CANADIAN COMBINES POLICY—THE MATTER OF MERGERS*

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I

The problem of formulating an appropriate public policy for mergers is not essentially different from that of policy formation toward price agreements and other types of restrictive practices. In both instances, the heart of the problem is that of weighing alternatives; that of deciding, in Dean Mason's words, "how much, in fact, would have to be sacrificed in the achievement of one objective to secure a given amount of progress toward the other."[1] What difference exists is rather one of degree. In particular cases, the likelihood that a merger will result in detriment to the public through its effects on concentration and competition is almost always counterbalanced by possibilities of worthwhile benefits. There has, therefore, never been any serious question of mergers being considered *per se* offences, and in practically all discussion of them the desirability of a selective policy is implicit.[2]

Canada has had legislation purporting to influence and control mergers for more than fifty years. On the face of it, the legislation would seem to have supplied the foundation for a truly selective

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[1] The Current Status of the Monopoly Problem (1949), 62 Harv. L. Rev. 1265, at p. 1289.

[2] Since 1935, the term "merger" has been defined in the Combines Investigation Act, S.C., 1935, c. 54, now R.S.C., 1952, c. 314 as am. by S.C., 1953-54, c. 51; 1959, c. 40; 1960, c. 45; 1960-61, c. 42; 1962-63, c. 4. as including the condition which makes it offensive, (in this case public detriment). The same is true of the word "monopoly". In view of the widespread usage of these terms to refer to legitimate situations, the narrow legislative use seems bound to cause some confusion. It is notable that neither term is used in the legislation of the United States or Great Britain, *i.e.* in the Sherman Act (1890), 26 Stat. 209, as am., s. 2, the Clayton Act (1914), 38 Stat. 730, as am., s. 7, and the Monopolies and Restrictive Practices (Inquiry and Control) Act, 1948, 11 & 12 Geo. 6, c. 66 s. 3.

policy under which mergers detrimental to the public were to be discouraged and, more recently, prevented. In fact, no such policy has evolved and Canada today seems further than ever from any policy toward mergers, selective or otherwise. The persistence of this situation is doubly surprising since, on the one hand, Canadian industry is clearly interlaced with a considerable element of oligopoly, emphasizing the dangers of public indifference to mergers; while, on the other, there are strong indications of excessive fragmentation in much of Canadian manufacturing, which suggest to many that merger may promote what is widely referred to as "rationalization".

The purpose of this article is to show how this situation came about historically and to discuss some issues in the development of a selective policy. While it is not intended to attempt to write a prescription for our ills, nevertheless in the policy vacuum which now exists some confrontation of alternatives is virtually inescapable. There is a growing literature in the field of mergers which will greatly assist in Canada's problem. But ultimately, our approach must take account of the limiting conditions within which Canadian industry works: the large element of outside ownership and control, the tariff structure, the structure of industry with particular reference to plant use, and the conditioning effect of a strongly seasonal market and the unusual significance of geography.

II

The shape of Canada's approach to mergers was determined in the Combines Investigation Acts of 1910 and 1923, both of which were fashioned almost single-handedly by William Lyon Mackenzie King. Mr. King, Minister of Labour in 1910, struck the keynote of the debates on the first Combines Act when he referred to the "innumerable instances of mergers alleged to have been formed during the present year," and turned for confirmation to "no less an authority than the *Monetary Times*". In a manner not untypical, Mr. King denied being alarmed over the merger trend, but admitted that something really ought to be done; not, of course, because mergers were wrong, but because the public might easily get the wrong idea about them, especially since the public already was disturbed about the rapid price increases that were taking place. In fact, said Mr. King, anything which his law contemplated for mergers was contemplated only for the parties' own good, to protect them against being "wrongfully judged by the public". Moreover, Mr. King insisted that what he was doing was merely a response to public demand:

> The fact that mergers and price increases have been going on simultaneously, has created in the minds of the people a strong impression that the two are intimately connected, and the public are demanding some kind of legislation which will enable them to see whether they are right or wrong in that particular.[3]

Mr. King was at pains to absolve trusts and mergers from any blame for the rising prices, which led him into a curious analysis of the causes of the inflation then being experienced. Among these he accorded a prominent place to the extravagances of the rich:

> Through the extravagances to which I refer we have come to have large demands for certain classes of commodities that are not commodities that are produced for the mass of the people, and capital . . . has been withdrawn from (more worthy) occupations and put into such businesses as making automobiles and the like in order to supply the demand of those who have become very wealthy.[4]

Having thus enrolled in his support a compelling demand from the public, an upright antipathy for the rich, and the authority of the *Monetary Times*, Mr. King seemed well along toward introducing some forthright and vigorous measures for merger control. Instead, what he brought forth in his first Combines Investigation Act of 1910 marked but the beginning of decades of ineffectiveness, uncertainty and frustration in merger policy. It is clear, in fact, that Mr. King, notwithstanding his militant posture in Parliament, had no serious intentions against mergers in 1910 or even in later years, his half-hearted approach being reflected in the very vagueness and redundancy in which the relevant clauses of his legislation were cloaked. Establishing the pattern that was to be followed for fifty years, Mr. King threw mergers into a package with monopolies and trusts, the three being considered without distinction as merely one form of the larger category of combines. A combine, said the 1910 legislation,[5]

> includes the acquisition, leasing or otherwise taking over or obtaining, to the end aforesaid, of any control over or interest in the business, or any portion of the business, of any other person, and also includes what is known as a trust, monopoly or merger.

Care was taken to see that even this innocuous treatment was not mistaken for an expression of purpose. Though the legislation contained elaborate provision for investigation and publicity by a tripartite board (almost identical in form and practice to Mr. King's famous and long-enduring Industrial Disputes Investigation Boards of 1907), penalties were limited to conduct persisted

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[3] (1909-1910), House of Commons Debates, vol. IV, p. 6819.
[4] *Ibid.*, p. 6816.
[5] S.C., 1910, c. 9, s. 2 (C).

in after an adverse Board report, and even here to a list of offences modelled on the Criminal Code enumeration,[6] and from which mergers were pointedly excluded. It was not until the Combines Investigation Act of 1923[7] that mergers as such became an offence. In a major change of approach, penalties were attached not solely to continuing in, but to being party to or assisting in the formation of a combine, which term was defined as including "merger, trust or monopoly, so called". This quaint and meaningless phrase (to which for some reason the words "so-called" were added in 1919)[8] had by then attained a sort of legislative tenure by right of which it was to remain undisturbed in the law until 1960. Though it was not defined in 1923 it was accompanied, as in 1910, by a separately worded offence which appears to have been aimed at mergers and which became the basis of the definition which was included in the Act in 1935.[9]

