

ANTI-COMBINES ENFORCEMENT IN CANADA

1945-58

by

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In the early chapters of the thesis several theories pertinent to anti-combines legislation are discussed and the evolution of anti-combines legislation is traced. Following which, the enforcement of the various sections of the legislation relating to the different types of offences--combinations, mergers and monopoly, resale price maintenance, and predatory and discriminatory pricing--is reviewed.

Central to the thesis is a discussion of the relative applicability of the per se and rule of reason approaches to the various types of offences. The ease of enforcement of the per se rules is contrasted with the greater flexibility of rule of reason. It is concluded that per se rules may be used over a fairly wide area of enforcement without ill effects to the efficiency of the Canadian economy.

PREFACE

It is the purpose of this thesis to report on and evaluate anti-combines enforcement in the period 1945-58. This period has been chosen for two reasons. First, in no period of similar duration has so much serious effort been directed to the problem of dealing with restrictive and monopolistic trade practices. Second, and of necessary importance to the writer of a thesis, it has not been adequately covered in other writings.

It is believed that in a thesis of this kind, the main emphasis should be on reporting. That is, full coverage of the legislation, its background, published reports of investigations, and prosecutions should be provided. However, it is also felt that the more dangerous task of evaluation should not be avoided. This view is held with particular conviction with regard to the period under review. It is necessary that the legislation and enforcement procedures be subjected to review and criticism before some of their less desirable features are generally accepted and are thus more difficult to change. In keeping with this view, criticism has been freely made where it was felt to be necessary.

The major part of this thesis was written during the summer of 1958. Only developments until that time have

been dealt with. Thus, at the time when the thesis is submitted, April, 1959, many of the figures dealing with the number of reports and similar matters will be somewhat out of date. I trust that the reader will appreciate the difficult task one faces in trying to keep apace of the swift march of events in the area of combines enforcement.

I would like to acknowledge several debts of gratitude. The foremost debt I owe is to my thesis advisor, Professor I. Brecher, who willingly gave of his time when he was already burdened with work from other quarters and was never failing in his patience and encouragement. To Mr. J. J. Quinlan, Combines Officer, who never refused a request for assistance, I am also grateful. Whatever appreciation I have acquired of the legal point of view is largely due to Professor M. Cohen of the Faculty of Law and the students who attended his seminar in the spring of 1958. To the list of creditors must be added the library staff at Purvis Hall, McGill University, whose efficiency and co-operation contributed in no small way to the completion of this thesis.

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CHAPTER I

INTRODUCTION

The word "combines" when used in the term combines enforcement has a much broader meaning than one would ordinarily derive from a dictionary definition. However, such was not always the case. The earliest Canadian legislation in this field limited itself to prohibiting two or more companies or individuals from combining to agree on price or other matters. Thus, in the beginning, the area coming under the heading combines enforcement could be readily understood. Through the years, however, a number of changes were made, until, at the present, monopolies, mergers, discriminatory pricing and resale price maintenance, as well as combinations, all fall under the heading of combines enforcement.

This area is of interest to both the lawyer and the economist. The interest of the former may be readily appreciated. Although the combines laws may have a different rationale from that of other areas of legislation, they are, nevertheless, laws; as such, the lawyer must be prepared to know and understand them. The economist, on the other hand, finds interest in the combines laws only insofar as they affect the working of the economy. Thus, the statutes relating to banking, old age pensions, unemployment benefits, public utilities and transportation, are

to name a few, of concern to the economist. In some instances, the laws are of a more or less direct result of the application of economic reasoning, as is the case with public utilities where regulation is based on the rationale that they are "natural monopolies". Similarly, the rationale behind the creation of a central bank may be traced to the reasoning of economists. Other statutes, such as those relating to old age and unemployment assistance, owe their existence almost solely to humanitarian reasons. Nevertheless, they may assume importance in problems that are studied by the economist -- e.g. unemployment.

The passing of laws involves value judgments, almost by definition. This fact is in no way changed because the legislators look to economists or their theories for guidance. Implicit or explicit, every law has as its basis certain social or moral aims. However, this is not to say that they are always achieved. Faulty analysis or an incomplete or incorrect knowledge of the facts, may lead to results very different from that intended by the legislators. Or, just as likely, the effects may not be readily perceived, and the legislators may not be sure whether their course of action was wisely taken. The economist clearly has a role to play in the instances where confusion or misconceptions arise because of faulty economic analysis. However, this role should be limited to economic analysis unless it is made clear that other judgments are involved.

The area of combines enforcement is an excellent example of a subtle mixture of political value judgments and economic analysis. It is unfortunate that it is not always made clear that there are these two facets to the "monopoly problem". But it must be recognized that not all parts of combine legislation are equally affected by political considerations; some aspects of the legislation are almost purely the result of economic reasoning, as, for example, the prohibition of resale price maintenance (See Chapter III). However, no matter what the extent of political considerations, the importance of the economist's voice in combines enforcement cannot be easily overestimated.

Economic theory has played an important role in setting standards by which the various forms of market structure and behaviour may be judged as social or antisocial. The message handed down by Adam Smith that monopoly was undesirable and competition desirable, was and is, generally accepted. However, there has been much important change in economic theory as regards the concepts of competition and monopoly. Since Chamberlin and others made their move to destroy the simple dichotomy of competition and monopoly, there has been a host of attempts to redefine and explain what types of market structure and behaviour are necessary to preserve a sound free enterprise economy. The second chapter discusses some of these attempts. The area covered includes the theories of monopolistic

competition, workable competition, creative destruction and countervailing power.

Chapter III deals with the legislation and its enforcement. The emphasis is placed on the changes which took place during 1945-58. However, the progress in legislation since 1889 is provided as a background. This chapter is intended to provide, along with Chapter II, some of the necessary information against which the detailed discussion of enforcement experience in the following three chapters may be carried out.

Combines legislation is divided into three parts for purposes of the thesis. Resale price maintenance and discriminatory pricing are placed together to form one division and are discussed in Chapter IV. Chapter V is concerned with combinations, and Chapter VI contains a discussion of mergers and monopolies. Each of the three chapters concerns itself with the working of the legislation, its interpretation by the courts and the Restrictive Trade Practices Commission and its economic rationale (or lack of it). The amount of attention given to individual cases varies widely. The merger and monopoly cases are discussed rather extensively because of their importance to the search for the legal definition of these offences. Although the reports on resale price maintenance by the Restrictive Trade Practices Commission are also discussed individually, the amount of space devoted is relatively short.

In Chapter V, on combines, a case by case appraisal is completely abandoned. As should be clear in each of the chapters, the approach adopted was dictated by the material, and it is believed that the three chapters, along with Chapter III, provides a fairly comprehensive review of enforcement experience over the period under discussion.

CHAPTER II

AN OUTLINE OF ECONOMIC THEORY PERTINENT TO ANTI-COMBINES POLICY

A brief review of some economic writings is presented. An attempt has been made to demonstrate that economic theorizing as regards the various market structures and their performance has been less uniform in recent years. The various theories that have been put forward have pointed to the difficulties facing those responsible for anti-combines policy.

The markets in the economy, until fairly recently, have been viewed as either monopolistic or freely competitive. However, although monopoly was clearly defined -- one seller in the market -- free competition was explained more by way of exclusion, markets that were not monopolistic were taken to be competitive.¹

The Chamberlin Approach. Chamberlin, in destroying the economists' reliance on free competition and monopoly theories as adequate tools with which to analyze and explain the workings of the markets in the economy, also destroyed much of the economists' ability to make judgments on the workings of these

¹Adam Smith, The Wealth of Nations, (5th edition edited by Edwin Cannan; New York: Random House, 1937), p. 342.

markets. As long as it was accepted that the majority of industries in the economy were perfectly competitive, the economist was in a position to make some reassuring statements about these industries. Two important a priori predictions could be made about industries in equilibrium:

(1) That firms were producing at the optimum scale;
and

(2) Firms were not making excessive profits.²

Whether industries ever reached equilibrium or not is another matter. Suffice it to say that, as long as industry was regarded as close to perfect competition and as long as there was a tendency for industries to move in the direction of equilibrium, the economist could still feel that he was not too wide of the mark in his a priori predictions regarding costs and profits.

To a great extent, Chamberlin changed this. His thesis is that markets are never purely monopolistic, seldom are purely competitive; usually a blend of both. The monopolistic characteristics are due to the fact that each firm has a monopoly of some sort that is unique to itself and cannot be duplicated by any of its rivals. Examples offered are location, trademark, quality of service, patents and copyrights. The

²For a discussion of pure competition, see E. H. Chamberlin, The Theory of Monopolistic Competition, (6th ed.; Cambridge; Harvard University Press, 1948), Chapter II.

competitive characteristics are due to the fact that there are always substitutes that are competing with any firm's products.³

The large group case. Comparison of monopolistic and pure competition offered some disturbing results. Taking the large group case with easy entry, Chamberlin found that normal profits and production at the optimum scale are mutually exclusive possibilities for any firm. When the industry is in⁴ equilibrium, profits are reduced to normal, but production must be carried on to the left of the optimum. When supernormal profits are being earned, production may take place at the optimum or it may not. The important thing is, however, that there is nothing in the entrepreneur's drive to maximize profits that will force him to that scale of production. Thus, it is

³Ibid., Chapter IV.

⁴R. Triffin, Monopolistic Competition and General Equilibrium Theory (Cambridge; Harvard University Press, 1947), Chaps. III and IV, carried Chamberlin's ideas to their logical conclusion. He points out that under monopolistic competition, it is inaccurate to conceptualize the economy as a series of separate, independent industries consisting of a definite number of firms. The essential unit is the firm; its actions affect other firms, the extent depending on the degree of substitutability between its product and theirs. Thus, properly speaking, there are no industries, only firms, each connected to a greater or lesser degree to others.

If 100 per cent accuracy is desired, Triffin must be adhered to. But for most practical purposes it is necessary to retain the industry concept, which generally means following the usage employed by the businessman and the government statistician; but it is also necessary to bear in mind -- especially for purposes of anti-combines enforcement-- that there may be occasion when the commonly supposed boundaries of the industry may have to be widened in order to take into account close substitutes.

possible to have excess capacity for long periods with the producers finding nothing amiss, as they are covering costs and earning profits.⁵ Chamberlin concludes that "the theory affords an explanation of such wastes (excess capacity) in the economic system -- wastes which are usually referred to as "wastes of competition". In fact, they could never occur under pure competition, and it is for this reason that the theory of pure competition is and must be silent about them, introducing them, if at all, as 'qualifications' rather than as parts of the theory. They are wastes of monopoly -- of the monopoly elements in monopolistic competition."⁶(p. 109)

It may readily be seen that the theory of monopolistic competition placed pure competition in a strong position as a welfare ideal. Of course, it was no more than an ideal, because the monopolistic elements in monopolistic competition are entrenched in the very bones of society and can not very well be removed. But pure competition when considered as an ideal may easily be distorted; it is necessary to consider the demand side as well as the cost side when it is being used for policy considerations (and, of course, otherwise).

For a firm to earn profits, there must obviously be a demand for its products. Part of this demand may be considered as a demand for the general product of the industry;

⁵Chamberlin, op. cit., p. 81 ff.

⁶Ibid, p. 109

but part must also be considered as a demand for the particular way in which the firm has diversified its product. Therefore, product differentiation must be considered, on the demand side, as an addition to welfare and not a reduction from it. If pure and monopolistic competition are to be compared on the basis of welfare, the gains from product heterogeneity in monopolistic competition must be balanced against the loss in efficiency due to higher costs. It is clear that pure competition cannot be looked to in all cases as the ideal if it means changing an industry from monopolistic competition; because "whenever there is a demand for diversity of products, pure competition turns out to be not the ideal but a departure from it."⁷

The small group case. Monopolistic competition has already been discussed for situations where there is a large group of firms comprising an industry, and easy entry. The small group case will now be considered. The difference between the two is that in the large group case the individual firm may act to maximize profits without taking into consideration the effects of his action on other firms in the industry, and, therefore, need not expect any reaction to his profit-maximization behaviour. The firm in the small group industry,

⁷E. H. Chamberlin, "Product Heterogeneity and Public Policy" American Economic Review, Vol. XL, Papers and Proceedings, (May, 1950) p. 92

on the other hand, must, if it is realistic, take into account that its behaviour will affect the other firms in the industry, and that, if affected adversely, they will retaliate. Thus, if a firm seeking to increase profits lowers price, other firms, strongly affected by the reduction in their sales, will lower price as well to regain their former position. Sales may, then, return to their original distribution before the cut in price. The firm that originally cut price to increase sales and profits has not benefited, because, after the other firms have followed suit, it may be earning less revenue (assuming the industry demand curve is inelastic at that point) and has, therefore, weakened, rather than improved, its position. The individual firm in the industry, foreseeing these results, will, of course, refrain from such rash action and price will remain high. Chamberlin thus provides perhaps the best sure defense oligopolists can provide for high uniform prices in their industry, without collusion. For collusion is unnecessary to the result. All that is required is that all the firms in the industry recognize their interdependence.

Another realistic possibility suggested by Chamberlin is that there is no determinate solution for the case of oligopoly over a considerable range of price and output. Although the individual firms recognize their interdependence, they are not sure of each others' reactions and do not know in which way any of their attempts to increase their respective shares of the market will be acted upon by their rivals.

However, even in this case, the range of indeterminacy does not begin, where there is product differentiation, until a level above the perfectly competitive price and output.⁸

Selling Costs and the product as a Variable. Chamberlin's stress on the importance of differentiation as comprising one of the most important elements of monopoly in monopolistic competition very naturally led to greater stress being laid on the product as an important variable. Selling costs are also portrayed as playing an important role in the affairs of the monopolistic competitor. Since the individual seller, unlike his counterpart in pure competition, is faced with a limited demand for his product, selling costs play an important role in increasing his demand and in preserving his present share of the market from the incursions of other aggressive sellers. Selling costs and product differentiation go hand in hand. The former plays the role of accentuating in the minds of the consumer the real or imagined difference between products that essentially serve the same functional purpose and that would in the absence of advertising often be considered as almost identical.⁹

Workable Competition

A reaction to monopolistic competition. The concept of workable competition may best be viewed as growing out of a

⁸Chamberlin, The Theory of Monopolistic Competition, p.100 to 106

⁹Ibid., Chapter VII

reaction to the results of monopolistic competition theory. Chamberlin, it has been seen, included two important variables in his analysis that had previously not had much importance attached to them. These were selling costs and the product. J. M. Clark¹⁰, in taking issue with the pessimistic results (chronic excess capacity, high prices) of Chamberlin's analysis, broadened and elaborated that analysis. Although noting that the "specific character of competition . . . depends on a surprisingly large number of conditions . . . that the number of mathematically possible combinations runs into the hundreds of thousands."¹¹ Clark lists what he considers the ten most important conditioning factors. It will be noted that the static analysis employed by Chamberlin, of necessity, does not take many of them into account. They are as follows:

- (1) The degree of differentiation of the product.
- (2) Number of firms and their size distribution.
- (3) Geographical distribution of producers and consumers.
- (4) Degree of current control of output.
- (5) Character of market information.
- (6) Channels of distribution.
- (7) Short-run cost conditions.

¹⁰"Toward a Concept of Workable Competition", American Economic Review, Vol. XXX, (June, 1940), p. 241-245

¹¹Ibid., p. 243

- (8) Long-run cost conditions.
- (9) Flexibility of expansion and contraction of output, and
- (10) Method of price making; supply-governed or quoted price.

From the conditioning factors cited above, two broad market classifications are derived. One includes many sellers and the other conforms to oligopoly. The first classification includes, in addition to many sellers, standard products, known price, and free entry. (Although conditions of entry are not specifically mentioned in the ten conditioning factors, it may be taken to follow naturally from those mentioned.) This classification is further sub-divided as to mobility. Where there is perfect two-way mobility of the factors of production, average cost equals marginal cost and is covered by average revenue. When the condition of mobility is removed and output is currently controllable by the producer, fluctuating demand may cause average price to fall below average cost so that it is not covered over the long run. The same thing may occur when output is not currently controllable, but with added problems such as the "cobweb theorem".

The second broad classification is divided into pure oligopoly and "monopolistic competition". The conditions of pure oligopoly include standard products, few producers, and, generally, formally free entry; but no exit without loss.

This classification is further sub-divided into two cases:

(1) Price is supply-governed. The individual firms' demand schedules are downward sloping, though less steep than the industry's.

(2) Price is quoted and individual demand schedules are downward sloping. Demand schedules may be calculable due to spatial differentiation where prices are mill quoted and uniform, or the demand schedules may be indefinite due to limited freight absorption.

Included in the conditions of "monopolistic competition" are differentiated product and sloping individual demand schedules. Competition is seen as depending on the extent to which quality differences may be duplicated. The "monopolistic competition" category is divided into the case of quoted prices and the much rarer one of supply-governed prices.

Using the conditioning factors, the market classifications derived from them, and the realities of economic life, such as cyclical disturbances, Clark finds that "imperfect competition may be too strong as well as too weak; and . . . workable competition needs to avoid both extremes".¹² Examples are offered demonstrating that actual competition is not as ineffective and inefficient as would be expected to follow from the analysis of monopolistic and imperfect competition; average cost and demand curves are not as steep as generally represented;

¹²Ibid., p. 243

businessmen's foresight causes them to try and forestall entry by not exploiting their monopoly position to the extent that short-run considerations would demand; substitutes are increasingly made available through the advances of modern science; some imperfection (uncertainty) in knowledge causes price competition which would not take place if all customers and sellers were aware of all prices being charged; also, a few firms selling a differentiated product, where interdependence is recognized, will not automatically charge monopoly prices because the individual firms are not willing to increase prices for fear that their lead will not be followed. Monopolistic elements are also seen as leading in some instances to healthier industries. Price that only covers short-run marginal costs is not always the most desirable because of fluctuations in demand; some downward slope to the demand schedule, which will allow the producer to cover long-run average cost, is preferable. Also, complete standardization of the product where there are a few firms leads to cut-throat competition, which may be eliminated by differentiating the product.

As a desirable standard. Different writers, depending on the economic and political aims (they cannot always be separated) they consider to be most important, have treated the concept in different ways. Clark notes that a necessary consideration of competition is the nature of the option

actually open to the buyer. This idea has been readily accepted by other writers. But, whereas in some cases, a considerable number of buyers and sellers is seen as important for this end,¹³ Adelman finds this unnecessary as long as the buyer has a real choice and not just one between "Tweedledum and Tweedle-dee".¹⁴ Absence of collusion and free entry are also seen as important conditions of workable competition.¹⁵ In addition to the conditions mentioned above, Corwin Edwards adds that traders selling in a particular market must not be so situated that they are not guided by ordinary commercial incentives and so powerful that they can coerce their rivals; also, there must be easy access of traders on one side of the market to traders on the other side, unless there are natural barriers, such as ignorance or distance.¹⁶ Finally, there must be no preferential status for any traders because of political, legal, or commercial alliances.¹⁷

¹³ George J. Stigler, "Extent and Bases of Monopoly", American Economic Review, Vol. XXXII, Supplement (June, 1942), p. 2-3

¹⁴ M. A. Adelman, "Effective Competition and the Antitrust Laws", Harvard Law Review, Vol. LXI, (September, 1948), p. 1295

¹⁵ Ibid., p. 1303

¹⁶ The effective working of the market will be affected whether the barriers are natural or contrived. Presumably, Edwards believes that the presence of the other conditions mentioned will be sufficient to overcome natural barriers.

¹⁷ Maintaining Competition, (New York: McGraw-Hill Book Co., 1949), p. 9 and 10

Efforts to define workable competition have, basically, taken two directions. One seeks to define it in terms of the structural conditions of the industry, as discussed above, and the second describes workable competition in terms of effects. Adelman, not going much beyond the necessity of meaningful choice for the customer, does not see any particular market structure as necessary. However, competition in the workably competitive industry is expected to take the form of "reductions in price, improvements in quality, and a constant search for cost reductions and innovations."¹⁸ Edwards, on the other hand, is more concerned with privately held power used to exploit the weak, resist the adoption of new methods and restrict output.¹⁹ But going beyond pure economic considerations, Edwards is concerned with keeping open the channels of opportunity and preventing the excessive concentration of wealth, and is afraid lest monopoly control lead to political oligarchy.²⁰

Objective measurements. Bain would establish an objective standard by which an industry may be judged workably competitive. The method of testing he proposes would entail

¹⁸Op. cit., p. 1303

¹⁹Op. cit., p. 11

²⁰ Ibid., p. 9

examination of the results which emerge from the market process in terms of productive efficiency, the proportion of resources devoted to sales promotion effort, the rewards to investment, the utilization of opportunities to innovate, and the response of price to cyclical movements. However, lacking the tools of measurement, Bain establishes the following signs by which an oligopoly situation (the article is concerned with workable competition in oligopoly) may suggest unworkable competition: a profit rate generally above or below the accepted rate of return, "scale of many firms seriously outside the optimal range", chronic excess capacity, selling costs above a designated proportion of total cost, and a consistent backwardness in cost saving and quality improving changes. In all cases an objective standard would be established by which industries would be placed in specific categories, depending on the extent to which they diverge from the desirable standards.²¹ Once acceptable standards have been formulated, Bain's criteria would lead to greater objectivity. But it is to be doubted that economists could agree, for example, on how much is too much selling outlay; and, of course, it would be most difficult to establish just when cost reducing and product improving changes are too slow in coming into being. However, it must be recognized that

²¹ Joe S. Bain, "Workable Competition in Oligopoly", American Economic Review, Vol. XL, Papers and Proceedings, (May, 1950) p. 36-37

Bain's suggestions are a step in the right direction in establishing a common basis by which different industries in the economy may be compared.²²

Workable competition is not one theory but many. As seen above, some formulations are more precisely stated than others, but insofar as the writers try to establish a causal relationship between A and B they are theories. However, methods of observation, even though based on long experience, have not been precise enough to establish any of the formulations on a generally accepted basis. In summing up his position on workable competition, Adelman in effect, sums up the state of theory as regards its investigation into the market structure and performance of industry rather succinctly in the following:

"No more general statements seem possible. In fact, the net result of the past twenty-five years of discussion has been a deep appreciation by economists of the variety of results met in actual situations, and the development of a few tools helpful in understanding them."²³

²²Bain, Barriers to New Competition, (Cambridge: Harvard University Press, 1956), has already made an extremely important start in that direction with his research on the relationship between the conditions of entry and profit levels, degree of excess capacity and advertising expenditure.

²³Op. cit., p. 1304

Countervailing Power

Starting with the premise that competition has on the main declined as the "autonomous regulator of economic activity", Galbraith²⁴ suggests that a new "self-generating force" has arisen to take its place. The new force is a direct result of the existence of market power. Its existence in the hands of a strong buyer or seller, it is held, is incentive for the respective sellers and buyers on the opposite side of the market to acquire power as well. The incentives are twofold:

(1) By acquiring power they are able to protect themselves from exploitation, and,

(2) They are able to share in the monopoly gains accruing to the original possessor of market power.

