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TOWARDS RECONSIDERATION IN ANTI-COMBINES LAW AND POLICY

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I. *Historical and Functional Perspectives*

Many pressures are now impinging upon the conventional wisdom of our anti-combines traditions and are compelling a re-examination of their validity.[1] In a sense this policy has been paradoxically both a powerful and vulnerable instrument of indirect regulation of entreprenurial activity and almost always it has been under a critical public and political eye. Then too, it is the one area where law and economic policy and theory touch with the directness of an embrace, for the objective of anti-trust law is the removing of restrictions on, and the preservation of, "competition"; while, conversely, the existence of the "market", of competition from a general social point of view, is regarded as a substantial necessity for a free political order and social system.[2] In no other field of legal studies, policy and practice — except for criminal law and criminology perhaps — is there such a frontal co-mingling of the disciplines as in this sustained effort to prevent, through law, "undue" restrictions on competitive behaviour. Courts and law teachers — certainly the latter at

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[1]See the recent statements by the Hon. Donald Fleming with regard to possible studies and revisions of the Combines Investigation Act, particularly *Can. H. of C. Debates*, Dec. 17, 1962, p. 2717; also Gosse, *The Law on Competition in Canada* (1962), p. 9-10; Kilgour, *Cases and Materials on Unfair Competition and Restrictive Trade Practices* (1962), p. i-vi; Dobson, *Monopoly and Competition in English and Canadian Law* (M.C.L. thesis 1959, McGill University), p. 361-371.

[2]Corwin Edwards, *Maintaining Competition* (1949), *passim*; Machlup, *The Political Economy of Monopoly* (1952); Chamberlin, *The Theory of Monopolistic Competition*, 7th ed., (1956); Robinson, *The Economics of Imperfect Competition* (1933); Burns, *The Decline of Competition* (1935); Adams, "The 'Rule of Reason': Workable Competition or Workable Monopoly?" (1954) 63 Y.L.J. 348; Skeoch, "The Combines Investigation Act: Its Intent and Application" (1956) 22 C.J.E.P.S. 17; Stykolt, "Combines Policy: An Economist's Evaluation" (1956) 22 C.J.E.P.S. 38.

least — must possess some familiarity with theories of competition, "perfect" and "imperfect", "workable" and "effective". Even if Canadian judges have eschewed economic esoterica, they cannot avoid drawing gross conclusions about the nature of a competitive economy that this system of rules attempts to regulate or preserve. Similarly, economists taking if not all knowledge, at least all economic behaviour, for their province, are driven to acknowledging and evaluating the role of law in controlling business behaviour and preserving a market economy; and thus they often find themselves interpreters of a very sophisticated branch of common and statute law to the point of frequently suggesting, by their liberties with legal concepts and jargon, how dangerous is a little knowledge. But economists are surely no worse than judges or lawyers whose rough manners with economics often hinder the progressive application of anti-trust policy to the facts of business life, in the course of attempting to maintain, by law, a so-called free and competitive economic system.

The pressures for "revisionism" in this field, therefore, come from both within and without — from within by way of the theorists and the social engineers, economists, lawyers and administrators, who think about and operate the system; and from without through the influences of business, labour, organized agriculture and, fleetingly, from the unorganized consumer.[3] And overlaying both these intrinsic and extrinsic pressures is the now almost classical mythology that surrounds anti-trust thought and practice.[4] For it has long been assumed by this mythology that economic power exercised by way of industrial concentration or combination or restrictive trade practices, is "evil"— morally offensive and legally proscribed. This pervasive mystique has penetrated so widely in both the United States and Canada that it has become an accepted value to which most opinion genuflects without many daring, until recently, to reopen the basic assumptions involved.[5] Indeed, it is probably fair to say that there is no single political party in Canada that would take the risk of openly advocating revisionism even though from time to time amendments are proposed, grievances expressed and statutory changes actually made some of which, in recent years,[6] have begun to suggest major alterations in the course of Canadian policy — in themselves reflecting possible shifts in public opinion.

[3]See *House of Commons*, Proceeding before the Standing Committee on Banking and Commerce, Minutes of Proceedings and Evidence with respect to Bill C-58, June-July 1960.

[4]Arnold, *The Folklore of Capitalism* (1937); Galbraith, *The Affluent Society* (1958), p. 40; Berle, *Twentieth Century Capitalist Revolution* (1954).

[5]Galbraith, *op. cit.*, at 349; Bladen and Stykolt on Friedmann, *The Canadian Anti-Trust Laws* (1956), p. 45; Berle, *op. cit., passim.*

[6]See the general attitude of all parties on the course of the debate on the second reading of Bill C-58 dealing with the 1960 amendments to the Combines Investigation Act, in *Can. H. of C. Debates*, July 25-26, 1960, pp. 6897-7016.

There are many well understood reasons for this mixture of emotional adherence to, as well as of rational support for, these broad rules of combines control. Historically, the roots of the rules are to be found deep in ancient distrusts of unfair economic advantage. That celebrated trilogy of medieval offenses, "forestalling", "regrating" and "engrossing",[7] together with the Calvinist search for the "just price",[8] demonstrate how early was the anxiety of the townsman not to be exploited for his food and his clothing. Similarly, the medieval landowner was afraid of exploitation by labour and the sharp lesson of supply and demand, accentuated by the Black Death, led to the *Statute of Labourers*[9] in the mid-14th century to prevent any premature form of collective bargaining.

These pre-modern fears had, later on, other economic experiences, now mixed with political anxieties, to buttress them as modern England moved forward from Elizabethan commerce to the industrial revolution. The concept of "monopoly" becomes involved in the constitutional crisis emerging at the end of Elizabeth I and the beginning of the Stuarts.[10] The word "monopoly" itself acquired a bad name because it stood for the royal effort by way of the prerogative to grant a trading advantage and so added another argument in the battle of Commons and common law against the royal power. Commerce and constitution thus were united in the struggle, and the freedoms sought for in both, though differing at times in their relative legal and political emphasis, were parallel courses to be run until joined fully together in the success of 19th century laissez-faire and of a triumphant Parliament to which the prerogative was now subordinated. The 18th and 19th centuries, too, saw the rise of contractual relations where the new and freer commercial spirit introduced notions of "public policy" into the common law to limit the restraints that the right to contract could exercise over the right to trade — contracts between those selling a business and promising to compete no more or those leaving an employer and promising to avoid the region in the same trade. Thus, *Mitchell v. Reynolds*[11] and its successors opened wide the door to forbidding unreasonable restraints and fashioned a crude public policy by which to judge enforceability. Then, too, by the middle of the 19th century the earlier ambiguities in the ancient doctrine of "conspiracy"[12] also began to suggest a modern form so that, in tort, conspiracy now could become a basis for regulating business conduct intended to harm another[13] while in crime it

[7]Gosse, *op. cit.*, at p. 15-17; Dobson, *op. cit.*, at p. 22-25; Cohen, "The Canadian Anti-Trust Laws—Legislative and Doctrinal Beginnings" (1938) 16 Can. B. Rev. 439.

