) with some norm of a fair price, or with the Hall and Hitch concept of full cost plus a certain admitted percentage. This answer, however, clearly begs all the relevant questions, such as what standards determine a fair price, or what criteria of efficiency make a given full cost allowable.

Perhaps a more helpful line of approach might be some test of profitability, as suggested by the theoretical study of Bain.[11] This is not in itself easy to assess, since high rates of return may result not from the monopoly power itself, but from other advantages (which may be associated with it), such as efficiency, or innovation gains. These, of course, are gains to be encouraged by authority. (In addition, there may occur temporary

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[11] J. S. Bain: "The Profit Rate as a Measure of Monopoly Power", _Quarterly Journal of Economics_, February, 1941. Bain's study showed that, for his sample, the profit rates of firms in industries of high seller concentration tended to be larger than in industries of lower concentration. The findings applied mainly to large firms.

windfall gains, or capital gains on investments, profits which in the present context might be described as neutral. There is no reason, however, why some attempt should not be made to quantify and isolate these.) It could be argued that if innovation or efficiency gains are properly translated into lower costs, and therefore prices, then excess gross profits will disappear. Similarly, net profit should be no more than reasonable if any excess gross trading profits which remain are devoted to research or the costs of innovation. By these criteria, the assumption would be that a monopoly which showed an unusually high rate of net profit for distribution[12] over more than, say, two years, was failing to meet its responsibilities to the public. This viewpoint seems remarkably similar to that of an aggressive left-wing trade unionist, but it is hardly possible to reach any other conclusion. Perhaps, in any case, in an era in which widespread governmental regulation, by governments of all shades of political colour, of private enterprise is the rule, this conclusion is not so surprising after all.

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[12]The finding that the rate of profit was 'unusually' high would be by reference to the following criteria, in order of preference. (a) The rate prevailing over the highly competitive section of the industry, if such a section existed. (b) Failing this, the rate prevailing in a similar industry where competitive conditions existed. (c) Failing (a) and (b), a rate of return to equity regarded as normal in the conditions prevailing at the time.

It remains to consider what measures, in the light of the foregoing discussion, could best be taken to control mergers and monopolies, bearing in mind that legislation must be fairly clear cut if it is to serve as any sort of guide to administrators and businessmen alike.

Some economists,[13] who are on what might be called the most "pro-competition wing" of the profession, consider that concentration has already gone too far or far enough in industry as a whole. On these grounds they suggest either controlling all future mergers by some kind of tribunal or alternatively, prohibiting all mergers (except those resulting from failures or bankruptcies) but leaving the onus on an individual firm to show why an exception should be made in its case. Their assumptions appear to be questionable, but the main objective to their proposal is a practical one. The administrative burden of

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[13]Corwin Edwards: op. cit.

investigating each and every merger which claimed justification (and one assumes that most firms seriously projecting a "take-over" would at least try to gain permission) would be seriously heavy. In the case of many small firms, permission would invariably be granted, and the investigatory process seen in advance to be unnecessary. The objection of unnecessary work applies the more strongly if services and labour are included as subjects for mergers.

A more realistic method would be to determine in advance the degree of concentration permissible in any industry, and to subject the firm possessing a greater degree of market control, or proposing a merger which would confer such control, to investigation by a suitably qualified tribunal. The firm concerned (unless it wished to abandon its plans in the case of a merger) would then have to defend the actual or proposed merger on the two counts which have earlier formed the subject of discussion in this chapter: namely, the "justification" defence, which is largely technical, and the "no public detriment defence" which works in terms mainly of price, output and results to the consumer. In the case of a proposed merger, future results would have to be estimated as far as possible; provision would be made for possible error here by legislating that if the merger were permitted and carried out, the firms could later be re-examined under the monopoly definition if this seemed advisable. This method suggested here is, of course, very similar to the present British method of control; the chief difference suggested is that the investigatory process should apply at a level of market control far below one-third. At the one-third level, concentration may be beginning to reach its peak. It is often, therefore, the amalgamations of medium-sized firms which are most significant in determining the future pattern of concentration, and resultant structure of an industry. The "barrier" figure for mergers would therefore be designed to include the mergers of medium-sized firms as subjects for investigation.

It has been earlier pointed out that no general figure is likely to be properly applicable to all industries. Ideally, therefore, a limit would be fixed for each individual industry, after a detailed survey of the conditions and technical needs of each; again, an industry securing or proposing to secure a greater degree of control would have to show cause by the two criteria. Whether or not this proposal could in practice be carried out would depend on the amount of funds available to anti-trust authorities in any country: this method is likely to prove expensive because of the high cost of investigating an industry.

