

COMBINES AND COMPETITION: A RE-APPRAISAL OF CANADIAN PUBLIC POLICY*

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In very real terms, Canadian anti-combines policy now finds itself at the crossroads. This country, to be sure, has a long tradition of public vigilance over the maintenance of competitive behaviour in Canadian business. But quite apart from the fact of important exceptions to this general rule, the plain truth is that over most of its seventy-year life national anti-combines law has not been distinguished by comprehensiveness or sustained vigour of enforcement. Only during the period since World War II—and in certain respects even more recently—has the Combines Branch conducted its operations on a substantial scale. This intensified activity has been accompanied by an unprecedented flow of critical comment calling into question the basic rationale of anti-combines policy.¹

*A number of amendments to anti-combines law were introduced into Parliament in May 1960, after the time of writing. Bill C-58: An Act to Amend the Combines Investigation Act and the Criminal Code (May 6th, 1960). With certain deletions and additions, these derived from amendments originally introduced in June 1959 and withdrawn shortly thereafter. Bill C-59: An Act to Amend the Combines Investigation Act and the Criminal Code (June 11th, 1959). The new Bill received second reading on June 6th, 1960 and was then assigned for further study to the Banking and Commerce Committee of the House of Commons. On July 19th the Bill was reported back to the House with minor changes. Third reading occurred on August 1st, and royal assent was given on August 10th. As of October 1960, it would be premature to attempt a detailed appraisal of the new law's significance. Its major provisions will be noted in a concluding postscript to this article. Meanwhile, the reader will doubtless wish to keep the amendments in mind, and to make his own comparisons with the statutory revisions suggested below. But the basic point is that particular amendments, from whatever source, are not now of the essence; the vital need at this juncture is for an analytical framework which yields a careful re-evaluation of Canadian public policy in the anti-combines field.

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¹See especially the following: W. Friedmann, *Monopoly, Reasonableness and Public Interest in the Canadian Anti-Combines Law* (1955), 33 Can. Bar Rev. 133; Canadian Pulp and Paper Association, *Submission to Royal Commission on Canada's Economic Prospects* (1956), pp. 109-

I. *Introduction: The Framework for Discussion.*

Like all forms of soul-searching, "the new critique" has not evolved in a vacuum. It is rooted in contemporary economic circumstances, and in the emergence of ideas purporting to explain some of the salient facts of modern industrial life.

Of major importance is the phenomenon of "bigness" in Canadian industry. This is a many-sided issue involving, for example, the size of plant and firm, nation-wide concentration of economic power, and concentrated control in specific markets. Each of these facts, in turn, embraces the twofold question of current dimensions and past trends. While measurement of the latter poses serious difficulties in both statistical method and conceptual approach, there can be no doubt as to the great scope and magnitude of bigness in the post-World War II Canadian economy. What appears crucial for the new critique, however, is not the possibility of adverse economic and political effects stemming from the fact of bigness, but rather the inference that in general current levels of size and concentration represent absolute minima below which considerable losses would occur in efficiency of production and distribution. That is to say, present Canadian bigness, and more, is held to be the necessary result of giving full play to the economies of scale operative in modern industry.

This view is reinforced by the existence of ample evidence to show that the years since the Second World War rank among the periods of most rapid and pervasive economic growth in Canadian history. The postwar era of expansion is believed to establish the proposition that, despite highly concentrated control over large segments of production, Canadian business has typically performed in brilliant fashion to promote consumer welfare; and that without such bigness the incentive and capacity for growth would have been relatively weak.

In effect, there has emerged a group of ideas commonly termed "the new competition". One can find no easy way to describe this approach for it seems to mean many things. Just what these are will be explored at a later stage of the discussion. Suffice it here to note the general line of reasoning: first, that the traditional theory of competition and monopoly does not, and never did, paint a

123; V. W. Bladen and S. Stykolt, *Combines Policy and the Public Interest: An Economist's Evaluation in Anti-Trust Laws: A Comparative Symposium*, ed. W. Friedmann (1956), p. 45; D. H. Fullerton and H. A. Hampson, *Canadian Secondary Manufacturing Industry, A Study Prepared for the Royal Commission on Canada's Economic Prospects* (1957), Ch. 4; G. W. Wilson, *Anti-Combines and Injury to the Public* (1957), 23 Can. J. of Ec. and Pol. Sc. 121.

realistic picture of business behaviour; second, that in the modern dynamic world industrial markets characterized by fewness of sellers or buyers can, and usually do, produce the economic benefits claimed for the atomistic competition of traditional theory; and third, that the prevalence of oligopoly is a necessary condition for business efficiency and economic progress. These generalizations are held to be particularly significant for the Canadian economy—with its small domestic markets and its heavy reliance on international trade.

In broader perspective, it is frequently argued that “competition”, however defined, is not the paramount issue. The overriding need will be for productive efficiency, or technological advance, or a stable industry, or government-business co-operation aimed at combating “unfair” foreign business practices. Accordingly, the losses sustained through reduced competition can be more than offset by such gains as those accruing from increased business stability or strengthened export markets.

This, then, is the analytic heart of the new critique. Whatever doubts it may raise as to meaning and content, its implications for public policy are clear. The key judgment is that the proper focus for anti-monopoly policy is not the structure of industrial markets, but rather the economic results which those markets produce. There is, in other words, no *a priori* reason to believe that rivalry among the few is less compatible with the public interest than rivalry among the many; indeed, the appropriate guidepost for government would seem to be a social presumption in favour of the new competition. Furthermore, there is said to be no ground for assuming that more competition is generally preferable to less; the balance of public advantage is likely to be with a narrowing of the competitive sphere.

In this critical setting, Canadian anti-combines policy is deemed seriously deficient on two counts: (1) its use of “outmoded economic theories” as the frame of reference for preserving business competition; and (2) its assumption that reduced competition, by whatever standards, is synonymous with public detriment.² But

² There are, of course, other stated objections, notably the “government regulation” thesis and the “trade union” argument. The former seems to regard anti-combines policy as inconsistent with the policy of direct government regulation in important areas of Canadian business. On the face of it, this is a “nonsense” thesis, since it rules out the possibility of different problems requiring different remedies designed to achieve similar goals. The trade-union issue—comprising increasingly strong demands for bringing organized labour under anti-combines jurisdiction—is more complex in nature and so cannot receive adequate treatment here. It may be worth suggesting, however, that in large mea-

this specific assessment does not derive from the general policy implications noted above. Both are separate and distinct pillars of the new critique. The full test of its validity must therefore be in terms not only of internal logic—the underlying theory—but also of empirical accuracy in identifying the course of anti-combines policy.

A central purpose of the analysis which follows is to provide the main outlines of such a test. An effort will then be made to use them as a basis for re-appraising broad policy alternatives in the anti-combines field.³

II. *A Review of Canadian Policy.*

This is not the place for a detailed historical survey of anti-combines policy. The need is rather more general—namely, to review the major provisions of the (pre-amendments) law, and to sketch the overall pattern of interpretation drawn from that law by the administrative and judicial authorities charged with its enforcement.⁴

The statutory system

The core of Canada's statutory system can be conveniently described in the following terms:

1. The phrase "anti-combines legislation" embraces two categories of parliamentary sanction—the Combines Investigation Act⁵ and sections 411 and 412 of the Criminal Code.⁶ These statutes (in amended form) date back to 1910 and 1889 respectively.

sure this issue also revolves around the question of consistency—the assumption being commonly made, without real support, that trade unions and business firms are similar entities which behave in much the same manner and therefore require the same approach in terms of public policy.

³ The foregoing introductory discussion can readily be seen to have substantial application to the United States. Indeed, it should occasion no surprise that Canada's new critique has its earlier counterpart in American disquiet over contemporary trends in United States anti-trust policy. What gives the Canadian development special interest is that it comes at a time when the anti-combines authorities appear to be opening important new avenues of policy enforcement.

⁴ In this connection see: S. F. Sommerfeld, *Free Competition and the Public Interest* (1948), 7 U. of T.L.J. 413; A Symposium on "The MacQuarrie Report and the Reform of Combines Legislation" (1952), 30 Can. Bar Rev. 548; V. W. Bladen, *Monopoly and Competition in Canada*, and F. A. McGregor, *Preventing Monopoly—Canadian Techniques*, in *Monopoly and Competition and Their Regulation*, ed. E. H. Chamberlin (1954), pp. 3, 359; Friedmann, *Monopoly, Reasonableness and the Public Interest*, *op. cit.*, *supra* footnote 1; D. G. Blair, *Canada in Anti-Trust Laws*, *op. cit.*, *supra*, footnote 1, p. 3; L. A. Skeoch, *The Combines Investigation Act: Its Intent and Application* (1956), 22 Can. J. of Ec. and Pol. Sc. 17.

⁵ R.S.C., 1952, c. 314.

⁶ S.C., 1953-54, c. 51.

Each is in some degree supplementary to, and duplicative of, the other.

2. Both enactments outlaw combinations or agreements among sellers or buyers — where, under section 411 of the Criminal Code, the purpose of any such agreement is to lessen competition “unduly”; or where, under section 2 of the Combines Act, any such combination has the design or effect of lessening competition and “has operated or is likely to operate to the detriment or against the interest of the public”. In both cases, then, there must be substantial impact to warrant a finding of illegal behaviour. The real point in issue is the determination of what constitutes a trade restraint that is either “undue” or “against the public interest”.

3. Sections 2 and 32 of the Combines Investigation Act prescribe mergers and monopolies which do not satisfy the “public interest” requirement. For purposes of the Act, a “merger, trust or monopoly” denotes “one or more persons (i) who has or have purchased, leased or otherwise acquired any control over or interest in the whole or part of the business of another, or (ii) who either substantially or completely control, throughout any particular area or district in Canada or throughout Canada the class or species of business in which he is or they are engaged”. It is again apparent that the law allows broad scope for interpretation — centering, in this instance, around the meaning of both “public interest” and “merger, trust or monopoly”.

4. Section 412 of the Criminal Code forbids certain kinds of discriminatory and predatory pricing: (a) no supplier may make a “practice” of granting price concessions to a customer which are not available to such competitors of the customer who are willing to buy in “like quality and quantity”; and (b) no supplier may engage in a policy of selling goods at prices lower in one area of Canada than another, or “unreasonably low” anywhere in Canada, if the design or effect of such policy is that of “substantially lessening competition or eliminating a competitor”. This provision was enacted in 1935 to implement a recommendation made by the Royal Commission on Price Spreads.⁷

5. Section 34 of the Combines Investigation Act provides for the categorical prohibition of resale price maintenance: “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” at

⁷ Report of the Royal Commission on Price Spreads (Ottawa, 1935), p. 270.

or above a price or discount "specified by the dealer or established by agreement". (Suppliers remain free to suggest and enforce maximum resale prices.) Parliament added this section in 1951 thereby giving effect to one of the key legislative revisions proposed by the MacQuarrie Committee.⁸

6. Prime administrative responsibility for enforcement of the anti-combines laws is shared by two agencies of the Department of Justice: the Director of Investigation and Research, and the Restrictive Trade Practices Commission. Underlying this approach is the view that, as a matter of equity and efficiency, the functions of investigation and appraisal should not be combined into a single office.⁹ In essence, therefore, the Director constructs the "raw materials" base for anti-combines policy; and the Commission assesses and reports on the effects of the business conduct in question.¹⁰ Various duties of co-ordination rest with the Minister of Justice, as does the final decision on whether to bring court action. But both the Director and the Commission enjoy virtually complete autonomy within their own spheres of operation.

7. While publicity has always been regarded as a vital technique of anti-combines enforcement, the ultimate general sanction must, of course, be sought through the judicial process. In the last analysis, it is the courts which make the definitive interpretation of the law; and which, for the most part, apply its penalties and remedial procedures. The judicial influence is accordingly to be gauged not only on the basis of actual litigation, but also in terms of the illegal behaviour restrained by public awareness of the courts' power.

⁸ Committee to Study Combines Legislation, *An Interim Report on Resale Price Maintenance* (Ottawa, 1951), p. 21.

⁹ In recommending this division of authority, the MacQuarrie Committee commented as follows on the then-existing union of functions in the office of Commissioner: "This . . . is, in our opinion, a basic weakness of the legislation. It is neither right in principle nor sound administratively. . . . As investigator, [the Commissioner's] duties are explicitly marked out by the Act. . . . When an investigation is completed, the Commissioner is required by the Act to assume an entirely different and incongruous role. He must make an appraisal, intended to be public in nearly all cases, of the situation which has been brought to light by the investigation carried out at his instance and under his direction. He is given the compromising appearance of being 'at one and the same time prosecutor and judge'. No matter how fully his assessment of a situation may be justified by results, its value is lessened by the inconstancy of his position". Report of the Committee to Study Combines Legislation, (Ottawa, 1952), p. 29.

¹⁰ This is by no means to imply that the Director does no evaluative work and the Commission no fact-finding. Given the complexity of the tasks involved, some such overlapping can hardly be avoided; nor is it likely that a rigid separation of functions would be as conducive to enlightened administration. In practice, the issue is one of relative emphasis, and the two-agency approach has evolved along these lines.

8. A number of specific policing measures give the statutory system its direct cutting edge. All prohibited acts are criminal offences punishable by a fine in the discretion of the court and imprisonment for a term not exceeding two years, or one of these only. In addition, the Combines Investigation Act provides certain "special remedies": (a) the Governor in Council may reduce or remove tariff protection when he finds, from a court judgment or an inquiry under the Act, that a combine exists "to promote unduly the advantage of manufacturers or dealers at the expense of the public";¹¹ (b) the Exchequer Court of Canada may curtail or revoke patent and trade-mark privileges in any case where they have been used "unduly to prevent or lessen competition";¹² and (c) the courts are empowered¹³ to issue restraining orders against the creation or re-creation of combines, and to dissolve mergers and monopolies which contravene the Act.¹⁴

The record of enforcement

It is appropriate now to outline the paths of application followed by these anti-combines laws. Whatever concreteness the legislation shows can be traced fundamentally to the work of interpretation and analysis carried out by the courts and the Restrictive Trade Practices Commission (including the reports of the pre-1952 Commissioner).

One of the most striking features of Canadian public policy in this field is its limited range of execution thus far. This is especially so when comparisons are made with the scope and intensity of United States enforcement.¹⁵ Obviously, account must be taken of national disparities in size and industrial structure. And there are other important qualifying factors, such as Canada's favourable record of enforcement vis-à-vis most countries with anti-monopoly laws. But leaving aside the international picture—that is, observing Canadian experience only within the context

¹¹ Combines Investigation Act, *supra*, footnote 5, s. 29.

¹² *Ibid.*, s. 30.

¹³ *Ibid.*, s. 31.

¹⁴ The meaning and effect of the statutory language on restraining and dissolution orders are not clear. There is no ambiguity on prohibiting the continuation or re-creation of convicted conspiracies. The Supreme Court of Canada has held that this remedy is *intra vires* of Parliament: *Regina v. Goodyear Tire and Rubber Co. et al.*, [1956] S.C.R. 303. However, the question remains as to how far s. 31, *ibid.*, is intended to go in the direction of enjoining a conspiracy, merger or monopoly without a conviction; and whether such prohibition, as well as the power to dissolve illegal mergers or monopolies, would be constitutionally valid.

¹⁵ For a brief comparative survey of United States and Canadian experience, see M. Handler, *Varieties of Approach to the Problem of Competition* (1959), 5 McGill L. J. 209.

of this country's legal system—it is very difficult to escape the judgment that the overall administrative effort has not achieved any substantial breadth or depth of coverage.¹⁶

A. Section 412

This point is perhaps best underscored by reference to the law on price discrimination and predatory price cutting. Between 1935 and 1957 only one report was issued under section 412 of the Criminal Code.¹⁷ “This report was of a minor character and no prosecution occurred because of the technical nature of the offence and also because it was the first inquiry of its kind”.¹⁸

More recently, there has been some indication of governmental intent to activate the 1935 statute. In 1958 the Director of Investigation and Research issued a report on discriminatory pricing in the distribution of grocery products.¹⁹ This was not a specific investigation of alleged contraventions of the law, but rather a general inquiry “concerning the existence and effect of conditions or practices having relation to any commodity which may be the subject of trade or commerce and which conditions or practices are related to monopolistic situations or restraint of trade”.²⁰ The significance of this inquiry lies not so much in its concrete empirical findings—though the evidence does suggest the enjoyment of substantial price advantages by large buyers in their dealings with grocery suppliers—as in the fact that it represents one of the few thoroughgoing studies of market behaviour in the Canadian

¹⁶ It goes almost without saying that official reports and court prosecutions are not the only standards for assessing the quality of the enforcement record. There is also the undoubted impact of frequent inquiries which never see the light of day; and the undoubted preventive influence exerted by the whole enforcement programme. Although less tangible than the others, these standards are no less real. They must therefore soften the critical force of any judgment on anti-combines coverage.

¹⁷ Restrictive Trade Practices Commission, Report Concerning Alleged Price Discrimination between Retail Hardware Dealers in North Bay, Ontario (Ottawa, 1953).

¹⁸ Blair, *op. cit.*, *supra*, footnote 4, p. 32. The Commission found that General Steel Wares Ltd., a manufacturer of metal products and household appliances, had engaged in a policy of discriminatory pricing as between two competing retail hardware stores created out of a dissolved family hardware business in North Bay. But “the special circumstances in this case are peculiarly local and narrow in character. In the absence of evidence which would indicate the manner in which such differential treatment . . . would tend to operate if such special circumstances of family relationships were not present, the Commission has not attempted to draw any broad conclusions in terms of competitive business generally.” Hardware Dealers Report, *op. cit.*, *ibid.*, p. 27.

¹⁹ Department of Justice, Discriminatory Pricing Practices in the Grocery Trade (Ottawa, 1958).

²⁰ S. 42 of the Combines Investigation Act, *supra*, footnote 5.

economy. That is to say, the analysis goes well beyond the question of legality to survey the broad pattern of distribution and pricing in the grocery field; to consider the economic meaning and effects of price discrimination; to show that "in *certain circumstances* discriminatory buying terms could be the means of improving economic performance";²¹ and to emphasize that "the basic [economic] problem is to assure that success in distribution results from increasing efficiency and not from the exploitation of strategic market positions".²²

Also in 1958 the Restrictive Trade Practices Commission reported to the Minister of Justice on a series of violations alleged to have occurred in the zinc oxide industry.²³ Here was apparently a case in the classic United States tradition of Standard Oil and American Tobacco—secret discriminatory rebates, predatory price cutting, price wars, elimination of competitors.²⁴ Among the salient facts to emerge from investigation and hearings were the following: (1) During the directly relevant period (1952-55), the Canadian zinc oxide industry comprised three firms, namely, the Zinc Oxide Co. of Canada Ltd. ("ZOCO"), Durham Industries (Canada) Ltd., and Canadian Felling Zinc Oxide Ltd. (2) The leading firm in the industry was ZOCO, which accounted for an average of some sixty per cent of total production and fifty-four per cent of sales in the domestic market. (3) A clear second to ZOCO was Durham Industries, with thirty-seven per cent of production and thirty-three per cent of domestic sales. (4) Canadian Felling entered the industry in mid-1954 and by the end of 1955 its shares of both total output and sales had risen to nine per cent. (5) "Imported zinc oxides appear to have offered considerable competition to domestic products, . . . [but] total imports . . . approximated only eleven per cent of the Canadian market and, while the possibility of imports would appear to have set a ceiling on Canadian zinc oxide prices, the competitive influence of such imports was limited by such considerations as tariffs, delivery and service".²⁵ (6) ZOCO was the largest Canadian customer for the

²¹ *Supra*, footnote 19, p. 194.