[8]Holdsworth, *A History of English Law* (1938), XI, at p. 468; Tawney, *Religion and the Rise of Capitalism*, 2nd ed., (1947); Weber, *The Protestant Ethic and The Spirit of Capitalism* (Reprint, 1952).

[9]Cohen, *op. cit.*, at 441.

[10]For a full account see Dobson, *op. cit.*, at p. 46-70.

[11](1711) 1 P. Wms. 181; 24 E.R. 347; and particularly the judgment of Tindal, C.J. in *Horner v. Graves* (1831) 7 Bing. 735 at 743; *Hitchcock v. Coker* 112 E.R. 167, at 174-175. The development is set out in detail by Gosse, *op. cit.*, at p. 42-67.

[12]Gosse, *op. cit.*, p. 17-39.

[13]*Mogul S.S. Co. v. McGregor Gow & Co.* [1892] A.C. 25;

still was formidable enough to require a statute to protect or to legalize the emerging trade union movement[14] from the rigours of the ancient offence "to conspire". Not unexpectedly, by the end of the 19th century, British courts had evolved a double standard of business freedom in contrast to labour restrictions.[15]

It must be remembered that in general this common law tradition was equally operative in Canada (in the common law provinces) and the United States; but different conditions soon accounted for the efforts in both countries, by 1889-90,[16] to provide a new basis in law for the regulation of collective economic action by businessmen. The whole spirit of this Canadian and United States' legislative effort, directed against monopolies and combinations, thus had linguistic and doctrinal roots in a long progression of ideas and experiences stemming from these medieval early and late modern concepts in English law. But these North American statutes derived even more immediately from the vital differences in North American society, differences of an economic, social, and political nature. Tariff policy, the frontier, the egalitarian climate, and the fear of the farmer-pioneer of suffering from unequal terms of trade in contrast with the protected manufacturer, artisan and townsman, all of these were factors pressing upon legislatures to move more positively than did the common law to define the rules of the competitive game.[17]

Those first legislative rules, in Canada at least, were primitively administered in the years 1889-1925 when neither the older Criminal Code provisions nor the later Combines Investigation Act of 1910[18] were able to satisfy the anxieties of a watchful urban and rural public now concerned with the effects of well-protected industry, itself freer from the full competition of the wider world. Even from 1925 onward, Canadian anti-combines policy and administration had moved only fitfully until recent years when the momentum of a more rigorous enforcement had reached sufficient intensity to re-awaken the business community to the potential dimensions of the program and to raise questions about the relevancy of policy and law to modern economic realities.

The language of the emerging dialogue about the present and future course of Canadian economic policy now begins to reflect a sharper tone of business anxiety. In the first days of this legislation and even up to five or ten years ago, the agreed objective had been to prevent business abuses by regulating the freedom to combine, to prevent price fixing, market sharing and other restrictive practices and to inhibit mergers and thereby, in all cases, to interrupt any

[14]38-39 Vict., 1875, c. 86, s.3. (U.K.), enacted in Canada 39 Vict., S.C. 1875, c.37, s.37, s.4 with much the same objectives if not the same language; now sec. 410 of the Criminal Code.

[15]Compare *Allan v. Flood* [1898] A.C.1 and *Quinn v. Leathem* [1901] A.C. 495 with the *Mogul* case, *op. cit.*, note 13. For a discussion of the "double standard", see Cohen, "The Role of Law and Lawyers in Industrial Relations" (1951) 11 R. du B. 477.

[16]Gosse, *op. cit.*, at p. 68-93; Dobson, *op. cit.*, at p. 129-149; Cohen, *op. cit.*, at p. 449-455.

[17]*Ibid.*

[18]9-10 Edw. VIII, S.C. 1910, c.9.

tendencies toward monopoly.[19] But in the past three or four years a new concern appears. It is the anxious search for answers to Canada's role in the reconstruction of world trade and the quest for domestic policies to improve the level of efficiency of Canadian economic activity. The argument now runs thus: the efficiency of industry for the most part depends upon a certain *optimum* size which, in most cases, depends upon developing markets, and with Canadian industry facing the European Common Market, Japan and similar industrial developments elsewhere, Canadian business must be permitted to organize itself so as to achieve the size required for the "true efficiency" necessary to meet this competition.[20] Thus the pressure for "revisionism" comes from a new source, *i.e.* the reorganization of world trade and the determination of Canada's place in this urgent, intense race for competitive competence.

Two other more traditional pressures also emerge with fresh strength. First, there is the distaste of the businessman for a regulatory mechanism that places him in the prisoner's dock for what is only, in his view, a question of business taste, judgment or tactics. This objection to anti-trust law on the ground that it brings with it the stigma of a crime, as part of criminal law, is an old story in the running debate between the business community and the defenders of the existing legal pattern. What is new about it, is the uniting of moral indignation to the new national interest in international competitive strength. There is something to be said for this view; indeed, Mr. King held the position with some modesty at the very beginning of the introduction of the first Combines Investigation Act of 1910.[21] For not all multifirm infringements of the Act would be basely conspiratorial, and not all mergers or monopolies would be achieved by predatory or other unpleasant means. It could be argued, therefore, that the law often made criminal what in some cases was a rough but not improper exercise of business judgment and methods in dealing with competitors and the market.

Secondly, there was the pressure of the special pleaders, the co-operatives claiming to be exempt and explicitly excluded from the law;[22] the trade union movement asserting the unique character of their collective defence against the rigours of the bi-lateral contract in a capitalist society and winning statutory exemptions for themselves also;[23] fishermen claiming consideration of their joint needs to determine prices and marketing arrangements and obtaining

[19]Gosse, *op. cit.*, at p. 94-214.