The first aspect of the concept of countervailing power is thus seen as the growth of power as a reaction to power on the opposite side of the market. Two examples are offered: The growth of labour unions and the large retailing outlets. However, both examples have been challenged as lacking in empirical validity²⁵, and in the absence of further evidence by Galbraith, the first part of his thesis must be taken as open to very serious doubts.

²⁴American Capitalism: The Concept of Countervailing Power, (Cambridge: The Riverside Press, 1952) Chapter IX

²⁵G. J. Stigler, "The Economist Plays with Blocs", American Economic Review, Vol. XLIV, Papers and Proceedings, (May, 1954), p. 11-13.

The second aspect of countervailing power concerns the effects of the existence of power groups on both sides of the market. Galbraith claims that this situation tends to approximate the results of competition. Unfortunately, no analytical development is presented in support of this claim. The case appears to rest on his one example of large retailers who use their bargaining power to force down the prices of monopolistic sellers and then present their gains to the consumer by way of lower prices. However, he has since admitted that the retailers in favourable bargaining positions pass on their gains only because of the competitions they are subjected to from other retailers.²⁶ Thus, countervailing power is seen to be ineffective in reducing prices unless there is also competition.

Galbraith's position on antitrust policy is in keeping with his thesis of countervailing power. It is stated as follows: "In the first place the mere possession of market power is not a useful criterion for antitrust action. The further and very practical question must be asked: Against whom and for what purposes is the power being exercised? Unless this question is asked and the answer makes clear that the public is the victim, the antitrust laws, by attacking counter-

²⁶ "Countervailing Power", American Economic Review, Vol. XLIV, Papers and Proceedings, (May, 1954) p.3

vailing power, can as well enhance as reduce monopoly power."²⁷ As stated, it is a very reasonable position. But is the advice warranted? A priori, it would seem that in most cases it is not. Where strong bargaining power serves to give a firm an advantage over competitors that will tend to place it in a complete or near-complete monopoly position, it will not do to allow that firm to exploit its position to the full. As pointed out above, it is competition which causes the powerful buyer to pass on the gains of its position to the consumer; with competition destroyed, altruism or fear of antitrust proceedings will have to be relied on to keep it in check.

However, it is not clear that exploitation of bargaining power will always lead to monopoly. A strong case can thus be made for not applying the law restricting bargaining power in an indiscriminate manner. What emerges then, as Galbraith's contribution, is an attack on an existing standard rather than the establishment of a new one.

Creative Destruction

The keynote of creative destruction is dynamic analysis of a broad historical variety. This method of analysis gives Schumpeter²⁸ the advantage of being able to move where the

²⁷American Capitalism: The Concept of Countervailing Power, p. 149

²⁸Capitalism, Socialism and Democracy, (3rd ed.; New York: Harper & Bros., 1950), esp. Chapters VII and VIII

more rigid formulations of static theory are unable to tread. But part of what is gained through greater breadth is foregone by way of precision. These facts are mentioned because the conclusions of the analysis cannot very well be separated from the method. These conclusions may be briefly stated:

(1) Market power is in the long run in a state of flux due to the bombardment of innovations which may not only ameliorate that power, but destroy it entirely.

(2) The innovations which destroy existing positions also create. They are the engines of capitalism, leading to greater productivity and better products.

(3) It follows from the above propositions that a climate conducive to innovation must be preserved.

The firm and the industry, Schumpeter feels, must be viewed as being part of and existing in a system which is a continuing process. The firm's life, no matter how secure it may seem, is constantly in danger; present and potential rivals may at any time introduce a new product, or a much cheaper way of producing an existing one which will destroy its profits, and, perhaps, its very existence. No firm is secure. Even the monopolist, who is traditionally seen as resting on his laurels while he goes about his business of exploiting the consumer, is not immune.

The result of the constant threat of extinction is

that every firm that can afford it establishes research facilities. And it is the large firms, with the most to lose, that strive hardest to preserve their positions by recourse to market preserving and gaining, and cost reducing research.

A favourable climate for innovation must be preserved. A market structure that facilitates innovation, even though it is highly concentrated, will lead to better results than even a perfectly competitive one. Innovation in a perfectly competitive market would have to depend on altruism, because the individual entrepreneur would have no monetary reward to gain as perfect knowledge and perfect mobility would ensure that all his competitors immediately copied him. Therefore, much of the concern expressed that there is too little competition is unwarranted. Perhaps in the short run this may be true, but even then the threat of new entrants may act as a deterrent to what is generally considered to be monopoly behaviour. But in the long run, a strong form of competition from innovators is assured. Schumpeter likens the competition within a given framework of industrial organization to that of an attempt to force a door, and that resulting from the important innovation to a bombardment of that door. Thus, " . . . it becomes a matter of comparative indifference whether competition in the ordinary sense functions more or less promptly; the powerful lever that in the long run expands output

and brings down prices is in any case made of other stuff."²⁹

However, even though believing that innovation is a powerful policeman and destroyer of monopoly power, Schumpeter still sees some form of antitrust as necessary. The form is not specified, but a need for a more discriminating kind of antitrust policy is expressed. But if there is no clear evidence that a special size or type of firm is responsible for innovations, what kind of general antitrust policy is possible? And, also, not all research is of a desirable nature. Might it not be better to make sure that research is in the hands of many rather than in the hands of a few?³⁰

The difficulty in making innovation the foremost criterion for antitrust policy, which is the gist of Schumpeter's

²⁹Ibid., p. 85

³⁰There does not appear to be any clear-cut answer as there is a dearth of evidence given to conflicting interpretation. For a good review of the material, see P. Hennipman, "Monopoly: Impediment or Stimulus to Economic Progress?", in Chamberlin (ed.), Monopoly and Competition and their Regulation, (New York; MacMillan & Co., 1954). A rather striking example of an industry under monopoly control striving to reduce the efficiency of its product rather than increase it, is offered in Report of Commissioner, Combines Investigation Act, Canada and International Cartels, (Ottawa; King's Printer, 1945), p. 23. Efforts to reduce the life of battery lamps by one-third are described.

proposal, is that a rather unwieldy analysis, from the enforcement point of view, is called for; " . . . since we are dealing with a process whose every element takes considerable time in revealing its true features and ultimate effects, there is no point in appraising the performance of that process ex visu of a given point of time; we must judge its performance over time, as it unfolds through decades or centuries.³¹ "That in a nutshell is the problem. How far should the law enforcement agencies or judiciary be willing to go in their analysis of any particular firm or industry? The answer to this question was not answered by Schumpeter, nor to date, by anyone else.

Summary and Conclusions

Reviewing the work discussed in this chapter, a few very pertinent facts stand out:

(1) The formulation of economic theories of general applicability to actual situations in the area of market structure and performance has not been an outstanding success. The reason for this is the difficulty of the phenomena that the economist deals with, changing social structures which make first some facts more pertinent and then others, and the emergence of still others that were not even considered worthy of passing reference in the past.

³¹Schumpeter, Capitalism, Socialism and Democracy, p. 83

(2) The different conclusions arrived at are not due to logical differences but rather to the breadth of analysis employed. For instance, it might be said that Schumpeter views the economy through a telescope, whereas Chamberlin employs a microscope. Both methods are equally valid. What is dangerous is that the results of their analysis may be accepted without also accepting its limitations. Because it is almost impossible for one man to take everything into account, it follows that where factors are neglected they may in some instances assume sufficient importance to make the results of the analysis that neglected them inapplicable. A good example of this is where Clark adds some factors neglected by Chamberlin and arrives at different conclusions than he does. Thus, what is stated as a general proposition becomes somewhat less than that; and the specific case must be examined in order to see that other factors are not more important, thus giving different results from those that might be expected from a priori considerations.

Because of the diverse results to be expected in actual situations, the overriding question becomes: Can any anti-combines laws providing general coverage be formulated that will not discriminate against economic efficiency, or will it become necessary to examine each case in the light of the economic conditions surrounding it?

CHAPTER III

ANTI-COMBINES LEGISLATION: DEVELOPMENT, CONTENTS AND ENFORCEMENT

The object of this chapter, as the title suggests, is to review the legislation. As an attempt has been made to cover, however briefly, the past and present enforcement experience, there is some overlapping with the later chapters where some aspects of enforcement are treated in detail. However, as the chapter is meant to be able to stand alone as well as serving as a background to the later chapters, some repetition is unavoidable.

Offences and Administration

Anti-combines legislation concerns itself with several phases: It (a) prohibits certain acts, (b) provides the machinery for discovery and investigation of offenders, and (c) sets out punitive and corrective measures.

Offences. The anti-combines laws are to be found in two statutes: The Combines Investigation Act¹ and the Criminal Code². The two statutes in conjunction with the interpretation provided by the judiciary have established four offences,

¹R. S. C. 1952, C. 314

²Stats. Can. 1953-54, C. 51, ss.411-412

summarized as follows:

1. Combines: Firms in the same industry are prohibited from undertaking joint action to unduly limit competition by fixing prices, limiting production and distribution facilities, or any other means³. Firms that enter into such unlawful arrangements are known as combines or combinations. Most unlawful agreements concern price fixing, but efforts to exclude new competitors and other restraints of competition may be corollaries to the price-fixing agreement. The bulk of the cases dealt with by the courts have concerned horizontal price-fixing agreements.

In their interpretation, the courts have found any price-fixing agreement covering a wide area of the trade or industry to be unlawful per se. The courts have consistently refused to consider whether the effects of the agreement in terms of prices, profits or technological development have been

³Criminal Code, ss.411 and Combines Investigation Act, ss.2. The definition that was given is based on ss.411 of the Code and the way it has been interpreted by the courts. The definition of combines that is contained in ss.2, of the Act, is somewhat different; agreements are held to be illegal only when they are, or are likely to be, detrimental to the public. But almost without exception, combines have been charged under ss.411 of the Code. Thus, its definition may be accepted for most practical purposes. However, the matter does deserve further attention and will be pursued in Chapter V.

"reasonable". The courts' refusal to apply what has come to be called "rule of reason"--that is, judgment of effects rather than forms--has been accepted by the Restrictive Trade Practices Commission. It too, like the Commissioner of the Combines Investigation Act before, has refused to be drawn into a discussion of effects. All combines coming within the definition supplied by the courts have been held by the Commission to be operating to the detriment of the public. There has been much controversial discussion on this aspect of the enforcement based on the theories of workable competition and creative destruction reviewed in Chapter II. The problem of per se versus "rule of reason" will be considered in detail in Chapter IV.

2. Merger, trust and monopoly: The acquisition or control of the business of another or the control of a particular class or species of business in a particular area or throughout Canada is unlawful when operating or is likely to operate to the detriment of the public⁴. This provision has not been invoked to any extent, a thorough understanding of exactly what is and what is not legal will not be attained until a few more cases have been tried⁵.

⁴Combines Investigation Act, ss.2(a) (VI) and 2(e).

⁵See Chapter V for a detailed discussion.

3. Resale price maintenance: Suppliers are forbidden to coerce or induce anyone to establish a set or minimum price. However, suppliers are not excluded from setting a maximum resale price⁶. There have been no interpretative problems in connection with this section of the Act. The section provides for the categorical prohibition of resale price maintenance and it has been so interpreted and applied.

4. Discriminatory and predatory pricing: A supplier is prohibited from the practice of making price concessions to a customer that he will not also make available to the customer's competitors if they are willing to buy in like quantities and qualities; nor may a supplier sell at lower prices at one point in Canada than at another, or unreasonably low anywhere, if the design or effect is a substantial lessening of competition or the destruction of a competitor⁷.

This section of the Criminal Code has never been applied in a court action. Aside from one report of a very minor nature, there has been no enforcement effort. There is some indication that the section may be activated (see Chapter IV), but this may prove to be a premature judgment.

Discovery and investigation. The body responsible for the discovery and investigation of anti-combines offences is

⁶Combines Investigation Act, ss.34

⁷Criminal Code, ss.412

the office of the Director of Investigation and Research. Almost all investigations result from the initiative of the Director and his staff. However, there are two other ways in which an investigation may be started. (1) Six resident citizens may submit a complaint alleging a violation, and (2) the Minister of Justice, responsible for the administration of the Act, may order an investigation⁸. In addition, numerous informal complaints alleging violations are received by the Director each year; but most of them either do not deal with offences falling under the Act or are mistaken in their allegations. However, this is not to minimize the importance of this procedure in detecting unlawful agreements and practices; the public may be of considerable help, especially in bringing to the attention of the Director uniform tenders⁹.

The Director has wide powers of investigation, which are granted to him on an ex parte application to the Restrictive Trade Practices Commission. (The functions of that body are explained below.) The Director or his representatives may search the premises of an alleged offender; examine, copy, and seize documents pertaining to his affairs, and order the preparation of a written return of any information required.

⁸Combines Investigation Act, ss.7-8

⁹See Annual Report of the Commissioner of the Combines Investigation Act for 1952 (Ottawa), p. 26

Investigations, whether the result of a complaint or upon the sole initiative of the Director, go through several stages. If it is believed that the Act is being contravened, a preliminary inquiry is undertaken; this may result in the discontinuation of the investigation or may strengthen earlier suspicions and lead to a formal investigation. In some instances, the investigation may be dropped because the alleged offences are discontinued. It is to be expected in such occurrences that the offences are of a minor nature.

If satisfied that no offence is being committed, the Director may discontinue the investigation on his own authority, or if evidence has been placed before the Restrictive Trade Practices Commission, after obtaining the permission of the Commission. If the Director feels that a violation has taken place, he must submit a statement of evidence to the Commission and to the parties alleged to have committed the offence.^{10, 11}

It is the purpose of the Commission, a three man board, to consider the statement of evidence submitted by the Director and the arguments of the alleged offenders. The Commission in preparing its report is not directed to render judgment on the guilt or innocence of the investigated parties, but rather to

¹⁰cf. L. A. Skeoch, "The Combines Investigation Act: Its Intent and Application", Canadian Journal of Economics and Political Science, Vol. XXII, (February, 1956), p. 17, ff.

¹¹All the authority and responsibilities discussed under the heading "Discovery and Investigation" are conferred by the Combines Investigation Act, ss.5-22

determine the effect of whatever acts have taken place on the public interest, and to make recommendations as to remedies that can be applied. The report is transmitted to the Minister who must make it public within thirty days after its receipt, unless the Commission expressly recommends that its publication would not be in the public interest. The decision of whether or not to prosecute rests with the Minister, which decision is generally taken on the advice of counsel retained to consider the facts disclosed in the investigation and inquiry of the Director and the Commission.

Through an amendment enacted in 1952, the Director is authorized to investigate not only offences specified in the Act, but any monopolistic situations or practices that may be detrimental to the public interest¹². Several investigations are in progress and reports should be forthcoming shortly and one very important report concerning "loss-leader" selling

¹² Combines Investigation Act, ss.42. In recommending the duty of research, the MacQuarrie Committee (origin and purpose of Committee explained below) stated: "Research in the field of monopolistic situations and practices should become one of the most important assignments of the investigation and research agency. Information concerning this aspect of the organization and the working of our economy is badly lacking in Canada". Canada, Parliament, House of Commons, Report of the Committee to Study Combines Legislation and Interim Report on Resale Price Maintenance, (Ottawa: Queen's Printer, 1952), p.43

has already been made public¹³.

Punitive and corrective measures. All of the prohibited acts are criminal and are punishable by imprisonment and/or a fine to be set in the discretion of the courts. The courts, however, have refrained from imposing a jail sentence at any time and will likely continue to do so in the future, unless faced with a case of exceptional circumstances. Notwithstanding the unlikely possibility of facing a jail term, it is to be expected that a theoretically limitless fine would be a sufficient deterrent to any would-be offenders.

In addition, there are other unpleasanties to be faced, even before the case reaches the courts. It is doubtful that any firm appreciates investigators 'invading' its privacy. There is also the matter of publicity--a bone of contention. It is claimed that the publication of the report militates against fair trial and establishes a strong presumption of guilt in the mind of the reader. However, the MacQuarrie Committee held that the public and parliament had a right of access to the views of an impartial and competent body, and, furthermore, there was little danger of an unfair trial as most cases were tried by a judge without a jury¹⁴.

Corrective measures designed to provide positive relief

¹³Canada, Restrictive Trade Practices Commission, Report on an Inquiry into Loss-Leader Selling, (Ottawa: Queen's Printer, 1954). See Chapter IV for a discussion of this report.

¹⁴Op. cit., p. 35

from restraints of trade are by their very nature punitive as well. To supply relief, the Exchequer Court of Canada may alter patent and trade mark protection and the Governor in Council may lower or remove tariff protection¹⁵. However, none of these measures have been invoked to any extent, simply because they have not proved useful in the bulk of anti-combines offences that have been brought to light; patents and trade marks are generally not of any importance to a combination, and a reduction or removal of tariff protection may harm innocent suppliers who are not a party to the unlawful agreement. But even in the event that all suppliers throughout Canada are included in the agreement, tariff protection may still not be reduced or removed. If the government is committed to a policy of fostering domestic industry by providing tariff protection, it may feel that it is best to attack monopolistic practices through other means--even though they may be less effective¹⁶.

¹⁵Combines Investigation Act, ss.29-30

¹⁶The existence of several conflicting policy aims necessitates compromises in the degree that any of them may be achieved. This is so, for example, in the fields of monetary and fiscal policy, e.g., full employment versus price stabilization. Such a conflict as this creates a curious situation in the field of anti-combines enforcement. The government's desire to preserve full employment and foster domestic industry may mean that it will be more reluctant to reduce tariffs in cases where the industry involved in monopolistic practices is a large and important one.

Included in the 1952 amendments to the Act were several provisions designed to strengthen the power of the authorities to effect corrective measures. The courts were given the authority to issue a restraining order which may be used to dissolve illegal mergers and monopolies; and prevent the creation and recreation of combines¹⁷. To date, the section has been used primarily to obtain orders against the recreation of convicted combines¹⁸. However, there are signs that increased activity against monopoly through merger may result.

The courts may also for a period of three years after conviction investigate the affairs of the offenders¹⁹.

History

1889-1910. Canada's pioneering legislation is generally regarded as the reaction of a largely agrarian society to the growing economic and political power of newly formed business interests²⁰.

¹⁷Ibid, ss.31

¹⁸The constitutionality of the court issuing such orders was tested by the Supreme Court in 1956 and found to be intra vires of Parliament; Reported in Annual Report of the Director of Investigation and Research, 1956, (Ottawa), 34.

¹⁹Combines Investigation Act, ss. 33

²⁰D. Gordon Blair, "Canada", Anti-Trust Laws, edited by W. Friedman, (Toronto: The Carswell Co. Ltd., 1956), p. 7

As has been the case with almost all legislation dealing with combines, the first law was a result of a study made by a special committee to investigate the question. A parliamentary committee appointed in 1888 discovered a number of combines operating with harmful effects.

The Act of 1889²¹, amended in 1890 to remove difficulties of interpretation, has survived the years and now exists as Section 411 of the Criminal Code. It has been part of the Code since 1892. The Act may be described as only moderately successful; although it outlawed combinations, it did not create any machinery for their discovery, and the normal law enforcement authorities cannot be expected to handle the complicated anti-combines investigation. However, there were six prosecutions until 1910, four of which were successful. In addition, the provisions of the Act were of importance in a number of civil cases.

In 1897, passage of the Customs Tariff Act introduced through one of its sections, the measure of tariff reduction as a means of mitigating the harmful effects of combinations. The Governor in Council on suspecting the existence of a combine could order an investigation by a judge. If a combine harmful to the public interest was found to exist, the Governor in Council could reduce the tariff protection afforded the

²¹Stats. Can., 52 Vict. (1889), c.41

industry²².

1910-1919. To rectify the defect of the lack of special machinery for discovery and investigation of combines, the Combines Investigation Act of 1910²³ was passed. In addition, the principle of using publicity as a deterrent to would-be offenders was introduced.

A combine was defined in almost the same way as it was in the Criminal Code, with the significant difference that mergers, trusts or monopolies were also included in the definition.

Any six persons could set in motion the wheels of an inquiry upon proving its necessity to the satisfaction of a judge. He could then issue an order to that effect. A three-man board was then to be appointed by the Minister of Labour. One of the appointees was to be selected by the parties to the alleged combine, one by the complainants and the third, the chairman, by the Minister if the opposing parties could not agree.

The board was to be invested with all the powers necessary to conduct an investigation. They were almost identical with powers presently possessed by the Director of Investigation and Research.

²²See Lloyd G. Reynolds, The Control of Competition in Canada, (Cambridge, Mass.: Harvard University Press, 1940), p. 135

²³Stats. Can. 9-10, Ed.VII, c.9

The board was to report its findings and recommendations to the Minister, who would publish them in the Canada Gazette.

If a finding against the alleged offenders was made, they were given ten days to cease their unlawful activities, failing this, they were liable to a fine of up to one thousand dollars a day for every day they continued to offend.

The new remedy of the removal of patent protection was introduced in the Act, and the earlier provision of reduction or removal of tariff protection was carried forward.

Although the Act had moved in the right direction, it was not successful; its clumsy machinery was used only once. It had two basic weaknesses: (1) Private citizens could not be expected to undergo the expense and bother necessary to start an investigation; (2) the dissolution of the board upon completion of an investigation left no competent body that was in constant touch with the day-to-day situation.

1919-1923. The Board of Commerce Act²⁴ and the Combines and Fair Prices Act²⁵ were parliament's answer to the inflationary conditions that followed the First Great War. They replaced the Combines Investigation Act of 1910. The Board of Commerce,

²⁴9-10 Geo. V, c. 37

²⁵9-10 Geo. V, c. 45

a permanent three-man body, was set up under the Act bearing the similar name to administer the Combines and Fair Prices Act.

The Act outlawed combines--the definition was essentially the same as in the Act of 1910--and prohibited hoarding and profiteering.

The Board was given the necessary powers to discover and investigate breaches of the Act. It was empowered to determine when combinations were or were not acting in the public interest and no prosecution under Section 498 (now Section 411) could be instituted without its approval. It could also pass judgment on margins of profit and act against hoarding by ordering the distribution of stocks. To enforce its rulings the Board would issue a cease and desist order; non-compliance with the order was an indictable offence.

The Acts succeeded in correcting the shortcomings of the Combines Investigation Act of 1910 in that the Board was permanent and could start investigations on its initiative. It engaged in extensive activity and enjoyed a rather spectacular career²⁶. However, its powers were found to be too wide. In 1921 the Privy Council declared the Acts unconstitutional²⁷.

²⁶See Reynolds, *op. cit.*, p. 142-44, for an interesting discussion of the Board's short career.