The debate in 1923 was largely a personal tilt between Mr. King and Mr. Arthur Meighen, leader of the Conservative party, Mr. Meighen attempting to justify the ill-fated Conservative experiment of 1919 and extolling the value of the Criminal Code as a sufficient remedy in combines offences. In Mr. King's view, the Combines Investigation Act of 1923 was to provide the investigative arm without which "the Criminal Code of itself was of very little use".[10] Mr. King's long-held belief in the wholesome consequences of investigation and publicity was strengthened by the lack of facilities suited to the investigation of combines charges brought under the relevant provisions of the Criminal Code.[11]

[6] From 1892 to 1960, the Criminal Code contained provisions outlawing conspiracies, combinations, agreements or arrangements in designated areas of business activity. In 1960, the Criminal Code provision, then section 441(1), was brought into the Combines Investigation Act, S.C., 1960, c. 45 as section 32(1). In general see Richard Gosse, The Law on Competition in Canada (1962), and V. W. Bladen, Introduction to Political Economy (1956), Ch. VIII.

[7] S.C., 1923, c. 9. [8] S.C., 1919, c. 45. [9] *Supra*, footnote 2.

[10] (1923), House of Commons Debates, vol. III, p. 2607. In 1919 the approach was revised, the relevant wording being changed in the Combines and Fair Prices Act of that year to "mergers, trusts and monopolies so called", hardly calculated to add precision to a phrase even then beginning to suffer from disuse, *supra*, footnote 8. Executive support for the enforcement of the 1919 legislation was irresolute, and the constitutional validity of the law uncertain, so that any expectation of achievement during its brief and turbulent life would have been quite unwarranted. The Board of Commerce, which was created by the 1919 Act with wide authority, including that of prior approval of all combines prosecutions, performed its one really notable act when it went out of existence voluntarily in 1921 since in so doing it made prosecutions impossible and so increased the pressure for reform of the law.

[11] *Ibid.*, p. 2608. Mr. King said: "As regards the average subject with which the criminal law deals, the offence itself is apparent on the surface, but it is not so in respect to most of the evils that arise out of the methods

Mr. King's view prevailed and for the ensuing thirty seven years, the main stream of anti-combines legislation in Canada was to be duplicated in two separate enactments, each of which prohibited the same set of offences but attached to it seemingly different standards of illegality. The actions enumerated in the Criminal Code[12] were illegal if done "unduly"; those in the Combines Investigation Act[13] if done "to the detriment or against the interest of the public". This dichotomy, attributable to Mr. King's conception of the Combines Act as a device for checking cost-of-living increases in 1910, and for providing the investigative arm of the Criminal Code in 1923, was to become an anomaly in Canadian law, constantly posing to the courts the question of whether "unduly" and "to the detriment of the public" were meant to convey the same or different meanings.[14] As for mergers and monopolies, the notable thing is that these appeared only in the Combines Investigation Act and were therefore subject only to the criterion of public detriment. All cases involving these offences have therefore been brought under the Act. In practice, their disposition has been determined by (a) the interpretation placed by the courts on the word "unduly" in Criminal Code cases, and (b) the extent to which this interpretation has been carried over to cases involving public detriment under the Act.

To date, the efforts that have been made to apply the merger provisions have been conspicuously ineffective. A total of eight investigations of the possibly detrimental effects of a merger has been made under the Act, five of them since the second World War. Of that total, only four have resulted in prosecution in the

resorted to by combines in restraint of trade .... The men who have to do with administering questionable methods of proceeding in business usually take all possible precautions to see that there is as little publicity as possible .... In such cases the difficulty is to discover and bring to light the evil of which complaint is made, but when it is discovered, the Criminal Code may well become effective. That is the basis on which this legislation proceeds."

Mr. Meighen attacked the 1923 Bill on the ground that its elaborate investigative procedure led nowhere. See House of Commons Debates, *ibid.*, p. 2559. "But after they have done all their inquiry", he said, "in public or in private; after all are completed they cannot order anybody to do anything or to stop doing anything; they have no executive power. ... I venture to say that the Criminal Code will be more practically useful left alone".

[12] R.S.C., 1927, c. 36, as am. [13] *Supra*, footnote 2.

[14] The significance of the question was only partly reduced by the fact that most of the cases involving restrictive practices were brought under the Criminal Code, the attention of the courts being thus largely focused on the meaning of "unduly". Though smaller in number, the cases involving either restrictive practices or mergers which were brought under the Act were sufficient to keep the question to the fore. See Gosse, *op. cit.*, footnote 6, Appendix IV, esp. pp. 324-326.

courts.[15] Of the other four, the Restrictive Trade Practices Commission found no action necessary in two cases;[16] it recommended in one that prosecution be considered,[17] and it concluded in another that no effective action against the mergers in question was possible.[18] In all four of the court cases, the Crown was totally unsuccessful in proving to the court that an offensive merger had taken place. In the two most recent of these, in fact—The *Canadian Breweries* and the *Western Sugar* cases[19]—the judgment was such as to raise a question whether the existing legislation could ever be given practical effect, or whether an impasse had been reached in Canada's mergers policy.

If an impasse had in fact been reached, it could be attributed largely to the trend of judicial interpretation of the dual provisions of the Code and the Act respectively. In a number of cases brought under the Criminal Code, some judges had deduced by the middle fifties, "that an agreement must virtually eliminate competition before it becomes 'undue' " and had further (under the Combines Act, even as it applied to mergers) "interpreted 'detriment to the public' in the same way as they did 'unduly' ".[20] Neither of these deductions has yet achieved the status of "settled law". The first—respecting the necessity of a virtual elimination of competition—was given its most widely-quoted formulation by Cartwright J., in the *Howard Smith* case in 1957.[21] Previous decisions, he said:

> . . . appear to me to hold that an agreement . . . becomes criminal when the prevention or lessening agreed upon reaches the point at which the participants in the agreement become free to carry on those activities virtually unaffected by the influence of competition, which influence Parliament is taken to regard as an indispensable protection of the public interest . . . .[22]

[15] The four prosecutions were: *R.* v. *Canadian Import Co.* (1933), 61 C.C.C. 114; [1935] 3 D.L.R. 330 (C.A.); *R.* v. *Staples*, [1940] 4 D.L.R. 699; *R.* v. *Canadian Breweries Limited* (1960), 32 C.R. 1; *R.* v. *British Columbia Sugar Refining Co. Ltd.* (1960), 32 W.W.R. 577, [1960] O.R. 601; *R.* v. *Eddy Match Co. Ltd.* (1951), 13 C.R. 217; 18 C.R. 357 (C.A.) involved a number of mergers. Since it was brought under the definition of monopoly, however, it is here considered a monopoly case.