[20]See, for example, Munro, *The New Europe* (pamphlet, Winnipeg Tribune, 1963); Smith, *Some Questions about Economic Planning for Canada* (1962) (mimeo. Address to the Empire Club Toronto, Nov. 1, 1962); *cf.* France, *Quatrième Plan de Développement, Economique Sociale*, 1962-65 published by La Commission du Plan, Paris; *Planning in France*, P.E.P. pamphlet XXVII, No. 454, Aug. 1, 1961; Weldon, Cadbury and Oliver, *Democratic Planning: A Symposium* (1962 pamphlet).

[21]Mr. King in *Can. H. of C. Debates*, 1909-1910, Vol. IV, at p. 6823.

[22]R.S.C. 1952, c. 314 as amended by 2-3 Eliz. II, S.C. 1953-54, c. 51 and 8-9 Eliz. II, S.C. 1960, c. 45 (1960 Office Consolidation). See sec. 33A (3).

[23]Crim. Code, sec. 411 (3), (now sec. 4, 1960 Office Consolidation). All references to the 1960 amendments hereafter referred to are as set out in the 1960 Office Consolidation.

recent legislative sympathy;[24] finally, the small businessman, chronically aware of the chain store or the large retailer and seeking additional protection against the rigours of superior competitive power — advertising, marketing, bulk buying, discounts, etc.[25] Little wonder that in the face of all of these claims for amelioration or exemption, with others now placed also on the high ground of national commercial policy abroad, that demands for revision of combines legislation should be more vociferous than perhaps ever before.

And now there is added another voice, perhaps more significant in its ultimate impact than the claims for change already listed: it is an argument that goes partly to the position of Canada in the new trading arrangements of the world, but perhaps more it is an argument that is, in a sense, directed against perpetuating the mystique of a free and competitive economy even in its present imperfect and welfare-state form. For this is the argument that leads to "planning". Planning is now the fashionable tool, the touchstone of success with which to do away with chronic unemployment, regional underdevelopment, unbalanced international payments, the underuse of existing capacity, the misdirection of capital investment and resource development.[26] For the mythology which once supported anti-combines policy had as its core the idea of "the market". The market was the touchstone where buyers and sellers in freedom made their choices, and through the operation of their many "invisible hands", there emerged a fair or market price and an efficient allocation of resources.[27]

But, of course, it is too well known how the history of the past hundred and fifty years of Western capitalism became an essay on the unpredictability of the market as a guide to affluence.[28] And still the paradox emerged that though the business cycle combined with the industrial revolution to create the experience of mass urban employment, yet it was the same "market economy", and access to science, to skills and resources, that in a very large part gave to Western civilization its taste of affluence.[29]

Hence, the problem has emerged with particular acuteness for communities such as Canada—namely, how to maintain affluence while yet preventing chronic unemployment and awkward international trade and payment situations and how to do this at a time when the pattern of world trade is itself undergoing important alterations, partly in the direction of greater freedom from restrictions and partly toward significant regionalization. If this is the kind of basic general question that is now to be asked, it must lead to the related more specific question about the role of anti-combines law and policy

[24]9-10 Eliz. II, S.C. 1960-61, c. 42.

[25]8-9 Eliz. II, S.C. 1960, c. 45, secs. 33A, 33B, and 33C and 34(5).

[26]See the more cautious view of Smith, *op. cit.*, note 20.

[27]Galbraith, *op. cit.*, at p. 40-43.

[28]Galbraith, *op. cit.*, p. 24-47; Berle, *op. cit.*, *passim.*

[29]Galbraith, *op. cit.*, p. 1-3, and 322-333.

in this new pattern of plans and expectations. Indeed, what seems to be emerging is a consensus on the need for what has now come to be known as "indicative planning", not unlike some of the experience in the United Kingdom and Western Europe in recent years.[30] And while this kind of planning is based upon "suggestions", "incentives" and overall co-operation between management, labour and government, it has a quality of "positive regulation" that may be alien to the spirit of "negative regulation" that characterized the kind of policy-thinking under which anti-combines law grew and partly flourished. By "negative regulation" is meant the prohibition of certain types of entrepreneurial behaviour and by implication, therefore, permission or freedom for all other business policies and practice. Thus, the more significant urge to revise present anti-combines law may be said to be founded on this shift from negative regulation — and the concomitant heavy reliance upon the classical market even if only workable competition resulted — as against the newer reliance upon the more "positive regulation" which varying degrees of democratic, "indicative planning" may require. Thus a prohibited trade practice, or a merger, under the one system of ideas and values during the period of negative regulation, may become more acceptable to the rationalizing requirements of the new period. Therefore, it may be necessary to review the present Combines Investigation Act and its administration and to ask pointedly how far does the present Act, as amended in 1960,[31] suggest an essentially durable and desirable pattern of regulation, with the occasional modifications that experience suggests; or, how far must there be some fundamental change in the very approach that government takes to the legal control of enterprise today?

II. *Technical and Administrative Achievements and Perspectives*

Before the more difficult area of future policy and action can be explored, it is necessary to examine the technical and administrative record of the present Canadian anti-combines program. It is well understood that the initial attempts from 1889 to 1910 failed because as a piece of criminal legislation it soon became apparent that the police work required for enforcement went beyond the ordinary resources of provincial attorneys-general.[32] The 1910 Combines Investigation Act[33] and, more particularly, the 1923[34] statute introduced a federally-operated investigatory process, cumbersome in the first and more efficient in the second, but in both cases under the control of the national government. The early years of enforcement from 1925 to 1940 were marked by changes in government, the onset of the great depression, and competing

[30]For a comment on the French Plan see P.E.P. pamphlet *Planning in France*, *op. cit.*, *supra*, note 20.

[31]8-9 Eliz. II, S.C. 1960, c. 45.

[32]Dobson, *op. cit.*, at p. 170-172.

[33]9-10 Edw. VII, S.C. 1910, c. 9.

