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PROPOSED CHANGES IN CANADIAN COMBINES LEGISLATION:

Some Comparative Comments on the "Interim Report on Competition Policy"

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In July 1969 the Economic Council of Canada published its "Interim Report on Competition Policy" (hereafter cited as Interim Report) which recommended far reaching changes of the existing Canadian Combines Law. The following comments attempt to analyse and support some of the Council's proposals in terms of comparisons with European and U.S. laws against restrictive trade practices.¹

I. CRIMINAL AND CIVIL LAW

As everyone knows, the present Canadian Combines Investigation Act² is entirely criminal law: The basic substantive "Offences in Relation to Trade", to wit conspiracies and combinations unduly in restraint of trade,³ being a party to or forming a merger or monopoly which is likely to operate against the public interest,⁴ and resale price maintenance⁵ are "indictable" and, upon conviction, subject the violator to imprisonment. The Council would retain the criminal sanctions which, as U.S. experience demonstrates, are well suited for "hard-core" violations of universally understood legal norms

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¹ Chapter 3 of the "Interim Report" deals with "Competition Policy in Europe and the United States" in general terms; the present comment is intended to supplement that chapter by a more specific treatment.

² R.S.C. 1953, c.314, as amended.

³ Combines Investigation Act Section 32(1), as added in 1960, c. 45, Section 13.

⁴ *id.*, Section 33, as added in 1960, c. 45, Section 13.

⁵ *id.*, Section 34. This section provides for imprisonment or fines.

like the rule condemning price fixing. Indeed, although the usual punishment consists of fines, jail sentences of executives convicted of particularly flagrant price fixing activities have been imposed in the United States in recent years.⁶ However, the Interim Report emphasizes that the criminal law should not provide the only technique for enforcement of competition policy:⁷ Convictions for crimes are difficult to obtain because of the requirements of proof beyond reasonable doubt, and the civil law approach affords "greater flexibility", especially in those areas which call for "case-by-case consideration of the likely economic effects of particular business structures or practices".⁸

The persuasiveness of these comments may be underscored by the uniqueness of the present Canadian law: No other country uses criminal punishment as the only sanction for violation of its antimonopoly and competition policy.^{8-a} In the U.S., as already mentioned, prosecutions are practically limited to traditional *per se* offences⁹ under the Sherman Act.¹⁰ But that Act permits the Government to choose between criminal and civil proceedings,¹¹ and the latter have resulted in a number of significant decrees ordering monopoly firms to divest themselves of parts of their properties.¹² These decisions epitomize the equity jurisdiction of the Federal courts. The remedy in each case must be fashioned in such a way as to assure to plaintiff (the Government) the relief to which it is entitled; that relief is the restoration of competitive conditions, and, under the circumstances found in these cases, this could be achieved only by splitting up the monopoly firm.

The divestiture cases represent the most drastic and comparatively rare examples of civil jurisdiction; but in numberless other cases, under the Sherman Act, injunctions and treble damages have been obtained by the Govern-

⁶ In February 1961 seven executives in the electrical industry were sentenced to prison by the U.S. District Court for the Eastern District of Pennsylvania. See A. Bernhard: *The Antitrust Convictions in the Electrical Equipment Case. The Value Line Survey*, March 13, 1961; Demaree: *How Judgment came for the Plumbing Conspirators*, *Fortune* December 1969, p. 96.

⁷ Interim Report, p. 109.

⁸ *id.*

^{8-a} In *Direct Lumber Co. v. Western Plywood*, [1962] S.C.R. 646, it was held that no civil liability arises from a conspiracy to lessen competition even if the plaintiff can show direct damage. A contract which violates Section 32 of the Combines Act will be unenforceable, *Weidman v. Shragge* [1912] S.C.R. 1, but this is of little value as an aid in encouraging competition.

⁹ The Interim Report, *id.*, calls these "unqualified prohibitions". In *Queen v. Canadian Coat & Apron Supply*, [1967] 2 Ex. L.R. 53, at 70, the Court referred to the decisions of the Supreme Court of Canada such as *Howard Smith Paper Mills v. Queen*, 8 D.L.R. 2d 449 (1957) which affirmed convictions for conspiracies amounting to virtual monopolization as exemplifying a *per se* approach.

¹⁰ 15 U.S.C. §1 declares illegal "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce . . ." §2 forbids monopolization, or attempts to, or conspiracies to monopolize.

¹¹ 15 U.S.C. §4. Sometimes the Government resorts to both criminal and civil procedures.