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

[17] Report Concerning the Meat Packing Industry and the Acquisition of Wilsil Limited and Calgary Packers Limited by Canada Packers Limited (1961), pp. 428-430. This case has now been dropped.

[18] Report Concerning the Manufacture, Distribution and Sale of Paperboard Shipping Containers and Related Products (1962), pp. 656-662.

[19] *Supra*, footnote 15.

[20] Gosse, *op. cit.*, footnote 6, pp. 137 and 184.

[21] *Howard Smith Paper Mills Ltd.* v. *R.* [1954] 4 D.L.R. 161; [1955] 4 D.L.R. 225 (C.A.); [1957] S.C.R. 403, (1957), 8 D.L.R. (2d) 449.

[22] *Ibid.*, at p. 426 (S.C.R.).

This interpretation, which was itself part of a minority judgment, has caused some doubt to be expressed in subsequent cases heard in the lower courts. In 1960, Batshaw J., of the Quebec Court of Queen's Bench, in *Regina* v. *Abitibi Power and Paper Co., Ltd.*, disagreed with Cartwright J's position, stating, "I conclude, therefore, that it cannot be accepted as our law that only those conspiracies are illegal that completely eliminate or virtually eliminate all competition".[22A] In a more recent case, *R.* v. *Electrical Contractors*, Laidlaw J.A., of the Ontario Court of Appeal, referred with approval to a Supreme Court case which antedated by two years Cartwright J's formulation:[23]

> I adopt the words used by Manion, J. in *R.* v. *Crown Zellerbach Canada Ltd., et al.* . . . , and concur in the views expressed by him as follows: "There are no words in the statute which put the Crown under the onus of proving a monopoly or virtual monopoly. I cannot subscribe to the proposition that any such onus rests upon the Crown." The fact that the co-conspiritors did not have the power to completely or substantially control the business in question is immaterial. Such power of control is not an element of the offence and the absence of such control is not an answer to a charge under sec. 411(1)(d).

It is, therefore, quite premature to conclude that a virtual monopoly is a necessary condition for a conviction under present law, in cases involving agreements. As for the second deduction—respecting the interpretation of "detriment to the public" and "unduly"—there is a similar element of uncertainty. In the judgments to date there is a clear diversity of opinion between those which would accord a similar interpretation to both terms, and those which would require added proof of some specific harm where detriment to the public is alleged. As expressed by the Director of Investigation and Research:

> The criteria which the Courts will apply, under the Act, in determining when a practice is detrimental to or against the interest of the public have not yet been clearly established. Some cases (*R.* v. *Alexander*, [1952] 2 D.L.R. 109; *R.* v. *Canadian Import Co. et al.*, [1955] 3 D.L.R. 330) have appeared to assimilate the meaning of the words "to the detriment or against the interest of the public" in the Act to that of "unduly" in section 411 of the Criminal Code but a recent case (*Regina* v. *Morrey et al.* (1957), 6 D.L.R. (2d) 114), under the Act, in the British Columbia Court of Appeal suggests a severer test involving proof of some immediate and specific harm.[24]

Finally, there is further uncertainty concerning the applicability of the same criteria to cases involving mergers or monopoly as to

[22A] (1960), 36 C.R. 96.
[23] [1961] O.R. 279.
[24] Annual Report (1958), p. 8. See also Gosse, *op. cit.*, footnote 6 Ch. V, esp. pp. 188-189.

those involving restrictive agreements. This, of course, appears even more pronounced since the 1960 amendments, when, with the incorporation of the Code into the Act, agreements were made subject to the "unduly" criterion, and mergers and monopolies to that of public detriment.

In spite of these multiple uncertainties, the formulation by Cartwright J., and the tendency toward assigning the same meaning to the two criteria, played a deciding role in the two recent merger cases involving Canadian Breweries and British Columbia Sugar Company,[25] contributing heavily to the failure of the Crown to prove its allegations in both cases. The trial court in both cases held that competiton must be shown to have been suppressed as a result of the merger, quite apart from any other effect on the public interest that might be shown. The courts' reasoning is illustrated in statements from the judgment by Chief Justice McRuer in the *Canadian Breweries* case.[26] Regarding the meaning of "detriment to the public", he held that "for the purposes of this prosecution the words have substantially the same meaning as the word 'unduly' as used in its context in the Section 411 of the Criminal Code".[27] Proceeding then to review and accept Cartwright J's formulation, and applying it to the facts of this case, Chief Justice McRuer asked, "Has it been proved beyond a reasonable doubt that the merger has conferred on the accused the power to carry on its activities without competition or substantially without competition? I think the irresistible answer is 'No' ", on the basis of which finding he rendered the verdict of not guilty.[28] In the *Western Sugar* case, Chief Justice Williams of the Manitoba Court of Queen's Bench took the same position, going, in fact, somewhat further in stating that:

> . . . the crown in this case must not only establish that as a result of the mergers the accused acquired the "power" referred to in the case decided under section 411 (old sec. 498) of the *Criminal Code:* It must also establish excessive or exorbitant profits or prices. The crown has not attempted to establish exorbitant profits; its attempt to establish exorbitant prices fails.
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> The crown must also establish a virtual stifling of competition.[29]

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[25] *Supra*, footnote 15. [26] *Ibid.* [27] *Ibid.*, at p. 605 (O.R.).

[28] *Ibid.* McRuer C.J.H.C. also observed, as a basis of his judgment, that the provincial authority was still able to protect the public interest "in the exercise of its duty in fixing prices".