Remedial measures appropriate to a failure to pass one or other of the "criteria" tests would have to be devised (whichever of the two methods outlined above were adopted). It would appear to be most satisfactory to regard the first test (the "justification" or technical criterion) as the qualifying test; failure to pass this would result in the refusal of permission for a proposed merger, and if practicable, the dissolution of a recently acquired merger or monopoly. In the case of an established monopoly (these exceptions would exist only in the initial period of the new legislation), dissolution would probably not be feasible, and the remedial action appropriate to the second criterion would apply.

Failure to pass the second criterion must next be considered. Apart from easily discernible hardships, such as restriction of output or discrimination in supplying, the abuse of monopoly power would consist mainly in too high prices, failure to engage in sufficient research and innovation, or failure to pass on the gains of technical progress to the public in lower prices. Any of these abuses would result in too high a rate of net profit. The remedies could be both short and long-term. One short-term remedy would be to deprive the monopoly of the fruits of wrong-doing through heavier taxation, specially designed for monopoly firms on profits above a previously fixed rate, on the grounds that these are "true monopoly profits". One objection, of course, which could be raised here is that there is a risk of penalizing the gains of greater efficiency (apart from any efficiencies resulting from the monopoly). To this there are two answers: first, an opportunity would be given to a firm in this position to demonstrate efficiency gains, the onus being on the firm to prove its point: secondly, it could in any case be maintained that such gains must be, to some degree at least, passed on to the public, and that a monopoly has a heavier responsibility in this respect.

On a more long-term level, the monopolies tribunal would endeavour to persuade the offending firm to remedy its errors, after which its case would be reviewed. In most cases, given an already established climate of some mutual good-will and co-operation, this effort would probably be successful. As has been stated earlier, modern industrial firms are on the whole conscious of the necessity for a good image and satisfactory public relations; an intelligent management would in addition realize the futility of trying to oppose the monopolies tribunal. If the firm proved obdurate, the tribunal would then be entitled to control the policy of the company on major issues; this would include control over price and output, and over the firm's research and innovation projects, and would continue for an indefinite period.

It remains to be considered to what extent the existing anti-monopoly legislation of Canada and Great Britain could be adapted to the optimum scheme outlined above. As has already been pointed out, the British procedure is similar in many ways to the optimum; the only salient change needed would be to make the qualifying conditions more widely applicable, i.e. lower the fraction of market control which would justify intervention. Such a change would require an increase in the strength of the membership of the tribunal and of the supporting administrative personnel. (The separate British provisions for newspaper mergers appear to be justified and should be retained.)

At first sight, the Canadian system seems to be far removed from the optimum concept, being based as it is on rigid legal procedure. Yet the kind of empirical investigatory work required is in fact carried out by the Combines Investigation Branch (not, however, after any fixed degree of monopoly has been attained); the drawback is that the branch's work and findings have little real standing. Reform of the Canadian system would involve little more than laying the emphasis for monopoly action on the work of the branch, and no longer on the legal courts. The power to decide should preferably be vested in a specially appointed tribunal associated with the branch: this would avoid the charge that decisions were made by the civil servants, or that investigation and judgement were given by the same body. There is no reason why the formal legal structure should not remain, with the law courts acting as an appeal court of last resort to rectify any possible miscarriage of justice; indeed, there is much to be said for having some sort of an appeal court of this sort, as an escape channel, since no tribunal is infallible.[14] What is desirable is that the process of economic argument should normally be carried out in courts and by disputants equipped to understand it.

The problem of how to control mergers and monopolies has been dealt with at length, not only because it is the only serious combines problem remaining, but because in asking what degree of competition, and of concentration and monopoly power are desirable, it is posing the fundamental question for anti-trust. This question has never really been properly faced; for too many years,

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[14] An appeal court would have to recognize the kind of economic criteria cited before the tribunal. Its terms of reference would probably be most usefully limited to questions of validity, admissibility of evidence or similar purely legal points.

anti-combines activity has proceeded with no clear concept of its fundamental aims. For Canada, this resulted in a severe legal theory, and a very lenient practice regarding mergers; for Britain, the result was that there was no activity at all to control mergers prior to last year (1965). At no times has any clear and unambiguous analysis of how much competition is needed been given.