[34]13-14 Geo. V, S.C. 1923, c. 9; R.S.C. 1927, c. 26.

theoretical and practical views as to the role of restrictive trade practice control in the midst of a static or shrinking national income.[35] It was one thing to be concerned about predatory and harsh business methods and policies in an expanding economy; it was something else again to permit too much competition when output was shrinking and when the predominant motif, economically, was to provide for reasonable sharing of a "static pie" rather than encouraging a market scramble for the thin depression crumbs. This surely explains the experiment with the National Recovery Act[36] in the United States in the early days of the first Roosevelt administration from which Mr. Bennett, in Canada, took his principal guide in fashioning the Dominion Trade and Industry Commission Act[37] that provided, under section 14, for legalized and approved trade restriction agreements. The return of the Liberals to power in 1935 restored the earlier confidence in anti-trust legislation, and a considerable enforcement momentum developed by 1939 when World War II introduced fundamentally opposed concepts of economic control. Now the objective was to mobilize and allocate skills and resources to be shared in some deliberate proportion between guns and butter.[38] Almost by tacit consent on the part of everyone, the structure of anti-combines administration and policy was put in wartime escrow to await a more peaceful day with the staff of the Commission now deployed to serve a regulatory body empowered to fix prices and rationalize output and its distribution, namely, the Wartime Prices and Trade Board.[39] Of course, the W.P.T.B. was only one of several instruments that marked a period of extensive governmental control of every phase of the economy,[40] but it was clear that such a philosophy of detailed regulation could not be paralleled by and be concerned with the preservation and enforcement of competition — although pretensions to have such a reconciliation persisted in United States wartime policy, if not in Canada.

The end of the war revived with unexpected vigour, public and governmental interest in competition and its encouragement; and, additionally, there was some fear that sectors of the business community having become comfortable within the protective rationalization of wartime regulations, would find it less agreeable to face again the sharp winds of competition. This would, of course, mean that there might be attempts to carry over into postwar days the authorized wartime arrangements on prices, production, and market sharing; and it was precisely this concern that stimulated an intensive postwar

[35]Reynolds, *The Control of Competition in Canada* (1940), *passim.*

[36]Cohen, "The MacQuarrie Report and the Reform of Combines Legislation" (1952) 30 Can. B. Rev. 549, at 554.

[37]25-26 Geo. V, S.C. 1935, c. 59.

[38]Galbraith, *op. cit.*, p. 132; Cohen, "Canada Looks to the Post-War" [1943] Antioch Review (Winter Issue) 483.

[39]See Cohen, "Review of Machinery of Economic Control Set Up under War Measures Act", Committee on Reconstruction, P.R. 12823 (1941 mimeo.).

[40]*Ibid.*

program of investigations and prosecutions. Taking the period 1925 to 1952 there were: 28 formal enquiries resulting in reports, 16 prosecutions, and 14 convictions; while in the much shorter period 1952-1960 there were 34 R.T.P.C. reports, with 19 prosecutions and 13 convictions. The actual staff in 1961 was 52 persons including the Director and 20 officers, and this substantial increase in staff since 1950 suggests a new awareness and determination in enforcement policy.[41]

Nevertheless, the business community and others, remembering the pleasures and conveniences of wartime security from excessive competition and familiar with the awkward consequences of publicity flowing from investigation under the Act, already were pressing for the study and reconsideration by government of anti-trust policy. The McQuarrie Committee, established in 1950 to study the legislation, issued two reports to the Minister of Justice, the first of which, in 1951,[42] far from giving aid and comfort to business, urged the abolition of resale price maintenance as being unduly restrictive. The second report, in 1952,[43] proposed a series of quite substantial reforms of the Act on the administrative side if not of the central doctrines of the law itself. The consequences of the McQuarrie committee's study were, of course, to amend the law by rendering illegal resale price maintenance,[44] and perhaps more important its 1952 recommendations led to the division of the work of the Commissioner into two parts. There was now established a Restrictive Trade Practices Commission[45] that would hear and determine the facts of alleged infringements of the Act and draft reports outlining the facts and its evaluation of them while a newly established office of Director of Investigation and Research[46] would conduct all the preliminary enquiries and prepare statements of evidence to go before the Commission. One of the objectives, perhaps the most important one in this new division of labour, was to prevent the policeman and the quasi-judge from being one and the same official which, to a large extent, was the case theretofore. A second objective was to provide a more formal mechanism for the tendering of evidence and also to discourage the reports, to be published by the new Commission, from making criminal law evaluations when the essential purpose of the report was to state findings of fact under the fairest conditions of a quasi-administrative hearing. It was naive, of course, to believe that "facts" already requiring law-impregnated words to describe them, could avoid suggesting findings that almost amounted to judgments as

[41]Compare *Annual Report of the Director of Investigation and Research* 1962, pp. 36-37 with data in Cohen, "Can Trust-busting Preserve Competition?" [1947] Public Affairs, December, p. 6.

[42]See *Resale Price Maintenance: An Interim Report of the Committee to Study Combines Legislation*, Oct. 1, 1951;

[43]*Report to the Minister of Justice of the Committee to Study Combines Legislation*, Mar. 8, 1952.

[44]15-16 Geo. VI, S.C. 1951, (2nd sess.), c. 301; 1 Eliz. II, S.C. 1952, c. 39, s. 7;

[45]1 Eliz. II, S.C. 1952, c. 39, ss. 16-22 (1955 Office Consolidation); (ss. 16-22 also in the 1960 Office Consolidation).

[46]*Ibid.*, ss. 5-15.

to "lawfulness" or otherwise. Finally, the 1952 amendments also intended to remove the ceilings on fines and to introduce an important new sanction, namely, a form of injunctive procedure to restrain convicted persons or companies from carrying on the proscribed practices and to require,[47] if necessary, a systematic reporting back to the court about their practices and their elimination once the conviction had been obtained.[48]

It is significant that though the business community argued, very strongly, to the Committee that the Act should have much more extensive guide-lines to enable businessmen to know what were legal or illegal restraints on competition, the Committee was not disposed to alter the very general language of either the definition of section 2 of the Combines Investigation Act or the older language of section 498 and 498 A, (later sections 411 and 412) of the Criminal Code. For by 1952, it was evident that the concept of "unduly" in the Criminal Code and the phrase "to the detriment of the public" in the Combines Investigation Act were both receiving parallel interpretations,[49] although most prosecutions were taking place under the Code rather than the Act since it was believed that indictments under the Code presented fewer technical difficulties than the parallel language of the Act. And while a minute analysis of the contrasting language in section 2 and section 411 would reveal some interesting differences, in general the tradition grew both in the courts and at the Bar as well as in the Office of the Director that there was little to choose in substance between the meaning of the two definitions.[50] By 1960 these definitions had, so far as multi-firm, looseknit combinations were concerned, developed a predictable and consistent pattern, while as to "mergers" and "monopolies", there was also emerging a kind of predictable scheme of permissive and prohibited business activity.