[29] (1960), 32 W.W.R. 633. Gosse, *op. cit.*, footnote 6, p. 192, comments: "[Williams C.J.Q.B.] requires proof of suppression of competition *and* actual detriment in the form of excessive profits or prices. *Thus, more is required of the Crown in a merger prosecution than under section 32(1). In a merger case, it is not to be presumed that a virtual monopoly will enhance*

The impact of the principles set down in these two decisions has been that further attempts to secure a judgment against mergers have been discouraged and the chances of success for any such attempts greatly obscured. One possible ray of encouragement to those responsible for the Act's enforcement has been the slight amendment of 1960, whereunder the term merger was separately defined,[30] and the criterion changed from a merger which *has operated* (or is likely to operate) to the detriment of the public, to one which *lessens competition* (or is likely to do so) to the detriment of the public. Whether the amendment will make any difference in future is as yet unknown. The Minister of Justice at the time of passage did not seem to think so,[31] and Professor Richard Gosse has also expressed the view that "the modification should make no real difference in future cases".[32] The Restrictive Trade Practices Commission has been mildly more optimistic. In 1961 the Commission found that two acquisitions of competing firms by Canada Packers "were contrary to the public interest as being likely to lessen competition . . .". The Commission acknowledged that on the pre-1960 grounds as established in the *Breweries* and *Sugar* judgments,[33] a case against Canada Packers would fail. Nevertheless, it said, "the new definition would appear to embrace situations such as those revealed in the present inquiry," namely,

prices. Thus the possibility of there being a conviction for a merger detrimental to the public becomes less likely than ever." (Emphasis mine)

[30] *Supra*, footnote 6, s. 2(e): " 'merger' means the acquisition by one or more persons, whether by purchase or lease of shares or assets or otherwise, of any control over or interest in the whole or part of the business of a competitor, supplier, customer or any other person, whereby competition

(i) in a trade or industry,
(ii) among the sources of supply of a trade or industry,
(iii) among the outlets for sales of a trade or industry, or
(iv) otherwise than in paragraphs (i), (ii) and (iii),

is or is likely to be lessened to the detriment or against the interest of the public, whether consumers, producers or others." "Monopoly" was also separately defined, and "trust" was dropped as being meaningless and redundant. As noted above, the relevant section of the Criminal Code was brought into the Act as section 32(1). However, "the case law on the Criminal Code section is to apply to section 32(1)". See Gosse, *op. cit.*, footnote 6, p. 4, footnote 24.

[31] See Hon. E. Davie Fulton, then Minister of Justice, (1960), House of Commons Debates, vol. IV, p. 6915: "Since we have separated the merger and monopoly provisions into separate sub-paragraphs . . . the words 'which merger, trust or monopoly is likely to operate' just do not seem to fit in, and we have made the point apparent that what we are concerned with is the lessening of competition; therefore it is now whether competition is or is likely to be lessened to the detriment or against the public interest. I do not really think there is much change there because the only way in which competition would be likely to be lessened would be tied up with the effects of the operation of the merger; therefore I do not think there is really any change in substance."

[32] *Op. cit.*, footnote 6, p. 197.

[33] *Supra*, footnote 15.

mergers which were "likely to lessen competition in the industry in such a way as to prejudice significantly the public interest in a free competition" and, on this basis, it recommended that court action be considered.[34]

In a more recent case involving the producers of paperboard shipping containers in 1962, even this qualified measure of optimism is absent; the Commission's view was strongly expressed that, if the *Breweries* and *Sugar* decisions are accepted at their face value, "it will be very difficult indeed for the Crown ever to secure a conviction in a merger case, unless, as a result of and flowing from the transaction, the merger constitutes a complete or virtually complete monopoly in the industry".[35] In this case, involving a substantial number of mergers over a considerable period by various companies, the Commission renounced any hope of proving an offence under the Combines Investigation Act. Not without some suggestion of restiveness and frustration, it rejected dissolution as a remedy and recommended instead the removal of tariff protection.

The present position, therefore, is that Canada, though in possession of a strongly-worded statute pertaining to mergers, is virtually without a mergers policy. Moreover, in an odd judicial twist, the provision which was ostensibly intended to deal with monopoly (the "merger, trust or monopoly" provision) has been left to gather dust over long periods in the past, while the restrictive agreements provisions have come to be so interpreted as to require a monopoly offence. As Professor Friedmann pointed out when the trend was just beginning to become evident: "On the face of it, the elaborate provisions of the Criminal Code dealing with restrictive practices would seem superfluous if they meant to penalize only monopolies. For monopolies are specifically dealt with in the Combines Investigation Act together with mergers and trusts."[36] The *coup de grâce* seems to have come with the cases just considered, which have added mergers to the offences for which a monopoly test alone will suffice.

III

The legal polemics of recent years have done much to divert attention from the essentially economic nature of anti-combines activity, especially in the matter of mergers, where economic considerations are indeed of the essence. To non-lawyers at least, there

[34] *Op. cit.*, footnote 17, p. 429. [35] *Op. cit.*, footnote 18, p. 652.
[36] W. Friedmann, Monopoly, Reasonableness and the Public Interest in Canadian Anti-Combines Law (1955), 33 Can. Bar Rev. 150.

seems to have been more than a little rationalizing in the studied avoidance by Canadian courts of any involvement in economic issues. Repeated protestations have come, notably from the lower courts, that they are not called upon to adjudicate economic issues, a position aptly summed up in Sir Frederick Pollock's famous dictum, much quoted by his judicial colleagues, that "Our Lady of the Common law is not a professed economist".[37] However this may be, one can scarcely forebear wondering whether indeed the lady doth protest too much, whether the judges' very insistence is not a reflection of their own wavering conviction, and whether they have not in fact themselves become committed to economic theories of dangerously narrow dimension.[38]

I shall return to this later. Meanwhile, some contrast to the Canadian situation can be found in Britain and the United States. The United States courts have not hesitated to take account of economic criteria in reaching decisions, particularly in cases involving mergers.[39] The Federal Trade Commission, as a quasi-judicial tribunal, has concerned itself almost entirely with economic issues and has been a prolific source of information on industry structure in the United States. In Britain, though no direct approach has yet been made to the merger problem, a consciousness of the economic factors involved in agreements and monopoly is abundantly evident in the structure and practices of the Monopolies Commission and the Restrictive Practices Court. It was, in

[37] See for instance *Rex* v. *Container Materials Ltd. et al*, [1940] 4 D.L.R. 293, at p. 398 (Ont.).

[38] See S. F. Sommerfeld, Free Competition and the Public Interest (1948), 7 U. of T.L.J. 413, at p. 418: "We submit . . . that it is abundantly clear from the decided cases (a) that judges do consider the question of economic theory; but (b) that only one economic theory has received the approval of the courts. That theory is that the public is at all times entitled to the benefit of absolutely free and unrestricted competition, and that any combination that seeks to destroy competition is criminal, whether or not in the particular circumstances of the case the public interest might better be served by the operation of such a combination . . . . Thus . . . the courts have successfully by-passed the question of the public interest again, notwithstanding that we now have legislation which is supposed to be enforced in accordance with that very principle." Also Gosse, *op. cit.*, footnote 6, p. 142 *et seq.* Professor Gosse contends that the courts' conception is not only over-simplified (the law of the jungle) but also inconsistent (permitting agreement to the point of virtual monopoly).