²⁷In re The Board of Commerce Act, 1919, (1922) I.A.C. 191

It was ruled that it was outside parliament's power to grant the Board the right of arbitrary decision in individual cases. Thus, the law lacked the generality of application that is considered necessary to safeguard the rights of individuals.

1923-1935. The Combines Investigation Act of 1923²⁸ is basically the same as the Act that stands today; it differs only in that it has been strengthened through the years by amendments.

A permanent Registrar was appointed to administer the Act. Investigations could be started in the same way as at present, but the Registrar, after conducting preliminary inquiries, was to turn over formal investigation to a special commissioner who was to be appointed as required.

At the conclusion of the formal investigation, a report would be transmitted to the Minister. Publication of the report was to be made within fifteen days from the time of its receipt, unless the Commissioner recommended to the contrary.

The offences as expressed in the Acts of 1910 and 1919 were carried forward, as were the clauses for reduction of tariffs and removal of patent protection.

Offenders, if individuals, were subject to a maximum

²⁸Stats. Can. 1923, c.9

fine of \$10,000 and/or a maximum of two years imprisonment; corporations were liable to a fine not exceeding \$25,000.

With procedures for discovery and investigation of combines simplified, the Act ushered in a period of energetic enforcement. Sixteen formal investigations and numerous minor inquiries were undertaken until 1935. But the depression which introduced the '30s seemed to weaken the course of determined enforcement that had been adopted; publication of four reports was withheld and the publication of another was delayed for three years.

1935-1945. The government's attitude to combines was made clear in 1935. New legislation was passed and the Act of 1923 was amended. A new section prohibiting discriminatory and unfair pricing, which is now Section 412, was added to the Criminal Code.

The Dominion Trade and Industry Act²⁹ transferred the administration of the Combines Investigation Act from the Minister of Labour to the Dominion Trade and Industry Commission. The Commission consisted of the same three-man board that constituted the existing Tariff Board. The powers conferred on the Commission were extremely wide in view of the fact that the regular duties of its three members were considerable. It could initiate and conduct investigations; it had powers of

²⁹Stats. Can. 1935, c. 59

report; and most important, it had full powers to decide whether agreements were operating to the detriment of the public or were merely preventing 'chaotic' and 'demoralizing' price-cutting. Agreements meeting the standards set by the Commission could with its approval continue in force and no prosecution under the Combines Investigation Act or the Criminal Code could take place.

An amendment to the Combines Investigation Act held that any documents seized by or submitted to the Commission were not permissible as evidence in any prosecution that might follow. As has been pointed out³⁰, this gave offenders the opportunity of preventing any incriminating evidence being brought against them during trial--they had only to submit such evidence to the Commission.

The most important power of the Commission was declared unconstitutional only a few months after the passage of the Act. A newly elected government referred the question of the constitutionality of the Act to the Supreme Court, which body declared that Section 14 of the Act, which conferred on the Commission the authority to approve agreements restricting competition, was beyond the powers of parliament to enact³¹.

The decision of the Supreme Court is reminiscent of

³⁰Reynolds, op. cit., p. 149

³¹Reference Re: Dominion Trade and Industry Commission Act, (1936) S.C.R. 379

the ruling made by the Privy Council regarding the Board of Commerce and Combines and Fair Prices Acts. The decisions point to the conclusion that any legislation seeking to govern agreements, practices and situations which lessen competition will have to provide for general application of prohibitions--the Acts of 1919 and 1935 shared the feature of providing for arbitrary decision on a case by case basis.

In 1937, except for a few changes, the Combines Investigation Act was restored to its former position. Administration of the Act was again centralized in the hands of one man. His title was changed from Registrar to Commissioner. Investigations and the subsequent reporting were to be carried out by him, or, when the burden of work so required, by a specially appointed Commissioner.

The Act was weakened, however, in two respects. The Commissioner could not start investigations on his own initiative, and he had to obtain an order either from the judge of a provincial Supreme Court, the Chairman of the all-but-defunct Dominion Trade and Industry Commission, or from the President of the Exchequer Court of Canada before he could compel the production of evidence in the course of an inquiry. Of the two amendments, the withdrawal from the Commissioner of the right to start investigations was by far the more serious. How-

ever, three important investigations, leading to prosecution, were made in the years before the start of the Second Great War.

During the war, the Wartime Prices and Trade Board assumed direct control over almost all civilian trades and industries in Canada. The Commissioner was appointed Enforcement Administrator of Board in December, 1941³². No formal investigations were made during the war.

1945-1958. The post-war period has been marked by strengthening legislation and vigorous enforcement. Amendments passed in 1946, 1949, 1941 and 1952 served to facilitate enforcement procedures; provided greater flexibility in the kinds and degrees of punitive and corrective measures that could be undertaken; and enlarged the number of restrictive practices condemned.

The amendments passed in 1946 were based on the recommendations contained in the report on international cartels³³ released in 1945. The study was undertaken on the request of the Minister of Labour and was prepared under the general direction of the Commissioner of the Combines Investigation Act in consultation with two members of the Department of External Affairs. Further assistance was provided by a number of

³²Canada, Annual Report of Commissioner for 1942 of Proceedings under the Combines Investigation Act, (Ottawa), p. 3

³³Canada, Combines Investigation Act, Report of Commissioner: Canada and International Cartels, (Ottawa: King's Printer, 1945)

distinguished members of the legal and economic professions.

The purpose of the study was to ascertain the effects of international combinations (cartels) on Canadian interests in terms of import and export trade, employment and operations of Canadian business enterprises; and in accordance with the findings to make recommendations for legislative changes. Recommendations for changes in legislation affecting domestic trade combinations and other restrictive practices were also to be included.

A number of cartel arrangements affecting Canadian import and export trade and employment were described in the report. It was found that in many instances the government's ability to encourage import and export trade could be frustrated by private agreements. Detrimental effects in terms of abuses of monopoly power and restrictions on flexibility and innovation were also noted. It was recommended that the government fully support United States proposals for an international agreement directed to control harmful cartels.

Of more immediate interest are the Report's references to domestic combinations--they set the tone for the post-war period. In this connection, the Report must be viewed in its historical setting. In order to facilitate government-business co-operation, it had been necessary to allow and encourage inter-firm alliance. Thus, the trade associations assumed

an important role. They were the line of communication between the government and the individual business enterprise. The problem, then, as pointed out in the Report, was to make sure that the inter-firm co-operation, fostered for reasons of national defense, was not carried over into the post-war period for unlawful purposes.

A programme of vigorous anti-combines enforcement was proposed. It was recommended that the Commissioner be permitted to begin investigations of restrictive practices on his own initiative without waiting for directives from the Minister or the public. The recommendation was accepted and subsequently embodied in the Act in 1946. Without this step, it was doubtful whether the successful enforcement achievement of the post-war period could have been realized.

In the same connection, the Report recommended that necessary financial appropriations be made in order to provide the Commissioner with an enlarged and trained staff. It is pertinent to note that the staff of the Commission numbered eight persons in 1945 as compared with forty-four in 1957³⁴.

The Report also added some incisive comment on the limitations of merger and monopoly provisions in particular and on anti-combines policy in general. The difficulty in dealing with monopoly, the Report pointed out, was that, in

³⁴Canada, Report of the Director of Investigation and Research for the Year Ended March 31, 1957, (Ottawa: Queen's Printer, 1957), p. 33

the absence of court authority to order dissolution, only negative sanctions were available. Perhaps overawed by constitutional difficulties, the Report did not recommend dissolution as a remedy, but suggested that more attention be directed towards abuses of tariff protection. It was also proposed that the government's powers of taxation be employed to discourage the monopolistic firms from not more fully utilizing available capacity, which may be resorted to as a means of maintaining prices.

It was urged that, in general, the government place greater reliance on positive measures and less on the negative sanctions available under the Combines Investigation Act.

A view very similar to that later expressed by the MacQuarrie Committee, although somewhat more strongly stated, is expressed in the following:³⁵

Prosecution is not the only remedy for abuses of monopoly, as past and present legislation indicates. Parliament possesses powers in such matters as tariffs, patents, trade marks, taxation, public regulation and public ownership, which may be invoked to safeguard the public interest. Too often in the past each field of legislation or control has been regarded as separate from the others.

Finally, on the strength of the Report's recommendation, the present Section 30, regarding abuses of patent and trade mark protection, was included in the 1946 amendments.

³⁵Canada and International Cartels, p. 59

Thus, summarizing, as far as legislative changes are concerned, the Report was responsible for the return to the Commissioner of the authority to initiate investigations and the extension of restrictive practices falling under the ban of the Act to abuses of trade mark and patent privileges.

In 1949 the Act was further amended after an important court ruling was made that, as a precedent, could have had the effect of seriously lessening the Crown's chances of obtaining a conviction in conspiracy cases. It was ruled that incriminating documents seized on the premises of a company did not necessarily implicate the company. It was first necessary to prove that the documents were related to members of that company responsible for policy decisions³⁶. It was clear that the cause of effective anti-combines enforcement was seriously threatened.

The amendment to the Act strengthened the Crown not only when dealing with corporations but also with individuals and unincorporated enterprises. It declared that all documents seized on the premises of the accused were admissible as evidence against the accused. In this regard, two rebuttable points were established: (1) Employees acting in connection with the business of the employer do so with the full knowledge

³⁶R. V. Ash-Temple Co. Ltd., et al (1949) O.R. 315. The decision of the lower court was sustained in an appeal by the Crown to the Ontario Court of Appeal--R.V.Ash-Temple Co. Ltd., et al (1949) 93 C.C.C. 267

and concurrence of the employer; (2) documents found on the premises of the accused are not unknown to him³⁷.

In June, 1950, the government appointed a committee to study combines legislation, generally, and resale price maintenance, in particular. The Committee was directed to study procedures followed in other countries, for use as possible guides, and to recommend whatever legislative changes were considered necessary.

Constituting the Committee were the Honourable Mr. Justice J. H. MacQuarrie of the Supreme Court of Nova Scotia, chairman of the Committee; Dr. W. A. Mackintosh, Principal of Queen's University; Professor Maurice Lamontagne, Director of the Department of Economics, Laval University; Mr. George F. Curtis, Dean of the University of British Columbia Law School.

Following common usage, the Committee will be referred to as the MacQuarrie Committee or as just the Committee.

In compliance with a government request, the report on resale price maintenance was submitted in an interim report, October, 1951. This report is discussed in detail in the following chapter. Here, it will only be noted that the Committee's recommendation that resale price maintenance be prohibited was accepted and embodied in the Act in 1951.

The complete report covering all aspects of combines

³⁷Combines Investigation Act, ss. 41

legislation was not submitted until March, 1952³⁸. A brief review of the history of combines legislation is contained in the first section of the report. Also included in this section is an outline of American and United Kingdom legislation. A comparison of the Canadian, American and United Kingdom approaches to the problem of restrictive practices is also presented.

The second section is entitled "Economic Background to Monopoly Problems". It is somewhat less than that. Much of the sweeping criticism directed against this part of the report is justified³⁹. Certainly the Committee is to be taken to task for a statement like the following: "Effective competitive control requires the existence of large numbers of buyers and sellers so that no one exerts any observable influence on the market but is in fact controlled by it"⁴⁰. This is, of course, a definition of pure competition; an economic abstraction to be used as an aid in analysis but to be encountered only on rare occasions in the markets of the

³⁸Canada, Parliament, House of Commons, Report of the Committee to Study Combines Legislation and Interim Report on Resale Price Maintenance, (Ottawa: Queen's Printer, 1952)

³⁹See V. W. Bladen and S. Stykolt, "Combines Policy and the Public Interest: An Economist's Evaluation", Anti-Trust Laws, edited by Friedmann (Toronto: The Carswell Co. Ltd., 1956), p. 52 ff.

⁴⁰Report of Committee to Study Combines Legislation, p. 21.

economy. Certainly effective or workable competition does not require that individual buyers or sellers do not exert any ". . . observable influence on the market . . . ".

The picture of competitive reality offered by the Committee is that static conceptual scheme of monopolistic competition theory. In this connection, it has been observed that " . . . the Committee seems to have swallowed Chamberlin whole without noticing what they were eating"⁴¹.

Although on the whole, the Committee's economic analysis leaves something to be desired, in the long run, the significance of the report depends on other things: namely, its recommendations. The Committee's objective is explained in the following:⁴²

Our recommendations are directed to the strengthening and improving of the procedures, organization and remedies laid down in the Act rather than to revolutionizing them. One of our main concerns has also been to strengthen the dynamic and flexible features of the procedures and of the organization in order to facilitate the adaptation of our monopoly policy to the ever-changing character of the problem that it is designed to solve.

As a result of the Committee's recommendations, the following amendments were made:

1. The post of Commissioner of the Combines Investi-

⁴¹Bladen and Stykolt, op. cit., p. 63

⁴²at p. 29

gation Act was discontinued and the functions of the Commissioner were divided between the Director of Investigation and Research and the Restrictive Trade Practices Commission. The Director was made responsible for conducting investigations and the Commission for appraisal of the evidence and reporting.

2. The Director and the Commission were given authority to investigate and evaluate all types of restrictive practices and situations and not just those prohibited by legislation.

3. Authority was granted the courts to prohibit the Commission, continuation or repetition of an offence; order the dissolution of a merger or monopoly; investigate the affairs of offenders for a period of three years after conviction.

4. The ceiling on fines was removed and the amount of all fines relating to the two relevant sections of the Criminal Code and the Act were placed in the discretion of the Court.

The full impact of the amendments cannot as yet be appraised. However, some anticipated effects may be noted.

First, the division of functions between the Director and the Restrictive Trade Practices Commission has probably resulted in more investigations.

Second, more information about Canadian business practices will be obtained. In this direction, the report on "loss-leader" selling has been a very promising beginning.

Third, court orders prohibiting the continuation or repetition of offences may have a strong impact on collusive relationships. This is especially important in regard to major industries. In the last analysis, the importance of this amendment will depend on the number and importance of collusive arrangements the Director can uncover. Once facing a court order prohibiting the repetition of an offence, it will be the foolhardy firm indeed that defies the court.

Fourth, the activation of the merger and monopoly provision of the Act has already taken place. However, whether this development takes root or not depends to a large extent on whether the court's authority to order dissolution is declared constitutional. To date, this has not been tested.

Fifth, the lifting of the ceiling on fines can be expected to have a strong deterrent effect on would-be offenders. The \$10,000 limit under Section 498 (now Section 411) and the \$25,000 limit under the Act could hardly be taken as a sufficient deterrent for the large firm. As stated by one judge: "The expression has been used by some of the judges that even the maximum fine under this statute (498), as it stood before amendment, was no more than a license fee, and a very moderate license fee"⁴³.

⁴³R. V. Dominion Steel and Coal Corporation, Ltd. et al.
Supreme Court of Ontario--reasons for judgment of Mr. Justice
Judson at Toronto on April 27, 1956

Aside from the amendments that have been discussed, several other recommendations submitted by the MacQuarrie Committee are worthy of note. However, as their discussion involves, for the most part, new and controversial material, they will be considered in a separate section.

In summary the post-war period has been marked by vigorous enforcement and strengthening legislation. In all, a total of thirty-three reports were written. While under the administration of the Commissioner of the Combines Investigation Act, twelve reports were written; there were eight prosecutions, seven successful. In the space of slightly more than five years, the Director and the Restrictive Trade Practices Commission combined on twenty-one full investigations: five concerned resale price maintenance; one, price discrimination; three, mergers; eleven, combines; and one was a special report on "loss-leader" selling.

Summary and Conclusions

(1) Important factors to be taken into account when considering Canadian anti-combines experience are the constitutional limitations which stand in the way of a case-by-case appraisal not based on a general coverage and prohibition of offences. That is to say, a law, whether defined in terms of forms or effects, must not be aimed in the direction of regulation. And, especially, it must not place in the hands of a pseudo-judicial body the power of absolving

offenders from actions falling under a general prohibition.

(2) However, these are not serious limitations, even when viewed in the light of the conflicting opinion among economists reviewed in Chapter III. Parliament is still free to pass laws which do not categorically prohibit certain acts but only those acts which lead to undesirable effects. The prohibition of resale price maintenance is an example of Parliament's refusal to utilize this power. It obviously felt that the maintenance of resale prices was likely to lead in almost all cases to undesirable effects. There was then no reason to look beyond the act to the effect. Section 411 of the Criminal Code would appear to be an example of Parliament's willingness to utilize its power to look beyond actions to effects. The courts, however, defined the offence so that it was not necessary to examine any effects beyond the limitation of competition. Section two of the Act, which defined both combines and mergers and monopolies, would already seem to look to the results of the actions rather than only to the actions. But the courts have not examined a sufficient number of cases so that a clear indication of the way in which they will define "to the detriment or against the interest of the public" is not available.

From the point of view of enforcement, it is preferable that there should be no doubt as regards what constitutes an

offence. Such clarity is present when certain activities are categorically prohibited without any reference to the resulting effects. But in the light of the theories reviewed in Chapter III, it is pertinent to ask whether it is possible to construct any categorical prohibitions which do not in their enforcement lead to a few or many instances where it would have been preferable to allow the prohibited acts to continue. In short, can it be stated with confidence that certain activities will always, or almost so, lead to undesirable results? Can it be that monopolistic and restrictive activities are likely to result in increases in efficiency and in the competitive climate which ensures that the gains in efficiency are not withheld from the consumers for too long? Or it may be, as has been suggested, that some reduction in competition is necessary in order to have the innovational achievements which ultimately lead to benefits for the consumer.

(3) It is to be noted that the Restrictive Trade Practices Commission is free (this freedom has been put to limited use) to appraise restrictive practices in the light of any theory or theories it considers applicable. But, of course, the Commission cannot absolve parties from the legal consequences which follow from their actions; it may only present its findings and recommendations.

(4) There is clearly a tendency in the direction of vigorous enforcement. In the light of the difficulties and possibilities mentioned above, the question is: Is it a wise policy of enforcement that is being pursued?

The following chapters represent an attempt to answer that question.

CHAPTER IV

RESALE PRICE MAINTENANCE AND UNFAIR PRICING

Resale Price Maintenance Prohibited

Unlike the other areas of anti-combines enforcement, the prohibition of resale price maintenance does not begin before the start of the period under review. Thus, even though keeping within the stated limits of the thesis, a complete (or so it is hoped) record of this important area of anti-combines enforcement will be presented, including the background to the legislation and coverage of the reports and cases.

Resale price maintenance is forbidden in Section 34 of the Combines Investigation Act as follows:

(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.¹

As may be noted, the language used to prohibit resale price maintenance is clear and unequivocal in its import. In this respect, it is unlike the sections of the Code and the Act prohibiting combines, discriminatory pricing and mergers and monopolies. The difference is that these offences are defined in terms of acts leading to certain effects, the effects lending definition to the acts, whereas the section on resale price maintenance refers only to acts. In other words, the

¹Combines Investigation Act, R.S.C. 1952, C. 314

section on mergers, for example, says: you can not merge if it is going to be detrimental to the public; on the other hand, the section on resale price maintenance says: you can not induce or coerce anyone to set a resale price on your product.

Such clarity of meaning has diminished the importance of the role of the courts. They have not been required to step into the field of economic analysis in order to answer questions of guilt or innocence as they were required to do in cases of combines and mergers. That the courts have established per se rules for the judgment of combines² and may do so for mergers and monopolies does not change the fact that they were left to their own devices. Of course, the courts are still called on to interpret the extent to which a dealer may go in influencing its customers' decisions regarding the price they should charge, but this is an entirely different matter.

One other important effect stemming from the explicit wording of Section 34 is worthy of mention, especially since it is a fairly recent enactment. The Direction and the Commission have been enabled to quickly enforce the desires of Parliament without any delay. And, of course, the businessmen, considering the clarity of the section, have been in no position

²See Chapter V

to claim that they have misunderstood or have been unable to understand what was expected of them.

Events Leading to Prohibition of Resale Price Maintenance

Resale price maintenance has long been used as a monopolistic device. The horizontal restrictive agreement often included provisions for maintaining uniform resale prices at the next distributive stage³. There would seem to be strong motive for firms involved in horizontal price fixing agreements to desire to control the price at which their product is resold. If uniform prices are not maintained, the dealers may inadvertently give one or several of the producers an advantage by charging less for their products. The horizontal agreement could hardly be expected to survive under those circumstances. Also, if the distributors are satisfied with the margin of profit allowed under the resale price maintenance plan, they are less likely to apply pressure on the various producers for better terms. Absence of such pressure is less likely to cause the members of the agreement to make secret concessions to the dealers in order to have them "push" their product.

³For examples see: Canada, Combines Investigation Act, Reports of Commissioner: Optical Goods 91948), p. 78 ff.; Bread-Baking Industry in Western Canada (1948), p. 80 ff.; Matches (1949) p. 80 ff. Restrictive Trade Practices Commission Report Concerning an Alleged Combines in the Manufacture, Distribution and Sale of Wire Fencing in Canada, (Ottawa: Queen's Printer, 1954), p. 79 ff.

Although resale price maintenance has long been recognized as a restrictive device, it is only recently that serious attention has been drawn to the practice as distinct from its relationship with other restrictive devices. In 1949, the Royal Commission appointed to study the rise in prices in the post-war period concluded that, on the basis of the examples it had examined, the advantages of resale price maintenance to the buying public were greatly exceeded by the disadvantages⁴. As the Commission had made note of resale price maintenance only as part of its general study of price levels, the significance of its conclusion stems not from the analysis from which it followed but from the further investigation in which it resulted.

The Interim Report of the MacQuarrie Committee^{5, 6} substantiated the finding of the Royal Commission. The study of the matter made by the Committee was, of course, more exhaustive. Many briefs were received, presenting arguments for

⁴Canada, Report of the Royal Commission on Prices, Vol. I, (Ottawa: King's Printer, 1949), p. 28

⁵Canada, Parliament, House of Commons, Report of the Committee to Study Combines Legislation and Interim Report on Resale Price Maintenance, (Ottawa: Queen's Printer, 1952). The Interim Report was submitted in October, 1951.

⁶All of the following is taken from the Interim Report, which is included as p. 55-72 in the citation immediately above.

and against the continuance of the practice. Manufacturers' and distributors' associations reasoned in terms of its benefits and consumer groups opposed it as detrimental to their interests.

The Committee concluded that, according to the standards of economic efficiency and the facilitation of competition, resale price maintenance was undesirable. It recommended that manufacturers or other suppliers be prohibited from influencing the resale price of their products, with the exceptions, however, that they continue to be free to issue price lists and to set and enforce maximum resale prices.

It is noteworthy that the dual standards of competition and efficiency were used in considering the merits and demerits of resale price maintenance. It is especially so in the light of the strong tradition of considering combinations only in terms of their effect on competition.

The submissions made on behalf of and against the continued legalization of resale price maintenance and the Committee's conclusions on the question will be discussed from the point of view of the effects of the continuance or discontinuance of the practice on the manufacturer, distributor and consumer.