²² *Ibid.*, p. 195. The Director was careful to note that "economic factors are [not] the only ones to be considered . . . [Issues] of a non-economic, social character will figure significantly in any assessment of pricing and distribution policies." *Ibid.*, pp. 194, 195.

²³ Restrictive Trade Practices Commission, Report Concerning the Production, Distribution and Sale of Zinc Oxide (Ottawa, 1958).

²⁴ *Standard Oil Co. of New Jersey v. U.S.* (1911), 221 U.S. 1, and *U.S. v. American Tobacco Co.* (1911), 221 U.S. 106.

²⁵ Restrictive Trade Practices Commission, Zinc Oxide Report, *op. cit.*, *supra*, footnote 23, pp. 4, 5. British oxides were duty-free under Canadian law, *ibid.*, p. 20.

High Grade zinc of the Hudson Bay Mining and Smelting Co. Ltd., which, together with the Consolidated Mining and Smelting Co. of Canada Ltd., produced all of the refined zinc made in Canada.²⁶ (7) There was no active price competition between Canada's zinc producers, with the result that Canadian users were charged the artificially high prices prevailing on shipments to the United States (where imports were subject to duty). (8) In this market environment, Hudson Bay and ZOCO agreed on substantial and exclusive price concessions for the latter's purchases of high grade zinc—these concessions beginning in February 1952 and continuing in force until early 1956. (9) In January 1955 ZOCO launched a "price war" against its two rivals, and hostilities did not cease until February 1956.²⁷ (10) Meanwhile, in June 1955, ZOCO had bought the share capital of Durham Industries and had made several unsuccessful attempts to acquire control over Canadian Felling. (11) As of 1956 ZOCO, in combination with Durham Industries, was producing eighty-six per cent of all Canadian zinc oxide and selling eighty per cent of all zinc oxide marketed in Canada.

On the basis of these facts, the Director made a multi-pronged allegation of unlawful conduct on the part of ZOCO and Hudson Bay. The ZOCO amalgamation with Durham Industries was held to contravene the "merger, trust or monopoly" provision of the Combines Investigation Act. The arrangements between ZOCO and Hudson Bay were to be viewed as a combination for the undue lessening of competition. Hudson Bay, said the Director, had violated section 412 of the Criminal Code by knowingly engaging in a policy of price discrimination in favour of ZOCO. Finally, ZOCO was charged with a "section 412" violation, on the ground that it had pursued a competition-restraining policy of selling goods at unreasonably low prices.

The Commission's appraisal of the evidence leaves no doubt as to its general concurrence in the Director's allegation of public detriment. This can be most strikingly seen in the following comment:

It is the opinion of the Commission that ZOCO, with the assistance of Hudson Bay, by engaging in a price war endeavoured to monopolize the manufacture of zinc oxide in Canada and to dissuade any

²⁶ Hudson Bay was by far the smaller of the two producers. Its share of the total output of refined zinc averaged twenty-eight per cent over the years 1952-55, *ibid.*, p. 173.

²⁷ ZOCO denied having begun the price war. The evidence lends little support to this position. In any event, the key question here involves ZOCO's intent and conduct during the course of this struggle.

other person from establishing a zinc oxide plant in this country. That the objective was not wholly accomplished, in that Canadian Felling has remained an active producer, does not mean that the effects have been limited to the acquisition of Durham Industries by ZOCO. The fact that the price war was pursued so relentlessly for more than a year may be expected to be taken into account not only by the other Canadian producer but by any other concern which may have contemplated entering the Canadian market or may consider doing so in the future. It is scarcely necessary for the Commission to say that it does not regard consequences of this kind as desirable in the public interest or as part of normal competitive behaviour.²⁸

No less significant, however, is the relative narrowness of the Commission's economic approach. By and large, attention is focused on the predatory and conspiratorial aspects of the case, with little regard to the underlying problems of market structure. Only passing mention is given the effects of the ZOCO-Durham merger in the context of a three-firm industry subject to high entry barriers. Nor does the Commission discuss the economics of price discrimination and price cutting with a view to placing the ZOCO-Hudson Bay relationship in proper general perspective. It is the role of the various parties in the price war which occupies the centre of the analytic stage.

The Commission's recommendations clearly reflect this behavioural approach. Three of the four recommendations are for court orders restraining discriminatory practices—by ZOCO in its purchases of zinc, by Hudson Bay in its sales of zinc to producers of zinc oxide in Canada, and by Hudson Bay in its zinc sales as between Canada and the United Kingdom. The final recommendation—"that consideration be given to the removal of the customs duties on refined zinc"²⁹—embodies the only reference to the question of structural change. Conspicuously absent are such suggestions as a court decree dissolving the ZOCO-Durham merger, an injunction against any further acquisitions by ZOCO, and removal or reduction of the Canadian tariff on United States zinc oxide.³⁰

The Edmonton Cigarette Report dealt exclusively with the "unreasonably low prices" provision of section 412.³¹

²⁸ Zinc Oxide Report, *op. cit.*, *supra*, footnote 23, p. 134.

²⁹ *Ibid.*, p. 138.

³⁰ There may, of course, be grounds for rejecting these proposals in whole or in part. But the Commission chose to make no comment, either pro or con.

³¹ Restrictive Trade Practices Commission, Report Concerning the Wholesale Trade in Cigarettes and Confectionary in the Edmonton District (Ottawa, 1958).

The facts were that certain of the larger grocery wholesalers in Edmonton . . . had adopted a "cost-plus" method of distributing merchandise under which a purchaser was charged for goods at the invoice cost plus a fixed service fee based upon the total weekly or monthly volume of purchases. . . . Macdonalds Consolidated Limited, whose policy is to have one price for all customers, found that its medium and large volume accounts were turning to some of these "cost-plus" sellers and, as a result, Macdonalds . . . made substantial reductions on a limited range of so-called "traffic" items. . . . These new low prices were quoted to all customers regardless of the quantity in which they purchased.³²

Against this factual background, the Director alleged that Macdonalds had engaged in a policy of selling cigarettes, chocolate bars, and chewing gum at unreasonably low prices; and that such policy had the effect of substantially lessening competition in the Edmonton area.

The tests of "unreasonableness" advanced by the Director comprise the main analytic feature of the Report. In brief, these involved a series of comparisons purporting to show that the new margins at Macdonalds' Edmonton branch were: (1) lower than its average gross profit for 1957; (2) lower than its average operating expense ratio for 1957; (3) among the lowest being secured on any items; (4) lower than those being taken at any other Alberta branch but one; and (5) lower than average gross profits or expenses of other wholesalers in the Edmonton district. The Commission examines and rejects each of these criteria—the first three on the ground that "the evidence indicates operating costs in handling cigarettes are among the lowest experienced by Macdonalds"; the fourth because "the evidence . . . does not disclose the operating conditions at branches of Macdonalds, . . . other than Edmonton, or the competitive conditions in other territories where such branches operate"; and the fifth on the ground that the special low-cost position of cigarettes among wholesale grocers invalidates any judgment based on comparisons which lump such grocers with tobacco jobbers.³³

The Commission finds, further, that Macdonalds' price reductions were made for "legitimate business reasons which are in keeping with normal competitive practice".³⁴ The resultant difficulties of tobacco and confectionery jobbers are explicitly acknowledged. But these are held to be inherent in the cheaper operating

³² Report of the Director of Investigation and Research, Combines Investigation Act, for the Year Ended March 31, 1959 (Ottawa, 1959), pp. 16, 17.

³³ Edmonton Cigarette Report, *op. cit.*, *supra*, footnote 31, pp. 53-59.

³⁴ *Ibid.*, p. 60.

techniques being developed by the wholesale grocery trade. "If the new systems of distribution are soundly based on savings derived from more economical operations, the problem must be regarded as one of adjustment to new conditions of competition which are not against the public interest".³⁵

To recapitulate: Until very recently, section 412 of the Criminal Code remained virtually unexplored. Three interesting steps towards its activation were taken in 1958—a general inquiry into discriminatory pricing in the grocery trade, and specific appraisals of alleged contraventions in the zinc oxide and wholesale grocery industries. The first culminated in a careful economic analysis basically oriented to the principle that "the significance of any individual case of price discrimination must depend upon its particular circumstances".³⁶ The second embraced a rather special situation in which the alleged misconduct under section 412 was intimately bound up with other substantive provisions of anti-combines law; and from which the Commission did not derive any general working guides to discriminatory and predatory behaviour. The third effort, in market scope the narrowest of the three, serves nevertheless to pinpoint the Commission's cautious approach to public detriment; and to illustrate the real problem of defining "unreasonably low" prices in the complex conditions of modern industry. All things considered, it seems clear that by 1959 little more than a beginning had been made in the task of giving operational content to the 1935 statute—with the process of court review still to be introduced in this field.³⁷

B. Mergers and monopolies

The enforcement record on mergers and monopolies is a more impressive one, but only in the light of developments during the past five years. To date, there have been seven reports appraising alleged "merger, trust or monopoly" violations under the Combines Investigation Act. Two of these were written before the 1952 amendments³⁸ and both led to court prosecution.³⁹ All of the other

³⁵ *Ibid.*, p. 62.

³⁶ Discriminatory Pricing Practices in the Grocery Trade, *op. cit.*, *supra*, footnote 19, p. 27.

³⁷ For reasons which remain obscure, the Department of Justice decided against court action in the zinc oxide case: "The evidence was referred to Counsel for advice as to whether it warranted prosecution under the anti-combines legislation. Counsel advised that in his opinion the evidence, having regard to certain conflicts therein, would not support such prosecution". Report of the Director of Investigation and Research, *op. cit.*, *supra*, footnote 32, p. 16 n.

³⁸ Report of Commissioner, Investigation into an Alleged Combine of Wholesalers and Shippers of Fruits and Vegetables in Western Canada

five have appeared since 1955,⁴⁰ with court action completed in one of the cases (beer) and now underway in the other (sugar).⁴¹

The government's charges were dismissed in the *Staples* case⁴² and upheld in the *Eddy Match* case.⁴³ Neither judgment is of prime doctrinal importance, however. The former is the only inquiry on record that concerns vertical, rather than horizontal, integration—the question for decision having been whether public detriment resulted from the acquisition of stock in a fruit sales agency by the largest fruit and grocery jobber in Western Canada. In the *Eddy Match* case⁴⁴ the court had been confronted with a long history of competition-restraining mergers accompanied by such flagrantly abusive practices as fighting brands, industrial spying, and secret discounts and rebates—all this in an industry regulated by international cartel arrangements. Thus the *Staples* case⁴⁵ has little direct relevance for the merger-monopoly situations investigated in later years.⁴⁶ And the elements of misconduct found in the *Eddy Match* case were so extreme as to produce a decision which cannot shed much light on the court's approach to a merger case lacking in extensive predatory practices.⁴⁷

(Ottawa, 1939), and Report of Commissioner, Investigation into an Alleged Combine in the Manufacture, Distribution and Sale of Matches (Ottawa, 1949).

³⁹ See *Rex v. Staples*, [1940] 4 D.L.R. 699, and *Rex v. Eddy Match Co. Ltd.* (1951), 104 C.C.C. 39, affirmed (1954), 109 C.C.C. 1.

⁴⁰ Restrictive Trade Practices Commission: Report Concerning an Alleged Combine in the Manufacture, Distribution and Sale of Beer in Canada (Ottawa, 1955); Report Concerning the Sugar Industry in Western Canada and a Proposed Merger of Sugar Companies (Ottawa, 1957); Report Concerning the Manufacture, Distribution and Sale of Yeast (Ottawa, 1958); Zinc Oxide Report (1958), *op. cit.*, *supra*, footnote 23; and Report Concerning the Manufacture, Distribution and Sale of Ammunition in Canada (Ottawa, 1959).

⁴¹ The Beer case was decided in February 1960, after the time of writing. Chief Justice McRuer of the Supreme Court of Ontario rendered a verdict of not guilty: *Regina v. Canadian Breweries Limited* (as yet unreported). In March 1960 the Minister of Justice announced the federal government's decision not to appeal.

⁴² *Supra*, footnote 39.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ This is not to deny the strong impact of vertical integration on the competitive process. These very consequences are discussed in the Commissioner's Report on the *Staples* case. But vertical and horizontal mergers raise distinct, though related, problems of economic appraisal.

⁴⁷ In a general way, the facts of the *Eddy Match* case, *supra*, footnote 39 bear a substantial likeness to those related in the Zinc Oxide Report. Indeed, it may be that the Commission's attitude towards the ZOCO-Durham merger was influenced by an awareness of its extreme "Eddy-Match-like" setting. But even so, this would hardly justify bypassing the issue of merger effects and remedies in the zinc oxide industry. By the same token, it seems reasonable to suggest that, if the *Eddy Match* case had been brought to trial after the 1952 amendments, the court might well have issued an order of dissolution (instead of, or along with, the \$85,000 fine actually decreed).

Attention must therefore be centred on the post-1954 reports of the Restrictive Trade Practices Commission. One of these, the Zinc Oxide Report, has already been discussed. Each of the others presents important issues of analysis and interpretation.

First to be published was the Beer Report of 1955. Over a period of twenty-five years, Canadian Breweries Ltd. had acquired twenty-three brewing firms in the province of Ontario. In 1952, despite government notice of possible illegality, that company had effected a merger with National Breweries Ltd., for many years the largest producer in the province of Quebec. Meanwhile, by 1950 Canadian Breweries had carried a seven-year programme of expansion to the point where it held the largest single bloc of voting shares (twenty-three point eight per cent) in Western Canada Breweries Ltd., a holding company owning or controlling five breweries and maintaining a substantial financial interest in four others.

As a result, Canadian Breweries Limited now [in 1955] controls businesses which, over the period 1949-1952 accounted for an average of 71.8 per cent of the capacity, 69.8 per cent of the production and 66.8 per cent of the sales in the province of Ontario; and 63.7 per cent of the capacity, 58.6 per cent of the production, and 59.5 per cent of the sales in the provinces of Ontario and Quebec taken together. . . . The five breweries owned or controlled by Western Canada Breweries . . . had in 1952 approximately one-third of the capacity, production and sales for the Provinces of Manitoba, Saskatchewan and British Columbia. . . . The control or influence of Canadian Breweries Limited extends to businesses that over the period 1949-1952 accounted for 50.5 per cent of the capacity, 48.3 per cent of the production and 48.6 per cent of the sales of the brewing industry in all Canada.⁴⁸

The Director alleged that, from the outset, the general design of Canadian Breweries was to achieve a dominant and controlling position in Canada's brewing industry. This was evidenced by written statements of company officials, and by such tactics as large-scale closing down of acquired competitors, payment of excessive amounts for acquired firms, and the exercise of substantial influence over price policy throughout the Ontario and Quebec sectors of the industry. It was further alleged that, to a material extent, the company had attained its overall objective. In other words, the Director argued, Canadian Breweries had contravened both the "merger" and "monopoly" sub-sections of section 2 (e) of the Combines Investigation Act.⁴⁹

⁴⁸ Beer Report, *op. cit.*, *supra*, footnote 40, pp. 3, 100.

⁴⁹ *Supra*, footnote 5.

Counsel for defence took the view that there had been no violation of the anti-combines laws: (1) the acquisitions in question were carried out with the full knowledge of the provincial authorities; (2) provincial control of the brewing industry was sufficiently extensive to preclude detriment to the public; (3) the increased concentration of output in the industry was a natural development dictated by considerations of productive efficiency; (4) this reduction in the number of competitors meant more competition, not less—the large surviving breweries being better equipped to sustain a vigorous rivalry; and (5) Canadian Breweries had performed a public service by reducing excess capacity and raising standards of marketing for the entire industry. Thus the gist of the defence argument was that competition had not been suppressed; and that, in any event, Canadian Breweries had not operated, and was not likely to operate, against the public interest.

The Commission rejects this defence reasoning and lends its general support to the position taken by the Director. In the Commission's view, it was Canadian Breweries' merger programme, not natural economic developments, which produced the increased concentration in the brewing industry. The fact that the provincial liquor board raised no objection to this programme was irrelevant in the light of such regulation having been beyond their intended scope of authority. Nor was it proper for a private company to assume the public duty of enforcing desirable standards of conduct throughout the industry.⁵⁰ The overriding point was that Canadian Breweries' acquisitions constituted a clear-cut historical pattern of intent to monopolize — "a deliberate plan for the closing, selling, or dismantling of a great number of these breweries after their acquisition, and the concentration of all capacity and production in a few selected large plants, the whole designed to eliminate competition, and obtain a position of dominant control of the industry".⁵¹ The main consumer effect of this plan was to deprive the public of the opportunity to choose from among the many brands and qualities of beer which would have prevailed in a more competitive environment.

Having gone this far, however, the Commission is not prepared

⁵⁰ "If one or more individual producers, engaged for their own benefit in the manufacture of a given commodity, were allowed full freedom to decide to what extent there should be competition and what the nature of such competition should be, in relation to the market for the said commodity, there would be great risk that his or their decision would be dictated primarily by the safeguarding of his or their own interest and by the desire to assure the financial success of his or their own enterprise". Beer Report, *op. cit.*, *supra*, footnote 40, p. 78.

⁵¹ *Ibid.*, p. 101.

to accept the Director's contention that Canadian Breweries had achieved substantial or complete control of the industry within the meaning of section 2 (e) (ii) of the Combines Investigation Act.⁵² Strong competition is held to remain, despite the company's intense efforts to eliminate it. And the Commission offers no comment on the Director's allegation that "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 issues 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 an entry".⁵³

The Commission's recommendations are in keeping with its mixed findings. In essence, the suggested remedies entail the issuance of court orders to prevent future misconduct on the part of Canadian Breweries—either through further acquisitions or through agreements to restrict competition. An undoing of the structural changes wrought by the company over the previous quarter-century is deemed to be unnecessary. Hence, "there is no occasion at this time to consider such a step as the division of the Canadian Breweries organization into several units owned and operated independently of each other".⁵⁴

The Sugar Report was made public in 1957. Basically in question was the legality of a proposed merger involving the Manitoba Sugar Company Ltd. and the British Columbia Sugar Refining Company Ltd. The latter had, in fact, already acquired a substantial interest in the former: at the time of the hearings before the Commission (August 1956), B.C.S.R. was conducting the management of Manitoba Sugar and held forty one point six per cent of its common shares. B.C.S.R. had also obtained share options which,

⁵² *Supra*, footnote 5.

⁵³ Beer Report, *op. cit.*, *supra*, footnote 40, p. 4.