[39] This attitude has been particularly evident in some of the post-war cases; for example those involving the Columbia Steel Company, and Bethlehem Steel Corporation. See I. M. Stelzer, Selected Anti-trust Cases (1961), Ch. II. It is also evident in the legislative history of the 1950 amendment to the Clayton Act, Pub. L. 899, 81st Congress, c. 1184, 2d sess.: See for example, the House Judiciary Committee Report 1191 (1949), 81st Cong., 1st Sess. Also M. A. Adelman, Effective Competition and the Anti-trust Laws (1948), 51 Harv. L. Rev. 1304 and Economic Aspects of the Bethlehem Decision (1959), 45 Virginia L. Rev. 684 and Comment in (1959), 68 Yale L. J. 1627.

fact, the sum total of the findings of the Monopolies and Restrictive Practices Commission between 1948 and 1956 which laid the foundation for the Restrictive Trade Practices Act of 1956;[40] and the work of the Federal Trade Commission which, for good or for ill,[41] pointed the direction of the amended section 7 of the Clayton Act in 1950.[42]

In Canada the Restrictive Trade Practices Commission was brought into being in 1952, seemingly with the intent of making some assessment of economic effects and possibly of establishing over time a similar body of accumulated economic jurisprudence as the basis for informed policy-making.[43] As far as mergers are concerned, any such expectations have not been fulfilled. Rosenbluth and Thorburn have stated the case as follows:

> In the few cases involving merger or price discrimination, the Commission's discussions have been narrow and legalistic and have not adequately explored the basic economic issues. Like a court, it has generally confined itself to the consideration of the evidence presented by the director and the opposing parties.[44]

The Commission's preoccupation with the legalistic was in fact, all too evident in the Canadian Breweries report, in its enchantment with intercepted telegrams, confidential memoranda, and letters which really never should have been written, to the virtual exclusion of economic analysis. Some improvement may be seen in later reports, notably that on the manufacture, distribution and

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[40] Restrictive Trade Practices Act, 1956, 4 & 5 Eliz. 2, c. 68. See The Monopolies and Restrictive Practices Commission, Collective Discrimination: A Report on Exclusive Dealing, Collective Boycotts, Aggregated Debates and other Discriminatory Trade Practices (1955).

[41] See Federal Trade Commission, Report on the Merger Movement (1948), p. 68: ". . . No great stretch of the imagination is required to foresee that if nothing is done to check the growth in concentration, either the giant corporations will ultimately take over the country, or the government will be impelled to step in and impose some form of direct regulation in the public interest." This report exerted a strong influence on Congress in its deliberations on the amendment to Section 7, possibly unduly so since, between the report's appearance and the passage of the amendment, there appeared an article by John Lintner and J. Keith Butters, Effect of Mergers on Industrial Concentration 1940 to 1947 (1950), 32 Rev. of Economics and Statistics 30, emphasizing the small size of the corporations acquired in the merger movement of the 1940's, and that the effect on concentration was very small, being one per cent or less. See also Jesse W. Markham, Survey of the Evidence and Findings on Mergers, in Business Concentration and Price Policy (1955), pp. 174-178.

[42] *Supra*, footnote 39.

[43] See s. 19(1), of Combines Investigation Act, *supra*, footnote 13: The Commission's report "shall review the evidence and material, appraise the effect on the public interest of arrangements and practices disclosed in the evidence and contain recommendations as to the application of remedies provided in this Act or other remedies."

[44] Canadian Anti-Combines Administration, 1952-1960 (1963), p. 103.

sale of paperboard shipping containers, but the orientation has remained legal rather than economic.

In Canada, therefore, despite isolated contributions of royal commissions, parliamentary committees and some research studies of academic origin, the economic information which must provide the substance of merger policy remains spotty and meagre. Though there is much hand-wringing over the legal stalemate and over the constitutional structure which has necessitated that the matter of mergers be dealt with exclusively on a criminal level, the fact remains that we are still without any promising alternative policy should these barriers to effectiveness ever be overcome. This situation seems to have given rise to an exaggerated reluctance to do anything about mergers, on the principle that we know so little about them that any action would be hazardous. Perhaps this is what prompted the then Minister of Justice to explain to Parliament in 1960 that "we prefer to wait for the decisions of the courts to see what the present [mergers] legislation means and what effects it has before we embark, in the dark as it were, on a far-reaching legislative project to revise the mergers provisions".[45] While this attitude reflects a remarkable degree of resignation on the part of the government of the day, and affords a disturbing, though common, example of the almost exclusively legal approach which Canada has so far taken to the mergers question, it is nevertheless true that continuing research into the motives, methods and results of mergers in a Canadian setting is sorely needed as an accompaniment of policy formation.

I would cite in passing, merely as an indication of the possible scope of such studies, the recent acquisition of the Cockshutt Farm Equipment Company by the Chicago-based Oliver Farm Equipment. This case illustrates the mechanics of international take-over on the grand scale, and provides opportunity for the type of follow up study which is probably most needed, that of the effects of foreign acquisitions. In the Cockshutt case, control passed from Canadian hands into those of an English merchant banking firm through open-market stock purchase, thence to a Florida real estate firm through a massive deal involving a large issue of new stock, and finally to the Oliver Company through the purchase of selected assets. The Florida group, having divested itself of most of the physical assets, auctioned the rest, changed the name of the company, re-incorporated in Florida, surrendered its Canadian charter, and moved south cash in hand. In addition to the sequence

[45] (1960), House of Commons Debates, vol. IV, p. 6909.

itself, much useful knowledge could come from study of the economic effects of this take-over, notably the specialization within the tariff-free North American market for farm machinery. While the Canadian company had been committed to "full line" production of farm machinery, principally for sale in Canada, the merged assets have reportedly been specialized to produce harvester combines for sale throughout the United States as well.

IV

In a Canadian setting, the major criteria of merger policy must be considered in relation to the branch-plant structure of a large part of the country's manufacturing industry, a feature which is certain to restrict the ability to influence mergers in that sector. To the extent that fragmentation of Canadian manufacturing industry reflects an over-representation of foreign-dominated firms, any attempt to use mergers policy as part of a larger plan aimed at promoting higher levels of specialization is severely restricted. This whole problem, of course, is related more directly to commercial policy than to combines policy, being itself a legacy of many decades of protection aimed at developing a manufacturing base of the Canadian economy. As such, although it falls outside the scope of this article, it emphasizes the need for a close link between the two policies. Studies of the sort which I have mentioned might well be directed at following the course of mergers control in the United States, as it affects firms represented by branches in Canada. Even though the objectives of merger policy in the two countries may occasionally be at variance, the close connection between the two manufacturing economies precludes any possibility of Canada's maintaining a mergers policy totally unrelated to that in the United States.