¹² See, for instance, *Standard Oil Co. of New Jersey v. U.S.*, 221 U.S. 1 (1911); *U.S. v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948): Producers required to dispose of motion picture theatres; *United States v. United Shoe Machinery Co.*, 110 F. Supp. 295 (D. Mass., 1953), *aff'd* 347 U.S. 521 (1954); *U.S. v. Grinnell Corp.*, 384 U.S. 563 (1966).

ment and by private plaintiffs.¹³ Moreover, the special prohibition of mergers contained in Section 7 of the Clayton Act carries no criminal sanctions at all. That section forbids mergers "where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly".¹⁴ The court is, thus, called upon to determine the probable economic effect of the challenged merger in order "to cope with monopolistic tendencies in their incipiency".¹⁵ In such a context, moral condemnation characteristic of criminal law would appear to be irrelevant. Indeed, the United States Supreme Court noted in a case brought under Section 7 that the executives of the defendant companies "acted honorably and fairly, each in the honest conviction that his actions were in the best interests of his own company and without any design to overreach anyone, including . . . competitors", but that this "does not defeat the Government's right to relief".¹⁶

The enforcement history of the antitrust laws of the European Economic Community (hereafter referred to as EEC), also reflects the notion that "economic goals"¹⁷ should be pursued primarily by civil remedies. Article 85, paragraph 1, of the Rome Treaty,¹⁸ which is analogous to Section 32 of the Combines Investigation Act, prohibits "all agreements between undertakings, . . . and all concerted practices which are liable to affect trade between member states and which are designed to prevent, restrict or distort competition within the Common Market or which have this effect. . . ." ¹⁹ Paragraph 3 of the same article, to be discussed in more detail below, provides for exceptions under certain specifically defined circumstances.²⁰ The implementing Regulation, issued in March 1962, requires, generally, that all

¹³ A few typical examples are: *Radiant Burners, Inc. v. Peoples Gas, Light and Coke Co.*, 364 U.S. 656 (1961): Concerted Boycott; *American Column & Lumber Co. v. U.S.*, 257 U.S. 377 (1921): Statistical Price Reporting Plan as camouflage of price fixing by trade association; *U.S. v. Parke, Davis and Co.*, 362 U.S. 29 (1960): Concerted Refusal to Deal in aid of resale price maintenance scheme; *U.S. v. Arnold, Schwinn & Co. et al* 388 U.S. 365 (1967): Territorial restrictions of dealer's sales illegal *per se*; *Standard Oil Co. of Calif. v. U.S.* 337 U.S. 293 (1949): Exclusive dealings prohibited under Section 1 Sherman and Section 3 Clayton Act where supplier enjoyed substantial market power; *Hartford Empire Co. v. U.S.*, 323 U.S. 386 (1945): Restrictive Patent Pool.

¹⁴ 15 U.S.C. §18. For a discussion of the U.S. case law see Antitrust Developments 1955 - 1968, a supplement to the Report of the Attorney General's National Committee to Study the Antitrust Laws, prepared by Section of Antitrust Law of the American Bar Association, pp. 65-100. Most of the litigated cases resulted in injunctions against mergers. Section 5 of the Federal Trade Commission Act (15 U.S.C. §48) which forbids "unfair methods of competition" and has often been used in proceedings brought by the Federal Trade Commission which could have been brought under Section 1 of the Sherman Act (e.g. *F.T.C. v. Cement Institute*, 333 U.S. 683 (1948) also has no criminal sanctions.

¹⁵ Senate Rep. No. 1775, 81st Cong., 2d Sess. (1950), recommending enactment of Section 7 in its present form.

¹⁶ *U.S. v. E.I. Du Pont de Nemours & Co.*, 353 U.S. 586, at 607 (1957).

¹⁷ The phrase is quoted from the Interim Report (p. 109).

¹⁸ 1 CCH Common Market Reports 2005 (hereafter cited as CCH).

¹⁹ Five examples of such agreements are explicitly enumerated: Price fixing, limitations of production, market sharing, discrimination and tying.

²⁰ 1 CCH 2051.

agreements falling under Article 85(1) be notified to the Commission,²¹ which has wide investigative powers,²² the exercise of which may lead to a decision obligating the parties to prohibited agreements to terminate their illegal practices.²³ Before entering a formal cease and desist order, the Commission "may address to the enterprises . . . concerned recommendations designed to put an end to the infringement" of the Treaty rules;²⁴ this informal procedure, which has been used frequently and successfully, is "one of the main advantages of a system requiring notification of agreements which may violate the applicable antitrust rules".²⁵ This is particularly so because failure to notify forfeits the right to invoke the exception under Article 85(3); hence, there is a strong incentive for enterprises to put their cards on the table.