⁵⁴ *Ibid.*, p. 104. As already noted, Chief Justice McRuer has since found Canadian Breweries not guilty under section 2(e) of the Combines Act. Suffice it here to point out that the *Beer* case could have been a landmark judgment in Canadian jurisprudence; that it was in fact decided on the technical ground that "when a Provincial Legislature has conferred on a Commission or Board the power to regulate an industry and fix prices, and the power has been exercised, the court must assume that the power is exercised in the public interest"; that in effect the court erased the unique "merger" aspect of "merger, trust or monopoly" (section 2(e)(i)) by resting content with the ruling that the acquisitions did not give the accused "a monopoly or a substantial monopoly in the market"; that the court equated intense advertising rivalry (among the Big Three companies) with "strong virile competition in the market notwithstanding the merger"; that, in the main, this case stands for the proposition that the economics of merger has yet to find its way into Canadian law.

if exercised prior to January 1st, 1958, would give it virtually complete ownership and control of Manitoba Sugar. The specific issue under Commission appraisal was whether, as alleged by the Director, this actual and planned acquisition of shares by B.C.S.R. "constitutes a combine within the meaning of the Combines Investigation Act, being, in this case, a merger, trust or monopoly which has operated and is likely to operate to the detriment and against the interest of the public".⁵⁵

The Commission paints a comprehensive word-picture of market developments in the Canadian sugar-refining industry. Here it is enough to note the following facts: Seven companies operating eleven plants supplied most of the domestic market for refined sugar.⁵⁶ In recent years, B.C.S.R. and its subsidiary (Canadian Sugar Factories Ltd.) were the only Canadian suppliers in British Columbia and Alberta, and up to 1953 virtually the only Canadian suppliers in Saskatchewan. By 1953, Manitoba Sugar had penetrated the Saskatchewan market to the extent of seven per cent of sales by Canadian refiners. In the Manitoba market, Manitoba Sugar accounted for an average of fifty-one per cent of sales over the period 1950-54, as compared with nineteen per cent for B.C.S.R. and C.S.F., and thirty percent for the eastern refiners. The tariff was high enough to insulate the industry from most foreign competition; and B.C.S.R. and the eastern refiners had pursued a policy of delivered pricing, with Vancouver and Montreal as the respective basing points.

There was no history of predatory behaviour or previous competition-restraining mergers by B.C.S.R. But the Commission was acutely impressed with the large-scale shift in market shares which would be effected by the proposed merger. The new enterprise would be the only supplier of sugar in British Columbia, Alberta and Saskatchewan; and it would control seventy-five per cent of the market in Manitoba, or nearly four times the share of the B.C.S.R. plants excluding Manitoba Sugar. Furthermore, the Commission takes special note of the latter's operating vigour, particularly as regards pricing, in an otherwise weakly competitive industry. This is also the Commission's basis for dismissing B.C.S.R.'s claim of increased efficiency through the proposed acquisition. "The conclusion appears inescapable . . . that the control of Manitoba Sugar by B.C.S.R. . . . is likely to lessen competition

⁵⁵ Sugar Report, *op. cit.*, *supra*, footnote 40, p. 7,

⁵⁶ Four of the plants (including B.C.S.R.) were cane-sugar refineries, six (including Manitoba Sugar) beet sugar and one a combination of both types.

in Manitoba and Saskatchewan to a degree which would not be in the public interest Manitoba Sugar [should be] operated as an independent company with no share interest in it or control over it held, directly or indirectly, by any other Canadian sugar refining company".⁵⁷

The Yeast Report of 1958 stands as the only instance of a Commission appraisal favourable to the acquiring company.⁵⁸ The yeast industry comprised a series of sub-markets in which the role of the producing firms varied with the type of yeast and the region involved. It was, however, a relatively static three-firm industry all of whose segments showed the same company, Standard Brands Ltd., in the leading position. In 1955 that firm, accounting for some seventy-six per cent of yeast production and sales in Canada, had acquired Best Yeast Ltd., accounting for approximately nine per cent. The remaining fifteen per cent derived from Fred A. Lallemand & Co. Ltd. Despite moderate tariff rates, the level of yeast imports was negligible.

Largely on the basis of these structural facts, the Director alleged that Standard Brands' acquisition of Best Yeast was a "merger, trust or monopoly" operating against the public interest. He placed substantial reliance, as well, on the contention that a 1935 acquisition by Standard Brands was evidence of a company policy to lessen competition; and that there was nothing on the record of the 1955 merger to indicate "any such economies of production or distribution as would compensate for the elimination of competition between the two Companies".⁵⁹

Again, as in the Sugar Report, the Commission is quick to recognize the force of the Director's argument involving changes in market structure. "What may be called the monopoly position of Standard Brands has been strengthened. It is, since the merger, the only manufacturer of fresh consumer's yeast. It makes almost all the dried yeast in Canada, both bakers' and consumers' Only in the field of fresh bakers' yeast is Lallemand's competition of serious extent".⁶⁰ Even in the face of this "reduction in competition", however, "the Commission is not convinced that the public interest has been so affected as to justify recommending action to

⁵⁷ Sugar Report, *op. cit.*, *supra*, footnote 40, pp. 182, 183.

⁵⁸ The mixed conclusions of the Beer Report, *op. cit.*, *supra*, footnote 40, have already been noted. It will also be recalled that in the Zinc Oxide Report the Commission made no specific finding on the ZOCO-Durham merger. But the analysis of that Report was in harmony with the Director's general position; and an inference of detrimental merger can fairly be drawn from the Commission's overall assessment.

⁵⁹ Yeast Report, *op. cit.*, *supra*, footnote 40, p. 4.

⁶⁰ *Ibid.*, p. 77.

alter the integration of manufacturing operations which has been accomplished or the dissolution of the merger".⁶¹ A number of reasons are advanced in support of this judgment, notably the following: (1) whatever might have motivated Standard Brands in its 1935 acquisition, the evidence did not establish a merger pattern of monopolistic intent; (2) Best Yeast was a rather ineffective competitor and had itself taken the initiative in arranging the 1955 merger; (3) the public had suffered no specific detriment after that merger; and (4) the competitive strength of Lallemand was great enough, and entry into the industry easy enough, to prevent any serious abuse of power by Standard Brands. It was apparently of little consequence to the Commission that the evidence did not permit an evaluation of the economies flowing from the merger; or that while entry barriers in the yeast industry might not be unusually high relative to other industries, they might nevertheless pose considerable difficulties for any prospective newcomer.⁶²

In effect, then, the Commission was distinguishing the yeast situation from both the beer and sugar cases which it had already appraised: the beer case in terms of predatory intent, and the sugar case in terms of the comparative extent of competition in the industry before and after the merger. More specifically, the Commission appears to be saying that in the presence of monopolistic intent public detriment can be established by a showing of substantial lessening of competition; and that without monopolistic intent the merger must be shown both to have reduced competition substantially and to have left the industry in a state precluding effective competition.⁶³ Merger-induced gains in efficiency would seem to be of secondary importance, not only in cases of mono-

⁶¹ *Ibid.*, p. 79.

⁶² The Director laid a good deal of emphasis on these difficulties, especially in regard to consumer preference and the nation-wide strength of Standard Brands. For the view that product differentiation—resting on such factors as advertising and goodwill—is one of the highest of all barriers to entry in United States markets, see the pioneering study by J. S. Bain, *Barriers to New Competition* (1956). The broad similarity in company and consumer behaviour as between Canada and the United States suggests that if this generalization is valid for one country, it is no less appropriate for the other.

⁶³ The extent of post-merger competition was not without significance even in the Beer Report, *op. cit.*, *supra*, footnote 40. There, as already noted, the Commission accepted the Director's allegations of monopolistic intent and substantial lessening of competition. On the other hand, the Commission was not prepared to recommend the dissolution of Canadian Breweries. This refusal stemmed, in the main, from the Commission's belief that, despite its unlawful programme of acquisitions, the company was still confronted with effective competition (from Labatt's and Molson's) in the Ontario and Quebec markets.

polistic intent—where they can reasonably be presumed negligible—but also in “non-intent” cases, where the Commission does not require that a competition-restraining merger yield economies likely to benefit the public. These are the elements which provide a thread of consistency for the various reports on mergers. It is not at all clear that such consistency reflects full accord between the Commission’s performance and the relevant principles of economic analysis.

In its Ammunition Report of 1959 the Commission breaks new ground. This was the first “single-firm monopoly” case to be brought under section 2 of the Combines Investigation Act.⁶³ The company in question was Canadian Industries Limited, for many years the sole manufacturer in Canada of non-military ammunition. As of 1959, the C.I.L. share of the Canadian market totalled ninety-five percent or more, with imports (chiefly American) accounting for the remainder. The record contained no evidence of acquisitions or collusive conduct designed to achieve market control. In fact, C.I.L. had reached this position largely by virtue of a high Canadian tariff and the economies of scale in ammunition output. That is to say, the company “is dependent upon the granting of tariff protection for the existence of its ammunition manufacturing business and occupies a monopoly position in the field because the Canadian market is not large enough for the economical operation of more than one plant”.⁶⁴

Thus the C.I.L. path to monopoly power was not in dispute; nor was the propriety of its possession of such power. Indeed, the Commission is at pains to commend the company for its active promotion of ammunition sales, and for providing the Canadian shooting public with satisfactory ammunition at generally reasonable prices. What does come under scrutiny is the traditional C.I.L. system of distributing ammunition at the wholesale level:

Except for the period in 1956-57, Canadian Industries Limited has followed a policy . . . of adding a new distributor in any area only when it considered that such an addition would improve service to retailers and make ammunition more readily available to the consuming public and then such new distributor would be chosen only from what are regarded as suitably qualified classes of wholesalers, namely full-line hardware wholesalers or full-line sporting goods wholesalers or a combination of these two classes.⁶⁵

⁶³ *Supra*, footnote 5.

⁶⁴ Ammunition Report, *op. cit.*, *supra*, footnote 40, p. 105.

⁶⁵ *Ibid.*, p. 56. C.I.L. had also exercised considerable indirect control over the retail outlets for its ammunition. But the Director did not challenge this facet of company policy.

Under this policy, C.I.L. had rejected the applications of forty-six Canadian wholesalers between January 1st, 1952 and December 3rd, 1956. The immediate cause of the Director's concern, however, was the company's refusal, in February 1957, to accept Peterborough Guns Ltd. as a distributor of C.I.L. ammunition. Peterborough Guns had been established about a year earlier as a wholesale house dealing exclusively in sporting firearms and related products.

In specific terms, the Director was challenging this latest rejection of a wholesaler-applicant. More generally, he alleged that C.I.L. had violated a duty not to abuse its specially privileged status—that, “enjoying a monopoly position and substantial tariff protection in the manufacture of ammunition in Canada, it has pursued a restrictive policy in the distribution and sale of such ammunition, whereby [C.I.L.] constitutes a monopoly which has operated and is likely to operate to the detriment and against the interest of the public”.⁶⁶ Counsel for the defence responded, in substance, that C.I.L.'s position in the ammunition industry was not a specially privileged one; that it was the best judge of distributive efficiency for its own product; and that such efficiency was maximized under the system in question.

After carefully reviewing the evidence, the Commission finds itself persuaded by the Director's point of view. It was the special monopoly position of C.I.L. and its restrictions on free entry into ammunition wholesaling which combined to place the stamp of “public detriment” on the company's distribution policy. “In a competitive economy the public should have opportunity to demonstrate by its choice the services it desires and is willing to pay for and the types of outlets on which it wishes to bestow its custom”.⁶⁷ Where a number of alternative sources of supply existed, such opportunity was likely to prevail—even against the efforts of individual suppliers to select their own customers. But where competition was severely limited at the manufacturing level, public policy had to be vigilant lest arbitrary private action extend such restraint to other levels of economic activity. This, says the Commission, was what C.I.L. had done; and the danger of serious public injury was made no less real by the wide measure of industry acceptance given to its distribution system. The Commission accordingly recommends that the continuance of tariff protection for the manufacture of ammunition in Canada be made conditional upon C.I.L. undertaking to allow the free play of

⁶⁶ Ammunition Report, *ibid.*, p. 5.

⁶⁷ *Ibid.*, p. 107.

competition in ammunition wholesaling, "subject to such reasonable conditions as the company may require as to quantities and varieties for purchase orders and as to stocking requirements for varieties and quantities of ammunition".⁶⁸

The foregoing story on mergers and monopolies has been told in some detail. This is as it should be; for taking the record as a whole, one cannot fail to be impressed by the care with which the Restrictive Trade Practices Commission has steered its course through virtually uncharted seas. Bearing this uncertainty in mind, there would be no reason for surprise if the Commission's analysis did not satisfy every test of economic soundness. By the same token, it would be wrong to assume that analytic care implies comprehensive enforcement. The fact is that there is as yet almost no Canadian case law in the merger-monopoly field; and that such administrative doctrine as has developed is essentially the product of exploratory effort crowded into the past five years.

C. Other areas of small-scale enforcement

There are still other areas of business behaviour to which little or no anti-combines enforcement has been applied. These include patent pooling, delivered pricing, international cartels, tie-in sales and exclusive dealership and requirements contracts.⁶⁹ Clearly

⁶⁸ *Ibid.*, p. 108. The C.I.L. case invites close comparisons with the landmark *United Shoe Machinery* case adjudicated by an American court in 1953: *United States v. United Shoe Machinery Corp.* (1953), 110 F. Supp. 295, affirmed by the Supreme Court in 1954 (347 U.S. 521). There the federal government alleged principally that the United Shoe Machinery Corp. had contravened section 2 of the Sherman Anti-Trust Act (1890, 26 Stat. 209 as amended) by monopolizing the shoe machinery industry. The court agreed, holding that the company's leasing system included certain restrictive features—such as a ten-year term and no repair charges—which helped substantially to maintain its monopoly position in the industry. It is interesting to note the court's observation that "it is a violation of section 2 for one having effective control of the market to use, or plan to use, any exclusionary practice, even though it is not a technical restraint of trade; and that United's avoidance of predatory practices was irrelevant to the issue of legality under section 2", this depending "not on moral considerations but on solely economic considerations". (1953), 110 F. Supp. 295, at pp. 342, 345. It is also significant that the United States court was not prepared to adopt (or reject) the *Aluminum* case doctrine that, unless monopoly is "thrust upon" a firm "by force of accident"—through economies of scale, for example,—the government need not show exclusionary practices, but only the acquisition of an overwhelming share of the market: *United States v. Aluminum Co. of America* (1954), 148 F. 2d. 416, at pp. 427-430. See also C. Kaysen, *United States v. United Shoe Machinery Corporation: An Economic Analysis of an Anti-Trust Case* (1956).

⁶⁹ To be sure, international restrictions have been the subject of general government study. See Report of Commissioner, Combines Investigation Act, Canada and International Cartels (Ottawa, 1945). More recently, there has been a developing interest in such fields as tie-in sales

such arrangements can have a material adverse impact on the competitive process. Their importance has been highlighted by extensive American litigation under the Sherman⁷⁰ and Clayton⁷¹ anti-trust Acts. In Canada, by contrast, no case law exists in relation to these problems, and few published reports of the Commission or its predecessors.

D. *Price fixing*

It is, indeed, entirely fair to state that only in the price-fixing field has there been substantial enforcement of anti-combines law. Two categories of business practice are involved, namely, collusion among competitors and resale price maintenance. For the latter, the record has been one of rather straightforward implementation of an unequivocal *per se* rule. In the short span of time since the enactment of this 1951 statute, the Commission has written six reports dealing with alleged violations.⁷² Thus far, three of these have led to prosecution, with convictions resulting in all cases. Two of the other three reports have produced a Commission finding of resale price maintenance proscribed by section 34 of the Combines Investigation Act.⁷³ The relative simplicity of enforcement derives chiefly from the fact that the law precludes any appraisal of economic effects, confining administrative discretion to a determination of whether or not the arrangement in question constitutes resale price maintenance.⁷⁴

and delivered pricing. But investigation and appraisal of specific misconduct have yet to be undertaken on a sizeable scale.

⁷⁰ See *supra*, footnote 68.

⁷¹ (1914), 38 Stat. 730 as amended.

⁷² Restrictive Trade Practices Commission: Report Concerning Alleged Instances of Resale Price Maintenance of Soap Products in the Montreal District (Ottawa, 1953); Report Concerning Alleged Attempt at Resale Price Maintenance in the Chicoutimi-Lake St. John District (Ottawa, 1953); Report Concerning Alleged Instances of Resale Price Maintenance in the Sale of China and Earthenware (Ottawa, 1954); Report Concerning Alleged Instances of Resale Price Maintenance in Distribution and Sale of Television Sets in the Toronto District (Ottawa, 1954); Report Concerning a Manufacturer's Plan Alleged to Constitute Resale Price Maintenance in the Distribution and Sale of Certain Household Appliances (Ottawa, 1955); Report Concerning the Sale and Distribution of Surgical Rubber Gloves and Certain Other Surgical Supplies (Ottawa, 1959); See also Restrictive Trade Practices Commission, Report Concerning Alleged Attempts at Resale Price Maintenance in the Distribution and Sale of Gasoline in the Toronto Area (Ottawa, 1960), published after the time of writing.

⁷³ *Supra*, footnote 5.

⁷⁴ This is not to suggest a lack of Commission awareness of economic impact; or to overlook the complex problems sometimes posed by the task of identifying resale price maintenance. In the Soap Products Report, for instance, the Commission alluded to the possible gains in efficiency accruing from the differential-pricing system of Procter & Gamble Co.; but "even if it were admitted that the purpose sought to be achieved is

The merits of this legislative approach open up a separate line of discussion which will be pursued at the appropriate points below. It should be noted here, however, that over the past decade the anti-combines authorities have been quite prepared to acknowledge the role of resale price maintenance as a restraint on "loss-leader" selling. The most important policy consequence of that recognition was the comprehensive "loss-leader" inquiries undertaken by both the Director and the Commission.⁷⁵ Without going too far afield in this connection, it is worth restating the Commission's major conclusions: (1) the retailer and wholesaler difficulties occasioned by aggressive price-cutting were apparently confined to a few large metropolitan centres and a few lines of trade; (2) even there "we have found that the difficulties are not being caused in any significant degree by loss-leading practices of a monopolistic nature, but arise out of changes being brought about by the action of normal competitive forces";⁷⁶ (3) the evidence showed instances of grave loss-leading to have been "quite exceptional and sporadic in nature, clearly insufficient to warrant new legislation for suppression or control";⁷⁷ and (4) existing statutes outlawing unreasonably low pricing and misleading or fraudulent advertising—in conjunction with the power of general anti-combines investigation—provided adequate remedy for such loss-leader selling as did prevail.

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" (*supra*, footnote 72, p. 26). In the Household Appliances Report of 1955, the Commission had to resolve the difficult question of whether Moffats Ltd. was practising resale price maintenance by granting a substantial advertising allowance to those retailers who were prepared to advertise its products at specified prices; an affirmative answer was given in terms of the key role of advertising in the selling process. In the Surgical Supplies Report, the Commission appears to have bypassed the issue of United States impact on the selling policies and practices of Canadian business; but it supported its findings of section 34 violation with considered judgments on economic effects (for example, "the evidence put before the Commission does not convince us that the continuance of the manufacture of surgeon's rubber gloves in Canada is dependent upon the avoidance of price competition in the resale of such products in Canada." *Ibid.*, p. 85).

⁷⁵ Restrictive Trade Practices Commission, Material Collected by Director of Investigation and Research in Connection with an Inquiry into Loss-Leader Selling (Ottawa, 1954); and Report on an Inquiry into Loss-Leader Selling (Ottawa, 1955). The MacQuarrie Committee had earlier given brief expression to the view that "the 'loss-leader' device . . . is a monopolistic practice which does not promote general welfare"; that it did not present "any immediate danger"; and that, in any event, there "can be found other effective and more desirable methods of controlling the 'loss-leader' than minimum resale price maintenance". Report of the Committee to Study Combines Legislation (Ottawa, 1952), pp. 71, 72.