For in the first group, multi-firm combinations, what seemed to matter in the long line of cases culminating in the *Fine Papers* case[51] was the very fact that there had been *an agreement* and the agreement did, or was intended, to restrain "unduly" or limit competition in many of its various aspects in the manufacturing or distributive process. As Summerfeld had pointed out some time ago, the courts were prepared to convict upon evidence of an agreement;[52] and many of the convictions dealt with situations where the agreement embraced a preponderance of the industry, nationally, possibly an average of seventy-five percent. This trend, however, did not mean that regional or local city-wide combinations could not be regulated and indeed, adverse Commission

[47]*Ibid.*, s. 31.

[48]*Ibid.*, s. 33.

[49]Gosse, *op. cit.*, p. 180-181.

[50]Gosse, *op. cit.*, Chap. IV and V, *passim.*

[51]Kellock, J. in *Howard Smith Paper Mills Ltd. v. R.* (1957) 8 D.L.R. (2nd) 449, at 459 quoting Meredith, J. with approval in the old case *R. v. Elliot* (1905) 9 O.L.R. 648, at 651, "The crime is in the conspiracy not in the unlawful acts comprehended in it".

[52]Sommerfeld, "Free Competition And the Public Interest" (1947-48) 7 U. of T.L.J. 413.

reports and convictions are to be found where there were local combinations to fix prices, share in markets, prevent new entries, or develop other restrictive practices.[53] And while the courts insisted, in these multi-firm cases, that Parliament intended everyone to have the benefits of competition and that it was the "agreement" to combine, etc., that was the gist of the offence[54] — *pace*, the older "conspiracy" doctrine[55] — it is significant, surely, that none of the cases brought to trial, or even before the Commission, are cases of mere "agreement". They are instead cases where the "agreement" was carried out with a great deal of evidence to indicate that efforts were made to execute it and the courts reasoned backwards from the implementation of the "agreement" *to find that the "agreement" itself was the essence of the offence.* Indeed, it may be argued that, from all of the cases to be found both in the judicial decisions or in the Commission reports, it cannot be said that there is any reason to believe that an agreement *without acts of implementation* may have been enough to found a prosecution since there were no such examples in the cases either reported on by the Commission or brought before the courts. Nevertheless, the fiction persists that the offence is committed when the "agreement" is made, independently of implementation, and there emerges, consequently, the *per se* doctrine which holds that it is evidence of the "agreement" *per se*, independently of effective execution and independently of any specific economic effects on prices, profits, alleged efficiency, etc., that is the basis of the offence. It is a short, neat but draconian rule which has served the policy well if it is intended to treat severely price fixing, market sharing and similar arrangements. But it is a doctrine that relieves courts of the kind of detailed economic analysis that should be essential to its findings whatever may be its technical familiarity with economic policy.

Similarly, the progress of judicial interpretation of the "merger, trust or monopoly" provisions of the Act has led to an almost equally clear understanding of what is proscribed or permitted. Both the reports of the Commission and the few judicial decisions available indicate that though the Commission would like to have established a formula which would have prohibited a deliberate search for market domination through merger and the use of money

[53]*e.g.* since July 1957 the following are among the R.T.P.C. reports that have dealt with city-wide or regional situations:

Electrical Construction Materials in Ontario, 1959.
Sugar Industry in Eastern Canada, 1960.
Sale of Coal in Sault Ste. Marie, Ont., 1960.
Manufacturing and Sale of Belts in Montreal, 1960.
Sale of Gasoline in the Toronto area (three reports), 1961.
Wilsil Ltd. and Calgaty Packers Ltd. (merger), 1961.

[54]Kellock, J., *op. cit.*, note 51.

[55]See Gosse's interesting discussion, *op. cit.*, at p. 95-104 as to whether the older doctrine of "conspiracy" was really intended to be incorporated into the Combines Investigation Act or the older Criminal Code provisions. He suggests that such was not the intention and that the words "conspire" and "combine", presently in sec. 32 (1), should be removed to avoid the continuing confusion. It is difficult to accept his reasoning for both historical and "term of art" reasons.

power — where in fact there has resulted some substantial reduction in competition — the Courts in the *Breweries* case[56] and *British Columbia Sugar* case[57] were unwilling to view mergers quite so severely. McRuer, C. J., in the *Breweries* case insisted that the policy of buying up smaller breweries by Canadian Breweries over a twenty year period could not be regarded as illegal when 52% of the business of Canada remained in the hands of competitors and at least two of these competitors, Molsons and Labatts, were strong enough to prevent any successful move by Canadian Breweries toward a dominant position in the industry.[58] Furthermore, he regarded control over price as essential evidence of a tendency toward monopolization or domination but in this case price was, in theory at least, a matter of provincial law and was determined by existing provincial machinery in the form of the Ontario Liquor Control Board.[59]

In the *British Columbia Sugar* case, William, C. J. Q.B., held there was no illegality in the purchase by British Columbia Sugar Refineries Limited of Manitoba Sugar because effective competition from Eastern sugar was possible in the Manitoba and Saskatchewan markets,[60] and unless there was a "virtual" monopoly, because competition had been virtually stifled,[61] the merger did not infringe on the intention of the Act. It is interesting that both judges relied quite heavily on the separate opinion of Cartwright, J., in the *Fine Papers* case, McRuer, C. J., *directly* on it and Williams, C. J., at least indirectly through his reliance on McRuer, C. J. Curiously McRuer, C. J. paid little or no attention to the adverse consequences of the company's policy on "new entries"; while Williams, C. J. may have been unduly concerned to protect the Manitoba beet sugar industry, presumably from "competition".

It is unfortunate that the merger-monopoly problem is now confused by the doctrine of "virtual monopoly" on the one hand and on the other by the exceptional status given to the role of pricing and, therefore, to the capacity of provincial law to cut across and to protect merger activities otherwise possibly illegal.

The conclusion, doctrinally, to be drawn from these developments is pointed up by some of the provisions of the important 1960 amendments to the Act.

[56]R. *v. Canadian Breweries Ltd.* (1960) 33 C.R.1; 126 C.C.C. 133.

[57]R. *v. British Columbia Sugar Refining Co.* (1960) 129 C.C.C. 7.