It is clear, however, that considerable theoretical assumptions are implied in the proposals outlined above. It cannot be denied that what is envisaged here is considerable government interference in, and control of, monopolies where these do not operate satisfactorily for the public benefit. This is not to say that the writer necessarily advocates government regulation, on socialist principles, of all industry; that is a different contention, which could of course be argued on its merits. What is in question here, however, is merely the control of monopoly firms, on the grounds that their market position confers upon them peculiar powers and immunities whose concommitants are additional responsibilities to the public. Nor does the writer necessarily claim that firms and companies are public utilities, whose major policies and decisions should, in their entirety, be subject to public supervision. It is only those aspects of policy which are chiefly affected by the monopoly which it is maintained should be regulated.

Canada are regarded as having some responsibility to the public appears to be indicated by those laws which regulate the safety, quality or weights of products; similarly, that monopoly in particular is not free to do as it will is indicated by the fact that the anti-combines laws exist and are accepted, even though they do not appear to succeed fully in their purpose. It is probable that government intervention is less frequent, and therefore less acceptable than elsewhere, yet, even in Canada, it seems likely that the forces tending towards centralization will operate necessarily to increase the role of government with time.

That the problem is urgent and significant cannot be doubted. Growth and full employment are major aims of most modern national economies; inflation their chief anxiety. The nature of the industrial structure has a considerable influence on whether aims can be realized, and dangers of inflation avoided. Eminent economists have pointed out that it is the price-rises imposed by the great monopoly firms, particular of those whose goods form the raw materials for other industries, which are chiefly instrumental in raising the cost of living.[15]

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[15]J. K. Galbraith: Testimony Before the Sub-Committee on Anti-Trust and Monopoly in 1957 (Part I) and in 1959 (Part II). Reprinted in Readings in Money and Banking, ed. Ritter (Houghton Miflin, Boston, 1961).

Nevertheless, it has been contended that the advocacy of the regulation of monopoly in this way involves certain value judgements and political assumptions which may not be universally acceptable, especially in Canada. It is possible that the amount of value-loaded judgement is quite limited; many of the tests suggested above could be performed objectively by any competent economist, whatever his private or political views. Nevertheless, it is true that the proposals tacitly assume the acceptance of two main concepts: first, that all firms have some degree of responsibility to the public and that those who hold a considerable degree of market power have a concommitantly greater responsibility; secondly, that government is entitled to intervene where these responsibilities are not met. It has been alleged that, while such concepts may be generally accepted in Great Britain, this is not necessarily so in Canada, where many businessmen recognize no responsibility to any outside authority.

It is, of course, true that widespread interference in all aspects of life by the government is not as much taken for granted in Canada as in Great Britain where both major political parties accept it as a necessity. Nevertheless, it may be an error to assume that the attitude of many Canadian businessmen is necessarily the attitude of the country as a whole. That all firms in

On the other hand, another prominent writer[16] points out that perfect competition with its large number of small units "too small for research and too weak for any bold action in an uncertain world" is unlikely to maximize the rate of growth. Somewhere in between, there must exist a realistic degree of workable competition which will maximize gains and minimize social costs. This degree is of kind rather than of quantity. The necessity for a regulating authority is to distinguish as far as possible between necessary and desirable concentration, and the acquisitions of unrestrained predatory power, and to ensure that, where inevitable concentration does exist, its gains are passed on to the recipient of benefit or detriment: the anonymous and faceless individual who passes in street or train or store: otherwise the consumer.

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[2]E. S. Domar: Essays in the Theory of Economic Growth (Oxford University Press, New York, 1957), p. 30.

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APPENDIX A

COMBINES INVESTIGATION ACT (CANADA)

Section 32 Sub-Section (1) of the present Combines Investigation Act reads as follows:

32.(1) Every one who conspires, combines, agrees or arranges with another person

(a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article,

(b) to prevent, limit or lessen, unduly, the manufacture or production of an article, or to enhance unreasonably the price thereof,

(c) to prevent, or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of an article, or in the price of insurance upon persons or property, or

(d) to restrain or injure trade or commerce in relation to any article,

is guilty of an indictable offence and is liable to imprisonment for two years.