Among the criteria of mergers policy, the most central pertains to the likely effects on efficiency and real costs. Here it should be recalled that "all the technical economies of scale are achieved at the level of the plant rather than of the firm"[46] while potential economies at the *firm* level are limited to savings in distribution, selling, administration, advertising and other similar costs. In recent years, increasing skepticism has grown up around the view, once widely accepted among economists, that scale economies on both the plant and firm levels were substantial, and that these gave a cast of inevitability to oligopoly formation and the limitation of

[46] Carl Kaysen and D. F. Turner, Anti-trust Policy: An Economic and Legal Analysis (1959), p. 6.

free entry.[47] Today's position is perhaps best summed up in Joe S. Bain's statement that "the picture is not extreme in either direction and is not simple".[48] Nevertheless, companies in the process of merging almost invariably claim that the merger promotes gains in efficiency and real costs; and policy formation must operate within the limits imposed by our restricted ability to judge the merit of such claims. This is a serious limitation. Unfortunately the difficulties which beset efforts to judge the economic performance effects of a merger are very great; so great, in fact, as to make the performance criterion the weakest link in the chain of mergers control. It is extremely difficult, for example, to elicit sufficient relevant information from the firms themselves to show, beyond a reasonable doubt, that a completed merger has *not* resulted in scale economies.[49] As for contemplated mergers, we are faced with the task of judging in advance the performance of the merged resources, a task for which neither theory nor empirical observations have yet supplied adequate tools.[50] Even in cases where it is quite clear that specific economies are most unlikely, there may still be an inference of what Professor Machlup calls "a sort of symbiosis between the productive facilities of a firm, in the sense that their togetherness makes them more productive"[51] than they would be as separate units. Such an inference can be almost impossible to prove or disprove, even given the complete information available to the firm itself, and is probably the most intractable of the problems concerning the effects of mergers on real costs.

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[47] See G. A. Stigler, Monopoly and Oligopoly Through Merger (1950), 40 Am. Eco. Rev. 30.

[48] Economics of Scale, Concentration and Entry in Twenty Manufacturing Industries (1954), 44 Am. Eco. Rev. 38. See also Barriers to Competition (1956).

[49] See for example, P. Lesley Cook, Effects of Mergers (1958), pp. 12-13. For an indication of the difficulty of eliciting motive through direct interview, see Report cited footnote 17, pp. 87-88.

[50] See for example, Basil S. Yamey, Some Issues in Our Monopolies Legislation, [1962] The Three Banks Rev. 1: "In assessing a restrictive agreement among a group of firms it is reasonable to suppose, for example, that ordinarily the agreement slows down the displacement of the less efficient firms by the more efficient firms and reduces downward pressures on costs and prices. . . . When, however, we come to the assessment of established monopolies it is difficult to find any useful guiding presuppositions which are likely to enjoy wide acceptance. . . . [This being so], the control of prospective mergers runs into difficulties. For if it is true that the desirability of a monopoly can be ascertained only by a study of the firm in action, then it may seem to follow that a prospective merger can be assessed only when the resultant monopoly . . . has been in action for some time and shown its paces, so that its performance in such matters as price, profits, enterprise and exports can be examined. Again, given the greater freedom of manoeuvre in the market resulting from the merger, it must remain to be seen how this freedom will in fact be used."

[51] Fritz Machlup, The Political Economy of Monopoly (1952), p. 116.

Firm-level economies, therefore, must remain a somewhat unreliable and uncertain guide to merger policy. Except in the occasional instance where such economies are obvious and undisputed, they should be given an inferior role in policy decisions. Against this unpromising prospect at the firm-level is the fact that technical economies at the *plant* level are more readily demonstrable, and that, contrary to the usual assumption that potential economies from mergers are confined to the firm, mergers may in fact make possible economies on the plant level. I refer to cases where the merging firms have multiple-use plants; plants, that is, whose physical facilities are used for the production of more than one product alternatively through the course of a year. This may have resulted from various influences inhibiting plant specialization, chief among them a limited market size and market pressure for "full line" production over a range of complementary products. In a merger which brings together a number of such multiple-use plants, making possible the specialization of these into single-use plants with the same combined output as before, a considerable saving might be realized in the avoidance of the costs and delays incidental to production changeovers. It should be noted that such savings are not automatic where multiple-use plants are merged; indeed, it is particularly true in Canada that increased costs attributable to longer transportation hauls or to a seasonal marketing pattern, may obstruct any net economies.[52] Nevertheless, the possibility exists in such cases for a merger to have independent effects on plant use, and consequently to result in plant economies, even in the absence of any technological change in the minimum scale of output. To cite one example, mergers of this type have not been uncommon in the history of the farm machinery industry in Canada.

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[52] Perhaps the earliest and most explicit statement of the relation between mergers and plant economies was contained in J. M. Clark, Studies in the Economics of Overhead Costs (1923), p. 97. Having reviewed the basis of plant specialization, Clark said: "It is worth noting, however, that there are other traditional savings of combination which hinge on not carrying specialization of plants to its ultimate limit. If one type of goods is made by only one plant there are heavy freight bills to pay, which could be reduced if every order could be filled by the plant nearest the customer, thus 'saving cross-freights' .... The dovetailing of different kinds of production in order to avoid the evils of seasonal operations is another economy which can only be had by increasing, not reducing, the variety of goods turned out by one plant .... Thus the principle of standardisation, like all the principles we are studying, encounters opposing forces which set limits upon it." But see also Erich Schneider, Real Economies of Integration and Large-Scale Production versus Advantages of Domination, in E. H. Chamberlain (ed), Monopoly and Competition and their Regulation (1954), p. 209.

Though the point would be difficult to establish from census statistics, the incidence of multiple-use plants of the sort described appears widespread in Canadian manufacturing. To the extent that it is, it emphasizes further the desirability of a selective policy since it increases the range of potentially acceptable mergers. Indeed, the view which seems to have gained ground in Canadian business, that mergers may be a means to economic salvation in the face of increasing competition from abroad, probably derives some of its momentum from an awareness of such potential plant economies. At the same time, the desirability of a case-by-case approach to mergers is emphasized by the lack of adequate data on plants and production processes contained in census materials and other official sources. Possible plant economies derivable from a merger are determined by the processes performed in the plants of the participating firms, information on which can rarely be inferred from census statistics of industry, and in fact can only be had from patient examination of individual cases.