[58]R. *v. Canadian Breweries Ltd.* (1960) 33 C.R.1, per McRuer, C.J.H.C., at p. 27; 126 C.C.C. 133, at 161, "As long as the evidence shows that there is strong virile competition, I do not think that the merging of competing companies comes within the standard of proof required in a criminal case."

[59]*Ibid.*, at p. 33; 168: "I ask myself this further question: Has it been proved beyond reasonable doubt that the merger has conferred on the accused the power to control the market so that the provincial authority in the exercise of its duty in fixing prices cannot protect the public interest? To this question I think the irresistible answer is 'No' ".

[60]Williams, C.J. Q.B. at p. 65: "The Crown has not satisfied me beyond a reasonable doubt . . . that the merger in question destroyed or even limited competition . . ."

[61]*Ibid.*, at p. 60: "The Crown must establish a virtual stifling of competition. This it has not done."

For in the case of mergers, the first draft bill introduced by the Minister in 1960[62] contained a new definition with a number of criteria for lawful mergers, but these were eliminated in the Bill as finally enacted. Today, a kind of stalemate exists in the legal position. Doubtless, the present survey of the merger problem, both of its statistics and of corporate policy, which the Director has undertaken, together with the invitation by the present Minister of Justice to the business community to present its views on all aspects of the Act,[63] may lead to some substantial re-examination and redefinition of both law and policy.

And this observation now leads into a consideration of the 1960 amendments themselves. For one of the prime reasons for the extensive changes made in 1960 was to some extent the pressures that accumulated from 1952 onwards as the business community became increasingly restive and possibly disappointed at the results of the McQuarrie Committee findings and their implementation. The most important sense of disappointment, doubtless, came from the intensification of the investigatory and prosecution activities of the Director and from the unexpected trend in the method of the Commission's drafting of its own reports. For one of the hopes of separating the investigation and reporting functions in 1952 had been to assure a reporting method that would not pre-judge the legal issues by making findings of "guilt" or "innocence" as many of the pre-1952 reports seemed to do. Instead, the Restrictive Trade Practices Commission reports began to follow much of the same pattern as the earlier reports, at least with reference to relating the facts before the Commission to the statutory or doctrinal criteria of licit and illicit business behaviour[64] — although the general level of economic analysis before the Commission and in the Commission Reports developed to a much higher degree of sophistication than was to be found in the pre-1952 inquiries and reports. In the end the business community claimed that it found itself with a reporting tradition in the Commission that seemed to have some of the objectionable qualities of the older reports, namely, virtual findings of guilt by a body not lawfully established to do so, and not having abided by anything but the most informal rules of evidence and its admissibility. Finally, it should be said that the rise of discount houses and their effect on the smaller retailer of durable consumer goods, the concern for a strong export position and the increasing demand by business leaders that anti-combines matters should not be regarded as criminal law, affected the amendments put forward by the Government in 1960. And when these grievances were added to the rigours of the *per se* doctrine, the changes in the Act were designed in part to meet both recent and longer-standing objections. Apart from certain minor proce-

[62]See Bill C-59, First Reading, June 11, 1959, sec. 1(2)(f) proposing to amend sec. 2, R.S.C. 1952 c. 314.

[63]*Report of the Director of Investigation and Research for the Year ended March* 31, 1962, p. 33.

[64]*MacQuarrie Report, op. cit.*, at p. 34.

dural matters there were eight more or less important "substantive" changes in the Act:

1. A group of specific defences were provided to combinations, agreements, etc., generally speaking, covering what already was understood to be innocent, such as exchanging statistics, defining product standards, credit information, trade terms, research and development information, and restrictions of advertising.[65] These, of course, were not to be an excuse for doing by the backdoor what was prohibited through the front and in no case could they deal with undue lessening of competition in the matter of prices, quality or quantity of production, markets or customers, or channels and methods of distribution.[66] A necessary comment here is the fact that these defences are essentially redundant since they already were "innocent" and the only effect of the new language is to underline these exemptions and perhaps render the businessman more vulnerable to previously innocent activities not coming within this specific class of exempted behaviour. In criminal law, silence often is more helpful than definition for those wishing to avoid trouble.

2. At long last the "competition" between section 411 of the Criminal Code and section 2 of the Act was eliminated by introducing into the Act the older Code definition with some slight rearrangement of language.[67] What remained of the Combines Act definition, but now somewhat clarified, were the merger-monopoly provisions of the older Act and they alone retained the "detriment . . . of the public"[68] language which was now replaced entirely for the multi-firm cases by "unduly" or "unreasonably" as it had been in section 411 of the Code. Otherwise, except for the elimination of the word "trust", the old merger-monopoly definition remained essentially the same if re-organized and better stated. Similarly, section 412 of the Code dealing with price discrimination was now incorporated into the Act.[69]

3. The influence of the "consent decree" provisions of the United States Sherman[70] and Clayton Acts[71] and the "cease and desist" orders under the Federal Trade Commission Act,[72] had long interested administrators and students of Canadian anti-combines law in the need for some similar

[65]8-9 Eliz. II, S.C. 1960, c. 45, sec. 32 (2).

[66]*Ibid.*, sec. 32 (3).

[67]*Ibid.*, sec. 32 (1).

[68]*Ibid.*, sec. 2 (e) (f).

[69]*Ibid.*, sec. 33 A.

[70]Dewey, *Monopoly in Economics and Law* (1959), p. 147, 308; Neale, *The Anti-Trust Laws of the United States of America* (1960), p. 373-376.

[71]*Ibid.*

[72]Neale, *ibid.*, at 379-381.

procedures in Canada. This technical objective was largely achieved now by providing for restraining orders before conviction and even without a conviction.[73] What may be the effect of this effort on the constitutional foundations of the statute as a whole, will be most interesting to observe. For if such a provision is *intra vires* the Parliament of Canada, it presses a little farther the possible use of the Trade and Commerce clause of section 91 or the inter-provincial and foreign trade powers of the Federal Parliament to embrace anti-trust legislation and kindred controls that heretofore have been confined narrowly to "criminal law" in section 91(27).[74] The *Goodyear Tire and Rubber* case[75] was able to assimilate a form of injunctive procedure provided for in the 1952 amendments on the ground that it was in aid of criminal law enforcement, after indictment and conviction. It may be quite another matter to find a similarly convenient link when there is neither a charge, indictment or conviction upon which to rest the application for such a restraining order, or, perhaps even more interesting, for the "dissolution" of a merger or monopoly, which the amendment also provides for.