Effects at the manufacturing level. In favour of resale price maintenance, it was argued that the practice did

not check competition among manufacturers as freedom of pricing and the introduction of competing products was not restricted. However, the critics of resale price maintenance, and the Committee, took the view that price agreements among manufacturers was facilitated and, further, were sometimes impossible with the existence of price competition at the retail level.

It was urged by the proponents of resale price maintenance that price-cutting at the retail level resulted in detrimental effects to the manufacturers of branded articles, especially when retailers employed the articles as "loss-leaders". It was argued that uniformity of price throughout the country created a feeling of goodwill and confidence in the consumer, which was destroyed by price variations, leading the consumer to believe that the quality of the article has deteriorated. The use of their products for "loss-leaders", it was pointed out, made it difficult for the manufacturer to retain the necessary channels of distribution, as dealers were reluctant to handle or at any rate, to exert much sales effort on articles on which only a small profit could be earned. The Committee agreed with this view--to a point. It felt that only the extreme form of price-cutting--"loss-leader" selling, was likely to harm the manufacturer. The Committee defined the "loss-leader" device as a monopolistic

practice, referring to it as ". . . an aggressive weapon designed to attract customers for a whole range of goods by a particular type of selective and excessive price-cutting. Usually a well-known brand is used as 'loss-leader' and it is sold at a price which has no direct relation to cost and may even result in a net loss"⁷. However, in view of the strong consumer demand at the time of the report--which made the use of "loss-leaders" unnecessary--and the shortage of time available to study the matter carefully, the Committee did not feel that it could make any specific recommendations other than to request that a thorough study be made.

The position of the retailer. The prevention of economic concentration, vertical integration and the use of monopoly power were all claimed as resulting from resale price maintenance. It was argued that the department and chain stores, by employing selective and overall price-cutting, could drive the small independent retailer out of business. The removal of resale price maintenance, it was claimed, would force manufacturers to extend their operations to retail selling in order to maintain satisfactory channels of distribution and retain the good will and confidence of the consumer. Also, resale price maintenance, because it involved

⁷Interim Report, p. 70

a specific, set price, rather than merely a minimum one, prevented the exploitation of the consumer in periods of deficient supply and in isolated communities where there are few retail outlets. Further, the use by the "chains" and other establishments of "loss-leader" articles requiring special knowledge and maintenance--e.g. electrical appliances--would cause the eventual disappearance of the specialized dealer; and since a high standard of service as well as low prices is desirable, the consumer will ultimately suffer detrimental effects.

The arguments of the critics of resale price maintenance won general approval from the Committee. However, the Committee will be specifically mentioned in all cases where it holds an independent view or has not passed opinion. Quite arbitrarily, and purely as a matter of choosing a starting point, the topics dealt with by the supporters of resale price maintenance will be mentioned first. One result of resale price maintenance, it was stated, was an increase in vertical integration. Retailers, it was claimed, in an attempt to retain freedom of action, have moved into the manufacturing field. In answer to the claim that resale price maintenance protects the consumer from monopolistic competition, the Committee pointed out that this protection would be retained if the manufacturer was permitted to set and enforce maximum resale prices. The Committee agreed that concentration in the

retail field was reduced and that the specialized dealer was afforded a measure of protection, but it pointed out that the protection given the small retailer should not be exaggerated: the large distributors were still free to cut prices on the article not affected by vertical agreement while still enjoying the generous margins available on those articles that were price-maintained.

The most important features and effects of resale price maintenance are to be noted. First, price competition among retailers is eliminated. What could never be accomplished by horizontal agreement--not in the large centers at any rate--is made effective by vertical agreement. Second, competition is transferred from price to service, with corresponding increases in the retailers' costs. Thus, the retailers' profits may be no more than in the absence of resale price maintenance. Third, the resale price is arbitrary, set not by the one best able to judge--the individual retailer--but by one far removed from the scene--the manufacturer. The price thus set is too high, being the same for the inefficient as well as the efficient dealer. As a result, the number of retail entrants, attracted by the high, guaranteed margins, are more than necessary for efficient operations. In other words, there is excess capacity.

Effects on the consumer, the economy, and general conclusions. The Committee, critics, and supporters of resale

price maintenance all agreed that the practice resulted in stable prices. But whereas those supporting resale price maintenance saw stable prices as a virtue--taking only a limited, short-run view--the opposite conclusion was reached by the other parties. The Committee concluded, although the factual evidence available was limited, that prices under resale price maintenance were on the average higher. In this connection, it was pointed out by the Committee and the opponents of resale price maintenance that insofar (the critics of resale price maintenance were somewhat more emphatic) as rigid, high prices transferred necessary adjustments to production and employment, resale price maintenance was detrimental to the general welfare.

It is fairly clear how the consumer is affected by resale price maintenance. It was emphasized, once again by both the Committee and the opponents of the practice, that the consumer is forced to pay a higher price and accept services (the result of competition being channeled in that direction) which may or may not be wanted. In other words, the consumer has no real choice, (one of the requirements for workable competition).

The Committee's presentation leaves something to be desired. The foremost fault of the report is that analysis is sacrificed to brevity. After spending eight pages presenting

the view contained in the submissions made for and against resale price maintenance, the Committee devotes half as many to a presentation of its own conclusions. The report is well written; what is said is stated succinctly, but not enough is said. There is almost no analysis whatever of marketing and retail distribution--something which can rightfully be expected in a report on resale price maintenance.

The Committee depended (or at least it would seem so from the report) on the following sources for information: written and verbal submissions, the White Paper on resale price maintenance in England, Federal Trade Commission reports and a number of books on restrictive practices.

The absence of basic research--although the Committee is not expected to have performed this research, and certainly not in the time allotted, a little more than a year,--is evident from the report. The Committee's statement on "loss-leader" selling is somewhat uninformed and appears to mirror the view held by some business groups.

The Report on "Loss-Leader" Selling.

As early as November, 1952, in answer to the recommendation that a study of "loss-leader" selling was in order, the Director of Investigation and Research set about

the task of gathering information. As is the practice, the Director and his staff performed the research function, and the task of evaluation was reserved for the Restrictive Trade Practices Commission. From all appearances, the final report⁸ is the result of very painstaking efforts. Much of the result of the Director's research is compiled in what has come to be called the "Green Book". The report of the Commission was set out in a separate volume⁹.

The Director made use of three sources of information: Answers to questionnaires and to a general request for information, data gathered by his staff concerning actual Canadian conditions, and published material. In all, the Director's request for information was met by 112 replies, 107 from Canadian sources. Supplementing the information gathered by the Director, the Commission examined 134 witnesses at hearings in seven major centers, including Montreal and points west.

It should be mentioned that the Commission had the benefit of some very expert opinions on marketing. Appearing at the inquiry at the express invitation of the Commission were Ewald T. Grether, Professor of Economics and Dean of School of Business Administration, University of California

⁸Canada, Restrictive Trade Practices Commission, Material Collected by Director of Investigation and Research in Connection with an Inquiry into Loss-Leader Selling, (Ottawa: Queen's Printer, 1954)

⁹Canada, Restrictive Trade Practices Commission, Report on an Inquiry into Loss-Leader Selling, (Ottawa: Queen's Printer, 1955)

and Vernon A. Mund, Professor of Economics, University of Washington. There can be no doubt that much of the excellent analysis displayed by the Commission is due to Grether and Mund's contributions, in all, 176 pages of testimony. Nothing by way of detraction from the Commission's achievement is intended by these remarks. On the contrary, the Commission is to be commended for its sound judgment in seeking expert help.

The most significant factor brought to light in the course of the inquiry was the diversity of opinion concerning the meaning of "loss-leader" selling. This is significant in two respects: (1) The difficulty of formulating and enforcing any legislation that would not be harmful as well as beneficial was made apparent; (2) valuable insight into the businessman's habits of thought regarding price competition was gained.

Definition. It may be taken as generally agreed that "loss-leader" selling involves selective price-cutting from a wide assembly. Anything like unanimity of opinion may be taken to stop at this point. The Commission found that the various definitions submitted could be conveniently divided into those that stressed the purpose of the price-cuts and those that placed importance on their extent.

The imputed motives covered a wide range, including efforts to: (1) Create in the consumer's mind an impression

that all goods in the assembly are equally good bargains;
(2) draw customers to the establishment for the purpose of bringing other goods to their attention; (3) destroy a competitor. The first two purposes attributed to the use of "loss-leaders" are very similar and may be regarded as a form of advertising. In noting this, the Commission commented:¹⁰
"Whether the use of a loss-leader in this sense is less desirable than advertising or other forms of sales promotion is a question that immediately comes to mind". The difficulty with definitions based primarily on motive, the Commission further pointed out, was that a subjective, arbitrary standard of judgment was required in order to make the definitions meaningful. In other words, how is one to differentiate between aggressive competition and practices designed to destroy a competitor?

The definitions emphasizing the extent of the price-cuts had limits as wide as those stressing purpose. The suggested prices selling below which the use of "loss-leaders" could be claimed". . . ranged through the entire gamut from the manufacturer's suggested retail price to the lower of invoice or replacement cost"¹¹. Included in the middle range of definitions were standards of average markup in an establishment and the average cost of doing business in the trade.

¹⁰Ibid, p. 8

¹¹Ibid, p. 11

All of the definitions, except one, could only acquire precise meaning if an arbitrary standard was invoked. But in an establishment with a wide assembly of goods, what is the proper average markup? Differences in value (consider interest charges), costs of physical handling and storage (determined by bulk, weight and necessary packaging), rates of turnover, advertising and sales effort all must be considered; all pointing to the non-uniformity in the costs of handling the various articles of retail trade. To require that the same markup over invoice cost be applied is to ignore these cost differences.

Because of variations in the cost of doing business among different establishments due to location, differentials in rent, efficiency and staff, the Commission objected to the suggestion that a minimum markup extending throughout the trade for any article be applied.

The Commission concluded that most of the definitions were concerned with price competition rather than "loss-leader" selling. The latter term was taken to mean the sale of an article at a loss for the purpose of drawing customers to the establishment in the hope of increasing the sale of other merchandise. Thus, goods sold at a loss, but for motives other than the one noted above, are not "loss-leaders": a loss is involved, but not a leader. Ruled out as "loss-leadering" are end-of-season clearances, disposition of broken

lines, sales of overstocked goods, sales to raise money to meet urgent cash requirements and similar cases. However, the basic difficulties of determining motives and what constitutes selling at a loss is not solved. As regards the latter, the Commission appeared to accept the opinion of Dean Grether and others that only sales at less than net purchase cost could be unequivocally recognized as selling at a loss.

Since the information gathered by the Director and supplemented and evaluated by the Commission was dictated by popular conceptions of "loss-leadering", the area of competitive practices and the range of price-cuts studied was necessarily wide. Questions to be answered were: What products were involved? Which industries were affected (e.g. food vs. hardware)? Where? To what extent? With what effects on the public interest? What remedies were to be devised?

It must be kept in mind that the answers to the questions raised refer to price competition and not in any way necessarily to "loss-leadering"--sales below net purchase cost for the purpose of increasing overall sales volume.

Price competition of a sufficiently serious nature to invoke complaint was found to exist largely in Toronto, to a lesser degree in Montreal and Vancouver, and with sporadic occurrences in other centers west of the Maritime Provinces. The commodities principally involved were electrical appliances--

the most important--cigarettes and bread.

The competition in bread and cigarettes both involved chain stores. A substantial differential, existing for a number of years, between the bread prices charged by chain stores and other outlets, was uncovered. However, no evidence was submitted to show that a loss was incurred on sales at the lower prices. Sporadic price-cutting and the advertising of store openings with giveaway programs were also found to exist. The Commission, it will be recalled, did not find this form of advertising any more objectionable than other varieties.

In 1952, the tobacco companies, led by Imperial Tobacco, extended to six large food chains, the privilege of buying at wholesale prices. The chains lowered the prices of cigarettes accordingly; thus creating difficulties for the tobacco jobbers and retail outlets handling cigarettes.

The chains were not selling at a loss. On the contrary, on the basis of comparative bulk the profit derived from cigarette sales was higher than on the average grocery package. The matter is, of course, more complex. But from all the available evidence, and all questions of leader benefits aside, it did not appear that the lower cigarette prices charged by the chains were in any way unprofitable.

However, there was no doubt that the jobbers and their customers were facing difficulties. The increased volume of

chain sales had affected other retail cigarette sales adversely, in turn lowering jobber sales. The Commission concluded that, in view of the freely competitive nature of the economy, the jobbers had to expect such changes as had occurred and would have to cope with them as best they could. It was pointed out that the pressures on the tobacco jobbers were similar to those faced at an earlier time by wholesale grocers, caused by the rapid developments in the "cash and carry" method of retail distribution.

As was common to other cases, what had been taken for "loss-leader" selling was in fact due to the price-cutting establishment's ability to buy at superior terms. But was it possible for the other establishments not so benefitted to duplicate these terms? Efforts by other retailers on a co-operative basis to achieve more favourable prices had met with failure. In answer to objections raised by the representative of the principal cigarette manufacturer, the Commission had this to say:¹²

We do not think that possible beneficial developments should be held up completely for these reasons, and we think that, in the circumstances it might be desirable for the manufacturers to allow experiments in this direction to be carried out, even at the risk of possible failure, although there should be safeguards to a reasonable extent against such an outcome. We believe that it is the function of business management to accept the responsibility of drawing the line, and it becomes the more necessary to accept this responsibility when the sources of supply are few, as is the case with cigarettes.

¹²Ibid, p. 218

As mentioned, the most important articles affected by price-cutting were electrical appliances. Very few instances of sale below net purchase cost were discovered: Out of fifty stores that reported, forty-four independently owned and six branch units, only five of the independents had sold at less than net purchase cost; and only eight of the large number of appliances handled had been so sold. As well as generally not being sold at a loss, it did not seem that most of the price-cutting on appliances was due to their being used as leaders.

It was found that a number of factors conducive to competitive pricing were operating, many of them applying to developments in the electrical-appliance field. One set of factors related to changes in the pattern of distribution and a second set was concerned with post-war developments.

Changes in the pattern of distribution were found to be due to: (1) The increased role played by the manufacturer in promotional work; (2) the increased emphasis on rapid turnover and volume selling; (3) the frequent model changes in some manufactured lines; (4) the breaking down of traditional distinctions between trades.

The first two factors were found to be of importance to the competitive pattern developing in the sale of electrical appliances. Through advertising and other promotional work, the provision of guarantees and the taking over of the responsibility for servicing the manufacturers were winning

public acceptance of their products and correspondingly reducing the selling efforts required from the retailer and paving the way for low markup, volume selling. The developments in the electrical-appliance field seemed to be paralleling the "cash and carry" movement that had occurred earlier in the food industry.

The third factor, frequent model changes, it was noted, also played an important role in the pricing of electrical appliances. It was reasoned that the introduction of new models, especially those involving significant innovations, exerted pressure on dealers to dispose of outmoded stock. Manufacturers similarly embarrassed also contributed to the downward movement of retail prices. It was discovered that manufacturers, as well as making general price reductions, offered special prices to those dealers known to be able to move merchandise quickly. Thus, the Commission pointed out, what appears to be "loss-leader" selling to the small retailer not so advantaged is nothing more than the result of the manufacturers' sales policy.

The breaking down of traditional distinctions between trades, the fourth factor, was claimed, in several briefs, to have adversely affected in some measure the drug, hardware and tobacco trades.

Included in the post-war developments contributing to

price-cutting were: (1) Saturation of the market for some products; (2) overproduction involving the employment of the same means to dispose of surplus stock as used in the disposal of discontinued models; (3) to many dealers; (4) increased imports. These factors were all considered important in contributing to the price competition taking place in the electrical-appliance field.

Underlining the many submissions was the recurrent suggestion that a return to resale price maintenance would relieve the small retailers from ruinous competitive pressures. The Commission admitted that the prohibition of resale price maintenance had aided in the breaking down of some of the traditional trade lines and was perhaps a contributing factor to the price-cutting that was occurring. However, the Commission pointed out, the underlying causes of increased competition would no doubt have been exerted even if the maintenance of resale prices was legal. Since the substantial drop in consumer's demand took place only after the 1951 legislation, the full extent of the effects of the prohibition of resale price maintenance could not be ascertained.

The Commission stated that even insofar as lower retail margins were facilitated by the prohibition of resale price maintenance, there was little reason to interfere with this development. The new patterns of distribution and the adjustments in the market, evidenced through price reductions,

were desirable and necessary.

Manufacturing groups, claiming that their interests were being prejudiced by the wave of price-cutting taking place, urged the return of their powers to maintain the prices at which their products were resold. The Commission pointed out that the available evidence did not support the contention that the volume of manufacturing sales had been adversely affected.

In answer to charges that fraudulent and misleading advertising was often used in conjunction with leader selling, the Commission observed that laws prohibiting these practices were already in existence. Growing monopolistic positions at the retail level were another serious effect claimed to follow from uncontrolled price-cutting. The Commission did not feel that there was cause for apprehension: First, Section 412 of the Criminal Code was a safeguard against predatory pricing leading to the destruction of competition; second, and very pertinent, the conditions of easy entry to the retail trade would not permit profitable monopoly conditions to exist for any length of time.

In conclusion, the Commission stated that neither the overall price-cutting nor the selective price-cutting used in lieu of or in conjunction with other advertising methods justified the passage of any new legislation.

Conclusions. The fact-finding and interpretative roles assigned to the Director and the Commission respectively must be taken as having been successfully performed. All questions concerning legislative changes aside, a valuable record of recent developments in the retail trade has been provided. The importance of this factor cannot easily be exaggerated. In addition to providing an essential background for policy decisions, the report is probably of more than just negligible value to the businessman. The forces of competition, although necessary, are also often cruel. It is worthwhile that the businessman be informed of the factors shaping his livelihood.

The Commission's decision regarding legislative changes appears to be sound in the light of developments taking place in the retail trades. Sales below net purchase cost--the only kind possible to legislate against without using arbitrary standards--were not shown to be a principal cause of the difficulties being experienced by jobber and retail groups. Further, such sales were not shown to be monopolistic either in intent or in effect.

Although no new legislation was passed, there is reason to believe that at least one part of Section 412 of the Criminal Code, dormant since its passage¹³, may be act-

¹³ Only one report, dealing with a local case, has been written--no prosecution followed. Canada, Restrictive Trade Practices Commission, Report Concerning Alleged Price Discrimination between Retail Hardware Dealers in North Bay, Ontario, (Ottawa:1953)

ivated. Subsections (1) and (2) of Section 412 read as follows:

(1) Every one engaged in trade, commerce or industry who

- (a) is a party to, or assists in, any sale that discriminates to his knowledge, directly or indirectly, against competitors of the purchaser, in that any discount, rebate, allowance, price concession or other advantage, is granted to the purchaser over and above any discount, rebate, allowance, price concession or other advantage, available at the time of such sale to such competitors in respect of a sale of goods of like quality and quantity;
- (b) engages in a policy of selling goods in any area of Canada at prices lower than those exacted by such seller elsewhere in Canada, having or designed to have effect of substantially lessening competition or eliminating a competitor in such part of Canada; or
- (c) engages in a policy of selling goods at prices unreasonably low, having or designed to have the effect of substantially lessening competition or eliminating a competitor,

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

(2) It is not an offence under paragraph (a) of subsection (1) to be a party or privy to, or assist in any sale mentioned therein unless the discount, rebate, allowance, price concession or other advantage was granted as part of a practice of discriminating as described in that paragraph¹⁴.

¹⁴Stats. Can. 1953-54, c. 51

Subsection (1) (a) may easily be applied to the situations revealed in the tobacco and electrical-appliance fields where the manufacturers seemed to be engaged in discriminatory pricing. However, any efforts to modify the selling policy of these and other manufacturers will probably not be undertaken until the study of prices afforded various sized retailers is completed. This study was undertaken soon after the investigation of "loss-leader" selling got underway.

Subsections (1) (b) and (c) would appear to be sufficient safeguards against the predatory pricing claimed to be taking place at the retail level. However, in view of the general conclusion arrived at in the "Loss-leader" Report, enforcement of this part of Section 412 will doubtless not be undertaken within the near future.

Enforcement of Section 34

In the short span of time since the passage of legislation prohibiting resale price maintenance, five reports have been written on alleged breaches of Section 34. Prosecution was undertaken in three instances, resulting in convictions in all cases. A review of enforcement experience is presented below.

Soap products in the Montreal District--an exception to the rule. The first report¹⁵ on resale price maintenance

¹⁵Canada, Restrictive Trade Practices Commission, Report Concerning Alleged Instances of Resale Price Maintenance of Soap Products in the Montreal District, (Ottawa: Queen's Printer, 1953)

is in a sense the most interesting. The Commission charged that the Montreal District Sales Manager of the Proctor & Gamble Company of Canada, Limited, had tried to enforce suggested jobber prices on two occasions. There did not seem to be any question that such was the case; but on the basis of the standards of judgment used by the MacQuarrie Committee--the promotion of efficiency and competition--the actions of the Montreal District Sales Manager could not rightfully be condemned. The Commission had this to say¹⁶: ". . ., even if it were admitted that the purpose sought to be achieved is commendable, this fact cannot justify an attempt to attain the desired end by methods which have been banned by Parliament as contrary to the public interest".

The circumstances leading to the attempted enforcement of resale prices were as follows: Sales by the Proctor & Gamble Company were made at three prices, depending on volume:

(1) The lowest price was charged on carload lots. Normally, only buyers with their own warehouse facilities purchased in such large quantities, such as jobbers, large department stores and chain-store organizations.

(2) The highest price was charged on less than carload lots. Retailers rarely purchased in this way.

¹⁶Ibid, p. 26

(3) The third method, sale under the "Pool Car" system, allowed small retailers to purchase at only a slightly higher price than was afforded the large purchaser buying in carload lots. The "Pool Car" system works as follows: Orders from all grocers in a reasonably small area are filled until, collectively, they amount to a carload; a carload shipment by rail is then made from the Company's plant at Hamilton to a convenient distributing point, from there truck deliveries are made to the individual grocer by the Company. All payments are made through jobbers or wholesalers, selected according to preference, by the grocer. The Company bills the designated jobber or wholesaler, who then collects from the grocer. Thus, the jobber incurs the billing and collection costs and bears the risks. He is paid for these services on the basis of the volume of business handled through him in this way. All delivery and selling costs are paid by the Company.

The price charged the grocer is somewhat higher than that paid by the large chain store buying in carload quantity. But the latter incurs warehouse expenses and the cost of delivery from the warehouse to the individual branch stores. Thus, the "Pool Car" plan would seem to be important in strengthening the competitive position of the small grocer vis-a-vis the large retailer. On the basis of the small markup at which Proctor & Gamble products are sold, claimed a Company

representative, it would be impossible for the small grocer to compete without the benefit of the "Pool Car" plan.