In sum, the prospects of judging the public-interest effects of mergers on the basis of performance are limited, thus increasing the emphasis which must be placed on the other major criteria—the effects on concentration and on competition. The effect of mergers on concentration is still largely unexplored, particularly their effect on concentration of economic power as contrasted with concentration of control over the resources in a particular industry.[53] Although in 1960 a gesture was made in the amendment of the Combines Act to emphasize that the mergers provisions applied to vertical as well as horizontal mergers, the law has never made any direct approach to the problem of the large conglomerate firm, in most cases the result of mergers which, though they bring together firms not in direct competition, may nevertheless increase the concentration of economic power in the country. In fact, the adding of a reference to a "lessening of competition" to the mergers criterion in 1960 would seem to have restricted more than ever the potential application of the section to conglomerate mergers.[54]

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[53] Mr. Markham makes an interesting distinction between "asset transfers among corporations and ownership fusions" which, he says, "may not have the same effect on concentration", *op. cit.*, footnote 41, pp. 145 and 171; also Walter Adams, Comment, *op. cit.*, *ibid.*, p. 182 *et seq.* See also Canadian Bank of Commerce, Industrial Concentration (Royal Commission on Canada's Economic Prospects) (1956), p. 23; Federal Trade Commission, The Divergence between Plant and Company Concentration (1950), *passim*; John Lintner and J. Keith Butters, *op. cit.*, footnote 41; J. F. Weston, The Role of Mergers in the Growth of Large Firms (1953), Ch. III.

[54] See *supra*, footnote 22.

Somewhat more promising is the possibility of discerning the effects of a merger on competition. As was seen earlier, the Canadian courts in the past have proceeded almost exclusively on the assumption that the purpose of the combines laws was "for the protection of the specific public interest in free competition".[55] This has led the courts to shun considerations of performance in combines cases. Unfortunately the courts have further, consistent with their disavowal of any truck with economic theory, refrained from refinement or clarification of their notion of competition, which has led to the present economically meaningless position that competition is anything short of a virtual monopoly of the trade or industry involved. In spite of this extreme position, however, it must be acknowledged that the effect of a merger on competition is still of paramount importance to public policy. Some decrease of competition is virtually inevitable in most horizontal mergers, and in point of fact, the practical limitations inherent in any effort to judge performance in mergers increase the significance which must be attached to competitive effects in arriving at any net appraisal.[56] Criticism of the position of the courts is meant to imply only that their exclusive emphasis on competition, and the dangerously simple conception of it which they have accepted, are out of keeping both with the approach needed for a selective mergers policy and with the increasingly promising means at hand.

In connection with the means at hand it is perhaps sufficient to point to the refinements made in the last two decades in the concept of market power and to the increasing effectiveness with which the concept has been used in studies of competitive situations.[57] Professor Mason has contended that, "A judgment concerning market power is of the essence of mergers policy", which in his estimate is "the most fruitful field for the application of a market power standard".[58] In a broader sense, the whole of the discussion of workable competition, elusive though it may have

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[55] *Container Materials Ltd. et al* v. *The King*, [1942] S.C.R. 147, [1947] 1 D.L.R. 529 affirming [1941] 3 D.L.R. 145 (Ont. C.A.); [1940] 4 D.L.R. 293 (Ont.).

[56] See *inter alia*, Irving Brecher, Combines and Competition: A re-Appraisal of Canadian Public Policy (1960), 38 Can. Bar Rev. 523; J. M. Clark, *op. cit.*, footnote 52, p. 147.

[57] See for instance, Carl Kaysen, *United States* v. *United Shoe Machinery Co.* (1956); M. J. Peck, Competition in the Aluminum Industry (1961); J. W. McKie, Tin Cans and Tin Plate, A Study of Competition in Two Related Markets (1959).

[58] Market Power and Business Conduct: Some Comments (1956), 46 Am. Eco. Rev. 471. See also Mason, *op. cit.*, footnote 1, where he argues that the tests of both workable competition and effective business performance must be used to complement rather than to exclude each other.

been in many respects,[59] has sharpened the penetrative powers of the economic tools available. In Professor Stocking's words: "Although economists may differ in their judgment as to the workability of any particular industrial arrangement, they are pretty well agreed on what to look for in reaching a judgment."[60] In the United States, in fact, there has been a perceptible move on the part of the courts themselves "in the direction of a single standard of monopoly in the economist's sense of market control".[61]

It would seem, therefore, that attempts to assess the net effects of a merger should emphasize initially its effects on market power and secondarily its effects on performance. The sequence accords both with the relative significance of the two effects, and with the possibility of making an accurate judgment. There may in individual cases be other aspects which would affect an appraisal, such as effects on local employment through plant closure (a factor which could take on special significance in an international take-over), or an undesirable increase in concentration of control over resources. Nevertheless, for what might be called the representative case, competition and performance provide the most meaningful criteria. Decreased competition, in the sense of an increase in market power, should be considered acceptable only in the light of clearly demonstrated improvements in performance.

V

The uncertainty which pervades Canada's present policy toward mergers is itself contrary both to the public interest and to that of firms contemplating mergers. Yet it is doubtful that a simple clarification of the legal uncertainties reviewed in this article would bring relief. I have tried to stress the desirability of a selective policy, recognizing, in Mr. Markham's words, that "while some mergers impair a competitive enterprise system, others may be an integral part of it".[62] But the implementation of a truly selective policy is clearly beyond the normal scope of a court of law. A selective policy, in fact, must depend on judgments of an almost exclusively economic nature. Whatever may be the claimed appropriateness of disputation over intent in cases involving price or other conspiracies, it has no place in merger cases. Nor can any

[59] See L. A. Skeoch, The Combines Investigation Act: Its Intent and Application (1956), 22 Can. J. of Eco. and Pol. Sc. 25.

[60] G. W. Stocking, Workable Competition and Anti-trust Policy (1961), p. 368.

[61] M. A. Adelman, Effective Competition and the Anti-trust Laws (1948), 61 Harv. L. Rev. 1304.