⁷⁶ Loss-Leader Report, *ibid.*, p. 265.

⁷⁷ *Ibid.*, pp. 265, 266.

Unquestionably the strongest and most consistent record of anti-combines enforcement has been established in the area of price agreement among competitors. If there is a single theme running through the whole of Canadian policy experience on combines, it is the doctrine that any arrangement among sellers or buyers to lessen substantially or eliminate price competition in a given market is, *per se*, illegal under both the Criminal Code and Combines Investigation Act.⁷⁸ Largely by implication, the same would appear to be true for any arrangement to limit production, divide up the market or restrict the channels of distribution.

To date, nearly all of the "combination" cases brought under inquiry or prosecution have been basically price-fixing cases. As a matter of fact, anti-combines enforcement prior to the 1950's comprised little else. It is only natural, therefore, that Canadian writings on monopoly and competition should have given much of their attention to this development. There is no need to re-trace ground already covered by others. A few summary comments may be useful, however.

Over the past half century, Canada's Supreme Court has been unswerving in its position that an agreement to suppress competition in an industry is a crime without further proof of injury to the public. From *Weidman v. Shragge*⁷⁹ to the *Howard Smith* case,⁸⁰ the court has struck down all collusive attempts to effect a substantial narrowing in the range of choice — particularly as regards price — which is open to buyers or sellers.⁸¹ That is to say, the test of illegality has been the extent of change in market structure — without reference to any "perfect" state of atomistic competition, or to the specific results flowing from the collusive arrangement. In the latter connection, the court has invariably refused to take into account the "reasonableness" of prices and profits, product quality and service, and the stability of the industry. Once the agreement has been identified and adjudged substantial in scope, competition

⁷⁸ The Supreme Court of Canada has not as yet ruled on the meaning of "public detriment" for loose combinations prosecuted under the Combines Investigation Act. In general, the lower courts have construed the relevant provisions of the Act and the Criminal Code in similar *per se* fashion; although some decisions have required a showing of specific detriment in addition to the price-fixing agreement.

⁷⁹ (1912), 46 S.C.R. 1.

⁸⁰ *Howard Smith Paper Mills Ltd. et al. v. The Queen*, [1957] S.C.R. 403.

⁸¹ See also *Stinson-Reeb Builders' Supply Co. v. The King*, [1929] S.C.R. 276; and *Container Materials Ltd. v. The King*, [1942] S.C.R. 147. At the lower-court level, see, for example, *Rex v. Elliott* (1905), 9 O.L.R. 648; and *Rex v. Canadian Import Co.*, [1935] 3 D.L.R. 330 (Que. C.A.).

is held to have been reduced and, *ipso facto*, the public interest to have been injured.

In essence the decisions . . . hold that an agreement to prevent or lessen competition . . . becomes criminal when the prevention or lessening agreed upon reaches the point at which the participants in the agreement become free to carry on those activities virtually unaffected by the influence of competition, which influence Parliament is taken to regard as an indispensable protection of the public interest; 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 . . . 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.⁸²

Thus, despite its less sweeping prospective language, Canadian law on horizontal price-fixing has been given the same operative effect as that of the United States.⁸³

In a long sequence of reports, the Restrictive Trade Practices Commission has followed the general court practice of raising a strong presumption against collusive arrangements designed to limit or destroy competition.⁸⁴ The consequence has been an over-

⁸² Mr. Justice Cartwright in the *Howard Smith* case, *supra*, footnote 80, at p. 426. His phrasing as to "virtual absence of competition" is unfortunate. It is open to the inference that only agreements which destroy—not those which seriously lessen—competition are in violation of anti-combines law. Perusal of the leading cases shows any such inference to be false.

⁸³ The classic judicial statement of the case for a *per se* approach to collusive pricing is to be found in the thirty-three-year-old Trenton Potteries decision of the United States Supreme Court: "The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed. Agreements which create such potential power may well be held to be themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions. Moreover, in the absence of express legislation requiring it, we should hesitate to adopt a construction making the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable—a determination which can be satisfactorily made only after a complete survey of our economic organization and a choice between rival philosophies". *U.S. v. Trenton Potteries Co.* (1927), 273 U.S. 392, at pp. 397, 398.

⁸⁴ For clear illustration see: Report Concerning an Alleged Combine in the Manufacture, Distribution and Sale of Asphalt and Tar Roofings and Related Products in Canada (Ottawa, 1955); Report Concerning an

whelming proportion of appraisals adverse to the parties alleged to have contravened the anti-combines laws. There is, however, a significant difference in conceptual approach: the Commission, unlike the courts, has chosen not to make its presumption a conclusive one. In an appreciable number of instances, consideration has been given to wide-ranging economic evidence purporting to show that the agreement in question did not substantially narrow the framework of competition, and that competitive forces were in fact at work despite such agreement.

The Metal Culverts Report is one of the best cases in point.⁸⁵

The metal culvert manufacturers with which this inquiry is concerned share, among them, almost all the metal culvert business in Canada. In each of the five years 1950-1954 inclusive, their combined production was over 97 per cent of total Canadian production. Imports of metal culverts, apart from a few specialized items, are negligible. In the sale of metal culverts these manufacturers have followed for a great many years the practice of having a rigid and uniform system of [delivered] prices, common to them all.⁸⁶

Counsel for the defence called a number of witnesses, including two economists, and presented a good deal of statistical and economic material. In substance, their contention was threefold: that the sale of concrete culverts rendered effective restraint on competition impossible in the culvert industry; that this was not a case of price agreement, but rather of price leadership by Armco, the dominant firm; and that even if there was an agreement, it had operated to the advantage of the public, not to its detriment. The defending parties called special attention to the research and development benefits allegedly conferred on the industry by Armco

Alleged Combine in the Manufacture, Distribution and Sale of Transmission and Conveyor Equipment and Related Products (Ottawa, 1955); Report Concerning the Manufacture, Distribution and Sale of Quilted Goods, Quilting Materials and Related Products (Ottawa, 1956); Report Concerning the Manufacture, Distribution and Sale of Metal Culverts and Related Products (Ottawa, 1957); Report Concerning the Purchase of Pulpwood in Certain Districts in Eastern Canada (Ottawa, 1958). A similar rationale is to be found in the earlier reports of the Combines Commissioner, for example: Investigation into an Alleged Combine in the Manufacture and Sale of Dental Supplies in Canada (Ottawa, 1947); Investigation into Alleged Combines 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 (Ottawa, 1952); and Investigation into an Alleged Combine in the Manufacture, Distribution and Sale of Electrical Wire and Cable Products (Ottawa, 1953). See also two reports of the Restrictive Trade Practices Commission which were published after the time of writing: Report Concerning the Sugar Industry in Eastern Canada (Ottawa, 1960); and Report Concerning the Manufacture, Distribution and Sale of Specialty Bags and Related Products (Ottawa, 1960).

⁸⁵ *Ibid.* See also Asphalt Report, *ibid.*

⁸⁶ *Ibid.*, p. 151.

and its parent company in the United States. It was further submitted that the delivered-price system had achieved a more equitable sharing of transport costs among producers, as well as broadening the sources of supply available to consumers; and that Canada-United States statistical comparisons established the reasonableness of prices and profits prevailing in Canadian metal-culvert markets.

The Commission rejects the argument in terms of price leadership and finds that there was an agreement which interfered substantially with price competition. While concrete culverts did provide some scope for substitution, they had "not been effective in the economic sense in preventing any advantage being taken of a monopoly position".⁸⁷ The detailed price-cost evidence bearing on reasonableness is carefully reviewed and held to be inconclusive; nor is the Commission persuaded by the elaborate defence analysis characterizing the delivered-price system as an instrument for transferring income from wealthy urban areas to poor and sparsely-settled outlying regions. More specifically, reference is made to such instances of public detriment as: where one company agreed to raise prices against its own judgment; where "the price of pipe arch produced by Armco's patented re-forming process was kept at a level above that which was necessary in order to permit other manufacturers who used more expensive methods to continue in the pipe arch field";⁸⁸ the submission of uniform quotations on tenders, with resultant prices higher than would otherwise have been charged, and the price discrimination and wasteful cross-hauling inherent in the delivered-price system. On the basis of this rather detailed appraisal, the Commission concurs in the central allegation of the Director, namely, that the companies in question "were parties to arrangements which fixed and enhanced prices and otherwise prevented and lessened competition in the manufacture, distribution and sale of metal culverts and related products in Canada, to an extent and in a manner against the interest of and to the detriment of the public".⁸⁹

The Electrical Contractors Report is an interesting recent departure from the usual pattern of Canadian collusion cases. It therefore merits brief discussion in this review.⁹⁰

Under scrutiny was the Electrical Contractors Association of Ontario—a trade association comprising about one-third of the

⁸⁷ *Ibid.*, p. 153.

⁸⁸ *Ibid.*, p. 154.

⁸⁹ *Ibid.*, p. 4.

⁹⁰ Restrictive Trade Practices Commission, Report Concerning the Distribution and Sale of Electrical Construction Materials and Equipment in Ontario (Ottawa, 1959).

electrical contractors in the Toronto area and more than half the electrical contracting business in Ontario. At the outset, it is significant to note that there was little evidence of price agreement; that the Association exercised no power of discipline over its members; and that no penalties were provided for non-adherence to Association policies. The Commission was also satisfied that the Association had performed such useful functions as setting standards of workmanship, promoting apprenticeship and training of men for electrical work, and disseminating information on matters generally affecting the electrical trade. Within this framework, the Association had pursued certain policies designed to ensure that all sales of electrical construction materials and equipment would be channeled through the electrical contractor making the installation; and that no sales of electrical materials and equipment would be made (at wholesale prices) to persons not approved by the Association as electrical contractors. Of particular concern to the Commission were the Association's Supplier Regulations Programme, its Registration Plan, and an Association-backed union pledge not to sign an agreement with anyone other than a party whose work is recognized as electrical construction work. In addition, the evidence pointed to an implied threat of a joint boycott against manufacturers and jobbers who did not co-operate with the Association.

The Commission is quite prepared to acknowledge that, as of the time of inquiry, the Association's efforts to implement the policies in question had achieved very limited success.⁹¹

In our view, however, the inquiry has disclosed a situation involving elements of public detriment that should not be permitted to continue. . . . In so far as the policy has met with success it has restricted competition in the supply and sale of electrical equipment and materials, by requiring such supply and sale to be made through the electrical contractor rather than directly to the consumer. In our opinion this restriction has led to cases of specific detriment to members of the public. The likelihood is clear that, if membership in the Association increases and the policy is more fully supported by its members, the consequent increasing control of the trade and restriction on competition will lead to greater public detriment.⁹²

The Commission's recommendations flow logically from its overall assessment of the Association's activities: the Association itself to be left intact, having in mind its socially useful functions; its exclusionary policies and programmes to be abandoned; and, if

⁹¹ "It may be that the inquiry itself has had the effect of retarding the development of those efforts". *Ibid.*, p. 115.

⁹² *Ibid.*, pp. 114, 115.

necessary, an injunctive court order to enforce such abandonment.

E. Penalties and remedies

It remains only to generalize that the anti-combines authorities have been sparing in their application of the penalties and corrective measures prescribed by law. In large part, this reflects the "loose-combinations bias" which public policy evolved over the first six decades of anti-combines enforcement. Accordingly, most Commission recommendations have envisaged the break-up of collusive arrangements or the discontinuance of particular forms of joint conduct; while the courts have typically outlawed and levied fines against such behaviour. That the fines have usually been very small relative to the parties' financial capacity, and that the penalty of imprisonment has never been imposed, can only be explained in terms of an implicit judicial view which regards anti-combines violation as being of a lesser order of gravity than commission of one of the so-called "common crimes".⁹³ Whatever the explanation, it is also a fact that the remedies of patent and trade-mark removal have never been invoked;⁹⁴ nor, with one minor exception, has the Governor-in-Council ever decreed the abolition or reduction of the tariff on goods under anti-combines investigation or prosecution.⁹⁵ In recent years, with the growing emphasis on mergers and monopolies, the Commission has been somewhat more disposed to recommend the tariff remedy. Then, too, both the Commission and the courts have given effect to the 1952 enactment of injunctive procedure for convicted combinations. On the other hand, there is as yet not a single instance of recommended or required dissolution of a merger after consum-

⁹³ It is true that, before the 1952 amendments, the maximum permissible fine was \$25,000. Even within this limited range, however, the courts seldom levied large-scale fines.

⁹⁴ Specific remedies are, of course, available under the patent and trade-mark laws, as well as under the Combines Act. In this connection, see Report of Commissioner, Combines Investigation Act, Investigation into an Alleged Combine in the Manufacture and Sale of Optical Goods in Canada (Ottawa, 1948), pp. 6, 93-102.

⁹⁵ The lone exception dates back to 1902, when an inquiry into the newspaper industry led to a ten per cent tariff reduction. (1-2 Edw. VII, Sess. P. No. 53). But this instance does not present a fair picture of tariff impact through anti-combines policy. The relationship between tariff recommendations and tariff changes is a difficult one to trace, since the latter are typically negotiated by international agreement. The Canadian match industry provides a significant example of this relationship in the anti-combines field. "The report [of the Combines Commissioner] recommended that consideration should be given to the rates of customs duty with the view of ensuring that the customs tariff does not operate to exclude competition from outside the country. Substantial reductions

mation; and only one case of recommended dissolution before consummation.⁹⁶

III. *The Policy Appraised.*

It is at this point that the crucial task of policy evaluation must be attempted. Given the intricacies of modern industrial markets, this would be difficult enough on the basis of a standard of evaluation which enjoyed universal acceptance. The plain truth is, however, that one cannot find even an approximation to general consensus on such a standard.

The meaning of competition

In an important sense this has always been so. To the lawyer prosecuting or defending business conduct under anti-combines law, the paramount consideration has typically been the presence or absence of collusive arrangements among competing firms. To the businessman, competition has traditionally meant rivalry and struggle more or less unfettered by governmental restraint. To the economist, competition has signified that state of affairs in which a particular industry or the economy as a whole most closely accommodates consumer demand. To the staunch advocate of political democracy, competition has been a vital instrument for checking the concentration of power in the hands of a relatively small number of large business units. For the most part, and over a substantial period of time, there has been little or no meeting of minds as between the various strands of the social fabric. The result could only be to weaken the force of public policy in the anti-combines field.

in the rates of duty on matches under British Preferential and Most-Favoured-Nation tariffs have been made in connection with the trade agreements negotiated at Torquay, which became effective June 6, 1951. The rates of duty on wooden matches, previously $17\frac{1}{2}$ and 20 per cent have been reduced to $7\frac{1}{2}$ and 10 per cent, and the rates of duty on paper matches, previously $17\frac{1}{2}$ and 25 per cent, have been reduced to $7\frac{1}{2}$ and 15 per cent." Annual Report of the Commissioner, Combines Investigation Act, for the Fiscal Year Ended March 31, 1951 (Ottawa, 1951), p. 10. It is also worth noting that the Canadian tariff on dental chairs was reduced subsequent to the Commissioner's suggestion "that the duties of custom have assisted in the promotion of the undue advantage of members of the combine alleged to exist among the firms associated in the Canadian Dental Trade Association and that one appropriate remedy might be found under Section 29 of the Act which permits modification of duties by the Governor in Council." Report of Commissioner, Combines Investigation Act, Investigation into an Alleged Combine in the Manufacture and Sale of Dental Supplies in Canada (Ottawa, 1947), p. 84. More important than actual cases of tariff reduction, however, is the fact that Canadian industry is very much aware of the tariff remedy and of the tariff's central role in government policy.

⁹⁶ The Sugar Report, *op. cit.*, *supra*, footnote 40.

But this is not all. Two developments set the past two decades apart from earlier years: first, contemporary economists have increasingly called into question some of the general principles of competition formulated in the older economic literature; and second, serious doubts have been raised with respect to the appropriateness of competition, however defined, as the prime test of industrial performance. An unfortunate effect of these trends has been to magnify already-confused thinking about anti-combines problems. Each development will be discussed in turn, with a view to achieving a reasonable measure of clarity on the fundamental issues involved.

A. The historical setting

The great appeal of "classical" and "neo-classical" competitive theory was that it provided a readily-identifiable set of criteria in terms of which the social value of business activity could be gauged.⁹⁷ From Adam Smith to Marshall—and beyond—British analysis had focused largely on the conditions requisite to the optimum allocation of scarce resources. The basic hypothesis emerged that only an economy comprising industries with many sellers and buyers, an homogenous product, free mobility, and full knowledge—in short, a "purely competitive economy"—is designed to yield the full benefits of efficient production, low prices and profits, high product quality, and direct consumer impact on the type of product supplied as well as the rewards paid to the available factors of production.⁹⁸ For each industry the optimum result was principally a function of every firm's negligible influence on price, and of free entry into and exit out of the industry.

It is firing wide of the mark to condemn the classical system on the ground that it was an abstraction which failed to mirror the reality of business organization and practice. In essence, this is precisely what the system was intended to be—an abstract model of the economic world as it should be, not a faithful reproduction of the world as it exists at a particular point in time. The soundness of classical deduction can hardly be challenged by reference

⁹⁷ Cf. G. J. Stigler, *Perfect Competition, Historically Contemplated* (1957), 65 *J. of Pol. Ec.* 1. The general concept of "classicism" and the question of where "classical" economics ends and "neo-classical" writing begins are not significant here. For interesting comment along those lines, see J. A. Schumpeter, *History of Economic Analysis* (1954), Part II, Ch. 1; Part III, Ch. 1; and Part IV, Ch. 1.

⁹⁸ Again, this is not the place for fine distinction between "pure" and "perfect" competition. In that connection, see E. H. Chamberlin, *The Theory of Monopolistic Competition* (4th ed., 1942), pp. 6, 7.

to actual conduct outside the scope of the specified deductive framework.

It is, of course, quite another matter to suggest that, normative considerations apart, the classical dichotomy between competition and monopoly does little more than provide the rare limiting cases for the vast range of market structures which prevail in the real business world. This, indeed, is the vital contribution of the Chamberlin-Robinson line of analysis—to have constructed a broad theoretical system describing the economic effects of business behaviour in hybrid markets characterized by fewness of sellers or differentiated products or both.⁹⁹ But no less importance attaches to being clear on what the theory of monopolistic or imperfect competition did not do: it did not mark a sharp break with the techniques of classical economics; it did not question the overriding significance of price and output adjustment as welfare indexes of business conduct; it did not reject the classical axiom that departures from perfect competition necessarily produce results which are in conflict with the general consumer interest. In effect, the Chamberlin-Robinson system gave analytical content to the four-fold proposition that such departures are far more extensive in the real world than the classical economists were prepared to admit; that there is great risk of unfavourable consequences even in the absence of formal collusion among sellers or buyers; that the wastes of advertising beyond informational needs must be ranked in gravity with the social losses arising from restricted output and excessive prices and profits; and, therefore, that while by no means all impure markets inflict severe harm (for example, the case of many small firms independently selling a slightly differentiated product), the role of public policy in maintaining competition is at once more urgent and more formidable than the classicals realized.