The success of the Plan, as pointed out by the Company's representatives, depends on achieving a sufficient volume within a reasonable small area. In 1952, sales below the suggested resale price were reported being made by a jobber in the Granby area. The Montreal District Sales Manager regarded this practice as a threat to the "Pool Car" system of distribution in the area, and after efforts to persuade the jobber to raise his prices failed, all supplies to the jobber were withdrawn. It is not known to what extent the jobber was selling to grocers who customarily bought under the "Pool Car" plan; but to the extent that he was, the successful working of the Plan in that area was in jeopardy.

If it may be accepted that the jobber was a threat to the successful working of the Plan, then it does seem that he was hampering an efficient operation. Since the Plan allowed the small retailer to purchase at prices equal, or almost so, to those charged the chain stores, it was also instrumental in strengthening the former's competitive position. In this instance, increases in efficiency and competition go hand in hand, but, of course, such is not always the case. There can be no doubt that the operation was more efficient than the alternative methods of distributing to the small retailers. The savings in transportation costs

were passed on to the retailer and, it is very likely, eventually to the consumer. From the point of view of competition, the "Pool Car" system would appear to be a very desirable way of strengthening the competitive position of the small retailers. Efforts by the small retailer to take advantage of the economies of volume buying, which are primarily open to the chain stores, should be welcomed. This is to say no more than that efforts to increase efficiency of operations in any segment of the economy should be supported.

The decision to enforce resale prices in the instance under discussion was taken by the Montreal District Sales Manager on his own initiative and was contrary to Company policy. No other instances of attempted resale price enforcement by Proctor & Gamble were uncovered.

The Counsel appointed to consider the case "advised against prosecution on the grounds of the technical nature of the offence and the fact that it would be the first prosecution under Section 34"¹⁷.

Household supplies in the Chicoutimi-Lake St. John District, Quebec.¹⁸ The circumstances of the case are fairly straightforward: A manufacturer of floor, leather and metal

¹⁷Canada, Combines Investigation Act, Annual Report for 1954 by the Director of Investigation and Research, (Ottawa), p.7

¹⁸Canada, Restrictive Trade Practices Commission, Report Concerning Alleged Attempt at Resale Price Maintenance in the Sale of Certain Household Supplies in the Chicoutimi-Lake St. John District, Quebec, (Ottawa: 1953)

products and related products refused, mainly on the basis of recommendations of one of its salesmen, to accept a new account on the price terms generally afforded wholesale buyers. The salesman had made his recommendation only after he had failed to get the new concern to sign an agreement binding them to maintain suggested prices. The salesman was held personally responsible in the prosecution that followed and a nominal fine and costs were imposed¹⁹.

China and earthenware products. The Report²⁰ describes efforts to enforce the maintenance of suggested retail prices by Parsons-Steiner Limited, the exclusive Canadian distributor for Dalton & Co. Limited, England.

The products distributed by Parsons-Steiner were china and earthenware, dinner, tea, toilet ware and ornamental goods. The attempts to maintain resale prices appeared to be due to the fear that price-cutting would "cheapen" these products in the eyes of the consumer. To the extent that these products have a "snob appeal" and are bought for purposes of conspicuous consumption, this may very well be true. However, effective enforcement would probably be rendered impossible if the effects

¹⁹Canada, Combines Investigation Act, Annual Report for 1955 by the Director of Investigation and Research, (Ottawa), p.33

²⁰Canada, Restrictive Trade Practices Commission, Report Concerning Alleged Instances of Resale Price Maintenance in the Sale of China and Earthenware, (Ottawa: Queen's Printer, 1954)

on the manufacturer had to be considered in each case.

Charges were laid in Toronto and Parsons-Steiner Limited were convicted and fined a total of \$1,000²¹.

Distribution and sale of television sets in the Toronto District. The issue under discussion in the report²² was whether a distributor's franchise had been revoked because of its pricing policy or for reasons within the legitimate discretion of the manufacturer. Although deploring the hasty manner in which the franchise had been withdrawn, the Commission did not feel that the decision had been taken as an effort to enforce resale prices.

An advertising plan alleged to constitute resale price maintenance. The Commission, in the report²³ under discussion, concluded that the cost sharing plan used by Moffats Limited, a manufacturer and assembler of refrigerators, electric ranges and automatic washers and dryers, constituted resale price maintenance. Under the terms of the plan, Moffats, within limits, shared fifty per cent of its dealers' advertising costs. However, and quite reasonably, costs were shared only when the advertising undertaken met with the approval of the manufacturer.

²¹Annual Report of the Director for 1955, (Ottawa), p. 34

²²Canada, Restrictive Trade Practices Commission, Report Concerning Alleged Instances of Resale Price Maintenance in the Distribution and Sale of Television Sets in the Toronto District, (Ottawa: Queen's Printer, 1954)

²³Canada, Restrictive Trade Practices Commission, Report Con-

Included among the advertising features that Moffats insisted meet with its approval was the price at which its products were advertised. Dealers advertising at prices lower than those acceptable to the Company were refused assistance. As explained by a Company representative, the co-operative advertising plan was not designed just to help the dealer but also to assist in the promotion of the Company's products. The second objective was not met, it was claimed, when the advertised price of Moffats' products by any one dealer were much lower than the prices at which other dealers in the area were advertising and selling the Company's products.

The position taken by Moffats was that there was nothing in Section 34 which did not permit them to conduct their co-operative advertising programme. The dealers were perfectly free to sell at whatever price they saw fit. Further, if they were content to forego their advertising allowance, the dealers were free, without fear of reprisal, to advertise at prices within their discretion.

The Commission did not agree. Advertising, it claimed, had become an integral part of the selling process and the price at which a product was sold was in a large measure influenced by the price at which the product was advertised.

23(cont.)

cerning A. Manufacturer's Plan alleged to constitute Resale Price Maintenance in the Distribution and Sale of certain Household Appliances, (Ottawa: Queen's Printer, 1955)

Thus, by controlling the price at which its products were advertised, a manufacturer could indirectly control their resale price. The Commission's viewpoint is expressed as follows:²⁴

By the simple device of offering an attractive advertising allowance to retailers who were prepared to advertise at prices specified by the manufacturer control, for all practical purposes, could be secured over the selling prices and the door would be opened wide for the defeat of the legislation with consequent disadvantage to the public.

Following publication of the report, Moffats was brought to trial in Magistrates' Court, Toronto, convicted and fined \$500. The Commission's conclusions were confirmed: "I cannot think that an inducement to advertise for sale at a higher price is not some inducement to sell at a higher price".

In an appeal to the Ontario Court of Appeal, the decision of the lower court was upheld. Leave to appeal to the Supreme Court was refused by that court.

The position adopted by the Commission and the courts is a striking demonstration of determined enforcement, characteristic of the period under review. Manufacturers, noting the decision in the Moffats Case, are likely to take pause before skirting the borderlines of the legislation.

Summary and Conclusions

The addition of Section 34 to the anti-combines legislation is perhaps the most important event in the post-war period. It is rivalled only by the activation of the

²⁴Ibid., p. 91

enforcement of the merger and monopoly provision of the Act. There can be no question that the prohibition of resale price maintenance has ensured greater flexibility in the use of resources and lower prices to the consumer.

It is also noteworthy that the enforcement of Section 34 will probably be achieved with a minimum of effort. Unlike the horizontal agreement, with its secrecy and codes, efforts to maintain resale prices are unlikely to go undiscovered for long; there are too many people involved, and with divergent interests. As a matter of fact, it is unlikely that very many contraventions of Section 34 will occur. The manufacturer, as well as the student, is aware of these considerations.

However, beneficial the effects resulting from the prohibition of resale price maintenance have been, it must be recognized that they have not been achieved without cost. The competitive forces unleashed have caused difficulties. It is not easy to unlearn old tricks. To some, the adjustments in the distributive system have meant material loss--notably the tobacco jobber, the small retailer handling cigarettes and the electric-appliance retailer. Others, mainly the manufacturers, at least to date, have imagined their loss. And it must be remembered that the freedom offered the wholesaler and retailer has been correspondingly taken away from the manufacturer. However, these are primarily short-run considerations. With the new rules of the game, so to speak,

established and accepted, those who venture to play will have been forewarned and, it is to be hoped, forearmed.

To conclude, the answers to the following questions will be attempted: Would a definition in terms of effects rather than acts have been preferable? In other words, should words such as to the detriment of the consumer or unduly restrictive have been used? In regard to these questions, simply, were the generalizations made by the MacQuarrie Committee that resale price maintenance hampered competition and efficiency valid?

On the basis of the limited evidence that is available, a strong preference for the present wording must be shown, notwithstanding the circumstances brought to light in the report on the distribution of soap products in the Montreal Area. Commenting briefly on this case: First, it is not known whether the jobber's price-cutting was really a serious threat to the "Pool Car" plan. Second, even if it was, resale price maintenance was probably the easiest but not the only solution. Third, similar cases are likely to occur only infrequently.

As a general consideration, the last conclusion is most important. If the prohibition of resale price maintenance is expected to result in adverse effects on competition and efficiency only very infrequently, if ever, then the advantages accruing from the present wording far outweigh the disadvantages. Keeping in mind that the resources available for enforcement are

scarce, the following must be considered to result from the adoption of a "rule of reason" approach: (1) A far greater number of cases would probably occur as a result of a "let's try our luck" attitude. (2) To the extent that the resources available for anti-combines enforcement would be diverted from present employments the overall enforcement programme would suffer. (3) The courts would have to develop standards of judgment which would very possibly be less desirable than the present straight forward categorical prohibition.

CHAPTER V

THE COMBINES PROBLEM--PER SE VERSUS RULE OF REASON JUDGMENTS

Section 411 (before Section 498) of the Criminal Code has been the backbone of combines enforcement. Before the post-war period, the term combines legislation was not just an expression indicating the historical origin of legislation prohibiting restrictive trade practices, it was in point of fact a proper description of the state of enforcement. Until the passage of Section 34 in 1951 and the activation of the merger, trust or monopoly provision of the Combines Investigation Act recently, combinations--generally involving horizontal price fixing--were the only restrictive practices to receive attention.

As well as (and partly because of) being the most rigorously enforced section of anti-combines law, it has also evoked the most comment--primarily controversial. This chapter will review the enforcement of the sections prohibiting combinations in the light of the controversial comment that has been raised.

The Law in Statute and Judgments

"Combines" are defined in Section two of the Combines

Investigation Act and prohibited in Section 32. A similar definition and prohibition is to be found in Section 411 of the Criminal Code.

Section 2 (a) of the Act reads as follows:¹

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

- (i) limiting facilities for transporting, producing, manufacturing supplying, storing or dealing, or
- (ii) preventing, limiting or lessening manufacture or production, or
- (iii) fixing a common price or a resale price, or a common rental, or a common cost of storage or transportation, or
- (iv) enhancing the price, rental or cost of article, rental, storage or transportation, or
- (v) preventing or lessening competition in, or substantially controlling within any particular area or district or generally, production, manufacture, purchase, barter, sale, storage, transportation, insurance or supply, or
- (vi) otherwise restraining or injuring trade or commerce, or a merger, trust or monopoly, which combination, merger, trust or monopoly, has operated or is likely to operate to the detriment or against the interest of the public, whether consumers, producers or others;

Anyone found guilty under this section of the Act is

¹R.S.C. 1952, c. 314

liable to a fine in the discretion of the court and/or imprisonment for a term not exceeding two years. Anyone prosecuted under Section 411 of the Code cannot be charged under Section 32 of the Act².

Section 411 (1) of the Criminal Code reads as follows:³

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 restrain or injure trade or commerce in relation to any article,
- (c) to prevent, limit or lessen, unduly, the manufacture or production of an article, or to enhance unreasonably the price thereof, or
- (d) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, transportation or supply of an article, or in the price of insurance upon persons or property,

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

A comparison of the two sections quoted above shows that they are quite similar, but not identical. It will be noted that the key word in Section 411 of the Code is "unduly", and that in Section two of the Act the phrase "has operated

²Ibid., s. 32

³Stats. Can 1953-54, c. 51

or is likely to operate to the detriment of the public" is most important. Literally interpreted, the statutes declare combinations illegal in the first instance, only when they have unduly limited production and competition or unreasonably enhanced price; in the other, only when they have or are likely to operate against the interest or to the detriment of the public. The question has turned, quite properly, on the meaning to be attached to these vague terms. With regard to Section 411 of the Code, the matter has already been settled⁴. However, Section two of the Act cannot be considered to have been conclusively interpreted by the courts. In other words, "detriment to the public" has not as yet received binding judicial interpretation, neither in relation to combines⁵ nor mergers and monopolies⁶. However, the practical importance of the absence of a judicial definition is restricted to the enforcement against mergers and monopolies. Combines enforcement is not at all affected as Section 411 of the Code is sufficient for this purpose.

⁴For a detailed discussion, see S. F. Sommerfeld, "Free Competition and the Public Interest", 7 University of Toronto Law Journal, (1948), p. 413

⁵The issue under question is whether it is necessary to show specific instances of detriment. This problem has not as yet been settled by the Supreme Court. In the last case on record, it was considered necessary in a majority decision for detriment to be shown; agreement to fix prices was not deemed sufficient grounds for conviction. R. V. Morrey et al, British Columbia Court of Appeal, June 18, 1956

⁶See the following chapter.

As will be recalled from Chapter III, all of the legislative experiments after 1900 with regard to combinations were concerned with the Combines Investigation Act, not with the relevant section of the Code. In addition, prosecution of combines had been taking place even before the Combines Investigation Act was passed in 1910, and, through the years, a judicial definition of combines in terms of Section 411 was being evolved. It may be held that this definition was conclusively arrived at no later than 1912--in the oft quoted Weidman v. Shragge decision⁷. Thus, Section 411 of the Code was already tried and tested while the Combines Investigation Act was still in its early infancy. It is small wonder that almost complete reliance was and is placed on Section 411.

Even within Section 411 not all of the subsections are of equal importance for enforcement purposes. Of the four, subsection (1) (d) has been the most widely applied and is of crucial importance. We can do no better than to turn to a recent decision by the Supreme Court for a statement of the interpretation that has been established. In commenting on the binding precedent that has been evolved, one member of the Court stated:⁸

⁷46 Can. S.C.R., 1912, p. 1

⁸Cartwright, J.; Howard Smith Paper Mills, Ltd. et al. v. R., S.C.R., 1957, p. 426

In essence the decisions referred to appear to me to hold that an agreement to prevent or lessen competition in commercial activities of the sort described in the section (411) becomes criminal when the prevention or lessening agreed upon reaches the point at which the participants in the agreement become free to carry on these activities virtually unaffected by the influence of competition, which influence Parliament is taken to regard as an indispensable protection of the public interest; that it is the arrogation to the members of the combination of the power to carry on their activities without competition which is rendered unlawful; that the question whether the power so obtained is in fact misused is treated as irrelevant; and that the Court except I suppose on the question of sentence, is neither required nor permitted to inquire whether in the particular case the intended and actual results of the agreement have in fact benefited or harmed the public.

In other words, once it is established that there is an agreement to carry the prevention or lessening of competition to the point mentioned, injury to the public interest is conclusively presumed, and the parties to the agreement are liable to be convicted of the offence described in s. 498 (1) (d). The relevant question thus becomes the extent to which the prevention and limitation of competition are agreed to be carried and not the economic effect of the carrying out of the agreement. In each case which arises under the section the question whether the point described has been reached becomes one of fact.

Thus, the question of whether an agreement restraining competition is illegal turns upon the amount of competition that is still present. In terms of the market controlled by the participants of the combination, convictions have been obtained where control has been of the order of 75 per cent⁹. Enforcement has proceeded against combinations controlling

⁹G. Blair, "Combines, Controls or Competition", Can. Bar Review, Vol. XXXI (1953), p. 1085

local¹⁰, regional¹¹ and national markets¹². The concept of the market has been restricted to the industry in which the combination was formed and there has been no consideration of competition from substitutes. As well, the courts have refused to seriously entertain arguments about innovational competition. Once price agreement has been found to exist over a wide share of a market, this has been sufficient to obtain a conviction.

The Controversy

The judicial interpretation that has been established and its adoption by the Restrictive Trade Practices Commission in its reports has been attacked as the acceptance of an out-

¹⁰Canada, Restrictive Trade Practices Commission, Report Concerning an Alleged Combine in the Distribution and Sale of Gasoline at Retail in the Vancouver Area, (Ottawa: Queen's Printer, 1954). Also, Report Concerning an Alleged Combine in the Distribution and Sale of Coal in the Timmins-Schumacher Area (1954); Report Concerning the Retail Distribution and Sale of Coal in Winnipeg.

¹¹Examples: Canada, Combines Investigation Act, Bread-Baking Industry in Western Canada (1948); Coarse Papers (1953). These are short titles. Also, Restrictive Trade Practices Commission, Report Concerning the Manufacture, Distribution and Sale of Quilted Goods, Quilting Materials and Related Products, (1956).

¹²Examples: Canada, Combines Investigation Act, Rubber Products (1952). This is the short title. Restrictive Trade Practices Commission, Report Concerning an Alleged Combine in the Manufacture, Distribution and Sale of Wire Fencing in Canada (1954).

moded and harmful approach. As the rules laid down by the courts must continue to be used by them, (only new legislation can cause any change in that direction), the brunt of the criticism has been borne by the Commission. It has been held that since the Commission has a more or less free hand in the writing of its reports, it should not disregard the opportunity to apply more extensive economic analysis¹³.

The criteria of workable or effective competition have been offered as replacements for the per se rules applied by the judiciary. The tests of workable competition suggested by Bladen and Stykolt are:¹⁴

- (1) alternative sources of supply among which the buyer may chose;
- (2) freedom of entry in the long run;
- (3) evidence of technological progress, including new products, processes and administrative procedures;
- (4) evidence that the benefits of the innovations have been passed along to the public.

To make the four tests, it will be noted, requires that the structure and performance of the industry be subjected to investigation. The last three requirements are perfectly

¹³S. Stykolt, "Combines Policy: An Economist's Evaluation", Canadian Journal of Economic and Political Science, Vol. XXII (February, 1956) p. 38 ff.

¹⁴Ibid., p. 66

consistent with the general tone and approach of the article, however, the first is rather puzzling. It suggests, keeping in mind, Bladen and Stykolt's criticism of the per se rule, that independent pricing policies by individual firms is not necessary in order that there be alternative sources of supply. However, it would not do to labour the point as the list of requirements of workable competition were not meant to be taken seriously.

The important thing to be considered is what Bladen and Stykolt find objectionable about present enforcement. They state:¹⁵

We believe that situations may exist where firms are subject to stiff 'workable' competition ('active') competition though not 'pure' or 'perfect' competition) yet enter into some co-operative arrangements which far from diminishing competition (in the long run) may be prerequisite to it. Under such conditions detriment to the public might result from enforcement of the rules against any agreement; the detriment would result from restraint on the rate of growth of the industry.

We are thrown back to the arguments considered in Chapter II in the discussion of Schumpeter's "creative destruction" and the several versions of workable competition. Indeed, Bladen and Stykolt refer extensively to the proponents of the new standards of competition. But it is doubtful

¹⁵Ibid,, p. 65

whether many of the contributors to the concept of workable competition would be willing to go so far as to accept industries which are ruled by a price agreement in the category of workable competitive. This, in itself, is not of course an invalidation of the stand taken by Bladen and Stykolt.

In the final analysis, it would seem that Bladen and Stykolt are primarily concerned with the innovating activity of firms, and are afraid, along with Schumpeter, lest attacks on all inter-firm agreements inhibit the long-run growth and productivity of industries that require stable price as a prerequisite to innovation.

Here lies the heart of the matter. If it is necessary that, from ~~the~~ point of view of long-run growth, some industries enjoy stable prices, then, clearly, the present anti-combines laws and their applications are defective. The question then becomes: What can be done to rectify the situation? The answer ~~any~~ individual economist would give hinges very largely on the degree of defection he thinks exists. Bladen and Stykolt obviously feel that there are a considerable number of industries that require some form of agreement among the individual firms.

It would be foolish to categorically deny that there are instances where some form of agreement in an industry

could lead to greater long-run benefits. However, the absence of such a denial does not imply agreement with those who feel that the existing rules should be abandoned in favour of a policy of examining effects. Whether it does or not depends primarily on the judgment one makes regarding the quantitative importance of the instances where it would be wiser to examine effects rather than forms. It is in this direction that those who argue for a continuation of the per se rules look.

In order to appreciate the arguments which are used in defence of the per se condemnation it is necessary to examine the concepts of per se and rule of reason. To do so, we refer to the most eloquent of the defenders of the per se rule--Mason.¹⁶

The fundamental point which must be appreciated is that there is no difference in principle between per se and rule of reason--there is only a difference of degree. This proposition may be illustrated with reference to the per se condemnation of combines. What can be inferred from the fact that firms controlling approximately 75 per cent of a market carry out a joint pricing policy? If the market

¹⁶ The following arguments, with a number of elaborations, are taken from "Market Power and Business Conduct", Economic Concentration and the Monopoly Problem (Cambridge, Mass.: Harvard University Press, 1956) p. 389-401. It is hoped that his arguments have been faithfully paraphrased.

boundaries are correctly drawn, it may be postulated that the joint control of such a large market share gives these firms substantial monopoly power--power to exploit the consumer. Clearly the ability to profitably raise price depends on elasticity of the demand curve, which in turn is a function of a number of factors, not least of which is the (cross-elasticity of demand) with other products. However, assume for arguments sake, that very close substitutes are included in the calculation of the market boundaries and that it is not necessary to worry about them. Neglecting for the moment any other considerations, the one fact that such a large share of the market is controlled by a group of firms (or for that matter--one firm) would be cause for concern and action. Why? Because it is commonly taken for granted that power which is held is power which is likely to be used.

The important point which must be stressed is that the argument has proceeded from a relatively simple fact--the joint possession of market power--to the inference of certain effects. (It is possible as well to draw additional inferences, although with somewhat less certainty. It may be held that agreements to shelter inefficient firms cause inflexibility in price and the movement of resources, and the dulling of the competitive spur which drives firms to seek

improvements that benefit themselves and society.) But in moving in that straight line, the argument was restricted--unduly restricted the proponents of the rule of reason approach would claim. Their reasons for holding such a view have already been considered. There may be instances where agreement is a positive and necessary factor in the long-run growth and innovational contributions of an industry. Thus, a second inference has been drawn from the fact that there is price agreement. However, this second inference is not drawn with nearly as much confidence as the first, and here lies the crux of the rule of reason. Since the hypothesis is not general, continual experimentation is necessary and effects must be examined. The differences between rule of reason and per se stems directly from the degree of confidence with which certain effects are expected to follow certain facts. The differences in practice, however, are likely to be wide. If one is certain that B (say, consumer exploitation) will always, or almost always, follow A (a combination), then one will upon observing A not feel that it is necessary to see if B has actually occurred (especially when it may require great effort to test for the occurrence of B). In something somewhat larger than a nutshell, this expresses the position for those who would cling to the continued use of the per se

rules. Their position must be contrasted with those who are not certain that C (say, innovations) follows A, and feel that it is very important that someone take the bother to investigate. Thus, rule of reason embraces a further step in the investigative process--A plus C.