[62] Jesse W. Markham, *op. cit.*, footnote 41, p. 182.

crude rule of thumb, intended to separate criminal from non-criminal mergers on the basis of suppressed or unsuppressed competition, be considered adequate. To the extent that American experience is relevant, it is significant that in the United States, the rule of reason was developed exclusively in relation to section 2 of the Sherman Act, on monopolization, rather than to section 1, on combination and conspiracy.[63]

The principal obstacle to the development of a selective policy in Canada has been the virtually complete assimilation of the matter of mergers into the main stream of combines law for the past half century. The result, as indicated earlier in this article, has been an increasingly legalistic conception of merger policy and the impasse of recent years. Some signs of dissimilation have now begun to appear—in the 1960 amendments, which separated mergers and monopolies from the broad category of combines offence, and a year later in the setting up of a separate merger section within the Combines Branch. The next logical step would seem to be at the level of activity now performed by the Restrictive Trade Practices Commission, whose responsibility still covers all types of offence under the Act, a concentration of responsibility unparalleled in the practice of other countries and unwarranted by results to date. Specifically, without creating any new responsibilities, a separate commission intended to focus exclusively on merger and monopoly situations could be established to assume the responsibility which the Restrictive Trade Practices Commission now has in these cases.[64]

If the function of such a commission were confined to investigation and recommendation as in the case of the present commission, at least some benefit would accrue from the specialization of its activity. There is much, however, to recommend a concomitant change of function. This conclusion stems from the fact that the most difficult of the policy questions in the matter of mergers is that of the ultimate remedy in a merger case. In cases of

[63] *Supra*, footnote 2. The amendment of section 7, of the Clayton Act, *supra*, footnote 39 in 1950 was an effort to make reason even more prominent in merger cases than had been possible under section 2, of the Sherman Act. See David Dale Martin, Mergers and the Clayton Act (1959), *passim*; and The Bethlehem-Youngstown Case and the Market-Share Criterion: A Comment (1962), 52 Am. Eco. Rev. 525: ". . . the Celler-Kefauver Act . . . simply called for value judgments by judges and the Federal Trade Commission that would place a lighter burden of proof on the government than the Sherman Act required in merger cases."

[64] Logic would suggest that monopolies and mergers continue to be treated together (as seems implied in the present section 33) since neither is in any sense a *per se* offence and both raise the same questions as far as public policy is concerned.

price conspiracy and restrictive practices of a continuing nature, an order to desist, along with some disciplinary action, are usually appropriate. As a general deterrent in such cases, the report of the commission probably remains, as Professor Skeoch once called it, "the keystone of the remedial measures".[65] But once a merger has been completed there is really no satisfactory remedy short of dissolution, of which the extreme difficulty and sheer impracticality are usually obvious and have on various occasions inhibited remedial actions which otherwise might have been taken.[66]

This difficulty has frequently prompted the suggestion that some form of automatic notification and prior scrutiny be required where a contemplated merger involves assets of more than a given amount, or would bring more than a given proportion of an industry under a single control.[67] Difficult issues of both a legal and an economic nature are involved here that would require much detailed consideration. Nevertheless, it does seem strange that the Department of Justice should virtually have to rely on "just what it reads in the papers", not only in deciding on inquiries but even for knowing if a merger has taken place. As far as prior scrutiny is concerned, it is clearly easier to stop an offensive merger from taking place than to break it up *post factum*. It might even be expected that the courts would give weight to economic argument in a case where a contemplated rather than a completed merger is at issue, so that even under the provisions of the present Act, conditions under which restraining orders would be issued might ultimately evolve with some of the clarity now so conspicuously lacking in the matter of dissolution.

[65] *Op. cit.*, footnote 59, at p. 33.

[66] There is, of course, no way of telling to what extent court decisions have been influenced by a reluctance on the part of the judges to order dissolution. The impracticality of dissolution as a remedy is referred to in Report of the Director (1958), pp. 21-23; also *op. cit.*, footnote 18, pp. 657-658. In England, the government has even refrained from acting on a recommendation of the Monopolies Commission that Imperial Tobacco should be required to sell its share interest in the Gallaher Company: The Monopolies Commission, Report on the Supply of Cigarettes and Tobacco (London, 1961), p. 213.

[67] Some examples are: Richard Gosse, Behind the Merger Trend, An Address to the Fourth Annual Conference on Corporate Administration, Toronto (1962); C. Kaysen and D. F. Turner, *op. cit.*, footnote 46, p. 133; G. A. Stigler, Mergers and Preventive Anti-trust Policy (1955), 104 U. of Penn. L. Rev. 176; Temporary National Economic Committee, Final Report and Recommendations (Wash., 1941), p. 38. Prior approval has received some attention, generally favourable, among British economists. See John B. Heath, two articles on Mergers in The Guardian, Manchester, Feb. 6th and 7th, 1962; and Basil S. Yamey, *op. cit.*, footnote 50, at p. 9 *et seq.* Political party support has also been expressed in Britain. *Cf.* Monopoly and the Public Interest, Conservative Political Centre (London, 1962); also Wanted — A Monopoly Policy, The Fabian Society (London, 1960).

But a requirement of prior notification alone would be merely a stepping-stone to a selective merger policy. Much of what has been said in this article with respect to a selective policy, suggests the desirability of a quasi-judicial tribunal with power to make an initial decision concerning a contemplated merger, which decision should have at least a temporary binding effect where the merger was deemed contrary to the public interest, but would, of course, carry no implication of immunity from later investigation under the monopoly provision in other cases. I do not believe that this would involve any radical departure from the spirit of the present law, already committed to protection of the public interest through the use of restraining orders in incipient merger cases.[68] Nor need the present administrative structure be basically disturbed, contemplated mergers being reported to the Office of the Director, which in turn would inquire into and bring before the commission responsible for mergers and monopolies any which appeared contrary to the public interest. On the other hand, it would dispel the enormous uncertainty which overlays mergers in any *post factum* approach, and would ensure consideration of their important economic aspects.

In any such procedure, of course, the ultimate protection of the courts should be retained. A tribunal decision should not have a permanently binding effect without the right of appeal. But where the public interest effects are seriously in question the urge to merge may cool over a waiting period. An enforced delay might permit the public airing of the issues so cherished by Mr. Mackenzie King and heretofore so ineffective a deterrent factor in merger cases. The most difficult part of such procedure would be the nature of a possible appeal to the courts, and the status to be accorded in it to the original ruling. The difficulty is not insurmountable: at the very least it might engage for years to come, the ingenuity of the country's lawyers and economists, for whom an exercise in co-operation in anti-trust matters is already overdue.

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[68] The Combines Investigation Act, *supra*, footnote 13, s. 31(2).