APPENDIX B

COMBINES INVESTIGATION ACT:

RESALE PRICE MAINTENANCE

Section 34 of the Combines Investigation Act, which deals with resale price maintenance, was first enacted on December 29, 1951. It was amended in 1960 to provide that, where a supplier has been charged with resale price maintenance and it is proved that he refused or counselled the refusal to supply another person, no inference unfavourable to the accused shall be drawn from that evidence if he satisfies the court that he had reasonable cause to believe and did believe that that person was making a practice of employing certain predatory practices respecting the supplier's product. The section as amended provides:

> 34.(1) In this section 'dealer' means a person engaged in the business of manufacturing or supplying or selling any article or commodity.
>
> (2) No dealer shall directly or indirectly by agreement, threat, promise or any other means whatsoever, require or induce or attempt to require or induce any other person to resell an article or commodity
>
> (a) at a price specified by the dealer or established by agreement,

(b) at a price not less than a minimum price specified by the dealer or established by agreement,

(c) at a markup or discount specified by the dealer or established by agreement,

(d) at a markup not less than a minimum markup specified by the dealer or established by agreement, or

(e) at a discount not greater than a maximum discount specified by the dealer or established by agreement,

whether such markup or discount or minimum markup or maximum discount is expressed as a percentage or otherwise.

(3) No dealer shall refuse to sell or supply an article or commodity to any other person for the reason that such other person

(a) has refused to resell or to offer for resale the article or commodity

(i) at a price specified by the dealer or established by agreement,
(ii) at a price not less than a minimum price specified by the dealer or established by agreement,
(iii) at a markup or discount specified by the dealer or established by agreement,
(iv) at a markup not less than a minimum markup specified by the dealer or established by agreement, or
(v) at a discount not greater than a maximum discount specified by the dealer or established by agreement; or

(b) has resold or offered to resell the article or commodity

(i) at a price less than a price or minimum price specified by the dealer or established by agreement,
(ii) at a markup less than a markup or minimum markup specified by the dealer or established by agreement, or

(iii) at a discount greater than a discount or maximum discount specified by the dealer or established by agreement.

(4) Every person who violates subsection (2) or (3) is guilty of an indictable offence and is liable on conviction to a fine in the discretion of the court or to imprisonment for a term not exceeding two years or to both.

(5) Where, in a prosecution under this section, it is proved that the person charged refused or counselled the refusal to sell or supply an article to any other person, no inference unfavourable to the person charged shall be drawn from such evidence if he satisfies the court that he and any one upon whose report he depended had reasonable cause to believe and did believe

(a) that the other person was making a practice of using articles supplied by the person charged as loss-leaders, that is to say, not for the purpose of making a profit thereon but for purposes of advertising;

(b) that the other person was making a practice of using articles supplied by the person charged not for the purpose of selling such articles at a profit but for the purpose of attracting customers to his store in the hope of selling them other articles;

(c) that the other person was making a practice of engaging in misleading advertising in respect of articles supplied by the person charged; or

(d) that the other person made a practice of not providing the level of servicing that purchasers of such articles might reasonably expect from such other person.

APPENDIX C

(BRITISH) RESALE PRICES ACT, 1964

The most important sections of this Act are Sections 2 and 3, as under:

Prohibition of other measures for maintaining resale prices	2.--(1) Subject to the provisions of this Act with respect to registration, to the powers of the Restrictive Practices Court thereunder and to the next following section, it shall be unlawful for any supplier to withhold supplies of any goods from a dealer seeking to obtain them for resale in the United Kingdom on the ground that the dealer --

(a) has sold in the United Kingdom at a price below the resale price goods obtained, either directly or indirectly, from that supplier, or has supplied such goods, either directly or indirectly, to a third party who had done so; or

(b) is likely, if the goods are supplied to him, to sell them in the United Kingdom at a price below that price, or supply them, either directly or indirectly, to a third party who would be likely to do so.

(2) In this section "the resale price", in relation to a sale of any description, means any price notified to the dealer or otherwise published by or on behalf of a supplier of the goods in question (whether lawfully or not) as the price or minimum price which is to be charged on or is recommended as appropriate for a sale of that description, or any price prescribed or purporting to be prescribed for that purpose by any contract or agreement between the dealer and any such supplier.

(3) For the purposes of this Act a supplier of goods shall be treated as withholding supplies of goods from a dealer --

(a) if he refuses or fails to supply those goods to the order of the dealer;

(b) if he refuses to supply those goods to the dealer except at prices, or on terms or conditions as to credit, discount or other matters, which are significantly less favourable than those at or on which he normally supplies those goods to other dealers carrying on business in similar circumstances; or

(c) if, although he contracts to supply the goods to the dealer, he treats him in a manner significantly less favourable than that in which he normally treats other such dealers in respect of times or methods of delivery or other matters arising in the execution of the contract.