To bring the discussion back to a more relevant situation than the letters of the alphabet, let us return to the consideration of combines and quickly sketch the important differences. The supporters of a rule of reason approach would generally agree that combines can lead to undesirable results. However, they feel that such is not always the case. Further (and without this additional reason, their cause would be lost), it may be necessary for firms to combine in order that innovations take place. Thus, where this necessity is present it is a mistake to attack the combine, because in the long-run the consumer would profit from its existence. Therefore, it is necessary to look beyond the price agreement to its effects.

Combines enjoy dangerous monopoly power and, in addition, may shelter inefficient producers and cause inflexibility in the movement of prices and resources. Therefore, they must be dissolved, states the per se rule. Furthermore, even if they don't always lead to these undesirable results, their dissolution is still acceptable as they are not likely to

result in positive benefits. In the words of Mason: "To defend a per se rule is not to deny that beneficial results may occur; it is only to assert that this outcome is sufficiently infrequent not to be worth bothering about".¹⁷

Although it is necessary for the defenders of per se rules to hold the opinion expressed above, it does not sufficiently explain their opposition to the attempts to have a wider collection of facts--an examination of effects. Opposition to such a movement is to be understood only through a consideration of what acceptance of rule of reason would entail. The questions asked in Chapter II must be repeated, but now with reference to Bladen and Stykolt's tentatively offered requirements for workable or effective competition. Can there be acceptable standards against which evidence of technological progress, including new products, processes, and administrative procedures may be measured? One can always compare the productivity in the industry with that in other countries. This may give some indication if conditions in the other countries are closely similar to those in Canada. Thus, it becomes necessary to know--and to know-well--any circumstances which are likely to offset productivity in the foreign based industries. However, although such studies may be of great interest and value to people who have a practical

¹⁷Ibid., p. 396

or academic interest in the industry, it is doubtful whether they would be very useful in determining whether there was effective competition. Unfortunately, the matter does not end here; what about whether the gains in efficiency have been passed on to the consumer? To answer this question one must venture into a complicated maze of what constitutes "reasonable" prices and profits. Once again the absence of a generally acceptable standard, or rather standards, is a potent stumbling block. As a matter of fact, the plural is more appropriate; allowance must be made for differences among industries. With all of the time consuming, and perhaps never to be resolved, difficulties which attend the adoption of a rule of reason approach, would effective anti-combines enforcement be possible? It is hardly likely, and especially so if the courts were required to perform the task of evaluation.¹⁸

To summarize, the defenders of the per se rule base their defense on two propositions:

(1) The instances when combines are likely to be beneficial are infrequent.

(2) To seek to discover these rare instances would destroy the effectiveness of the enforcement programme.

¹⁸With reference to this general area, the reader should see the following discussions. L. A. Skeoch, "The Combines Investigation Act: Its Intent and Application", Canadian Journal of Economics and Political Science, Vol. XXII (February, 1956) at p. 17. G. W. Wilson, "Anti-Combines and Injury to the Public", Canadian Journal of Economics and Political Science Vol. XXIII (February, 1957) at p. 121. J. N. Wolfe, "Some Empirical Issues in Canadian Combines Policy", Canadian Journal of Economics and Political Science, Vol. XXIII (February, 1957) at p. 113.

There can be no doubt that effective enforcement would be seriously threatened if the law was changed in the direction of making the courts responsible for evaluating the performance of combinations. However, Bladen and Stykolt have not gone that far. They only request that the Commission should be more searching in its investigations. However, it is clear that even the Commission would be unable to continue to handle the same number of cases if it was required to broaden the scope of its investigations and arguments to the extent discussed above. But if only an enlarged Commission or one with a large staff was necessary in order that more penetrating investigations be made, it would probably prove worthwhile. However, it could very well be that payment of a price greater than this would be necessary. There is a great danger that due to the difficulties already indicated, examinations of effects would become totally incapable of reaching conclusions. There is yet another danger to be noted. No exact instructions have been issued to the Commission; which standards of competition should it adopt? In other words, which effects should it consider and how far should it go in considering them? Assuming that it is able to reach some decision in this respect, and the danger of chaos expressed above is avoided, would this necessarily mean that its decision would be gratefully accepted by the citizens of Canada or the people who now indicate disavowal with its

adoption of the existing interpretation of the statutes.

It is often objected that the present interpretation is vague and does not provide a reliable guide. It is difficult to accept this objection in the light of the consistent interpretation rendered by the courts, which has been noted and reiterated in the reports of the Combines Commissioner and the Restrictive Trade Practices Commission. Any move on the part of the Commission in the direction of examining effects would undoubtedly tend to destroy much of the clarity and certainty which has been provided through the years. Would-be-offenders, in that event, would be more inclined to enter into collusive agreements; because, if detected, the risk of prosecution would be reduced. There would always exist the hope that the Commission would find their arrangement unobjectionable on "economic" grounds, and that, for this reason, the Minister of Justice would not seek to prosecute. As has been pointed out many times in the reports of the Commission, the habit of co-operation among firms is a difficult one to break. Thus, any increase in the number of collusive agreements which resulted from uncertainty about the enforcement of the law would be sure to have lasting effects.

For the reasons discussed above, it is felt that unless there is a stronger presumption than presently exists that collusion is likely to lead to increased efficiency and greater benefit to the consumer, the Commission should continue to use

the per se rule. Above all, the Commission should continue to resist attempts to have it rule on the reasonableness of prices and profits. In the words of the Director of Investigation and Research, T. D. MacDonald, formerly the Commissioner of the Combines Investigation Act--" an invitation to pass upon the 'reasonableness' of prices, is an invitation to regulate".¹⁹

Some other aspects of the Commission's Report. The Commission, in keeping with its duties outlined in the MacQuarrie Report and the Combines Investigation Act, does not pass on the guilt or innocence of the alleged offenders in a legal sense, and does not recommend or discourage prosecution. In reference to the report of the Commission, the Act states that "such report shall review the evidence and material, appriase the effect on the public interest of arrangements and practices disclosed in the evidence and contain recommendations as to the application of remedies provided for in this Act or other remedies".²⁰ The MacQuarrie Report, after stating that there had been a tendency for the report to become merely a preliminary stage in prosecution and that the tendency should be checked, recommended: "It (the report) should reach conclusions

¹⁹Canada, Combines Investigation Act, Report of Commissioner: Investigation into an Alleged Combine in the Manufacture, Distribution and Sale of Fine Papers (Ottawa:King's Printer, 1952), p. 409

²⁰s. 19

on whether or not competition has been restricted or lessened and whether in the opinion of the board (Commission) the conditions or practices have operated or are likely to operate to the detriment of the public".²¹

Unless one considers the instructions of the statutes and the MacQuarrie Committee against the proper background, one is very likely to be misled. It would be a simple matter to slip into the error of believing that a far-reaching analysis of effects is called for. There is no evidence to support this conclusion. Whether it is wise or not, the Commission is bound to follow in the tradition of report writing established before the 1952 amendments; and which tradition stems directly from the interpretation of the statutes that have been established by the courts.

The MacQuarrie Committee is to be taken to task for its statement. Considered in isolation, it may be acceptable; but not when it stands against the rest of the report written by the Committee. If the Committee felt that some modifications were necessary in the method of reporting, it should have been far more specific in suggesting alternatives. There was certainly very little justification for the Committee to merely state that the Restrictive Trade Practices Commission should consider "detriment to the public". If the Committee felt that price agreements were not universally harmful, then it

²¹op. cit., p. 34

had ample opportunity to discuss these fears and issue specific directives to the then-to-be-formed Commission as to how it should proceed in making its appraisals when investigating the conditions surrounding a price agreement. Unless it was exceptions to the per se rules governing the interpretation of combinations that the Committee had in mind, there was no reason to expect the report to stop being a preliminary stage in prosecution, for the Commission as well as the Director of Investigation and Research should be expected to know when the law, as it has been defined, is being broken.

The Report, Enforcement and Detriment

As an introduction to the discussion which follows it will be useful to examine the general format of the Commission's reports. The first chapter is devoted to the Director's allegations, a history of the parties to the combination and a rebuttal of the Director's allegations by the parties to the alleged agreement. A description of the product and the industry, including statistical information and references to the relevant tariffs (where they exist) is given in the second chapter.

The next part ("part" only in the sense that it is more reasonable to consider it as such; the largest divisions of the report are chapters) of the report may contain any

number of chapters, depending on the nature of the agreement under consideration. These chapters trace the history of the agreement and explain how it operated. In tracing the development and operation of the agreement, major reliance is placed on quotations from the documents seized for the alleged offenders and from quotations from the evidence gathered at the hearings. This part of the report, as when the Commissioner of the Combines Investigation Act was responsible for reporting, comprises the major portion of the volume.

Then, the second from the last chapter discussed and appraises the "effects" of the agreement. Much of this chapter is taken up with a rebuttal of the arguments of the alleged offenders as to the reasonableness of price, honesty of intentions, etc. Having disposed of these arguments, the Commission generally proceeds to a finding of detriment. The last chapter, which is generally very short, repeats in a general way the conclusions of the previous chapter and also includes the Commission's recommendations. Occasionally, the last two chapters are combined.

Of primary interest are the Commission's findings with regard to detriment and its recommendations. The Commission has, with only two exceptions²¹, reached a conclusive finding

²¹Report Concerning the Retail Distribution and Sale of Coal in Winnipeg, 1956. In the Report Concerning the Production, Purchase

of detriment. In the instance of the Winnipeg combine, the Commission found ~~that due to the conditions of entry and the~~ close substitutes that were available "the detrimental effect seems probably to have been not great"²². The Commission used sound economic arguments in reaching this conclusion, properly taking into account the competition from oil. However, it by no means absolved the offenders from being a source of detriment, pointing to the fact that many consumers would continue to use coal and would be hurt to the extent that the price was higher than it would be in the absence of an agreement.²³

The Commission, very surprisingly, agreed to consider the course and level of prices and profits--which, it may be noted, did not seem too high. It may be argued that in doing so the

21 (cont.)
and Sale of Flue-Cured Tobacco in Ontario, 1956, the Commission did not reach a finding of general public detriment, although it did find that the tobacco marketing association had made decisions which were not always in the interest of the members of the association and non-members. The tobacco growers subsequently submitted to market their tobacco in accordance with The Farm Products Marketing Act of Ontario. See p. 19 of Report of the Director of Investigation and Research for the Year Ended March 31, 1957, (Ottawa).

²²Op. cit., p. 108

²³The members of the combination were prosecuted and fines totalling \$20,000 were imposed; also, an order of prohibition enjoining the offenders from continuing or repeating the offence was issued. Annual Report of the Director of Investigation and Research for 1958, (Ottawa), p. 21

Commission was diverging from the per se rule that it has consistently followed. This conclusion may not be justified. It would be, if there had not been intense competition from oil, and if the conditions of entry were not very easy. However, under the circumstances it may be stated that the Commission was only buttressing its analysis with appeal to some facts.

The Commission, from the time it wrote its first report in 1954²⁴, has sought public detriment in the likelihood that price will be higher under agreement than it would be otherwise. However, when the agreement has extended to the product as well as to the price, the Commission has been even more emphatic in reaching a conclusion of detriment to the public²⁵.

Delivered Pricing has been another direction in which the Commission has looked for a finding of detriment. It has pointed out that a delivered price system is likely to result in higher prices being charged the consumer because of cross-hauling and because the consumer is not free to arrange his own perhaps more economical transportation. It was recommended by the Commission that f.o.b. pricing be used,

²⁴Canada, Restrictive Trade Practices Commission, Report Concerning an Alleged Combine in the Distribution and Sale of Gasoline at Retail in the Vancouver Area, 1954.

²⁵Such was the case in the Report Concerning an Alleged Combine in the Manufacture, Distribution and Sale of Asphalt and Tar Roofings and Related Products in Canada, 1955 and in the Report Concerning the Manufacture, Distribution and Sale of Boxboard Grades of Paperboard, 1956.

in order to free the consumer from a source of detriment²⁶.

Of course, the Commission restricted its recommendation to the instances which it was discussing, no general policy proposal was intended.

Public detriment has been found not only when consumers have been likely to suffer, the interests of producers who face a combination of buyers has been considered as well.

The Commission concluded that:

The arrangements and practices . . . have been to the disadvantage of the public consisting of settlers and farmers from whom pulpwood has been purchased . . . In the absence of public regulation such persons are entitled to sell their products under conditions of free competition without interference from private restrictive arrangements . . .²⁷

The wording used to condemn the buyers of pulpwood is identical with that often used in relation to a combination of sellers. It is clear that, in the eyes of the Commission, both blades of Marshall's time honoured scissors must conform to the conditions of free competition.

In proposing remedies, the Commission has placed almost complete reliance on the restraining order which may be ob-

²⁶ See Manufacture, Distribution and Sale of Asphalt and Tar Roofings, 1955, p. 152, and Metal Culverts and Related Products, 1957.

²⁷ Report Concerning the Purchase of Pulpwood in Certain Districts in Eastern Canada, 1958, p. 214

tained from the courts. In only one report is the use of a tariff reduction seriously considered. The wording of the recommendation is ambiguous, however, and it is difficult to know exactly what is intended. The recommendation reads as follows:

If, after a length of time sufficient for observation of the conduct of boxboard manufacturers, it appears that a reasonable degree of competition in the industry has not been restored as a result of the abandonment of the formal restrictive arrangements, consideration could be given to the reduction or removal of import duties on boxboard so as to provide the public with a more competitive market.²⁸

It is suggested that a tariff reduction is not to be expected unless there is a formal resumption of illegal practices. The Commission has used the very term it eschews in other contexts. Who will determine what is a reasonable degree of competition? To date (summer of 1958), eleven reports have been published. When this total is added to the equal number which were written by the Commissioner of the Combines Investigation Act²⁹, the total is impressive.

²⁸Report Concerning the Manufacture, Distribution and Sale of Boxboard Grades of Paperboard, 1956, p. 198.

²⁹A list of the titles and dates is given below:

Report of Commissioner, Investigation into an Alleged Combine in the Manufacture and Sale of Dental Supplies in Canada, 1947.

Report of Commissioner, Investigation into an Alleged Combine in the Manufacture and Sale of Optical Goods in Canada, 1948.

29 (cont.)

Report of H. Paul Goldenberg, Special Commissioner, of an Investigation into an Alleged Combine in the Bread-baking Industry in Saskatchewan, Alberta and British Columbia, 1948.

Report of Commissioner, Investigation into an Alleged Combine in the Manufacture, Distribution and Sale of Flour and Other Grain-Mill Products, 1948.

Report of Commissioner, Investigation into an Alleged Combine in Ontario and Quebec in connection with the Distribution and Sale of Flat Glass, 1949.

Report of Commissioner, Investigation into Alleged Combine in the Manufacture, Distribution and Sale of Mechanical Rubber Goods, Tires and Tubes, Accessories and Repair Materials, Rubber Footwear, Heels and Soles, Vulcanized Rubber Clothing, 1952.

Report of Commissioner, Investigation into an Alleged Combine in connection with the Distribution and Sale of Bread and other Bakery Products in the Winnipeg Area, Manitoba, 1952.

Report of Commissioner, Investigation into Alleged Combines in the Manufacture, Distribution and Sale of Fine Papers, 1953.

Report of Commissioner, Investigation into an Alleged Combine in the Supply, Distribution and Sale of Coarse Paper in British Columbia, 1953.

Report of Commissioner, Investigation into an Alleged Combine in the Purchase of Maple Syrup and Maple Sugar in the Province of Quebec, 1953.

Report of H. Paul Goldenberg, Q. C. Special Commissioner, of an Investigation into an Alleged Combine in the Manufacture, Distribution and Sale of Electrical Wire and Cable Products, 1953.

And it must be remembered that the number mentioned here includes only cases of combinations.

However, the number of reports may also be cause for concern as many of the industries involved in agreement are large and important, accounting for millions of dollars of sales. Is then the economy covered with combinations that raise price to exorbitant levels? Undoubtedly there are many combinations in existence which have not been discovered by the Director of Investigation and Research, and perhaps may never be. However, it must not be supposed that all combines make their goal the maximization of the profits of the group. In many instances the main object of the group is a stable price rather than a high price. Also, the fact that the price level is reached by group decision may tend to keep it lower than it would be if the decision was decided by only one producer. And most important, the price decided on is very rarely strictly adhered to. It is doubtful whether any price agreement, no matter how formal, is sufficient to prevent secret "chiseling". Finally, the fear of discovery and prosecution must be added to the list of influences which act to keep the price reached by agreement below the levels it might reach if the combination was trying to maximize joint profits.

Recommendations and Conclusions

Although it is not likely that the enforcement effort will be hampered by the fact that two separate, and not

identical, pieces of legislation exist for the same set of practices, it is recommended that reference to combinations in the Combines Investigation Act be deleted. At any rate, the manner in which combinations and mergers and monopolies have been run together in the Act is unsatisfactory. The economic considerations which must be taken into account in the two cases are not the same and the legislation should not treat it as if it were.

It is recommended that the Commission continue to refuse to be drawn into a discussion of the "reasonableness" of the performance of the firms comprising the combination. However, this is not to exclude the desirability of more economies and less effort devoted to the lengthy and generally redundant attempts to prove that an agreement was operative. At present, unless the industry is uncomplicated and familiar, the reader is unable to appreciate its economies. To rectify this, it is suggested that the report should include the following information, preferably at the beginning of the report.

Firstly to be considered is the nature of the product. And by this is not meant a listing of the technical names of the various classes and types of the product. What should be offered rather, or as well, is information about the degree of homogeneity of the products being sold, with reference to

actual physical differences, or psychological differences due to the nature of the buyers and the kind of sales programme engaged in by the sellers.

It is necessary to know the number of sellers, their relative size and their location.

To the list of information must be added the amount of investment in plant and machinery, and a measure of excess capacity. In addition, the reader must be told to what extent such excess capacity has existed in the past.

Barriers to entry and exit must be considered. This, admittedly, is a difficult task to perform. But because the Commission is more or less assured the co-operation of the firms involved, it would be much easier for the Commission to perform this analysis than for anyone else.

From the point of view of production, rather than demand, the type, and number of products should be examined, and, as well, their inter-relationship in the productive process. Also essential knowledge is the degree of specialization practised by the individual firm and among the firms in the industry.

Some picture of the number and kind of close substitutes must be indicated, including information about price differentials, uses and other pertinent information.

Although many may find this list incomplete (it is doubtful whether any list of this kind would ever be

considered to be complete) the information that is being asked for is certainly of the nature which any industry study would be required to give. It will be noted that it will require a good deal of economic analysis merely to gather this information, but no more than a body like the Commission should be expected to handle. And it must be pointed out that, in many cases, much of the information is apparent on observation. Most of the difficulties will be encountered when examinations of the larger and more complex industries are called for. However, it is these very industries about which it is most important to be fully informed.

There are several purposes which it is hoped that the information that has been called for may serve. First, it is extremely useful, both as a general policy guide and for academic reasons, to have as much information about as many industries as can be gathered. The importance of this consideration is not open to question; but it may properly be asked whether the Commission is the body which should provide this service. But who has a better opportunity? Since the Commission must become familiar with the industry anyway, why should it not expend the extra effort when in so doing it can perform an important task. At any rate, the reasons which follow are more in keeping with the role of the Commission.

Second, it is especially important to fully know and

understand ~~those~~ industries that have resorted to agreement. There are obvious questions to be asked. Is there any particular pattern which may be noted? Why these particular industries?

Third, the information which is being required must necessarily be taken into account by the Commission when it suggests remedies. Most careful analysis is necessary when the use of a tariff reduction is contemplated, especially since the government may be reluctant to make use of this remedy. But government reluctance aside, the Commission should be made to answer for any remedies it proposes. ~~Now~~ Having analyzed the structure of the industry, it should trace through the probable effects which the suggested course of action are likely to have. Considering that it is the public body most familiar with the industry, the Commission should feel itself responsible for indicating the extent to which the tariff should be reduced. Of course, tariff reduction is not the only available remedy, but its use would seem to require the most searching analysis.

Fourth, the information acquired in the investigation of a combination could be extremely useful if a merger was proposed in the industry.

Fifth, the information is necessary if the reader is to make an intelligent appraisal of the practices engaged in by the combination.

It must be repeated that, notwithstanding the request for additional information, it is not proposed that there should be any departure from the per se rule governing the interpretation of combinations. What has been requested, primarily, is a description of most important structural characteristics of the industry or market with which an economic analysis may be performed. But it must be noted that more time and effort will have to be put into the writing of a report, with the most marked difference occurring when large and complex industries are being investigated. Although the extra effort will be much less than is required to decide whether an industry is workably competitive, a diminution in the number of cases the Commission can handle is to be expected. However, much depends on who performs the basic economic research. At present, the Commission may request of the Director of Investigation and Research that he and his staff gather whatever information it requires. Thus, should the brunt of the task fall on the Director, it may be necessary for extra staff to be added if the intensity of the enforcement programme is not to suffer. Or, as an alternative, perhaps the Commission should have its own research staff. However, it would seem wisest to merely add to the staff of the Director since they are now required to perform special research projects--such as the study into "loss-leader" selling--and hence acquired the experience in that direction.

CHAPTER VI
ANTICOMBINES ENFORCEMENT EXTENDED--
MERGER, TRUST OR MONOPOLY

The Law Relating to Merger, Trust or Monopoly

All the cases discussed in the previous chapters dealt with resale price maintenance, price discrimination, and combinations in the strict sense of the term--two or more firms combining for the purpose of restricting competition. The latter type of activity has absorbed almost all the attention of the anti-combines enforcement agencies, but recent signs point to increased activity in another area of anti-combines enforcement. This is the area of "merger, trust or monopoly".

Definition. A "merger, trust or monopoly" means one or more persons

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

(ii) who either substantially or completely control, throughout any particular area or district in Canada or throughout Canada the class or species of business which he or they are engaged in, "which . . ., merger, trust or monopoly has operated or is likely to operate to the detriment

of the public, whether consumer, producers or others;"¹.

Interpretation. The aspect which lends a good deal of interest to the anti-combines activity in this sector is the way in which the courts and the Restrictive Trade Practices Commission have interpreted merger, trust or monopoly. Since none of these terms acquires legal meaning unless detriment, present or potential, is shown to exist, the differences of opinion and uncertainty have centered around the interpretation of detriment. Two lines of argument, although not always clearly drawn, have been used. They are as follows:

(1) The rules applied to combinations should be carried over and any substantial lessening of competition should be considered detrimental per se.

(2) The circumstances surrounding each case should be examined to determine whether they are such that detriment will result.

What finally seems to be evolving is a combination of the two arguments. In relation to this the intent of the accused has assumed great importance.