It is, then, still another matter to launch a frontal attack on the classical model itself. This the Chamberlinian system did not do. In fact, the latter—as the logical end-product of classical and neo-classical reasoning—has borne the main brunt of this direct approach, loosely termed “workable competition”.¹⁰⁰ Nor can

⁹⁹ Chamberlin, *ibid.*; and Joan Robinson, *The Economics of Imperfect Competition* (1933). There is good reason to argue that Professor Chamberlin’s “monopolistic competition” is more truly oriented towards hybrid markets than is Mrs. Robinson’s “imperfect competition”; that the latter is fundamentally an elaboration of traditional monopoly theory. See Mrs. Robinson’s own critique, *Imperfect Competition Revisited* (1953), 63 *Ec. J.* 579. In the present context, however, it is sufficient to treat both approaches as a single analytic system.

¹⁰⁰ This phrase dates back, of course, to the pioneering schema of

there be much quarrel with the real core of critical analysis in the changed thinking of the past fifteen or twenty years. Whatever merits the "old-style" competition may have had, an appreciation of the forces unleashed by industrial growth and innovation was not among them. The classical model, like its Chamberlinian offspring, was cast in the static mould of price-cost adjustment at a fixed level of production and marketing techniques.¹⁰¹ As such, it paid insufficient attention to the substantial gains flowing from improvements in product quality and service. More important, it failed to perceive that, given a dynamic setting (and excluding single-firm monopoly), the number of sellers in a particular market need not have a basic impact on the effectiveness of business performance; that even where producers are few, a dynamic market—driven by the introduction of new products, new processes, new resources—can yield consumer benefits which reasonably approximate those of the classical model. It is, indeed, apparent that "perfect competition", in so far as it assumes extremely small firms and immediate market adjustment, is unlikely to provide the environment necessary for efficient production and continuing innovation.¹⁰²

Having said all this, however, it would be a gross misreading

J. M. Clark, *Toward a Concept of Workable Competition* (1940), 30 *Am. Ec. Rev.* 241. Among the more incisive contributions to a voluminous literature are the following: C. Wilcox, *Competition and Monopoly in American Industry*, T.N.E.C. Monograph No. 21 (Washington, 1941); G. J. Stigler, *The Extent and Bases of Monopoly* (1942), 32 *Am. Ec. Rev.*, (Supp.) 1; M. A. Adelman, *Effective Competition and the Antitrust Laws* (1948), 61 *Harv. L. Rev.* 1289; E. S. Mason, *The Current Status of the Monopoly Problem in the United States* (1949), 62 *Harv. L. Rev.* 1265; C. D. Edwards, *Maintaining Competition: Requisites of a Governmental Policy* (1949); J. S. Bain, *Workable Competition in Oligopoly; Theoretical Considerations and Some Empirical Evidence in Papers and Proceedings of the American Economic Association* (1950); Report of the Attorney-General's National Committee to Study the Antitrust Laws (Washington, 1955), Ch. VII. It will be contended here that, less careful writings to the contrary notwithstanding, "workable competition" does not by any means involve the complete rejection of classical theory; that as a matter of fact they have significant elements in common.

¹⁰¹ Growth considerations were very much a part of the broad framework of classical and neo-classical analysis. The works of Adam Smith, Ricardo, and Marshall clearly attest to this. The fact remains, however, that the classical model of the competitive process was essentially static in both design and content.

¹⁰² It is sometimes alleged that the classical writers were oblivious to the production economies resulting from large-scale application of industrial machinery and equipment. This view is invalid. See, for example, J. S. Mill, *Principles of Political Economy with Some of Their Applications to Social Philosophy* (5th ed., 1896), Vol. I, Book I, Ch. 9. But the definite implication of classical and Chamberlinian theory was that in concentrated markets such gains would not be passed on to the consumer. It should be added that market adjustment over time is not logically incompatible with the concept of "perfect competition".

of classical theory to conclude that it has no relevance for present-day industrial organization and behaviour. In truth, there is much that was enduring and profound in the "old-style" competition. At the broadest level, it gave full economic effect to the fundamental thesis that the democratic processes of government are endangered in a society which does not maintain a wide dispersal of private decision-making power.¹⁰³ More concretely, the classical model produced a host of brilliant insights into the problem of evaluating the economic performance of business enterprise. For one thing, it underscored the central role of consumer welfare in the economic process. Secondly, it set out and analysed the principal elements of optimum resource allocation in the private sector of the economy. Thirdly, it drove home the point that for the private sphere cost savings and other improvements in production and distribution are significant only to the extent that market forces compel their transfer to the final consumer. In the fourth place, the inference was clear that economic competition means more than "rivalry" in the ordinary sense of that term: it is a special kind of struggle in which the rivals are forced to compete in such ways and under such conditions as will bring tangible benefits to the consuming public. Finally, the classical analysis, however extreme it may have been, afforded solid ground for the judgment that a market is more likely to perform effectively if consumers are confronted with a substantial number of independently-operating sellers than if consumer choice is limited to a few sources of supply for the product in question.

B. The analytical framework

Nothing added by subsequent economic theory has shaken the soundness of this achievement. The crucial fact—typically obscured in the heat of controversy—is that from the maze of analytic detail one can manage to distil a basic unifying theme of economic views on the meaning of competition. There emerges a cohesive framework which takes shape in the following general way.

"Sellers' competition" is a system of rivalry "in which each

¹⁰³ "Not the least of . . . the political virtues of the old competition . . . was the implicit relationship established between the economic organization and government. If firms remained small and acted independently of one another, then only with great difficulty could they attempt to use government for their own ends. If the firm could not influence price, it could not influence the legislator . . . In this sense the old competition's solution to the problem of economic organization is congruous with its political context". K. de Schweinitz, Jr., *Normative Implications of the "New Competition"*, (1956), 23 *Social Research* 379, at pp. 390, 391.

selling unit normally seeks maximum net revenue under conditions such that the price or prices each seller can charge are effectively limited by the free option of the buyer to buy from a rival seller or sellers of what we think of as 'the same' product, necessitating an effort by each seller to equal or exceed the attractiveness of the others' offerings to a sufficient number of buyers to accomplish the end in view".¹⁰⁴ That is to say, "competition" is a rivalry among sellers such that each is constrained by the efforts of the others, and by potential new rivals, to strive continuously to offer better terms to buyers. The prime test of competition in a particular product market is whether, owing to supply and demand pressures which no single firm can resist, production must tend towards maximum efficiency, selling prices towards minimum costs, and commodities towards highest quality and usefulness.

Thus it is the consumer who reigns supreme in an effectively competitive economy. There is no easy public-policy route to this goal. For a country like Canada, the facts of advanced technology and rapid growth dictate a flexible attitude towards the kind of industrial structure which is consistent with enjoyment of the relevant benefits. As already noted, even a market serviced by only a few sellers may meet this test. But it cannot be too strongly emphasized that the task of establishing such compliance is most complex; and that *a priori* reasoning warrants considerable skepticism in regard to the competitiveness of rivalry among the few. The nature and extent of growth or innovations are inherently difficult to determine—so much so that one can properly question the feasibility of devising an accurate measure of dynamic performance in a particular industry.¹⁰⁵ Nor would it be sufficient, in any case, to show that substantial gains are involved. The gains must reach the consumer in concrete form, best demonstrated by material reductions in price; and the transfer of gains must not be subject to the discretion of any individual firm or group of firms, but must flow inevitably from existing competition and from actual or potential entry of new rivals into the industry. These latter con-

¹⁰⁴ Clark, *Toward a Concept of Workable Competition*, *op. cit.*, *supra*, footnote 100, at p. 243. With minor changes, the same definition can be extended to "buyers' competition". Both sides of the market—at all stages of the productive process—are, of course, pertinent to the issue of satisfaction for the final consumer.

¹⁰⁵ "In the case of . . . technological progressiveness . . . we are substantially without meaningful and adequate criteria for evaluating the performance observed, so that even if considerable relevant empirical data are available, . . . we are unable to interpret the significance of the findings in terms of the established norms of desirable performance." J. S. Bain, *Industrial Organization* (1959), p. 394..

ditions are not easily satisfied in highly concentrated markets—where the leading firms will have sizeable power to forestall entry; and where each of these firms can be expected to take into account the others' reactions to its own changes in price. Moreover, the prospects for effective competition cannot be much brighter when "substitute products" are so distinct in terms of costs as to permit wide profit differentials among particular substitutes.¹⁰⁶

In multi-seller markets, by contrast, the barriers to effective competition are likely to be low quite apart from the influence of dynamic forces—always assuming that no single seller or small group of sellers occupies a dominant position. There the probability is that, with market shares small and financial resources relatively modest, the pressures towards agreement or parallel avoidance of price competition will not be strong. Admittedly, some natural inclination to collude will prevail in all markets. But the greater the number of firms, the likelier it is that collusion would take on the formal trappings liable to swift public detection; also that the diversity of interests among agreeing firms would be wide enough, and opportunities for entry into the industry real enough, to doom such restraints to ultimate failure. Indeed, the conditions of entry are vital from the broad standpoint of long-run competitive results. And the special advantage of the multi-firm market is the likelihood that existing rivals will be unable to escape the competition of new entrants into the struggle for consumer preference.¹⁰⁷

For these reasons it seems only logical to raise an economic presumption in favour of multi-firm markets and against substantial increases in concentration of market output. This presumption, solid enough in its own right, carries the added weight of close consistency with the principle of widely dispersed private power in an effective democracy. It is, of course, not a presump-

¹⁰⁶ "For instance: The rivalry between natural and synthetic fibers may force the price of a particular synthetic down to the neighbourhood of the long-run cost of producing one of its natural rivals, but it may do nothing to force the price down to the long-run cost of its own manufacture. Only competition among producers of the same synthetic or closely similar synthetics produced under closely similar cost conditions can do that". C. Kaysen, *Looking Around: Books about Competition*, (1954), 32 Harv. Bus. Rev. 137.

¹⁰⁷ It is not so much a matter of undertaking overt acts specifically designed to bar entry, but rather of power to do so and to effect the kinds of change in market structure and behaviour which make entry very difficult or virtually impossible. An important example of such change is a shift from price competition to rivalry in massive programmes of advertising and sales promotion. The present discussion would be drawn too far afield by detailed analysis of entry problems. In this connection, the reader can refer with much profit to Bain, *op. cit.*, *supra*, footnote 62.

tion against corporate bigness as such; in the economic sense, size is relevant mainly to the degree that it reflects the dimensions of market concentration.¹⁰⁸ Nor, by the same token, can this be a presumption which contemplates a structure of markets so fragmented as to yield producing units below the minimum size required by a complex and expanding technology. A reasonably large number of independent competitors—not an atomized, friction-less market—is the heart of the matter. In short, there is a strong *prima facie* case for low concentration and against any substantial narrowing of the range of consumer choice among competing sellers. The real problem is to determine, for each type of business situation, how far the facts on market concentration justify an inference of non-competitive results.

It can be cogently argued that in certain instances such facts are entitled to be regarded as conclusive. The clearest example, of course, is that of single-firm monopoly. Hardly less compelling, however, is the case of arrangements for collusive pricing and marketing among competitors. In effect, these are techniques designed to increase concentration by centering major business decisions in fewer hands. That such devices may sometimes bring competitive benefits cannot be denied. But their purpose is basically anti-competitive, and the chances of consumer gain correspondingly remote. Horizontal collusion belongs squarely in the class of “market situations and courses of conduct that *prima facie* limit competition (extend market power) with no *prima facie* contribution to efficiency”.¹⁰⁹ This being so, it makes good operating sense to infer a materially weakened competitive process from the facts of the agreement’s existence and its sizeable coverage in the affected market. To delve more deeply would be to introduce needless and harmful complications into an enormously difficult area of public policy; for whatever competitive gains may be foregone through the *per se* approach will, in all probability, be more than offset by the increased certainty and vigour of anti-monopoly enforcement.

Much the same reasoning applies to vertical collusion for

¹⁰⁸ In political terms, relative size is also very significant as an index of concentration based on national or regional assets, earnings, and employment for the whole industrial sector. Even absolute size, without more, can pose a serious challenge to governmental authority or individual freedom.

¹⁰⁹ E. S. Mason, *Market Power and Business Conduct: Some Comments on the Report of the Attorney-General’s Committee on Antitrust Policy, in Economic Concentration and the Monopoly Problem* (1957), p. 398.

purposes of resale price maintenance.¹¹⁰ Again, both object and execution are so typically violative of competition that general proscription of the practice seems clearly warranted.¹¹¹ In some directions, to be sure, competitive forces might be strengthened—particularly by the curtailment of predatory loss-leadering. But these are likely to be infrequent side-effects of an inherently restrictive scheme. And even if they turned out to be important, there is no reason why they could not be produced by public measures which avoided the anti-competitive restraints bound up with resale price maintenance.

The hard collusion cases are those which present special difficulties in terms of defining the relevant market and establishing the fact of agreement. Problems of market definition will confront all appraisals of economic competitiveness, but some more seriously than others. The prime task of the analyst is to steer a common-sense course between the product extremes of physical uniqueness and economy-wide substitutibility. As already implied, the most meaningful approach will be to require a degree of likeness such that price-cost differences for each commodity in question will tend towards zero.

Where the agreement formally fixes price or output, its proof is a relatively simple matter—subject only to the usual limitations on the gathering of direct evidence. The situation is quite different where the suspected agreement has little or no formal basis. It then becomes necessary to make a broad judgment on whether the facts permit a reasonable inference of tacit collusion to restrict the forces of competition. Of special interest, in this connection, is the trade association; for here the number and variety of practices are large, and the possibility of consumer gain is real. The problem of evaluation is well illustrated by reference to the competitive test for “open pricing”, that is, the exchange of market information and statistics among trade rivals:

Is it designed to promote informed but *independent* decisions by [the] rivals and . . . their customers in order that they may adjust their operations more intelligently to the vagaries of the market, or is it designed to achieve a common judgment among business rivals about their business policies and a common pattern of behaviour which will bring security to all of them? Setting up this standard means, of course, resort to reason in the administration and application of the

¹¹⁰ The element of coercion may often overshadow the collusion issue in resale price maintenance. But this is of little consequence for purposes of gauging probable impact on competition.

¹¹¹ There is, of course, a direct reciprocal relationship between horizontal collusion and resale price maintenance.

antitrust statutes. It necessitates a review of all the relevant factors and a determination of whether the fact-spreading activities of a particular trade association are designed to promote the public welfare by making competition workable or to promote business welfare by making co-operation work.¹¹²

Thus the fact of joint action through a trade association does not, in itself, signify injury to the competitive process (unless formal price-fixing or market-restriction is involved). But it does not call for an examination of ultimate economic effects either. No more is needed than that degree of factual inquiry which will support a finding of tacit collusion—such finding to be conclusive evidence of interference with competition. Stated in terms of the approach to formal collusion, “it is a question of modifying to some small extent the framework of the model from which inferences are sought to be drawn”.¹¹³

The act of merger with competitors requires a further broadening of this framework. Unlike collusion, merger carries with it a reasonable possibility of improved technology and increased productive efficiency. Thus, to contend that large scale merger *per se* contravenes the public interest in competition is to ignore the important truth that, under some circumstances, the structural restraints inherent in merger may be offset by an overall strengthening of the competitive process. In this general setting, it is appropriate to consider the number and relative size of firms in the particular industry; the growth pattern of the merging companies; the history of anti-competitive practices in the industry; the intent and design of the acquiring company; the gains in efficiency arising from the merger (or mergers); the nature of inter-firm rivalry subsequent to the merger; and the conditions of entry into the industry. This opens a new field of inquiry with its attendant difficulties of measurement, definition, and judgment. What makes it manageable, however, is the guiding principle of competition as a market-imposed, consumer-oriented process; and the basic presumption against massive accumulation of corporate power in industrial markets.

The risk of public injury is especially great when the accumulation takes place outside the channels of market struggle among independent competitors. Such a path to company growth is

¹¹² G. W. Stocking, *The Rule of Reason, Workable Competition, and the Legality of Trade Association Activities* (1954), 21 U. of Chi. L. Rev. 527. For an interesting Canadian appraisal of open pricing, see Restrictive Trade Practices Commission, *Asphalt Roofings Report*, *op. cit.*, *supra*, footnote 84.

¹¹³ Mason, *op. cit.*, *supra*, footnote 109, p. 397.

merger; for the essence of merger between competitors, in contrast with internal expansion of a single firm, is that the acquiring enterprise usurps a major function of the competitive process, namely, to determine in impersonal fashion whether any particular firm meets the test of efficient satisfaction of consumer wants. This being so, even those mergers which appear least restrictive must be carefully appraised in terms of impact on competition. A good case in point is a large-scale merger which enhances the capacity of the joining firms to compete against their larger and more efficient rivals; also a large-scale merger which eliminates a firm on the verge of, or already in, a state of bankruptcy. In both cases there should be clear evidence of substantial gains in efficiency flowing from the merger; and there should be no serious aggravation of the difficulties of new-firm entry into the affected market. Furthermore, the "bankruptcy" merger would obviously have to be viewed in an unfavourable light if the acquired firm had been brought to its knees by predatory behaviour on the part of the acquiring company.¹¹⁴ Apart from such special cases, the standards for evaluating large-scale mergers would be stricter still. In the broadest terms, any merger (or series of mergers) involving a sizeable increase in market shares would be deemed to violate the public interest in competition unless (1) the merger produced important gains in efficiency which could not otherwise have been achieved and (2) the competitive process remained strong enough to ensure their transfer to the consumer. It is fundamentally a question of unique merger benefits and market access for new (or outside) firms. Nor is the relevance of entry confined to obstacles caused directly by the merger: the key issue is whether all entry barriers, taken in the aggregate, are sufficiently high to negate the forces of competition which would make the merger gains meaningful.

Clearly, then, the merger problem merits a wider analytical framework than collusion. But it is far from being an open-ended framework. Again, only that degree of inquiry is pursued which will support a reasonable inference of impact on the competitive process. Precisely how far such inquiry goes will depend upon the particular merger under review. In some instances, it may prove especially useful to look at price and profit data for the industry.

¹¹⁴ More generally, the competitive process could be threatened even by a merger which produced only a small change in market shares. Such might be the case, for example, where the acquiring company is a leading firm in the industry and has a record of previous mergers and predatory practices. A long series of anti-competitive "nibbles" can be just as injurious as a single "bite".

(Data bearing on excess capacity may also be helpful.) Information of this kind may facilitate the basic tasks of defining the market, explaining company behaviour, and appraising the conditions of entry. At best, however, reference to price-profit results can do no more than reinforce an overall judgment as to effects on competition as a mechanism for ensuring consumer benefit. A finding of injury to competition, for example, would not be at all incompatible with evidence suggesting "reasonable" prices and profits at some point in time—assuming, heroically, that a sound measure of "reasonableness" could be devised. What is more, it would be quite impossible to demonstrate conclusively that post-merger prices and profits were lower or higher than they would have been had the merger not occurred. To place such a burden of proof on the acquiring company would be patently unjust; to impose it on the administering public agency would be to make the law unenforceable.

In general terms, therefore, the evaluative role of "performance" statistics must be a limited one. This is true even for highly concentrated markets which do not pose a problem in direct misconduct. There, to be sure, it is no longer a matter of specific acts narrowing the range of consumer choice among rival sellers. The *a priori* grounds for economic concern are somewhat more diffuse; and the fact of "going", often efficient, business firms of long standing lends a special note of caution to any public policy of de-concentration in these markets. Accordingly, for that sphere it may well be prudent to treat unfavourable evidence on prices, profits, or output as an essential ingredient of injury to the competitive process. But this is not to require exhaustive investigation and proof in terms of industrial performance. It is rather to suggest that, even in the absence of such restrictive elements as collusion or merger, a showing of high concentration and high entry barriers would warrant remedial policy in circumstances where pertinent data gave *prima facie* indication of adverse operating results. Once again it is a question of establishing that limited body of facts which will support a reasonable inference of impact on competition.