(4) For the purposes of this Act a supplier shall not be treated as withholding supplies of goods on any such ground as is mentioned in subsection (1) of this section if, in addition to that ground, he has other grounds which, standing alone, would have led him to withhold those supplies.

(5) In any case where, by virtue of this section, it would be unlawful for a supplier to withhold supplies of goods, it shall also be unlawful for him to cause or procure any other supplier to do so.

Exception for measures against loss leaders.

3.--(1) It shall not be unlawful by virtue of section 2 of this Act for a supplier to withhold supplies of any goods from a dealer, or to cause or procure another supplier to do so, if he has reasonable cause to believe that within the previous twelve months the dealer or any other dealer to whom the dealer supplies goods has been using as loss leaders any goods of the same or a similar description, whether obtained from that supplier or not.

(2) The reference in this section to the use of goods as loss leaders is a reference to a resale of the goods effected by the dealer, not for the purpose of making a profit on the sale of those goods, but for the purpose of attracting to the establishment at which the goods are sold customers likely to purchase other goods or otherwise for the purpose of advertising the business of the dealer:

Provided that a sale of goods shall not be treated for the purposes of this section as the use of those goods as loss leaders --

(a) where the goods are sold by the dealer at a genuine seasonal or clearance sale, not having been acquired by the dealer for the purpose of being resold as mentioned in this section; or

(b) where the goods are resold as mentioned in this section with the consent of the manufacturer of the goods, or, in the case of goods made to the design of a supplier or to the order and bearing the trade mark of a supplier, of that supplier.

APPENDIX D

COMBINES INVESTIGATION ACT (CANADA): MERGERS AND MONOPOLIES

Section 33, taken with paragraphs (e) and (f) of section 2, makes it an offence to participate in a merger which has or is likely to have the effect of lessening competition to the detriment of the public or to participate in a monopoly which has been operated or is likely to be operated against the public interest.

Section 33 provides:

> 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.

Paragraphs (e) and (f) of section 2 read:

> (e) 'merger' means the acquisition by one or more persons, whether by purchases 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) or (iii), is or is likely to be lessened to the detriment of or against the interest of the public, whether consumers, producers or others;

(f) 'monopoly' means a situation where one or more persons either substantially or completely control throughout Canada or any area thereof the class of 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.

APPENDIX E

(BRITISH) MONOPOLIES AND MERGERS ACT, 1965

The most important sections of this Act are Sections 6, and subsections (1) and (2) as under.

New powers in relation to mergers

General provisions about mergers.

6.--(1) Where it appears to the Board of Trade that it is or may be the fact that --

(a) two or more enterprises, one at least carried on in the United Kingdom or by or under the control of a body corporate incorporated in the United Kingdom, have, not earlier than six months previously, ceased to be distinct enterprises; and

(b) either --

(i) as a result, the following conditions prevail, or do so to a greater extent, as respects the supply of goods or services of any description, that is to say, as respects the supply of goods of any description, at least one-third of the goods of that description which are supplied in the United Kingdom or any substantial part thereof are supplied by or to any one person, or by or to the persons by whom the enterprises (so far as they continue to be carried out) are carried on, or, as respects the supply of services of any description, the supply of services of that description in the United Kingdom or any substantial part thereof is, to the extent of at least one-third, by or for any one person, or by or for the persons by whom the enterprises (so far as they continue to be carried on) are carried on: or

(ii) the value of the assets taken over exceeds five million pounds;

the Board of Trade may, if they think fit, refer the matter to the Commission for investigation and report and, if they do so, shall publish the reference in such manner as they think most suitable for bringing it to the notice of the persons affected:

. . . .

(2) On a reference under this section the Commission shall investigate and report on the facts, that is to say (subject to subsection (4) below) on the question whether subsection (1)(a) and (b) above are satisfied; and if the Commission find they are satisfied, the Commission shall also investigate and report whether the fact of the enterprises having ceased, in the circumstances of the case, to be distinct enterprises operates or may be expected to operate against the public interest; and if the Commission so find, the Commission shall consider whether any and if so what action (whether under this Act or otherwise and whether by a Minister of the Crown, Government department or other authority or by the parties concerned themselves) should be taken to remedy or prevent any mischiefs which result or may be expected to result, and may, if they think fit, include recommendations as to such action in their report.