Some Economic and Enforcement Considerations

Before launching into a discussion of the cases and reports, some important characteristics of mergers and mono-

¹Combines Investigation Act, R.S.C. 1952, c.314, s. 2(a) (VI) and 2(e).

polies will be discussed.

There are sound economic arguments for not treating every reduction of competition by way of merger and monopoly as per se detrimental to the public interest. Given the necessity of a large-sized production unit in order to attain an efficient scale, and a relatively small market, a high level of concentration will be the inevitable result². Thus, a high level of concentration or even monopoly on a regional, and sometimes national level, may be the price of efficient, low cost production. Concentration of control may sometimes not lead to lower costs or production, as such, but administrative and selling costs may be reduced. It may readily be seen that to attack every movement in the direction of concentration could lead to a high price being paid through the loss of efficiency.

However, it is not sufficient that it be demonstrated that the unit of control is efficient. Another important criterion is whether or not the benefits accruing from increased efficiency are being, or are likely to be, passed on to the consumer. To determine this possibility, one must look to existing or potential competition. The directions from which competition is likely to come is from close substitutes, foreign based producers, and new entrants. Where there are no

²Canadian manufacturing industries, generally, offer a good example of this. See G. Rosenbluth, Concentration in Canadian Manufacturing Industries, (Princeton, N.J., Princeton University Press, 1957), p. 20

close substitutes already in existence, it is suggested that it would be foolish to adopt the role of fortune teller.

Even if a considerable amount of time was spent in investigating the possibilities of innovation, predictions would still

have to be treated with extreme skepticism. However, where competition from close substitutes already exists, a careful measurement of the strength of this competition is necessary.

To do so requires that three questions be answered: (1) Over what share of the market do substitutes offer competition?

(2) How perfect are these substitutes? (3) How does their cost of production compare with the costs of the merging firms?

It is appreciated that these are difficult questions to answer.

However, it is not being suggested that attempts be made to measure demand schedules. It should be possible to get a

fairly clear picture of the areas of use where substitutes are offering competition merely by observation. Also, one should

have a good idea of the degree of substitutability from an examination of prices and sales. A cost comparison, unfortunately,

is more difficult to make, especially where the

production of joint products is involved. However, it would not be necessary to make a cost comparison unless it was

first determined that close substitutes existed over a wide

share of the market. Thus, to sum up, the consumers interests

can be considered to be protected by the existence of substitutes

only when they compete over a wide share of the market, are

very close, and their cost of production compares favourably with the costs of the merging firms.

The second direction to look for competition is to foreign based producers. Where a tariff serves as protection for domestic producers, there should be no difficulty in safeguarding the interests of the consumer. If the merging firms are confident in their ability to produce more efficiently because of the merger, then they should be willing to accept a tariff reduction; with increased efficiency their need for tariff protection should obviously be less. However, there may be other firms in the industry, and the situation is then more complicated. In such instances the policy to be followed would have to depend on the circumstances of the particular case.

New entrants provide a source of potential competition. Where barriers to entry are not high, it may be expected that high profits will attract new entrants to the industry. Thus, where increased efficiency may be anticipated to result from a merger, and where the barriers to entry are not high, it may be permissible to allow the merger to take place.

Other, and equally difficult, considerations apply to the judgment of monopoly. If the firm is an aggressive innovator in the Schumpeterian sense, or given the less dramatic, but equally important, consideration that the econ-

mony simply cannot afford more than one efficient firm, the problem of whether the consumer is benefiting still remains to be answered. When does consumer benefit end and where does consumer exploitation begin? What is a fair return to the business pioneer and how long should this rate of return be allowed to continue where a monopoly position is being enjoyed? Answers to these questions may be avoided through a careful selection of investigations by the Director of Investigation and Research, but any far-reaching investigation of mergers and monopolies will undoubtedly bring to light situations where they will have to be answered.

Whereas an existing monopoly, or one being formed by way of merger, may appear less harmful than a combination because of the possibility of increased efficiency, this is not the complete picture. A combination by comparison is a loosely knit organization. There is only agreement, not unity of control in a legal sense. Also, very few agreements are strictly adhered to, especially where the punishment on being discovered is slight. And where the combination is uncovered by the anti-combines administration it is rather an easily-managed matter to dissolve it, simply because there is no legal, only artificial, unity of control. None of this applies to the individual company that has acquired a monopoly or near-monopoly position or for that matter, any company. Although the court may give an order calling for the dissolution

of a merger or a monopoly--which power has hitherto not been exercised--it may be reluctant to do so since the practical difficulties in complying with the court's wishes may be many. These considerations must weigh heavily in determining the allocation of time spent in investigation. Greater returns will obviously be forthcoming if mergers harmful to the public interests are discouraged before plans for their completion can be carried out.

Enforcement of "Merger, Trust or Monopoly"

To date, there have been only two prosecutions under the merger, trust or monopoly offence, created in 1910 under the Combines Investigation Act. There have also been only five reports written on investigations into alleged offences under that part of the Act. Two of these gave rise to the prosecutions mentioned, and of the other three, court action is pending in one case. Legal action has been recommended in another if the plans for the merger are carried out, and in the most recent report, no action was prescribed.

Fruits and Vegetables--Western Canada³ (Rex. v. Staples)⁴.

In a report submitted in 1939 on the distribution of British

³Canada, Combines Investigation Act, Report of Commissioner: Investigation into an Alleged Combine of Wholesalers and Shippers of Fruits and Vegetables in Western Canada, (Ottawa, King's Printer, 1939)

⁴Rex v. Staples (1940) 4 D.L.R. 699

Columbia fruit in Western Canada, the Commissioner concluded that the ownership of stock by the largest fruit and grocery jobber in Western Canada in a fruit sales agency constituted detriment to the growers⁵.

The situation in British Columbia at the time of the report, and previously, was the familiar one of the unorganized, small agricultural producer contending with the relatively much stronger buyer of his produce. The system of distribution was such that the fruit passed from the grower to a shipper, who sold the fruit on the grower's behalf, for a mutually-agreed-on commission. The shipper sold to the jobber. Sale was generally conducted through an intermediary, a broker. It was his job to keep informed of the market conditions at the points where the fruit was being shipped. Essentially, he acted as an intelligence service for the shipper, and thus for the grower. It was the responsibility of both the shipper and the broker to ensure that the grower received the best possible terms in selling his fruit to the jobber.

A further link in the chain of distribution were the selling agents--organizations that represented the shippers. They performed exactly the same function as the shipper, that is, sold the growers' fruit to the jobber. The selling agents were often co-operative organizations of shippers who combined

⁵Fruits and Vegetables Report, op. cit., p. 81

in an effort to facilitate the marketing of the fruit of the growers they represented and to reduce their selling costs. Other sales agents were not co-operatives, although shippers often held some of their stock. One such agent, Sales Service Ltd., handled in the vicinity of 19 per cent of British Columbia fruit marketed on the prairies.

The last marketing organization of importance in the discussion was the jobber. There were four large jobbers at the time and several who were very much smaller. However, the four large ones, in essence, constituted only three independents as one, Dominion Fruit Ltd., was a wholly-owned subsidiary of another, Western Fruit Ltd. The jobbers marketed the fruit throughout the prairies. The larger ones had branches in most of the important cities. The small jobbers generally did not have any branches and only operated in one locality, sometimes peddling their fruit directly to the consumer⁶.

The situation leading to the investigation and prosecution followed the purchase by Dominion Fruit Ltd. of 50 per cent of the shares in a holding company, Lander Company Ltd., which held slightly more than 50 per cent of the shares in Sales Service Ltd. In addition, the holding

⁶Ibid., Chapters 2 and 3

company held a controlling interest in several shipping houses. The Commissioner's report concluded that it was detrimental to the growers' interest for Western Grocers through the Lander Co. and Dominion Fruit to have a financial interest in Sales Service and the shipping houses, since in all cases they were expected to operate in the best interests of the growers, not the jobbers'.

Although the investigation did not reveal that Sales Service was selling at a lower price to Dominion Fruit and Western Grocers than any of the other selling agents and shipping houses, the report did find that there were other possibilities for detriment to the growers:

(1) A system of floor stock protection practiced in British Columbia allowed for rebates to jobbers when a sudden drop in price found them with unsold fruit on their hands which they had bought at the old higher price.

(2) A system of condition claims which allowed the jobbers to be reimbursed for fruit that deteriorated on the way to its destination.

(3) Quantity discounts which allowed for lower prices to jobbers who bought in considerable volume⁷.

The judge trying the case, brought to court at the

⁷Ibid., pp. 52 ff.

instance of the Attorney General of British Columbia, did not concur with the Commissioner's conclusions. No combine under the merger, trust or monopoly provision was found to exist. The judge ruled as follows:

(1) Fifty per cent holding of the shares in the Lander Company by Western Grocers did not constitute control.

(2) Even if it did constitute control, there had been no detriment to the growers. Any protection offered Western Grocers, as far as price and refunds on damaged fruit are concerned, were justified. The quantity discounts were reasonable. The growers were not receiving any smaller returns selling through Sales Service than other growers. In addition, if they did feel they were receiving less they could always sell through someone else. Finally, since the two shareholders besides Western Grocers in Lander Company did not own any stock in Western Grocers, it was not in their interest to allow Western Grocers to eat into their income by giving them extraordinary discounts and the like⁸.

The conditions of the case are rather interesting. It is the only merger case on record that concerns vertical rather than horizontal expansion. But its very uniqueness detracts from the possibility that it will be much referred to in future cases. The decision itself is somewhat disappoint-

⁸Rex v. Staples, (1940) 4 D.L.R., 699

ing. No positive benefits could accrue to either the growers or the shippers from having Western Grocers owning shares in the Lander Co., and the possibility of harm being done the growers was clearly apparent. Perhaps the judgment would have been different if other than purely punitive measures were made available by the law. Section 31 (1) (b) of the Combines Investigation Act, introduced in the 1952 amendments, gives the courts the authority to order dissolution of a merger and a monopoly. These remedies were not available to the courts in the Staples case and there is good cause to speculate that the decision would have been different if they were.

Perhaps more important than the judgment was the report. Generally, the people who stand to suffer most from the activities of a combine are the consumers, and for obvious reasons no great interest and reaction is expected from them. But here was a report that affected the vital interests of the growers and it is to be expected that the report was avidly read and discussed. For this reason, the possibility of detrimental effects to the growers' interests because of Western Grocers' connection with the Lander Co. was reduced. The report also provided an excellent discussion of marketing arrangements, with suggestions for their improvement which would benefit the growers. It is interesting to note that the Commissioner warned the growers against using the remedy of

combining as a way out of their difficulties. He felt that this would lead to a higher price being charged the consumer. In essence, this amounts to a recommendation against the development and use of countervailing power⁹.

Matches¹⁰ (Rex. v. Eddy Match Company Ltd.)¹¹ The international match market has long been controlled by Swedish, British and American interests¹². The conditions of the match industry in Canada were a result of cartel arrangements among those interests. In 1927, after a brief period of rivalry in the Canadian market, three independent producers were merged under the name of the Eddy Match Company. At the time of the investigation in 1947, Bryand and May, the British member of the cartel, or its nominees, held approximately 66 per cent of the common shares in the Eddy Match Company, and the Diamond Match Company, the American member of the cartel, or its nominees, held 28 per cent. At the same time,

⁹Fruits and Vegetables Report, op. cit., p. 77

¹⁰Canada, Combines Investigation Act, Report of Commissioner, Investigation into an alleged Combine in the Manufacture, Distribution and Sale of Matches, (Ottawa, King's Printer, 1949)

¹¹Rex v. Eddy Match Co. Ltd., (1951) 104 C.C.C. 39

¹²Canada, Combines Investigation Act, Report of Commissioner, Canada and International Cartels: An Inquiry into the Nature and Effects of International Cartels and other Trade Combinations (Ottawa, King's Printer, 1945), p. 24 ff.

the American firm held 69 per cent of the preferred shares and the British firm held 17 per cent. The management of the Eddy Match Company had since 1928 been in the hands of the Diamond Match Company¹³.

The merger in 1927 placed Eddy Match in a position of being sole producer of matches in Canada. This position was maintained through the years by acquiring each new competitor in turn as it entered the market. However, competitors were not acquired immediately and there were periods of competition. Various tactics were used by Eddy to meet that competition--fighting brands, low prices in specific areas, resale price maintenance, confidential discounts and rebates. In one case, Eddy simply loaded a market with matches in order to make it difficult for a competitor to get started. In another, they resorted to various methods of spying. The net outcome was that at the time of the investigation there were no independent producers of wooden matches. All producers were subsidiaries of Eddy, either through its holding company, Valcourt, or directly.

Eddy and all of its subsidiaries, including the holding company, Valcourt, were charged under the "merger, trust or monopoly provision" of the Act. All the accused were found

¹³The acquisitions made by Eddy and its tactics are described throughout the report.

guilty and fined a total of \$85,000.

Unlike the decision of the Staples case, there is comparatively little analysis of detriment based on specific examples where the public had suffered through Eddy's activities. This, however, is to be expected as there was no elimination of competition in the Staples case, only the possibility of detriment to the growers due to the relationships between grower, sales agent, and jobber. Eddy, on the other hand, had systematically eliminated all competition in the wooden match industry.

The decision lays great stress on the intent of Eddy and its subsidiaries. At one point in the judgment, it is stated:

Moreover, in the examination and appreciation of the evidence relative to a charge of this nature, the matter to be considered is the end sought by the offender without regard to the actual and attained. Section 2, subsection (1) of the Act states expressly that every agreement, merger, trust or monopoly is illegal when it has operated or is likely to operate to the detriment or against the interest of the public. Hence it is immaterial in judging such an agreement that it did operate or that it did not operate to the detriment of the public. The criterion to be applied is that of the very nature of the plan contemplated without regard to its results¹⁴.

This line of reasoning is perfectly acceptable where an agreement is uncovered that will lead to the suppression of competition and it is perfectly acceptable for the circumstances

¹⁴Bienvenue, J., (1951) 104 C.C.C. 39 at p. 42

of the Eddy case, but most cases of merger and monopoly demand a somewhat subtler approach simply because it is not always possible to uncover a plan--very often because one does not exist.

The judgment goes on to state: "The combine is illegal when the free play of competition is paralyzed or is likely to be"¹⁵. What is suggested here is that the judgment is being based on the same principles as those governing combinations--any attempt to unduly reduce the area of competition is illegal per se. To use this approach in judging merger and monopoly is to completely beg the point. It can be stated of every case of monopoly that there is a paralysis of the free play of competition; however, this does not necessarily indicate that competition is being unduly suppressed or that there is public detriment. That can only be decided through a close analysis of the reasons for the existence of the monopoly. Of course, part of the answer can be provided through the determination of the intent of the monopolist, which was given careful attention in the judgment. However, intent only becomes a meaningful means of determining undue restraint of trade when it is given broad meaning, encompassing all the economic considerations.

¹⁵Ibid., p. 42

In an appeal to the Quebec Court of Queen's Bench¹⁶, the decision of the lower court was upheld. The decision of the higher court is of particular interest because of its discussion of detriment. The very important point is made that it is not necessary "that actual detriment be demonstrated". It is only necessary to show that the acts create " . . . a presumption that they will probably prejudice the public right"¹⁷. This line of reasoning makes possible the application of the principles used to judge combinations. The essence of the judgment is summed up in the following:

What we have here is the activity envisaged by Section 2-4-b, - the control of a class of business; a control that, as revealed by the evidence, excluded for all practical purposes, the possibility of any competition. Such a condition creates a presumption that the public is being deprived of all the benefits of free competition and this deprivation, being the negation of the public right, is necessarily to the detriment or against the interest of the public.

This presumption, however, may be rebutted and it does not seem unreasonable to suggest that some "controls" might in exceptional circumstances be more advantageous to the public than if the business had been left free. But when faced with facts which disclose the systematic elimination of competition, the presumption of detriment becomes violent. In these circumstances, the burden of showing absence of detriment must surely rest on the shoulders of those against whom the presumption plays.^{18 19}

¹⁶Eddy Match Co. Ltd. v. The Queen (1954) 109 c.c.c. 1

¹⁷per Casey J., (1954) 109 c.c.c. I at p. 21

¹⁸Emphasis added

¹⁹Casey J., op. cit., p. 21

The judgment does go on to specify particular instances where detriment can be inferred from Eddy's activities and price structure. But it is clear that the decision is not based to any great extent on these specific instances.

It is rather unfortunate that the Eddy case was not brought to trial after the 1952 amendments had been passed. It would have proved extremely interesting to see whether the court would have exercised its power to issue an order of dissolution. The circumstances of Eddy's rise to monopoly power, its activities to preserve and exploit that position would certainly have justified even such a drastic ruling. The \$85,000 fine was not sufficient as a punitive measure, and of course, a fine is not a corrective, it is primarily a deterrent.

However, as the tariff on wooden matches was reduced, a positive step to improve the situation was taken. The Commissioner's report contained a suggestion for this reduction²⁰, which was accepted. It is not always possible to reduce a tariff without harming producers not involved in illegal activities as in most cases there is no monopoly covering all of the country. While the tariff reduction must be regarded as a positive step in alleviating the exploitation of the consumer, there is some doubt as to its effectiveness because of the cartel control.

²⁰ at p. 128

However, in the particular instance of the wooden match industry one of the best correctives was discovery and prosecution. This fact is so obvious that it almost slipped by unnoticed. It is clear from the history of the industry that the conditions of entry are not difficult. They were only made so by Eddy's aggressive monopolistic tactics. Thus, with Eddy's power to continue such practices curbed, it is highly likely that new entrants will be attracted as they have been in the past, if Eddy continues to reap high profits.

Approach of the Restrictive Trade Practices Commission to Detriment

The two cases of merger, trust or monopoly do not provide any significant background from which comprehensive precedents can be drawn in judging future cases. However, of the two, the Eddy case is more useful for that purpose. But Eddy's systematic destruction of competition created circumstances very similar to many cases of combination, and the court had very little reason to look beyond the precedents established throughout the years. Thus, the Eddy case is of very limited usefulness as a guide.

The three reports written by the Commission involved circumstances not quite as obvious as those surrounding Eddy's rise and preservation of its monopoly position. Therefore, the reports cover largely uncharted territory. Thus, the

work of the Commission achieves most importance in its interpretation of merger and monopoly, because, as far as combinations are concerned, the Commission is bound to follow the unequivocal interpretation rendered by the courts.

However, there has been no substantial break with the established tradition. The Commission has sought to determine whether competition will be unduly lessened in forming a judgment of whether detriment to the customer is likely to follow from a merger. In that connection, careful attention has been given to the role the firms have played in affecting the pattern of competition in the industry. The criterion has still been the preservation of competition, but the analysis of what is undue lessening of competition has been more penetrating and flexible.

As well as investigating the competitive role of the firms, the Commission also has given attention to the possibility of mergers creating economies to the benefit of the public. In other words, although preserving the backbone of the anti-combines laws through judging each merger and monopoly in terms of its affect on competition, the Commission has recognized that there are instances where a reduction of competition may not be harmful to the public, and may even be beneficial. A fair amount of time has been spent in determining

the extent of the economies, if any, that can be expected from the merging of two competitors. However, the analysis has not stopped there; the further question has been asked--what benefit will these economies bring to the public? Where the competitive situation is such that the consumer is not expected to benefit from possible gains in efficiency, the Commission has made the preservation of competition the overriding consideration.

The above outline is a fairly complete picture of the position adopted by the Commission, but it becomes more comprehensive when the circumstances of each case are known. Although only three reports dealing with the "merger and monopoly" provision have been written, it is felt that the consistent use of the same criteria in arriving at a decision justifies the generalizations that have been offered.

The Brewery Report.²¹ At the time of writing of the report, Canadian Breweries Ltd. was in a very powerful, although not dominant, market position in Ontario and Quebec and was threatening to increase its holdings in Western Canada. A series of twenty-three acquisitions over a period of approximately eighteen years had placed Canadian Breweries in a position where it accounted for 64.2% of Ontario sales. A merger with National Breweries Ltd., the largest brewery

²¹Canada, Restrictive Trade Practices Commission, Report Concerning an Alleged Combine in the Manufacture, Distribution and Sale of Beer in Canada, (Ottawa: Queen's Printer, 1955)

in Quebec for a number of years, provided Canadian Breweries with 41.9% of Quebec sales²². In Western Canada, it held 23.8%, the largest single holding, of the voting stock of Western Canada Breweries Ltd., a holding company owning or controlling five breweries. In addition, Western Canada Breweries controlled, in conjunction with three officers of Canadian Breweries, Grant's Brewery Ltd. Including Grant's, Western Canada Breweries accounted for 34.4% of sales in the Western Provinces, excluding Alberta²³.

Counsel for Canadian Breweries adopted the position that there was no offence under the "merger, trust or monopoly" provision:

(i) There was provincial control of the brewing industry and the mergers and acquisitions were carried out with the full knowledge of the provincial authorities.

(ii) The provincial control extended to all aspects of the business, including advertising, inspection of production methods and pricing; these controls were sufficient guarantees that there could be no detriment to the public.

(iii) The concentration of producers in the brewing industry was a natural development that was in tune with the

²²Ibid., percentages given on p. 92

²³Ibid., p. 95

modern trend.

(iv) The reduction in the number of competitors did not mean less, but more competition. The large surviving breweries, with large research staffs were able to compete at a level and to a degree that was beneficial to the public.

(v) In reducing the excess number of competitors in the brewing industry in Ontario, Canadian Breweries had performed a public service; excess capacity had been reduced and the level of cleanliness and efficiency had been raised.²⁴

The Commission on the whole did not concur with these declarations. It found that the provincial authorities could not be expected to interfere with mergers or acquisitions; the price control by the provinces was not absolute, as the breweries had a voice in the pricing of beer, and the chance of the breweries speaking in unison was increased because of the reduction of the number of competitors; the concentration in the industry was not due to natural economic developments but to the efforts of Canadian Breweries. The Commission agreed that there had been an unfortunate situation in Ontario, but did not agree that it was the function of Canadian Breweries to rectify it. This was considered the duty of a government body. But the most important consideration of all

²⁴Ibid., p. 56 ff.

was that Canadian Breweries had continued to destroy competitors long after the number of Ontario competitors had been reduced to manageable proportions²⁵.

It was concluded that Canadian Breweries had through its reduction of the number of competitors engaged in activities detrimental to the public interest. Detriment was considered to stem from two directions:

(1) The artificial reduction in the number of competitors had deprived the public of the benefits to be derived from the free flow of competition.

(2) The reduction in the number of brands effected by Canadian Breweries was harmful to the consumers, who for one reason or another had become attached to them²⁶.

The Commission did not find that Canadian Breweries had achieved effective control over the industry either in specific markets or on an national level²⁷. Its recommendations mirror this finding as well as the one previously mentioned that Canadian Breweries' intentions seemed to be to gain control of the industry.