4. The serious pressures on the part of small business, particularly the retailers of durable consumer goods and groceries, found a partially sympathetic reply in the prohibition against "loss leaders" and similar practices.[76] For now the supplier may refuse to sell a retailer who abuses a "brand name" or any other form of identifiable product by using such products to entice customers rather than for *bona fide* selling reasons resulting in a normal profit.[77] Under this amendment the door may be open to a partial restoration of resale price maintenance through allowing the supplier to cut off the distributor where he satisfies the court "that he and anyone upon whose report he depended had reasonable cause to believe and did believe . . . etc."[78] Such highly discretionary language is likely to be open to much abuse because most of the suppliers provide "suggested price lists" which, under the rules prohibiting resale price maintenance, were not enforceable and could only be used as pressures on buyers at the risk of prosecution.[79] It remains to be seen whether the "good faith" required for the successful practical operation of this amendment will, in fact, be over-balanced by an anxiety to restore as much of resale price maintenance as possible — with the "suggested price list" now becoming a formidable weapon sharpened by the right of the

[73] 8-9 Eliz. II, S.C. 1960, c. 45, sec. 31 (2).

[74] See Gosse, *op. cit.*, Chap. VII, pp. 226-266.

[75] (1953) 107 C.C.C. 88; (1954) 108 C.C.C. 321.

[76] 8-9 Eliz. II, S.C. 1960, c. 45, sec. 34 (5) (a).

[77] *Ibid.*, sec. 34 (5) (b).

[78] *Ibid.*

[79] *cf.* sec. 34 (1) (2) and (3).

supplier to cut off a customer for alleged "loss leader" and similar practices.

5. A most important concession to the general dislike of the business community for the atmosphere of the criminal courts, and for the conception that anti-combines problems are truly "criminal" is to be found in the option now given under the amendments for the Attorney General to proceed in the Exchequer Court of Canada with the consent of all of the accused rather than in the regular superior courts of criminal jurisdiction.[80] At the hearings before the Banking and Commerce Committee of the House of Commons, this option raised a number of questions the most important of which was the value of having two systems of tribunals for this field of criminal law enforcement and, perhaps even more subtly, the question as to whether or not the Exchequer Court because of its familiarity with patent, copyright and trade mark problems as well as taxation questions, was not predisposed to be sympathetic to aspects of monopoly, on the one hand, and to the businessman's problems with government in general on the other.[81] There can be no doubt that counsel in many cases will be tempted to take their chances in the Exchequer Court in the hope of having a generally more tolerant view of merger-combination situations. But there is, of course, the other possibility that the Exchequer Court may develop into a skilful and experienced chamber dealing with anti-combines and related questions and thus provide a sustained judicial expertise in an area where a high degree of experience and sophistication would seem to be desirable.[82]

6. Not unrelated to the price discrimination problems of section 412 which, of course, had now been incorporated into the Act,[83] were the development of promotional allowance programs which also had a discriminatory aspect to them since manufacturers or major distributors might favour certain wholesale or retail outlets as against their competitors not by way of price directly but by varieties of promotional allowances, *e.g.* services, advertising subsidies, advertising directly placed on behalf of the customer, etc.[84] The amendments try to provide for equalization in this area but the dikes cannot be wholly closed to the great flow of cash, "gimmicks", etc., that can be employed by a manufacturer to push a product through a favoured channel. For example, under section 33 B (2) it is possible that the granting of equivalent allowances to a purchaser

[80]*Ibid.*, sec. 41 A.

[81]*E.g.* in *House of Commons*, Standing Committee on Banking and Commerce, Minutes of Proceedings and Evidence, July 7, and 8, 1960, p. 561.

[82]This is Professor Brecher's argument in "Combines and Competition: A Reappraisal of Canadian Public Policy" (1960) 38 Can. B. Rev. 523.

[83]8-9 Eliz. II, S.C. 1960, c. 45, sec. 33A.

[84]*Ibid.*, sec. 33B.

may mean an "immediate purchaser" rather than a remote purchaser and discriminatory benefits given to a remote purchaser in the distributing process may not have to be equalized in favour of other purchasers at the same level of distribution where the recipient is two or more steps removed from the donor of the allowance.

7. A further attempt to protect the consumer from radical forms of price competition and also to protect less dramatically oriented businessmen are the new provisions against "misleading advertising."[85] For there is the not uncommon practice of a retailer pretending that a product is available at a certain price when in fact none are intended to be sold at that price, but only to induce customers into the shop. Similarly, there is the device of advertising the sale price of an article side by side with its alleged regular price, when the regular price itself is usually fictitious. These methods are now prohibited.

8. Finally, some interesting concessions were made by providing defences to multi-firm combinations (but apparently not to mergers) relating to the export of articles from Canada.[86] But since exports generally were thought to be outside the scope of the Act, the door that is opened, if it is opened at all, may already have been there. Moreover, to make sure that it was a door easily to be closed, the amendments provide for a series of safeguarding clauses that would remove the defence if the combination, etc., limited the volume of exports, injured a domestic competitor not a party to the agreement, made more difficult entries into the business of exporting such articles or, in the end, lessened competition in the domestic market itself.

It will be evident from this too brief analysis of the new amendments that the primary interest of the draftsmen was to deal with certain urgent irritants rather than major questions of substance apart from the export trade issue. Of course, there remains to be considered — which this paper will not do — the procedural problems of the Act: notably, the powers of the Director during his preliminary enquiries; the relevance of fair hearing procedures during his formal investigation; the character of the proceedings before the R.T.P. Commission with particular concern for the legal meaning of the various steps provided for in sections 18 and 19 of the Act dealing with the enquiries by the Director through to the hearing by the Commission as well as the nature of the proceedings before the Commission and the character and significance of the Report itself. Some recent judicial statements are indicative of the concern for fairness that has emerged in these proceedings and more particularly a concern for the extent to which the Director can carry on his investigations without meeting some reasonable demand by a potential accused to have

[85] *Ibid.*, sec. 33 (C).