Enough has perhaps been said to point up, in a general way, the competitive implications of the great variety of policies and practices which have not been explicitly appraised—vertical integration, group boycotts, delivered pricing, tie-in sales, leasing and licensing arrangements, exclusive dealerships, price discrimination, price cutting, patent pooling, international cartels,

and so on. Each of these has its own peculiar characteristics and raises its own special problems. The broad principles applicable to all are clear, however. It is, of course, first necessary to identify the conduct in question and to assess its market coverage. Secondly, it is vital to determine whether the policy or practice is, like collusive pricing or market sharing, so basically restrictive in nature and purpose as to warrant being regarded as *per se* injurious to the competitive process. If not, it becomes appropriate to consider such factors as the degree of market concentration, the historical pattern of behaviour, the strength of price competition, and the extent to which existing and potential rivals are precluded from offering better terms to buyers.¹¹⁵ Here too, performance data are of limited importance: they may be helpful, but are not essential, to a showing of reduced competition; and they may be necessary (in the form of efficiency gains), but cannot be sufficient, to validate a favourable judgment as to effects on competition. The real issue is whether the channels of existing and potential rivalry in price, quality, and service remain free enough to ensure the continuous transfer of benefits to the consuming public. As a matter of economic logic, this issue can be resolved by means of inference from a highly selective finding of facts; as a matter of effective public administration, there can hardly be any alternative.

But the definitional story cannot be complete until it is made to embrace the forces of international competition. These will naturally be less significant for some countries than for others. The contrast between Canada and the United States is striking in this connection. For the latter, international trade is still a relatively minor economic influence—this despite the American assumption of leadership in the non-Communist world. For Canada, on the other hand, trade is still one of the crucial determinants of national economic strength—this despite the prodigious diversification and internal growth of the past two decades. Consequently, while a “closed-economy” theory of competition might be no more than mildly misleading in the case of the United States, it would doubtless provide a grossly inadequate basis for appraising certain key sectors of Canadian industry. The competitive implications of international trade are numerous

¹¹⁵ Behaviour which limits existing rivals’ access to markets is tantamount to an increase in concentration for those markets. A substantial lessening of competition can be presumed when such restriction is sizeable and there are no offsetting gains to the consumer. The likelihood of injury is particularly strong for those restraints imposed by leading or dominant firms.

and varied. Among those most worthy of note are the following: (1) an expanded concept of "the domestic market" to take account of foreign-based firms and the importation of their substitute products; (2) the need to recognize that advanced technology may warrant high concentration of output in particular industries of an "open" economy geared to comparatively small home markets; and (3) for producers in some of these industries, an intense competition with large and efficient foreign firms vying for business in markets throughout the world. Obviously, such considerations necessitate the exercise of great care in adapting competitive theory to the structural facts of each country. Other things being equal, an open market will be less concentrated than a closed one; and what is deemed non-competitive in a closed setting may turn out to be competitive in an open one. But the theory of competition is left intact. The overriding principle of market-enforced consumer benefit is no less sound for leading to different conclusions on competitiveness in different economic circumstances.

This, then, is the logical common ground of modern professional thought on the meaning of competition. Whatever may be read into the overall system, it cannot validly mean more than the proposition that effective competition faces serious, but not necessarily insuperable, obstacles in highly concentrated markets and in markets characterized by a substantial narrowing in the range of choice for competing buyers or sellers. Nor can these doctrines mean less than the proposition that rivalry in price is an indispensable form of competition; and that favourable economic results today must guarantee favourable results tomorrow.

C. *"The new competition"*

But this common theme is not easily recognized. Much of the literature on "workable competition" is inconsistent with the concept of "workability" viewed in terms of consumer gain compelled by the impersonal forces of the market. One finds an abundance of loose hypotheses to the effect that the competitiveness of a market can be adequately gauged by actual performance, with little or no need to determine the facts of market structure and behaviour;¹¹⁶ that competition is primarily a matter of the scale, not the substance, of rivalry among sellers or buyers; that the economic power of any large firm is effectively checked by the

¹¹⁶ At the other extreme, low concentration sometimes appears to be put forward as an absolute prerequisite to workable competition.

exercise of "countervailing power" on the opposite side of the market; that in a dynamic economy it is not competition within a single market which counts, but rather the phenomena of inter-product and inter-industry competition. One also finds frequent and uncritical acceptance of the idea that only large corporate size and concentration are compatible with productive efficiency and innovation. There emerges a comforting and far-reaching conclusion: in the circumstances of present-day technology, rivalry among the few is typically both necessary and desirable.¹¹⁷

To what extent this philosophy of "the new competition" is a rationalization of the industrial *status quo*, it is very difficult to say. Clearly, this cannot be the whole truth, having in mind the broad basis of support in Canada and the United States.¹¹⁸ At the same time, it would be most surprising if the element of apology or defence were not important for those adherents who form an integral part of the business community. Be that as it may, there is good reason to draw a sharp distinction between "the new competition" on the one hand and "workable competition" on the other. In the light of the foregoing discussion, perhaps the best way of explaining the difference is to state that innovation and countervailing power do not constitute a sufficient condition for workable competition;¹¹⁹ that the keystone of workability is

¹¹⁷ In this connection, one also encounters the curious doctrine that business leaders are now motivated by a strong sense of social responsibility to promote consumer welfare; and that, in any event, consumer gain is compelled by their keen awareness of public censure if this result is not achieved. To note this approach is also to dismiss it as flying directly in the face of economic and political reality.

¹¹⁸ Characteristically, the new approach originated with, and has been given more complete articulation by, American writers. See, for example, J. A. Schumpeter, *Capitalism, Socialism and Democracy* (1942), Chs. 7, 8; P. F. Drucker, *The New Society* (1950); The Editors of "Fortune" with R. W. Davenport, U.S.A., *The Permanent Revolution* (1951); C. Griffin, *An Economic Approach to Antitrust Problems* (1951); J. K. Galbraith, *American Capitalism: The Concept of Countervailing Power* (1952); D. Lilienthal, *Big Business: A New Era* (1953); R. M. Robertson, *On the Changing Apparatus of Competition*, in *Papers and Proceedings of the American Economic Association* (1954); A. D. H. Kaplan, *Big Enterprise in a Competitive System* (1954). In broad outlines, however, the Canadian position is essentially the same, as illustrated by numerous public addresses of leading businessmen; and to some degree by V. W. Bladen and S. Stykolt, *op. cit.*, *supra*, footnote 1, and R. M. Fowler, *A Speech on Anti-Combines Policy*, in *The Financial Post* (Toronto), June 27th, 1959, p. 9.

¹¹⁹ The shortcomings of Professor Galbraith's theory of countervailing power have been amply treated by other writers. See especially W. Adams, *Competition, Monopoly and Countervailing Power* (1953), 67 *Quart. J. of Ec.* 469; and G. J. Stigler, *The Economist Plays with Blocs*, in *Papers and Proceedings of the American Economic Association* (1954). Suffice it to note the following: (1) it is basically a theory of redistribution of monopoly gains, not a theory of consumer welfare; (2)

not desirable business performance as such, but the manner of its achievement and the assurance that it will be repeated in the future; finally, that it is no part of workable competition to assume a general relationship between concentration and efficiency and growth which the available evidence does not establish.¹²⁰ In short, the real source of confusion here is not the concept of workability, precisely defined, but rather its unwarranted extension to a host of market situations where rivalry does not produce effective competition.¹²¹

D. "The open economy"

In Canada, quite naturally, close attention has also been focused on the foreign-trade aspects of competition. These are widely held to justify a double-barrelled argument of major pro-

in so far as it has economic validity, it is a facet of, not a substitute for, the interplay of normal competitive forces; and (3) it has grave implications for the decision-making process in a democratic society.

¹²⁰ The empirical evidence on economies of scale is inconclusive. It does suggest, however, that they are frequently of modest proportions (excluding the economies of massive sales promotion); and that for many markets existing degrees of concentration are in excess of those required by scale economies. See Bain, *op. cit.*, *supra*, footnote 62, Ch. 3. The evidence with respect to innovation is sketchy indeed. In the main, it simply confirms the readily observed fact that large companies typically spend more than small ones on research and development. What little is known about the productivity of such expenditures points to the many-sidedness of innovational roots. Nor, given the varied imperfections of most real-world markets, is there any *a priori* basis for making high concentration a necessary condition of substantial growth. Cf. J. Jewkes, D. Sawers and R. Stillerman, *The Sources of Invention* (1958). At all events there is no empirical ground for the view that Canadian and American markets show a clear trend towards increased concentration over the past fifty years. M. A. Adelman, *The Measurement of Industrial Concentration*, Review of Economics and Statistics (Nov. 1951); and G. Rosenbluth, *Concentration in Canadian Manufacturing Industries* (1957), Ch. 5.

¹²¹ The difficulties of appraisal are, of course, compounded by the fact that many writers use the term "workable competition" in both its precise and vague senses. This is the case in V. W. Bladen and S. Stykolt, *op. cit.*, *supra*, footnote 1, for example — where there is much that is both in accord and in conflict with the principle of workability formulated above along the lines of Professor J. M. Clark's own definition of the competitive process. See also V. W. Bladen, *Competition and Monopoly and Their Regulation in Canada*, A Submission to the Royal Commission on Canada's Economic Prospects, No. 137. It is really this loose combination of ideas which has occasioned the harshness in criticism directed by some economists at "workable competition". That is to say, what is in effect being attacked is not the principle of workability, but the "new competition" philosophy that is subsumed under it. Cf. W. Adams, *Public Policy in a Free Enterprise Economy*, in *The Structure of American Industry* (ed. Adams), Revised Edition (1954); also *The "Rule of Reason": Workable Competition or Workable Monopoly* (1954), 63 Yale L. J. 348. Indeed, the purposes of future clarity and understanding might well be best served by abandoning the phrase "workable competition" and incorporating "workability" into the framework of "effective competition".

portions: Canada's economic "openness" militates against significant departures from competitive results; and a policy of de-concentration would, in any event, saddle Canadian industry with enormous losses in productive efficiency, while markedly slowing down the pace of economic expansion. It has already been noted that international trade adds another dimension to the issue of competitiveness. But this is a far cry from saying that it guarantees effective competition. The fact that foreign producers are efficient enough to compete vigorously in the Canadian market does not imply that they do; high barriers to entry may be raised by tariffs, patents, international cartels, and parent-sub-sidiary arrangements. The fact that there is a zone of substitutability between domestic and foreign products does not render the concept of a single market or industry meaningless; the pertinent questions in each case are "what kind of substitutability and how much?" The fact that Canadian producers compete with others in foreign markets does not ensure effective competition in the home market; the relevant consideration is whether that market is accessible to producing units outside Canada.¹²² All of this is to re-emphasize the point that rivalry cannot be equated to enforced consumer gain. The principles of effective competition still govern, whatever specific form their application may take. And blanket endorsement of industrial performance does not carry any greater conviction for an open economy than a closed one.

The argument on de-concentration also leaves a good deal to be desired. For one thing, maintaining effective competition does not mean revising the structure of Canadian industry in across-the-board fashion; it is highly concentrated markets and markets undergoing substantial increases in concentration which would receive special scrutiny. Secondly, the economic presumption against both types of market could be rebutted—in the former instance by a clear showing of low or moderate entry barriers, and in the latter by strong evidence of efficiency gains which would be passed on to Canadian consumers; in addition, there would have to be some indication of malperformance where the issue was high concentration *per se*. Thirdly, a variety of remedial techniques is available to government authorities; in certain cases, for example, the easing of conditions of entry might be an appropriate alternative to reducing the size of existing firms.¹²³ In the fourth place, the avail-

¹²² There is obvious inconsistency in supporting high import duties for an industry that is alleged to be competitive in foreign markets. Yet it is not uncommon for Canadians to take this twofold position.

¹²³ "Policies designed to reduce excessive barriers to entry may be con-

able data simply do not sustain the view that existing Canadian levels of concentration are typically at or below the minimum necessary for large economies of scale and a rapid rate of innovation.¹²⁴ More pointedly, there is little merit in the general proposition that these benefits are incompatible with a selective policy of reduced concentration for non-competitive markets in Canada. Such an approach could not, after all, have any meaningful connection with a policy of industrial atomization or complete removal of market imperfections; and one can seriously question the logic of ignoring the fact that so much of this country's innovation process derives from external sources beyond Canadian control.

E. *Competition and other goals*

What cannot be denied, however, is that in particular cases important losses in productive efficiency might result from reshaping the structure of a Canadian market. Indeed, it would be very strange if this were not so—having in mind Canada's advanced state of technological development and its relatively small and scattered population. Thus there may well be instances in which effective competition does not produce maximum efficiency. By the same token, in some circumstances the goal of effective competition may come into conflict with other objectives, such as business stability, economic growth, and expanded international trade. Here—astride “the new competition” and “the

sidered as *alternatives*, as well as supplements, to a policy designed to reduce seller concentration. High concentration may be a relatively innocuous phenomenon if entry barriers can be reduced to a moderate level”. Bain, *op. cit.*, *supra*, footnote 62, p. 218.

At the same time, it must be recognized that, where scale economies are large, a lowering of entry barriers may bring losses in efficiency by reducing the market shares, and therefore the size, of firms already established in the market. In Canadian terms, this possibility would be especially strong where an appreciable tariff cut was made on United States goods entering a small market whose domestic suppliers had failed to reach the minimum optimal size. The extreme case would be that in which all domestic producers were eliminated as a result of the lowered tariff. But in that case there would be no loss—indeed, probably a gain—in productive efficiency; the basic policy question would then be whether the tariff was justified on other grounds.

¹²⁴ According to the Royal Commission on Canada's Economic Prospects, “there is no denying the fact that Canadian secondary industry is a good deal less specialized and concentrated than consideration of productive efficiency alone would appear to warrant”. Final Report (Ottawa, 1957), p. 238. See also H. A. Fullerton and D. H. Hampson, Canadian Secondary Manufacturing Industry (1957), Ch. 4. But the evidence adduced therein can hardly be regarded as sufficient basis for a conclusion of such sweeping proportions. See L. A. Skeoch, A Review of “Canadian Secondary Manufacturing Industry” in (1960), 26 Can. J. of Ec. and Pol. Sc. 156.

open economy"—is the third major thrust of the new critique: that in the context of Canadian needs and problems not only competition, but these other goals as well, should guide any determination of "public detriment" under the anti-combines laws.¹²⁵

This view can be usefully approached on three levels. First, there are the conceptual questions of public versus private goals and public versus private jurisdiction. Whatever the appropriate scope for government action, the relevant objectives are public, not private; such items as the welfare of a particular firm and the stability of a particular group of firms will normally have no place in the public-policy scheme of things. Nor can the performance of public duties, however defined, be delegated to private individuals or organizations; they can hardly be expected to promote the public interest when it diverges from their own private interests.

Secondly, there is the question of legislating priority for goals other than competition. This is the approach taken in the field of public-utility regulation and to a certain extent in agricultural policy. In effect, a social decision has been made that the price of lost competition is sometimes worth paying. The same principle could have been incorporated into anti-combines law. But the key point is that it was not so applied.

Thirdly, there is the question of authorizing the enforcement authorities to determine "public detriment" in the light of all objectives comprising the public interest, not of competition alone. The evidence suggests that such broad authorization was not intended by Parliament—either before or after the 1952 amendments.¹²⁶ In any event, Canadian courts have generally identified "undue" restraint and "public detriment" with substantial injury

¹²⁵ The "other goals" argument is sometimes couched in extreme terms: "The present test of preserving price competition as the criterion of our anti-combines laws is invalid and inapplicable to the facts of economic life in Canada today. It does not assist us in meeting the basic national and international problems we are facing". Fowler, *op. cit.*, *supra*, footnote 118, p. 9. Shortly after its appearance in print, this contention and its accompanying proposals for government-business collaboration were categorized as "a fool-proof formula for the destruction of the private enterprise system". B. Hutchison, A Comment on the Fowler Plan, in *The Financial Post* (Toronto), July 25th, 1959, p. 44. In response to this criticism, Mr. Fowler elaborated his position on the following basis: "I believe that the preservation of free competition is a desirable public goal, but there are other public objectives which should also be given some weight in determining the legality of business practices". *The Financial Post* (Toronto), *ibid.*

¹²⁶ Mackenzie King's early distinction between good and bad combines is often cited in support of the contrary view. See Fowler, in *The Financial Post* (Toronto), *ibid.* But it is not at all clear from Mr. King's language that he was prepared to go any considerable distance beyond investigation of competitive effects.

to competition, and Parliament has made no move to override this construction. It is, indeed, well that the narrower concept has prevailed; to impose an administrative burden of weighing complex issues of competition against other intricate matters of public interest would be to invite an arbitrary and ineffective enforcement of anti-combines law.

An evaluation of Canadian experience

The essential prerequisites to policy appraisal are now at hand: a historical bird's-eye picture of anti-combines administration; and a detailed effort to give meaning and scope to the concept of competition. If this groundwork has been properly laid, the task of evaluation can be accomplished with accuracy and dispatch.

The point just made on "public detriment" provides a convenient beginning; for the fact is that since the earliest days all the agencies of anti-combines enforcement have understood their basic responsibility to be the maintenance of competitive markets. More recently, to be sure, the Restrictive Trade Practices Commission has expressed some uncertainty as to whether "any substantial interference with competition in itself constitutes public detriment, without proof of specific or actual public injury and without regard to any beneficial results".¹²⁷ This statement is open to various shades of interpretation. Taking it in overall context, however, one is most likely to conclude that the Commission was not seeking to displace or even downgrade the test of competition, but rather to apply it in broader fashion to problems of "merger, trust or monopoly" than to the traditional field of combination and conspiracy. This is consistent with the theory of competition developed above. If more was intended, anti-combines policy was exceeding legislative bounds. In addition, it was being confronted with practical difficulties of the gravest kind; the administrative process is trying enough when confined to the sphere of competition alone.

How, then, should the policy record on competition be judged? From the standpoint of strong enforcement, attention naturally centres on horizontal collusion and resale price maintenance. Very little need be said with reference to the latter. The administrative authorities can hardly be condemned for giving effect to a *per se* statutory prohibition. That is precisely what they have done (with an occasional acknowledgment of possible losses). On

¹²⁷ Yeast Report, *op. cit.*, *supra*, footnote 40, p. 77.

a different level, it could, of course, be argued that the legislative rule is at fault; the economic answer already given is that resale price maintenance is fundamentally an instrument for restricting or suppressing competition.

With horizontal collusion, the test of public injury has been framed in the administrative sphere. The broad statutory language compels this approach. For the courts, it has been a relatively simple matter of reading *per se* illegality into the anti-combines laws. Price-fixing agreements which cover a substantial part of the market have been conclusively presumed to constitute an "undue" or "detrimental" lessening of competition. The basic soundness of this result should now be apparent. What invites criticism is rather the fact that it has not been predicated on any explicit economic rationale. This is not to require a thoroughgoing judicial analysis of competitive impact in collusion cases; or to suggest that the courts have sought to turn the clock back to some idealized state of atomistic competition. What does seem reasonable to expect, however, is an articulation of the competitive process, and a general indication of why collusion can be fairly presumed to injure that process. No such framework is to be found in the decisions of this agency of ultimate anti-combines enforcement.