It was recommended that:

(1) Canadian Breweries be prevented from acquiring

²⁵Ibid., p. 77 ff.

²⁶Ibid., p. 101

²⁷Ibid., p. 102

either the assets or a controlling interest in the capital stock of any of its competitors.

(2) Canadian Breweries be prevented from increasing its holdings of the capital stock of Western Canada Breweries.

(3) No agent or principal of Canadian Breweries be permitted to serve as an officer or director of Western Canada Breweries.

(4) Canadian Breweries should be prevented from entering into any agreement with its competitors for the sake of fixing prices or restricting competition in any way²⁸.

The most important consideration in the Brewery Report is the intent of Canadian Breweries²⁹. Since it was found that Canadian Breweries was not a merger, trust or monopoly by way of standing alone or almost alone in the beer market, its intent acquires even more significance than it would ordinarily. Aside from the information gleaned from the files of the suspected companies, two objective tests have been used to determine intentions:

(1) Is the price paid for the equity in keeping with its value? In this connection, it was pointed out that Canadian Breweries had overpaid on a number of occasions.

²⁸Ibid., p. 103

²⁹Cf. M. Cohen, Review, Canadian Bar Review, Vol. XXXIII (1955), p. 1203

It was concluded that the reason for such extravagant generosity was Canadian Breweries' desire to be rid of a competitor.

(2) Another test used has been the eventual fate of the acquired company--have its plant and equipment been utilized or have they merely been scrapped? Where the latter has occurred, and at a loss, the presumption has naturally been that the acquisition was for an illegal purpose--the destruction of a competitor³⁰. On that basis, Canadian Breweries' record is quite poor as it discontinued operations at twelve of the twenty-three plants that it acquired³¹.

In conclusion it may be stated that, of all the charges levelled against Canadian Breweries, perhaps the most serious is that it changed the character of the industry to such an extent in Quebec and Ontario that the conditions of entry are such that the high degree of concentration may be expected to continue. The process of concentrating the industry changed the methods of competition, and with them raised the barriers to new competition;³² advertising on a

³⁰Brewery Report, op. cit., e.g. p. 71

³¹Ibid., p. 99

³²This was expressed quite clearly in the statement of evidence submitted on behalf of the Director:

wide scale now seems to have become an important element of the pattern of competition³³. This can be expected to raise the barriers to new competition in two ways:³⁴

32 (cont.) "Freedom of entry into the brewing industry has been restricted by the policies pursued by Canadian Breweries Limited, including the policy of acquiring and closing out plants, of opposing the issue of new licenses and in particular, by the basic policy of changing the whole structure of the industry in such a way as to make it increasingly difficult for persons without great capital resources to gain entry." (Ibid., p. 4)

It is rather surprising that the Commission did not include this factor in its conclusions as to detriment. In a later report (the Yeast Report) the Commission does take notice of a similar submission by the Director, and quite adequately examines the conditions of entry in the industry. It is to be expected that the movement from per se rulings on combines to the closer economic analysis ("rule of reason") required in merger cases necessitated a period of adjustment on the part of the Commission. Even though it only came into being in 1952, any experience of its members would be in combines cases.

³³This is especially true of Quebec, where provincial controls over advertising in the brewery industry is not very stringent. The effects of Canadian Breweries' acquisition of Dow were made evident very soon. See page 37 of the Brewery Report.

³⁴It is important to note Bain's conclusion with respect to the effect of product differentiation on the barriers to entry. He states: "Perhaps the most surprising finding of our study . . . is that the most important barrier discovered by detailed study is probably product differentiation". Barriers to New Competition, (Cambridge: Harvard University Press, 1956) p. 216

(1) The budget of the new entrant will have to be larger because it undoubtedly will have to participate in the advertising competition.

(2) The new entrant will be faced with greater difficulties in winning customers because of the great stress on differentiating the product in the customer's mind. Whether this disadvantage is overcome through greater advertising expenditures or lower prices makes no difference to the final conclusion that entry barriers have been raised.

Sugar - Western Canada.³⁵ The sugar industry in Canada is fairly concentrated, but by no means monopolized; seven companies with eleven plants supply almost completely the domestic market for refined sugar. The tariff is sufficiently high to keep out almost all imported sugar. The producers may accurately be described as eastern and western. Six plants are operated in the east, two refine home-grown sugar beets, one may be used either for beet or cane sugar refining. Of the five plants in Western Canada, one is located at Vancouver and produces cane sugar and the other four are used for the production of beet sugar.

Although five plants supply the western market, there are only two firms. The British Columbia Sugar Refining

³⁵Canada, Restrictive Trade Practices Commission, Report Concerning the Sugar Industry in Western Canada and a Proposed Merger of Sugar Companies, (Ottawa, Queen's Printer, 1957).

Company Limited (hereafter referred to as B.C.S.R.) operates the plant in Vancouver, and its wholly-owned subsidiary, Canadian Sugar Factories Ltd., operates three of the four sugar beet refineries, all of which are located in Alberta. The Manitoba Sugar Company Ltd. is an independent company, operating a plant at Fort Garry, Manitoba³⁶.

The circumstance leading to the investigation was the purchase by B.C.S.R. of Manitoba Sugar common shares. Approximately 41% had been acquired and options had been obtained on almost all the rest of the outstanding shares. B.C.S.R. had also assumed management of Manitoba Sugar.³⁷ The Commission's report concluded that it would not be in the public interest for B.C.S.R. or any other sugar refining company to have control, or even an interest in Manitoba Sugar.

The recommendation was based on the belief that Manitoba Sugar as a private company, due to its location and the homogeneous nature of the product, was a positive factor in stimulating competition in the Manitoba and Saskatchewan markets.³⁸ The relevant factors in leading the Commission to this conclusion are as follows:

³⁶Ibid.; see Chapter II for a discussion of the industry.

³⁷Ibid., Chapter VI. A fairly high price was paid for the shares. The chapter is very interesting, describing in detail the dissension among the principal shareholders and B.C.S.R.'s opportunism in exploiting the situation.

³⁸Ibid., p. 180 ff.

(1) As mentioned, the tariff on refined sugar quite adequately protected the domestic producers. All pricing in the industry was directly or indirectly tied to the price at which sugar could be profitably imported. B.C.S.R. set its Vancouver prices at a level just below that at which off-shore - sugar could compete. The eastern refiners, largely located at Montreal, followed the same practice.³⁹

(2) A system of basing-point pricing was practiced in the industry. The two basing points were Vancouver and Montreal, where two of the three eastern cane refineries were located. Prices at any point in Canada were based on either the Montreal prices plus freight or the Vancouver prices plus freight, depending on which total was lower. Moving towards the prairies from Montreal and Vancouver, prices increased until their highest point was reached in eastern Saskatchewan. All prices were, of course, delivered prices. For example, the Alberta producer at A selling to a buyer at B would not base his prices at B on the price at A plus freight to B, but would base it on the price at Vancouver plus freight from Vancouver to B.⁴⁰ Since all freight costs were calculated on the basis of railway tariffs, the buyer was not free to arrange his own transportation and could not take advantage of

³⁹Ibid., p. 174-175

⁴⁰Ibid., p. 68-74

any economies made available through less expensive modes of transportation.

(3) Except for a brief price war in Manitoba, in 1937, price competition between the eastern producers and B.C.S.R. was non-existent.⁴¹

(4) Price competition with B.C.S.R. has been stimulated by Manitoba Sugar. On occasions when Manitoba Sugar experienced difficulty in disposing of its supply, it guarded its market by lowering price, and on occasion it invaded the Saskatchewan market, which in the past had been solely supplied by B.C.S.R. and its subsidiary. Manitoba Sugar further enhanced the position of the consumer by not always adhering to a system of delivered pricing, on occasion allowing the buyer to arrange his own transportation.

It is evident that the separate ownership of Manitoba Sugar could do nothing to change B.C.S.R.'s complete control of the British Columbia and Alberta markets. However, the Commission felt that Manitoba Sugar could, by remaining under separate control, continue to inject some competition into an otherwise non-competitive situation in Manitoba and Saskatchewan.⁴²

⁴¹Ibid., p. 85-96

⁴²Ibid., p. 179 ff. It is interesting to note that the Commission employed outside assistance. Professor J. C. Welden, Department of Economics, McGill University served as an economic consultant. If anything, the employment of expert economic advice is an indication of the different approach used by the Commission in judging mergers and monopolies as compared to combinations.

has been whether competition will be unduly reduced. However this finding has been based on the specific conditions of the industry, not on the general presumption that the elimination of a competitor is per se detrimental to the consumer.

The Commission diverged somewhat from its usual practice of examining possible gains in efficiency. It largely ignored in its appraisal claims by B.C.S.R. that it could operate Manitoba Sugar more efficiently than it had been in the past. However, in this instance, the Commission was primarily concerned with the competitive situation because the facts in that direction were so very obvious. The evidence showed that B.C.S.R. kept its prices as high as was consistent with keeping imported sugar out of Western Canada. Thus, even if there were gains in efficiency, the Commission did not feel that they would ever be passed along to the consumer. The Commission's approach to the problem may be justified with the thought: What is the point of greater efficiency if the consumer is to lose rather than gain from the situation which makes the increase in efficiency possible? There can be no doubt that the Commission felt that the acquisition of Manitoba Sugar would result in higher prices to the consumer. Note the following:⁴³

⁴³Ibid., p. 178

From the evidence as the pricing policy followed by B.C.S.R. in the territories where prices are based on Vancouver and as to its policy in selling beet sugar in territories where the price is based on Montreal it is clear that in the absence of independent competition in Western Canada the likelihood is that the price of sugar will be maintained at the highest possible level, subject to limits set by the possibility of importations at the eastern or western ports.

The Commission also concluded that it was not in the public interest for B.C.S.R. to continue its system of delivered pricing. It was recommended that all B.C.S.R. price lists include the price f.o.b. Vancouver, so that the buyer could take advantage of any saving that was available through arranging his own transportation.⁴⁴

The Yeast Report.⁴⁵ Seemingly reversing its former interpretation of merger, trust or monopoly, the Commission found that the acquisition by the largest producer of yeast of its smaller of two competitors was not sufficiently adverse to the public interest to justify a recommendation for the dissolution of the integration of production and financial affairs. However, the decision is basically in harmony with the findings in its two previous reports. A review of the factors that led the Commission to its decision makes this quite clear.

(1) It was convinced that there had been no intent on the part of the largest producer, Standard Brands Ltd., to

⁴⁴Ibid., p. 178

⁴⁵Canada, Restrictive Trade Practices Commission, Report Concerning the Manufacture, Distribution and Sale of Yeast.
(Ottawa, Queen's Printer, 1958)

destroy a competitor; Best Yeast Ltd., the acquired firm, had made the offer to sell; Standard Brands had a legitimate reason to buy, aside from any possible desire to destroy a competitor, that is, it was planning to expand its production capacity; careful examination had shown that the price paid was fully in keeping with the value of Best Yeast's plant and equipment.

(2) The ownership of Best Yeast by Standard Brands had resulted in no seeming detriment to the consumer, either pricewise or productwise.

(3) Entrance to the industry was not inordinately difficult and did not seem more so than entry into any other industry where other producers were already established. This factor, probably, was of considerable importance in forming the Commission's decision.

But the fact remains, and the Commission noted it, that where there had previously been three firms in the industry, there were now only two. Further, by acquiring Best Yeast, Standard Brands, had almost completely removed all competition from the Maritime market. From the Commission's statements it is clear that this factor would have outweighed all the good intentions and reasonable behaviour of Standard Brands if the Commission had not been faced with a fait accompli; Standard Brands had proceeded to utilize Best Yeast's facilities and they had assumed considerable

importance for Standard Brand's operations. One last factor that played a part in the Commission's decision was that Best Yeast was declining rather than growing in importance as a competitor. Thus, it could be said that although a competitor had been eliminated, there had not been a corresponding elimination of competition.

The Report, in noting claims by Standard Brands that the merging of the two companies had resulted in economies, admitted that it had not ascertained their extent. It was also pointed out that it did not seem as though these economies had in any way been passed on to the consumer.⁴⁶

Notwithstanding the facts that it was not proved that the consumer would benefit from whatever economies resulted from the merger, and that the number of competitors had been dangerously reduced in an already-concentrated industry, the Commission's decision is understandable and basically in keeping with its former decisions, but it is also unfortunate. There is a serious logical inconsistency between the decision rendered in the Yeast Report and the accepted interpretation of combinations; and it is made no less an inconsistency because the Commission recognized it as such.

In the statement of evidence, submitted on behalf of the Director of Investigation and Research, the point is made

⁴⁶Ibid., p. 76-79 for all of the foregoing

that the results of the merger are even more serious than if the firms had formed a combination:

If Standard Brands Limited and Best Yeast Limited, had, while otherwise maintaining their independence, entered into an agreement to place their manufacturing and pricing policies under a single control, and to eliminate competition between them, this, it is submitted, would constitute detriment to the public within the meaning of the legislation. The effect of the merger between them has been to place such policies under a single control and to eliminate competition⁴⁷ in a manner more permanent than by agreement.

The Commission, making comment on the same point, i.e., the reduction in competition states:

Under these circumstances, if the provisions of the Combines Investigation Act relating to mergers, trusts and monopolies should be interpreted in the same manner as the law relating to combines arising from agreement, viz., that the public has a specific interest in the maintenance of competition, and that any substantial interference with competition it itself constitutes public detriment, without proof of specific or actual inquiry and without regard to any beneficial results, a finding adverse to Standard Brands would follow. However, our courts have hitherto had very little opportunity to apply anti-combines law to merger situations, and it is possible that distinctions may be found in such cases arising from agreement.⁴⁸

There would be no argument with the decision if "beneficial results" to the public had been shown to follow from the merger. As for specific detriment, the term is likely to be misleading unless the sense in which it is considered in the Brewery and Sugar Reports is recalled:

⁴⁷Ibid., p.3

⁴⁸Ibid., p.77

Detriment was shown to follow from the reduction in the number of competitors in a general way. In the Brewery Report, the reduction in the number of brands and the increased opportunity for the smaller number of firms to agree on prices to submit to the provincial boards are considered the sources from which detriment to the public stem. But it must be remembered that in the case of prices, there is only potential detriment. In the Sugar Report detriment is taken to follow from the elimination of a competitor who had interjected price competition into an otherwise non-competitive situation. Certainly the Commission did not determine specific detriment in the general sense in which the term is used. It merely demonstrated that the consumer had or was very likely to be harmed by the reduction in competition.

The Commission was unable to show that Best Yeast had contributed to consumer benefit through its independent ownership and existence. Therefore, if a finding of public detriment was to be made, it would have to be based on the potential disadvantages that might ensue from the increase in concentration, which, as the Commission notes, would mean following the rules laid down for combinations.

It is not believed necessary for the Commission to show specific detriment, even in the sense in which it has been interpreted. The factor that must be considered is

whether or not economies will result that will ultimately benefit the consuming public. In the absence of such benefits--especially since a merger is a much more permanent arrangement than a combination--a reversal of the rules governing combinations seems neither justified nor just. As long as the basis of the anti-combines laws is the preservation of competition, a merger that seriously lessens the number of competitors must be demonstrated to produce more than a merely neutral effect; positive benefits must be shown to follow.

There is brought to light in the Yeast Report another aspect of the merger and acquisition situation which is even more disturbing. As noted, notwithstanding all the factors in favour of Standard Brands, the Commission was disturbed by the situation. But faced with an accomplished fact, what alternatives were open to the Commission? Or rather, if the Commission had recommended that the serious reduction in ~~the~~ number of firms was not justified in terms of present or potential benefits to the public, what alternatives were open to the courts? A fine, in the absence of any intent to monopolize, would hardly be just, and more important, it would solve nothing; an order of dissolution would be successful in rectifying the situation, but there is no guarantee that the courts would be willing to impose such a hardship on Standard Brands. It must be remembered that

dissolution is not only a corrective, it may also be a terrible punishment. Also, there are many practical difficulties involved in a dissolution, especially when in addition to financial co-ordination production and distribution have been combined as well. It is suggested that the Commission made its decision with these thoughts weighing heavily in its deliberations, and it is very likely that the courts will be moved by the same considerations. It is imperative that some means be devised which would allow the Commission to consider the merits of a merger or acquisition before it is effected.⁴⁹ It is towards this end that the following proposals are made:

The importance of these proposals are highlighted by a statement recently made by the Director of Investigation and Research regarding the discontinuation of an inquiry into a merger that had taken place in a highly concentrated industry. Two reasons were offered in explanation, one of which is quoted below.

"Because of the dispersal of the acquired company's assets. . . , it would be difficult to secure an order under Section 31 of the Combines Investigation severing such assets from those of the acquiring company and thus restoring the relationship that existed before the merger. Thus, it appeared that the only remedy likely to be obtained would be a monetary penalty which, in a merger case, is not a satisfactory result."

Compulsory Registration of Merger and Acquisition Plans

At the present time, the newspapers appear to be the

⁴⁹Canada, Combines Investigation Act, Annual Report for 1958 by the Director of Investigation and Research, (Ottawa), p.23

Director's primary source of information regarding mergers and acquisitions. This means that the Director does not learn of the merger or acquisition until after it has taken place or has almost reached the stage of completion. As a result, it is to be expected that the Commission and, of course, the courts, will always be faced with a fait accompli.

There would be a marked improvement in merger policy if the investigation of the Director and the deliberations of the Commission could be carried out before the mergers are effected. Two considerations are pertinent to this conclusion: Firstly, many merger plans may be dropped in the light of Commission disapproval--cases that may have otherwise reached the courts; Secondly, the Commission and the courts may be expected to adopt a much sterner attitude towards those who have been made aware of the implications of their actions before they are undertaken.

The problems that must be solved are: How is the notice of merger and acquisition plans to be received by the Director and how are they to be postponed until after the implications of the plans have been considered? It is recommended that it be made compulsory for all proposed mergers and acquisitions falling within a certain category to be reported to the Director of Investigation and Research within a minimum specified time before the proposed merger or acquisition is to take place.

The following detailed requirements, subject to debate, are suggested for consideration:

(1) All mergers and acquisitions involving a participant responsible for ten per cent or more of gross national sales of any industry must be reported.

(2) Notification of intentions must be made, say, at least six months prior to the proposed merger or acquisition.

The percentage of the national market rather than the number of firms is suggested as a guide because the latter may be unreliable. Consider, for example, an industry with many producers but dominated by one or a few firms. Against the consideration of reliability must be balanced difficulties of computation. However, the co-operation of the Dominion Bureau of Statistics would minimize this latter problem. As well, the industry delineations employed by D.B.S. could be used. The use of D.B.S. definitions and statistics would avoid controversy and claims of misunderstandings.

The suggested period of required notice is, admittedly, arbitrarily chosen. Rather than attempt to defend it--to do so would be highly artificial--what it is hoped will be accomplished in the notice period will be discussed. Ideally, the allotted time should allow for a full investigation and report. At the minimum, the Director should be able to complete a preliminary inquiry.

As at present, neither the Director's decision to

conduct a full investigation, nor the findings of the Commission disclosed in the report would bind the investigated parties to any particular course of action. After the six month notification period--it could, of course, be less or more--the proposed merger or acquisition could be realized. However, it is more than likely that the Director's decision to undertake a formal investigation would cause the parties to wait until the Commission had written its report. In the event that the parties chose to ignore the Director's decision, or later the findings of the Commission, no penalties would follow. There would be no constitutional difficulties; the courts, applying their own tests, would have final authority. The criterion would be not that the danger signals of the Director's decision to investigate had been ignored, or that the Commission's recommendations had gone unheeded, but whether or not the anti-combines laws had been violated. However, if the proposal has any merit, it lies in the strong probability that many of the investigated parties would postpone completion of their plans pending the Commission's report, and would then abide by the Commission's recommendations. In addition, it must be stressed that any firms that chose to ignore adverse findings by the Commission would have only their own folly to blame if the courts later ordered their arrangements to be dissolved.

Summary and Conclusions

It would be dangerous to point to one specific thing as the cause of the activation of the enforcement of the merger and monopoly provision of the Combines Investigation Act. Certainly the tone of post-war experience is one of determined enforcement in all areas of restrictive and monopolistic practices and conditions. However, it would not do to overlook specific changes in the law which may have caused the increase in interest shown in the particular area under discussion. In this direction, the most important change is the addition of the provision allowing for the dissolution of illegal mergers and monopolies. If the constitutionality of this provision is upheld, and if the spirit of determined enforcement does not flag, then it should be safe to predict the growing importance of enforcement activity in the area of mergers and monopolies.

However, it would not be wise to enter into a period of vigorous enforcement until an adequate study has been made of the interpretation that is most suitable to merger and monopoly cases. It is recommended that a special committee be appointed by the government to review the question. Although it would be unrealistic to expect any study to be able to set out exact rules covering all conceivable circumstances, it is not too much to expect that existing uncertainty

can be confined to narrower limits. For example, such a study should be able to establish whether all moves in the direction of greater concentration are prima facie evidence that the public is likely to suffer detriment. Having decided that question (assuming that it is decided in the affirmative), the Committee would then have to grapple with the very thorny problem of what offsetting benefits to the public are necessary in order that the increase in concentration be acceptable. It should pay special attention to confining the search for these benefits to fairly narrow limits.

It is suggested that, even within the confines of existing economic theory and the available empirical data, it should be possible to do a great deal in the way of formulating concrete proposals by which the Commission should be guided in its deliberations. A great burden has been placed upon the Commission. Without recourse to accepted precedent, it must deal with extremely complex problems. It may very well be that the Commission will be able to resolve these problems in a perfectly satisfactory manner. However, it would seem preferable that a specially appointed committee with the time and resources, and not burdened by the continual pressure of work facing the Restrictive Trade Practices Commission, would be more suitable for the task at hand. As an alternative, it is recommended, that the Director of In-

vestigation and Research embark on a study similar to the Report on "Loss-Leader" Selling. A study of mergers and monopolies would have to be more theoretical than the inquiry into "loss-leader" selling, but there is still much room for empirical work. The Director would be expected to call upon expert assistance if required. The Commission would be expected to do likewise when the time came for it to review the evidence.

Whoever undertakes the study, it is suggested that the additional task of investigating the desirability and feasibility of introducing a system whereby acquisitions and mergers may be investigated before they are effected be included in the programme. The problem of the courts having to deal with a fait accompli is too serious to be ignored. This fact along with the uncertainty of the meaning of detriment must be classified as the two major defects of enforcement in the area of mergers and monopolies.

On the positive side, it must be noted the regard being shown the importance of mergers and monopolies is a step in the direction of adding long absent balance to the overall programme of anti-combines enforcement. Small justification, either in terms of overall effectiveness or justice, can be found for a policy that entirely neglected mergers and monopolies and concentrated solely on collusive activities. Such a policy may be termed one of closing the barn door after the horse has left.

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