[86] *Ibid.*, sec. 32 (4) (5).

counsel present and similar safeguards.[87] Finally, there is now the evident intention of those administering the Act to assert its relevance to certain aspects of the service industries despite the traditional belief that services are, strictly speaking, outside the scope of the legislation.[88]

III. *Questions for the Future*

The surprising rise in the volume of investigations and prosecutions from 1952 onwards is, of course, a significant factor in the present pressure for re-assessment, but in the end the really dominant reasons are those that have to do with a sense of discomfort on the part of the business community assuredly, and perhaps even others, that anti-combines law and policy in their present general form may not be entirely suitable to the "guided capitalism" and the world trading problems that possibly face Canada in the future. It is significant that the stalemate in the merger question and the rough justice of the *per se* rules are about the sum total of the doctrinal fruits of two generations of experience.[89] Thus the parameters of fair business conduct on the one hand and the requirements of twentieth century capitalism on the other, may be in need of some fundamental re-examination, though perhaps less in the first than in the second. The time has come, therefore, to relate anti-combines policy to the wider whole of economic policy and development where it may be observed as one instrument in a many-sided approach to the "positive regulation" of enterprise in a free society. Perhaps what is needed is another Royal Commission to do what the Gordon Commission eschewed when it frankly avoided coming to grips with the general question of competition and its regulation.[90] Such a Royal Commission might consider the following specific questions:

1. Does the Canadian economy, and its present organization and structure, require as a matter of public good the retention of general rules to prevent "undue" restrictions on competition?

2. Are the existing rules with respect to combines, conspiracies, agreements, etc., governing multi-firm arrangements, too strict in practice and do they "unduly" limit creative business arrangements; and correspondingly, would any extensive modification of the present rules, particularly of the *per se* doctrine, tend to encourage agreements, combinations, etc.,

[87]*Canadian Fishing Company Limited v. Rhodes Smith et al* [1962] S.C.R. 294; *cf.* the Canadian Bill of Rights, 8-9 Eliz. II, S.C. 1960, c. 44, sec. 2(d).

[88]See *Report of the Director of Investigation and Research for the year ended March* 31, 1961, re Montreal League of Linen Supply Owners Company, p. 5.

[89]*cf.* Gosse, *op. cit.*, Chap. VIII at 267-291.

[90]*Royal Commission on Canada's Economic Prospects, Final Report*, 1957, at p. 419 *et seq.*

which then would move the organization of industry in the direction of ever greater restrictions upon competition through direct or indirect price controls, market sharing, etc.?

3. Considering the domestic market and contrasting it with our foreign trade problems, can it be said that the anti-combine rules generally governing domestic restrictions upon competition should apply to arrangements with respect to Canadian external trade?

4. Are the present rules with respect to "mergers" too restrictive on creative business policies aimed at achieving economies of scale and similar objectives; and can workable rules with respect to mergers really be the same for domestic economic situations as they would be for Canadian external trade requirements?

5. What is the effect on Canadian anti-combines policy of the seeming efforts of the United States Department of Justice to view United States anti-trust law as having extra-territorial effects, with particular reference to United States subsidiaries in Canada; and should there not be some clearly defined limits within which the laws of the United States are to operate with respect to events taking place in Canada whether on the part of subsidiaries or not; and can this problem be managed by way of a treaty or otherwise?

6. What is the effect of any possible Canadian association with the Common Market countries in the future and, in particular, what will be the problems raised for Canadian business both in Canada and in Europe through the operation of articles 84 and 85 of the Rome Treaty dealing with restrictive practices within the European Economic Community?

7. How far should Government under the present or some future statute seek to extend anti-combines policy to service industries?

8. What are the problems of relating federal anti-combines law to provincial jurisdiction over prices, marketing, etc.; and do we not need a more developed doctrine of "paramountcy" or some similar concept to reconcile these conflicts — if indeed there is conflict both in fact and in theory? Similarly, what are some of the problems and consequences of national economic regulation in contrast with provincial regulation whenever it now takes place and the problem of overlapping and competing regulatory systems?

9. What is the present justification for claims to exemption from anti-trust laws in favour of organized labour, the co-operative movement, the fishing industry, and are there other sectors that are equally deserving of exemption or should the scope of exemptions, in any case, be restricted?

10. Are there technical problems with respect to the definition of the offence, and of the defences to a combines charge, which enforcement during the past two generations indicates are in need of major alteration or clarification?

11. Has the division of functions between the Director of Investigation and Research and the Restrictive Trade Practices Commission since 1952 developed as expected when the McQuarrie Report so recommended; and what has been the view of business, the Bar, the Courts, and scholarship as to the quality and usefulness of the Commission's reports as well as to the procedures established by the Commission for the conduct of its hearings?

12. Are there special procedural problems that arise because of the powers given to the Director to make preliminary pre-formal enquiries and are there improvements that may be made so as to retain for him the power to investigate as fully as possible but at the same time to limit the sense of intrusion on privacy or the appearance of harassment which has been claimed by some sectors of the business community to be characteristic of combines inquiries?

13. Are the penalties under the Act appropriate or too severe or too light; and in any case, should the whole field of anti-combines law be regarded as properly criminal in its form and substance, or, if the Canadian constitution should permit, may combines law and policy be better administered in some non-criminal forum? In addition, should there be established special courts for the administration of such legislation or experimentally should the Exchequer Court of Canada be given exclusive jurisdiction to hear anti-combine cases for a fixed period of years to determine whether such a forum can be developed into an expert one for such cases without weakening the traditions of effective enforcement?

14. What can be said about the general effect, if any, on the Canadian economy, as well as the effect specifically on concentration of industry and restrictive trade practices, of the past two generations of anti-combines law and enforcement? What are the structural and behavioural characteristics of certain key Canadian industries and what may be the significance of these characteristics for anti-combines and related regulatory policies, past and future?

15. What is the alternative, if any, to anti-combines policy and administration in the developing relations between the older "market" economy and the newer "indicative planning" that may be characteristic of the Canadian economy in the future; and thus, finally, what is to be the essential economic, political and social role of anti-combines policy and methods, in the context of the management and future movement of the Canadian economy?

It would be a policy far short of wisdom to discard or radically to modify the existing pattern of the legal control of enterprise until there is something really better with which to replace it. But it would be equally unwise not to recognize that though the "market" is still with us, its significance as the energizer of economic activity, may take on a different perspective in a world of increasing respect for "plans" and "planning." Yet, it would be quite wrong to assume that "planning" — whatever it may signify — and "anti-combines" are naturally conflicting concepts or policies. There is a vital place, as even the Common Market countries themselves, with quite different traditions, already are finding, — and *a fortiori* in Canada — for "anti-trust" type laws in the new era ahead. It is the task of students and political leaders to find that place and to give it effective, modern definition.