The same line of criticism applies to the investigative reports of the Combines Commissioner—typically oriented, as they were, towards the legal doctrine of criminal conspiracy and the narrow factual evidence necessary for conviction in a court of law. But the reports of the Restrictive Trade Practices Commission have to be viewed in a somewhat different light. While they show a similar reluctance to theorize about the meaning of competition, their approach is markedly more flexible. As previously noted, the Commission has been quite prepared to cite instances of specific detriment, and to consider economic evidence purporting to establish competitiveness in the face of alleged collusion.¹²⁸ Indeed, one can legitimately question whether, at times, the Commission has not gone further than it must in order to satisfy itself on public detriment. Be that as it may, there can be no justification for the view that the Commission has been oblivious to the economic consequences of collusive behaviour.

¹²⁸ See especially Metal Culverts Report, *op. cit.*, *supra*, footnote 84. In that case, the Commission was also willing to appraise economic effects outside the sphere of competition—the issue of regional distribution of income for example. But such procedure does not appear to be typical or central in the Commission's reports.

Its record on merger and monopoly is even clearer in this regard. Here too, one looks in vain for a broadly defined framework of competition. Nor do the reports yield a pattern of appraisal that is fully consistent with the economic principles outlined above. Some of the analysis falls below minimum standards of quality and rigour. But in no case have the relevant markets been identified without reasonable care; and in no case have the facts on market concentration been accepted as a sufficient criterion for assessing impact on the competitive process. The Commission has been disposed to consider a wide variety of economic factors pertinent to such an appraisal: import competition, substitute products, number and relative size of firms, economies of scale, conditions of entry, company growth and behaviour, intent, the strength of existing competition. Some reports, notably those dealing with the sugar and ammunition industries, stand up quite well on this basis; others, like the Beer Report, give less cause for favourable comment. The fact remains, however, that none of these reports has come anywhere near adopting the position that mergers or monopolies are *per se* injurious to the public interest. Indeed, there is good reason to suggest that the Commission has tended to understate the importance of market structure, particularly concentration and entry, in the evaluative scheme of things; that, on balance, the Commission has not been strict enough in applying the key competitive principle of market-ensured consumer gain.¹²⁹

But the most striking enforcement "sins" are those of omission, not commission. It is the thinness of the anti-combines record which brings its inadequacies into sharpest focus. To be sure, significant advances have been made in a number of directions: both the beer and sugar mergers have come before the courts; detailed research studies on loss-leader selling and discriminatory pricing have been published; similar inquiries have been launched into tie-in sales arrangements of certain gasoline companies, premium rates and practices in the field of automobile insurance, and selling and pricing policies in the pharmaceutical industry.¹³⁰ There is also evidence of increased willingness to recommend tariff

¹²⁹ The Yeast Report, *op. cit.*, *supra*, footnote 40, is broadly illustrative of this relative laxity in application; so too the Beer case, *supra*, footnotes 40 and 41, in terms of both Report and judicial result.

¹³⁰ For reference to the inquiries still in progress, see Report of the Director of Investigation and Research for the Year Ended March 31, 1959, *op. cit.*, *supra*, footnote 32, p. 37. The automobile insurance study was published after the time of writing: Restrictive Trade Practices Commission, Report Concerning the Business of Automobile Insurance in Canada (Ottawa, 1960).

reduction as a basic instrument for strengthening the forces of competition in Canadian industry. But these advances are so recent—and for the most part so scattered—as to exert only a limited qualifying effect on the generalization that Canadian anti-combines policy tells a rather simple story of government action to outlaw collusive price-fixing and to punish it by imposing fines on the guilty parties.

One can readily point to a variety of mitigating circumstances in this connection. The thinness of anti-combines enforcement reflects in part the meagre financial and staff resources traditionally devoted to this sphere of public policy. The heavy reliance on fines was not inconsistent with the policy bias towards loose combinations. The outlawry of collusive pricing must have had some “demonstration impact” in preventing anti-competitive behaviour that might otherwise have emerged. Canada’s economic openness, together with the preponderance of expansion periods during the past seventy years, may have moderated the restrictive forces operating in the Canadian economy. But the importance of such factors should not be exaggerated. Even meagre resources can go a long way if used efficiently by high-calibre personnel; recent programmes of combines investigation and research attest to this fact. To focus on loose combinations is not to require that the fines levied on offenders be generally light; and it is not to preclude the use of sharper remedial weapons. The “demonstration effect” of anti-combines policy would have been far stronger if enforcement had been more vigorous in nature and less narrow in scope. Neither openness nor growth necessarily promotes competition; the contrary relationship will hold where high import barriers prevail and where expansion solidifies entrenched positions of corporate power. At best, then, the inadequacies of anti-combines performance may not be quite as serious as they appear to be on first impression. At worst, the net influence of the mitigating factors is very small.

It is well now to recall the basic theme of “the new critique”. Peripheral issues aside, the argument proceeds along the following lines: (1) the classical theory of competition is an outmoded system of ideas divorced from the reality of modern economic life; (2) it provides not the slightest insight into business behaviour in an open economy like that of Canada; (3) being rooted in this analytic system, Canadian anti-combines policy is gravely defective on both counts; and (4) it has been rendered almost totally bankrupt by a persistent refusal to define “public detriment” in terms

broader than injury to competition. From the foregoing discussion it should be crystal-clear that, whatever the elements of weakness in the anti-combines approach, they are not these.

The question of public detriment yields the simplest answer. At this point it need only be re-emphasized that equating the public interest with competition is not violating statutory intent; and that the practical choice is not between the test of competition and some nebulous standard of public welfare, but rather between an effective and an inept administration of anti-combines policy. Turning to the classical system, there should now be no doubt of its enduring place in the theory of competition—not as a mirror of actual business conduct (which it was never intended to be), but as a set of norms for appraising such conduct and as the fountainhead for the proposition that the transfer of efficiency gains to the consumer must be compelled by the facts of market structure. There is more to the “classical” issue, however. The new critique carries the definite implication that present-day competitive theory, in so far as it eschews “the new competition”, is merely a fossilized replica of classical doctrine. This view is patently false. In the modern context, the logic of effective competition is to range well beyond the number and relative size of firms in determining whether each is constrained to offer better terms to buyers; both scale economies and innovation are deemed to be typically compatible with this result; and international competition emerges as one important facet of the overall framework. In short, it is not so much the classical system which is outmoded as the notion that the system has survived full-blown in the modern professional literature on monopoly and competition.

Be that as it may, the fact is that the anti-combines authorities have shown no inclination to mould Canadian markets in the classical image.

The establishment of a régime of “perfect” competition, however that might be interpreted in practical terms, has never been advanced as a norm of policy in the combines legislation; nor would the most searching review of the combines reports or of the court decisions uncover a single example of an attempt to establish, or re-establish conditions of atomistic competition or to eliminate product differentiation. Sellers are *not* expected to act as if there were no rivals to react to their market behaviour; sellers *are* expected to refrain from *collusion* on significant decisions affecting prices and production if they occupy a substantial position in a market.¹³¹

True, the basic policy on collusion is consistent with the results of

¹³¹ Skeoch, *op. cit.*, *supra*, footnote 4, p. 25.

classical reasoning. But it is no less consistent with the principles of effective competition outlined above. There is nothing paradoxical about this twin relationship; it merely underscores the point that, where collusion is involved, the probability of adverse consequences is so high as to make the classical approach a special case of the general theory of effective competition. Canada's courts, like the Restrictive Trade Practices Commission (and its predecessors), have failed to articulate this point. What is more, the Commission, through its references to specific detriment, has implied some reluctance to be fully guided by a *per se* doctrine on collusion. In the event, however, it is this doctrine which has prevailed—and with good analytical cause.

The enforcement position on mergers and monopolies presents a different picture. There, in the almost complete absence of case law, the Commission has recently been breaking new ground. Again the competitive process has not been placed in broad perspective; nor has the quality of economic appraisal been universally high. The Commission's exploratory effort is impressive nonetheless—embracing, as it does, the central proposition that especially strict standards of conduct must be met by any business firm which accounts for the overwhelming share of market sales and output; and that market shares are a necessary but insufficient criterion for assessing the impact of mergers on competition. In effect, the Commission has leaned over backwards to apply a "rule of reason" test in merger cases. The real question, indeed, is whether it has not leaned over too far—having in mind its generally inadequate concern with the barriers to entry, as well as with the crucial concept of market-enforced consumer gain. One is also entitled to ask why no anti-combines agency has raised an issue of public policy in monopoly or near-monopoly markets which are not characterized by mergers or restrictive practices.

As to other problem areas, the record gives no justification for a finding of harsh and rigid classicism. Careful research studies have been conducted in a few fields, such as loss-leaderism and discriminatory pricing. For the rest, only a handful of investigatory reports have been, or are in process of being, published (apart from enforcement of the statutory ban on resale price maintenance). And in no conceivable way can the path of remedial policy—throughout the anti-combines sphere—be viewed as a programme for reshaping the structure of Canadian markets.

It may be useful to summarize in the following sequence: The "old-style" classical theory of competition retains a significant

measure of validity in the "new-style" Canadian economy. Neither economic analysis nor anti-combines policy contemplates an atomistic framework for modern industry. Where (on collusion) Canadian policy comes closest to being classically oriented, it is sound in result even if misleading or wrong in logic. Where (on merger and monopoly) Canadian policy diverges most widely from classical reasoning, it tends to be less vigorous than warranted by the principles of effective competition. In avoiding or subordinating such performance tests as profit and price-output levels, Canadian policy has satisfied those principles while meeting one of the basic requirements for efficient anti-combines administration. In identifying "public detriment" with substantially lessened competition, Canadian policy has carried out the intent of Parliament while eliminating a major potential cause of inept enforcement. Judged in the light of both substance and remedies, Canadian policy errs on the side of weakness, not of strength; the current expansion in coverage and the growing appreciation of the tariff remedy are best understood within this frame of reference.

IV. *Some Broad Implications for Future Policy.*

The question of administration is, of course, only one side of the public-policy coin; the other side embraces the legislative system. As a matter of fact, the new critique has fluctuated between the view that anti-combines enforcement is seriously defective and the view that the central shortcomings lie in the statutory realm.

The statutory alternatives

The legislative issue is best examined in terms of the available alternatives. One of these is to repeal the anti-combines laws, and to enact a set of rules proscribing "fraudulent and irresponsible" business behaviour. Quite apart from the problem of defining such conduct, it is readily apparent that in essence here is a course of action which substitutes private for public regulation of business. Whether through collusion or the force of market power, competition would be rendered much less effective over wide sectors of Canadian industry. Public losses would have to be measured not only in sharply reduced consumer welfare, but also in grave injury to the democratic process. To this extent, therefore, *laissez-faire* becomes a synonym for anti-social self-regulation by private business.

Nor is the result much improved by expanding this approach into a comprehensive programme of government approval for

private restrictions on competition—such restraints to be aimed at objectives ranging all the way from full employment to the containment of Soviet power. Indeed, the straightforward policy of *laissez-faire* might well inflict the lesser damage. The main goals other than competition are reasonably attainable without destroying or crippling the competitive system; the monetary-fiscal approach to economic stability is a strong case in point. There is, in fact, no dearth of situations where anti-competitive restraints can frustrate the achievement of other goals. A real danger of government-business collaboration along these lines is that the restrictions will take on a quality of permanence that they could otherwise not acquire. More broadly, it is very difficult to see how such a programme can be effective without precipitating either one of two far-reaching consequences: business control of government or government control of business.

To mention the former is to reject it summarily as an alternative to anti-combines policy; the idea of business control does plain violence to both the economics and the politics of pursuing public ends. This is not necessarily so for control by government. Given the appropriate constitutional safeguards and procedural framework, it is not unreasonable to expect substantial success in the advancement of the public interest. At the very least, there is room for meaningful debate over the merits of direct government control of business. But whatever the objective truth may be, most Canadians have thus far chosen to believe that private decision-making in competitive industry is the superior general technique for promoting consumer welfare; and that in other respects the public interest can be adequately served by government policy which falls short of direct control of business activity. To be sure, in particular instances—by no means rare or insignificant—Canadians have been quite prepared to abrogate the rule of competition and to introduce varying degrees of government control.¹³² This has been done grudgingly for the most part, however; and then only where competition was deemed incompatible with realizing other public goals. Consequently, any extension of direct government operations would have to be justifiable on solid grounds of public interest. The full measure of adverse potential in the scheme for government-business collaboration is that,

¹³² The rule of competition has even narrower scope, of course, when reference is made to such fields as health, education, and broadcasting. But these are irrelevant in the present context; Canadians have long regarded them as being outside the normal business sector and therefore in need of special public scrutiny.

if it did not mean ultimate business control, it would probably bring an unlimited and arbitrary exercise of government power.

A related approach centres on the alleged over-narrowness of interpretation accorded the term "public detriment" (or "unduly") in anti-combines enforcement. In this connection, it has been suggested that the goal of consumer welfare should not stand alone but should be weighed in the balance with other ends to determine whether any specific form of business behaviour has injured, or is likely to injure, the public interest. The "detriment" approach has already been discussed. At this stage, therefore, it will be sufficient to note that, in effect, such proposals turn out to be a less extreme but close variant of the "government-business-collaboration" argument; that both permit the suppression of competition even when it is not a bar to the achievement of other public objectives; that both give enormous scope to the interplay of government and business pressures; that the "detriment" approach would saddle the anti-combines authorities with a burden of appraisal so complex as to ensure unsatisfactory administration of the law.

There is quite enough intricacy in the task of assessing impact on competition. It follows that sound policy is contingent upon obtaining the maximum degree of administrative simplicity consistent with the principles of competition. This basic working rule is broken by those who would incorporate the so-called "performance tests"—price levels, profits, output, progressiveness, etc.—into anti-combines law. The "performance" approach has strong appeal, and understandably so. It focuses on results actually reached in a dynamic context. It is employed in much of the modern research on particular industries. It provides a very broad field for the application of economic reason to public-policy enforcement. But none of these attractions alters the crucial fact that, as regards business practices, evidence on malperformance is neither sufficient nor necessary for a showing of injury to the competitive process. The effectiveness of competition stems from those characteristics of a market which compel the transfer of economic gains to the consumer. It is the response of this mechanism to changing company behaviour that signifies whether and how far such effectiveness has been reduced. In other words, the real test of competition is not whether performance happens to be good at some specific point in time, but whether, in the nature of things, it must be or is likely to be good over time. All this is not to deny the usefulness of performance data in certain market situations; nor even

their need, to some extent, in cases of oligopoly unaccompanied by direct acts of misconduct. But in the last analysis it is market structure and behaviour which really count: they can be assessed with little or no reference to performance data; and once the assessment has been made, such data are either secondary or irrelevant. Furthermore, in the present state of knowledge, the performance tests are especially difficult to define and even more difficult to apply. Here, then, is the concluding judgment on the "performance" approach: economic logic does not require anti-combines policy to reach out for the details of actual performance; while administrative feasibility requires that this type of appraisal be foregone.¹³³

It is well to pause at this point and look back at the statutory alternatives considered above. In fact, they are closely intertwined, so that it is by no means easy to determine where one leaves off and the other begins. This much is clear, however: all would have the effect of destroying or emasculating the traditional anti-combines approach to business behaviour; all would entail a degree of government or private power far in excess of that involved under the anti-combines laws; and all—possibly excepting direct government control—would mean the virtual abandonment of consumer welfare as a major goal of public policy. It can hardly be doubted that most Canadians, confronted with these alternatives, would choose to retain the anti-combines system. Their choice would be rooted in the conviction that, as a general rule, effective competition is best designed to promote both economic efficiency and political freedom.¹³⁴

Obviously, this must be more than a simple preference for the *status quo*. Even a perfectly conceived anti-combines framework would have to undergo continuing revision in a dynamic society. And there are few, indeed, who would challenge the observation that Canada's framework is a very long way from fully accommodating current needs. Thus the real preference is for those improvements which, over time, will ensure an increasing measure of effective competition in the private business sector. To decide

¹³³ Again, this is not to reject the use of performance data that are both readily available and subject to unambiguous interpretation. There is much to be said for such evidence as an aid to the enforcement of laws whose effectiveness is expected to derive in the large part from publicity and public understanding. But the enforcement process can only be frustrated by insistence on performance data which fail to meet the tests of clarity and availability.

¹³⁴ In this connection, see G. E. Britnell *et al.*, *Workable Competition and Monopoly*, A Submission to the Royal Commission on Canada's Economic Prospects, no. 263.

on the forms and directions of change is a formidable task that would carry the present survey far beyond its intended scope. It does seem appropriate, however, to touch briefly upon some of the high-priority improvements suggested by economic analysis and administrative experience.¹³⁵

Towards anti-combines improvement

At the broadest level is the clear gain to be derived from discarding the term "public detriment"—thereby precluding any effort to weigh competition in the balance with other social objectives. The corollary of this would be to specify "effective competition" as the overriding goal of anti-combines policy; and to give it that degree of articulation necessary to establish the principle of market-enforced consumer benefit.¹³⁶

Within this setting, one might properly expect a considerable re-working of major offences laid down in the law. There is, in the first place, ample justification for enacting a *per se* rule outlawing horizontal arrangements which cover a substantial part of a market, and which have the purpose or effect of fixing prices, restricting output, or sharing the market. Under such a rule, it would still be an enforcement function to define the relevant market, to identify the agreement, and to resolve the "hard cases" in which more diffuse forms of co-operation may or may not constitute the proscribed collusion. Even in the "agreements" sphere a judicious admixture of certainty and flexibility is warranted. This type of approach appears to yield the most solid compromise.

Also in need of re-formulation are the provisions dealing with "merger, trust or monopoly". Indeed, for reasons already outlined, the "merger" revision presents problems that are at once

¹³⁵ Cf. S. Stykolt, *Combines Policy: An Economist's Evaluation* (1956), 22 Can. J. of Ec. and Pol. Sc. 38; R. Solo, *The U.S. Attorney General's Report on the Antitrust Laws in Relation to Monopoly Control in Canada* (1956), 34 Can. Bar Rev. 669; J. N. Wolfe, *Some Empirical Issues in Canadian Combines Policy* (1957), 23 Can. J. of Ec. and Pol. Sc. 113; L. A. Skeoch, *Combines Legislation: An Examination of Proposed Amendments* (1959), 66 Queen's Quarterly 87. For an illuminating discussion of recommended revisions in United States anti-trust policy, see C. Kaysen and D. F. Turner, *Antitrust Policy: An Economic and Legal Analysis* (1959); also G. W. Stocking, *The Rule of Reason, Workable Competition and Monopoly* (1955), 64 Yale L.J. 1107. On the hardening British approach to departures from competition see Margaret Hall, *The New Look in Monopoly Policy* (1956), 18 Bulletin of the Oxford University Institute of Statistics 373; Lucile S. Keyes, *Antitrust at Last in Britain: The Restrictive Trade Practices Act of 1956*, (1957), 25 Geo. Wash. L. Rev. 627; R. Gosse, *The Enforcement of Competition in the United Kingdom* (1960), 38 Can. Bar Rev. 163.

¹³⁶ If the term "public detriment" is deemed politically unexpedient, the same result could be achieved by legislating its equivalence to "substantial lessening of competition".

more complex and more significant. Suffice it here to note that on the one hand, merger, unlike collusion, affords sizeable opportunity for advances in production and technology; and that on the other hand, merger, unlike collusion, involves a head-on change in market structure which can permanently injure or destroy the competitive process. In economic terms, therefore, it makes good sense for Parliament to eschew any *per se* rule on mergers, but to stipulate the illegality of all acquisitions which render, or are likely to render, competition ineffective. That permissible categories of merger—such as the “bankruptcy” group—can be specified was acknowledged in previous discussion. More important, however, is the realization that these must be narrowly circumscribed in the interests of competition; and that laxity in the early enforcement stages of merger policy might well provide a green light to the pursuit of restrictive merger conduct throughout the Canadian economy. Much will depend on an enlightened administration of the law. But the statutory contribution can be considerable if it includes: (1) a clear identification of illegal merger with ineffective competition; (2) for mergers involving a firm producing a substantial part of market output (say ten per cent or more), a requirement of sufficient prior notice (say three months) to permit preliminary investigation and appraisal by the Director and the Commission respectively; and (3) by way of illustrative guideposts for administrative judgment, such basic criteria as the number and relative size of firms, the change in market shares, the pattern of company behaviour and the conditions of entry in the affected markets.

These criteria of economic impact are fundamentally relevant to the “trust or monopoly” problem as well. However, it is vital that the law should distinguish sharply between the “merger” and “monopoly” aspects of anti-combines policy. For one thing, this would forestall any inclination to regard complete or substantial market control as a prerequisite to a finding of illegal merger. A series of mergers may well produce monopoly as an ultimate consequence; indeed, the case for close governmental vigilance over mergers rests heavily on this danger. But it is not at all necessary that the monopoly extreme be reached before an undermining of the competitive process can occur. In any event, the “monopoly” issue raises its own special problems which cannot be lumped together in a single set of merger-monopoly provisions. There is, for example, the question as to how—in the absence of an explanatory statement of national policy—any situa-

tion of monopoly or near-monopoly can be deemed legal within an anti-combines framework. There is also the question as to why the law apparently takes no stand against oligopoly markets in which—despite the lack of tangible misconduct—entry barriers are high and *prima facie* evidence can be adduced to show adverse operating results. At the very least, there is need to impose especially strict standards of conduct on dominant or leading firms; and the “monopoly” offence deserves careful study to determine how far legal doctrine diverges from the economic facts of life.¹³⁷

Then, too, the statutory provisions dealing with price discrimination and predatory pricing are worthy of review at this juncture. Their negligible implementation thus far may well reflect official uncertainty over the appropriate tests of illegal behaviour. In illustrative terms, it is not clear why the ban on price discrimination should contain no reference to substantially lessened competition. If the law presumes that all discrimination is anti-competitive, it conflicts with the relevant principles of economic analysis. Again, it is not clear why the likelihood of substantially lessened competition should nowhere be taken into direct account. Nor is it clear that, without elaboration, the test of “unreasonably low” prices makes for sound anti-combines enforcement. More broadly, consideration might be given to the merits of an expanded section 412 (or its equivalent) covering such practices as misrepresentation, tie-in sales, exclusive dealerships and delivered pricing.

In one area—resale price maintenance—the economic case for the *status quo* remains irrefutable. The legislative proscription is straightforward and unqualified. Its application has been correspondingly direct. This is as it should be, for there can be no question of resultant losses balancing gains on the “scale” of competition. Indeed, the possibilities of competitive injury are remote; and the certainty of present law and administration does not have to be impaired in order to combat whatever abuses may develop in a vigorously price-competitive system. To hedge this law with exceptions or loopholes would be to encroach unnecessarily and seriously upon the public interest in effective competition.

But there is more to good anti-combines law than a broad appreciation of the substance of public interest. Adequate procedural machinery is hardly less vital. This can be strikingly

¹³⁷ It may be noted incidentally that no doubts can be entertained on the logic of striking the anachronistic term, “trust”, from the anti-combines vocabulary.

shown by recalling the above suggestions of prior notice for large-scale mergers. Here is a field well suited to preventive action: the planned change is both sizeable and concrete; it takes time to consummate; and its probable impact can be gauged with reasonable precision. Here is also a field in which the utmost importance attaches to forestalling unwarranted revisions of Canadian industrial markets—so much so, in fact, that the administrative authorities should be unequivocally empowered to seek injunctive relief against the execution of merger plans. Nor is it simply a matter of acting now to prevent something which could be undone later by a decree of dissolution. The practical difficulties in the way of unscrambling a merger will typically be very great, and sometimes unsurpassable.

At this point, of course, one begins to approach complex issues of a constitutional nature. This is not the place to examine them. But it is the place to contend that exclusive focus on the criminal power leaves much to be desired as a basis for anti-combines enforcement; that in many market situations prevention and remedy, not punishment, are the appropriate means of maintaining effective competition; that criminal proceedings, with their strict rules of evidence and their strong burdens of proof, are often ill-adapted to the performance of this task. It is time to re-appraise the constitutional underpinnings of anti-combines jurisdiction; and especially to re-assess the prospects for activating the federal government's power to regulate trade and commerce. Two fundamental questions are at stake: whether civil proceedings can be made a pillar of the enforcement system; and whether clear and substantial limits can be imposed on the present capacity of provincial governments to override federal authority by legislating control over competition in particular industries. There are legitimate grounds for believing that negative answers would have gravely adverse implications for the future effectiveness of anti-combines policy.

On the other hand, even positive answers could not ensure administrative success. In the last analysis, it will rest on the quality of enforcement achieved by the agencies charged with responsibility for interpreting and applying the law. A mixed picture emerges here. On the whole, experience has validated the 1952 decision of Parliament to divide the functions of administration between the Restrictive Trade Practices Commission and the Director of Investigation and Research. Whatever their lapses along the route, both agencies have been gradually building a fund of expertise on

anti-combines problems. More important, the fact of their confinement to such problems leads to the strong expectation of continuing analytic progress. The judicial picture, by contrast, gives much cause for concern. It is not enough that up to now the courts have usually reached the right result in the "collusion" sphere. To have done so for the wrong reasons, or for no reason other than *stare decisis*, is to create the serious risk that on a more complicated set of facts the issue of collusion will be wrongly decided; and that rulings on collusion will be wrongly used as a guide to judgment in other combines cases. The plain truth is that in general, Canadian judges have shown little skill or interest in the methods of economic appraisal. This is readily understandable in terms of their educational background and the enormous variety of cases they have been called upon to handle. However, the conceptual gap is no less wide for being easy to explain. At the same time, nothing in Canada could be more solidly established than the principle that ultimate sanction for the rule of law must lie with the judicial process. Accordingly, the basic need suggests itself—a specialized system of courts empowered to resolve anti-combines issues in the light of both statutory intent and the economics of effective competition. Over time, such a system might well be expected to develop that high degree of sophistication commensurate with its task.¹³⁸

Having gone this far, one is obliged to go somewhat further and mention three avenues of improvement that seem beyond dispute. There is, first, the matter of consolidating the relevant Criminal Code provisions under the Combines Investigation Act: it is unlikely that such duplication has had any impact other than to becloud Canadian jurisprudence on the relationship between "undueness" and "public detriment". Second, there is the importance of materially expanding the financial and personnel resources of the Director and the Commission: it is difficult to appreciate how much they have managed to do with such modest means.¹³⁹ The third avenue is the least concrete but the most substantial of the three: within

¹³⁸ An important advantage of this special court system would be the elimination of costly intermediate appellate proceedings: provision could be made for exclusive appeal to the Supreme Court of Canada.

¹³⁹ Expansion of the Director's staff would permit his legal officers to assume prime responsibility for seeing anti-combines cases through the courts. In view of the complex subject matter, there is much to be said for favouring this approach over the present practice of engaging outside counsel to handle these cases. Existing requirements of membership in a particular bar need pose no problem: the specialized court system suggested here could make membership in any Canadian Bar a sufficient condition for arguing a case under anti-combines law.

the anti-combines framework, it involves assigning explicit priority to those remedies that strike directly at the "concentration" and "entry" barriers to effective competition; outside the anti-combines framework, it entails setting up machinery to minimize inconsistencies among those public policies—notably anti-combines, taxation, and patents—that exert a strong influence on the competitive process.¹⁴⁰

Some inconsistency is inevitable, to be sure. For certain purposes, other public goals may be held to take precedence over competition. But where this is so, the nature and implications of the choice should be clearly understood. By the same token, it is naturally open to Parliament to write provisions into anti-combines law which, in effect, would exempt particular industries or particular practices from the rule of competition. What should be recognized, however, is that such changes would not be cost-free to the Canadian economy. To the extent that they did not bring direct control by government, they could only mean losses in consumer welfare.

It will have become apparent by now that the foregoing comments have supplied more questions than answers on the central issue of statutory advance. The suggested paths to improvement are believed to be both sound and feasible. But this has been a broad exploratory effort, not a blueprint for detailed revision. Given the problem's complexity, the latter is a project for the most searching inquiry into the economic, political, and legal foundations of Canadian anti-combines policy.

V. *Postscript.*

The reader will, of course, have noted that in August 1960, after the time of writing, Parliament incorporated a new set of amendments into anti-combines law.¹⁴¹ In this context of transition, it is appropriate to outline the more important changes and to offer some tentative judgments as to their implications for the competitive process.

The simplest observation to make is that there is one instance of complete identity between the revisions suggested above and those actually given statutory effect. The case in point is the consolidation of sections 411 and 412 of the Criminal Code under the Combines Investigation Act.¹⁴² One need only reiterate the view that the real benefits of such a change are quite beyond dispute.

¹⁴⁰ Cf. Royal Commission on Patents, Copyright and Industrial Designs, Report on Patents of Invention (Ottawa, 1960).

¹⁴¹ Bill C-58, I

¹⁴² *Supra*, footnote 5.

The other amendments can be conveniently classified as follows: (1) those which seem to be in harmony with my suggestions; (2) those which appear to be in conflict; and (3) those which do not yield a clear impression of either consistency or conflict. Especially prominent in the first category is the new role envisaged for the Exchequer Court.¹⁴³ For the first time, a specialized court has been empowered to adjudicate anti-combines cases. Its use is discretionary, to be sure: the Attorney General of Canada is not obliged to conduct a prosecution in that court; nor can he do so without the consent of all the accused. But the fact remains that Canadian law now recognizes the basic need for judicial expertise in anti-monopoly policy.¹⁴⁴

Several other amendments are worth noting in this connection. One of these specifically authorizes the issuance of a restraining or dissolution order without a conviction where the offence has been completed.¹⁴⁵ Again, there can be no quarrel with the straightforward outlawry of misrepresentation to the public concerning the price of goods which it buys,¹⁴⁶ or with the amendment which provides that a tendency towards substantially lessened competition—not only actual lessening—is a sufficient condition for illegality where the accused charges prices that are “unreasonably low” or lower in one region than another.¹⁴⁷ The new Combines Act also drops the empty term “trust”, gives separate definitions of “merger” and “monopoly”, and articulates the principle (formerly implied) that reduced competition is an essential ingredient of illegal merger.¹⁴⁸

The second main category of amendments—those which seem to conflict with my suggestions—is less varied than the first, but in substance more significant. Only two amendments are directly relevant here, namely, the changes involving loose combinations in domestic trade,¹⁴⁹ and the revisions in the law of resale price maintenance.¹⁵⁰ Both are extensive amendments, however, and they affect the two areas of most vigorous anti-combines enforcement.

The section 32 changes appear to have been intended as no more than a clarification of then-existing law. Accordingly, they

¹⁴³ Combines Act as amended, s. 41A.

¹⁴⁴ For Exchequer Court cases, the corollaries of this innovation are the bypassing of intermediate appeal, and a new rule that a lawyer can argue any such case irrespective of the provincial bar in which he happens to have membership.

¹⁴⁵ Combines Act as amended s. 31.

¹⁴⁶ *Ibid.*, s. 33C.

¹⁴⁷ *Ibid.*, s. 2.

¹⁴⁸ *Ibid.*, s. 34.

¹⁴⁹ *Ibid.*, s. 33A.

¹⁵⁰ *Ibid.*, s. 32.

centre on a list of practices—including exchange of statistics, product standardization, and co-operative research and development—which will immunize such combinations as do not also “lessen competition unduly in respect of” prices, output, markets, and channels or methods of distribution. But even on casual reflection, it is readily apparent that, by formalizing a set of defences to loose combination, the new Act is likely to promote a flowering of evasion techniques and to complicate the entire process of legal argument and proof in this field. What is more, it is very difficult to escape the judgment that the wording of section 32 is now diffuse enough to permit a considerable dilution of “loose combination” law by the Canadian courts.

This can be best illustrated by reference to subsections (2) and (3). The former completes the list of defences with the item, “some other matter not enumerated in subsection (3)”; the latter sets forth the types of competition whose undue lessening will prevent resort to the stated defences. The net effect of this language could be to frustrate governmental efforts to strike down agreements which restrict competition in ways not explicitly covered by subsection (3). That such agreements (involving, for example, restraints on the use of technical innovations) will be devised in a complex business setting can hardly be doubted. If one is prepared to raise a rebuttable presumption against loose combinations, it follows that the anti-combines system has been weakened by attaching the “residual cause” to the defences under subsection (2) rather than to the offences under subsection (3).

A further weakening influence is exerted by the already-noted language, “in respect of prices, output, etc.”; for “a combination which lessens competition unduly in respect of . . . prices” could be given a judicial interpretation quite different from “a combination formed to lessen unduly competition in price.” Under the Criminal Code, the courts have construed the first type of arrangement to be unlawful irrespective of actual prices prevailing in the affected market. But in the future, they could plausibly come to view a showing of “unreasonable prices” as a necessary condition for outlawing the type of arrangement now specified in subsection (2) of the Combines Act. A special aspect of this ambiguity in phrasing is the fact that the language of subsection (1)—generally proscribing combinations in restraint of trade—is identical to that of the old law comprising section 411 of the Criminal Code.

It is not a matter of asserting that such judicial dilution of anti-combines law will actually occur. For present purposes, it is enough to cite good reasons for believing that it can.

Concern is also warranted in relation to section 34 on resale price maintenance. Here the accused is provided with a group of defences in circumstances where he has refused to sell to another person.¹⁵¹ That is to say, "no inference unfavourable to the person charged shall be drawn from [the] evidence if he satisfies the court that he and any one upon whose report he depended had reasonable cause to believe and did believe" that the buyer was using the goods as loss leaders, was subjecting them to misleading advertising, or was not providing the quality of servicing that his customers might reasonably expect. It can be argued that the new provision does not in fact alter the ban on resale price maintenance; that the defences are relevant only in terms of refusal to sell; that once such refusal has been linked to an attempted fixing of resale price, conviction follows without reference to those defences. Logic and strict statutory construction would seem to support this point of view. But it is not at all certain that the courts will eschew treating the defences as a possible offset to a finding of resale price maintenance; for the language of subsection (5) has converted a relatively simple process of appraisal into a highly complex procedure for evaluating the conduct of the accused in section 34 cases. Moreover, the new law is likely to render detection and prosecution of violations more difficult by encouraging sellers and buyers to advance grounds for sales refusal other than the maintenance resale prices.

Leaving aside the "no change" argument, one can hardly avoid asking why Parliament chose such an awkward "back door" device for policing certain distribution practices apart from resale price maintenance. If loss leaders and misleading advertising were deemed objectionable, they could have been prohibited directly by law. To the extent that inferior servicing was the target, it could have been left to the erosive forces of competition. In the event, subsection (5) grafted a questionable system of private law on to a sound and straightforward statute.

There is yet a third class of amendments to be distinguished. Perhaps the most interesting of these is the new provision which outlaws discriminatory promotional allowances.¹⁵² Such an allowance is defined as any concession that is (a) "granted for advertising or display purposes", (b) "collateral to a sale or sales

¹⁵¹ *Ibid.*, s. 34 (5).

¹⁵² *Ibid.*, s. 33 B.

of articles but . . . not applied directly to the selling price," and (c) "not offered on proportionate terms to . . . competing purchasers." The concept of proportionality is, in turn, related to each purchaser's value of sales or type of services, depending upon the particular form of the arrangement made. The new section has a twofold purpose: to prevent discrimination in this sphere of distribution; and to limit promotional expenditures in favour of price reductions to the final consumer. However, it is by no means clear that these objectives will be achieved—first because of the complexity in statutory language, and secondly (as regards promotion) because of the possibility that reduced promotional spending at the retail and wholesale levels will be offset by increased advertising at the manufacturing level. In the latter connection, there is little basis for assuming a decline in the total volume, rather than the composition, of advertising outlays; thus the end result could well be a negligible impact on both promotion and prices. The only sure way of curbing promotional spending is to curb it. And the only sound way of attacking discrimination is not through blanket proscription, but by legislating against those discriminatory practices which cause, or are likely to cause, a substantial lessening of competition.

The "export" amendment on loose combinations is similarly difficult to categorize.¹⁵³ Introduced in the final stages of parliamentary debate, it stipulates that agreements involving "only . . . the export of articles from Canada" are not in contravention of anti-combines law, except in so far as they tend to restrict Canadian export business or to "lessen competition unduly" in the domestic market. In fact, the stated tests of illegality are probably much the same as the tests which the courts would have applied in the absence of subsection (5). But there is merit in statutory articulation of implicit law. Taken by itself, therefore, the "export" amendment could be regarded as a contribution to increased certainty in anti-combines policy. In that setting, the only real questions would be whether a formal exemption was likely to induce a material rise in Canadian exports; and whether it was wise to give explicit sanction to the view that exploitation of foreign consumers is a matter of indifference to Canadian public policy. But the point is that the new "export" clauses cannot be considered without reference to the already noted revisions in the law of loose combinations in domestic trade. The aggregate effect of both amendments is to soften the standards of competitiveness,

¹⁵³ *Ibid.*, s. 32 (4) and (5).

to leave no room for doubting the complete relevance of those standards for export agreements, and so to substitute a new kind of weakness for the uncertainty which prevailed before the amendments were enacted.

Viewing the 1960 amendments as a whole, the preliminary picture that emerges is roughly the following: Certain changes—those covering export agreements and discriminatory promotional allowances—could affect the competitive process either way. A number of other changes—notably involving the Exchequer Court—are positive in their impact. Still others—the revisions applied to loose combinations and resale price maintenance—have negative implications for competition. It is impossible, of course, to assign precise weights to these countervailing forces. But the positive amendments are largely procedural in character; while the negative changes bear on major substantive areas of anti-combines law. One can recognize the difficult problem of separating procedure from substance, and yet safely conclude that, on balance, the amendments are not consistent with the principles of a strengthened legislative system. This judgment is reinforced by the observation that many significant avenues of improvement, including merger and oligopoly, were left fully or mostly unexplored.

Indeed, the amendments are no less conspicuous for features retained than for those which underwent revision. But if many gaps were left unfilled, so too did certain elements of strength remain intact—the overall philosophy of maintaining competition, the special concern over predatory pricing; the principle of combining remedial and preventive measures; the sharing of administrative responsibilities by the Director of Investigation and Research, the Restrictive Trade Practices Commission, and the Minister of Justice. All things considered, one should be careful not to exaggerate the dimensions of change that the amendments produced. Their greatest significance, by far, is that they provide a striking object lesson in the consequences of charting new directions for economic policy without first inquiring thoroughly into the rationale and effectiveness of the existing structure.