The implementing Regulation empowers the Commission to impose fines from one thousand to one million units of account.²⁶ This upper limit "may be increased to 10% of the turnover of the preceding business year" for wilful or negligent violations.²⁷ The present maximum penalty under the U.S. Sherman Act is \$50,000; in fact, the EEC maxima far exceed any other antitrust sanction on this planet.²⁸ At the time of writing (April 1970) fines had been imposed only in two cases involving price fixing cartels, both decided in July 1969.²⁹ In one of these, a Dutch and a German firm were fined \$210,000 and \$190,000 respectively.³⁰ They had omitted notification after they were advised by counsel that their agreements which increased the price of a drug vital for heart patients could not be defended. The other case involved leading producers in the oligopolistic chemical industry, each of whom was fined \$50,000. The fact that the European Commission singled out these two recent cases for the first application of its power to fine indicates that, like the U.S., it views price fixing conspiracies by powerful groups as particularly dangerous to the public interest which should, therefore, be more severely dealt with than other manifestations of anticompetitive behavior. The latter are left to civil remedies.

The EEC system follows substantially the national laws of France and Germany. Under the German law³¹ the Cartel Authority may issue injunctions and orders requiring the parties to change or rescind their agreements or declaring their agreements void; wilful (or, in some cases, negligent)

²¹ 1 CCH 2431, 2441 (Articles 4 and 5 of Regulation No. 17).

²² 1 CCH 2531 (Art. 14, *id.*)

²³ 1 CCH 2421 (Art. 3, *id.*)

²⁴ *Id.*, Art. 3, par. 3.

²⁵ Fulda and Schwartz: Cases and Materials on the Regulation of International Trade and Investment (1970), p. 147.

²⁶ The equivalent of the U.S. Dollar (1 CCH 2572.)

²⁷ 1 CCH 2541 (Art. 15, par. 2 of Reg. 17)

²⁸ Art. 15, par. 4, *id.*, states, nevertheless, that these fines "shall have no penal character", a thoroughly unconvincing conclusion.

²⁹ The International Quinine Cartel, 2 CCH 9313, and the Dyestuff Manufacturers Cartel, *id.* 9314.

³⁰ Quinine Cartel, *supra*. For details about the ramification of this case see Fulda and Schwartz, *op. cit. supra*, note 25, pp. 89-101.

³¹ Gesetz gegen Wettbewerbsbeschränkungen, as amended January 3, 1966 (BGB(e), I, p. 37), Section 12.

violation of such orders may be punished by fines to be imposed by the Cartel Authority, subject to judicial review.³² There is also a private right of damages for those who have been injured by a violation of the law or of an order of the Cartel Authority.³³ The French law prohibits concerted action to restrain competition, subject to certain exceptions. Complaints must be referred to the Technical Commission on Combines and Dominant Positions which, after elaborate investigation, makes recommendations to the Minister of Economics. The Minister will then advise the parties as to whether their anticompetitive practises should be discontinued, or modified, or whether they are legalized under the exception. He may recommend criminal prosecution, but has apparently never done so.³⁴

An authoritative survey of the cartel and monopoly laws of fifteen other countries outside the North American continent indicates that in all of them, except Japan, penalties are authorized only for "those who withhold facts from the responsible authority or disobey an order issued by it."³⁵

The foregoing international comparison demonstrates the uniqueness of the Canadian approach. Modern industrial countries find it necessary in varying degrees to foster competitive behavior and to control market structures. This policy is aimed at bringing about economic effects which are often honestly disputable; hence, sole reliance on putting people in jail is not a suitable or practical regulatory technique. Indeed, the recommendations of the Interim Report with respect to control of restrictive practices in distribution such as exclusive dealing and tying arrangements, when they are found to have "a deleterious effect on the public interest",³⁶ could not be adopted at all unless civil remedies independent from criminal law were made available. This could be done only if it were definitely recognized that the Canadian Federal Parliament, under its powers with respect to peace, order and good government, and the Regulation of Trade and Commerce could enact civil combines legislation applicable to interprovincial and foreign

³² *Id.*, Sections 38, 81-86.

³³ *Id.*, Section 35. The Interim Report (p. 191) recommends the same for Canada but rejects the U.S. provision for treble damages.

³⁴ Ordinance on Fair Competition, as revised on Sept. 28, 1967, Articles 2, 3 and 4. (1967 Bulletin Legislatif Dalloz, 375); Ordinance No. 45 — 1484 of June 30, 1945 (1945 Bulletin Legislatif Dalloz 141). Art. 419 Penal Code making it a crime to cause "an artificial rise or fall in . . . prices" by influencing the market "for the purpose of acquiring profit other than that which would be derived from the natural operation of supply and demand . . ." Edwards: Trade Regulation Overseas, The National Laws (1966), pp. 37 *et seq.* Reboul: Horizontal Restraints under the French Antitrust Laws: Competition and Economic Progress, 19 Vanderbilt L.R. 303, at 361 (1966) states that "those charged with enforcing the laws seem to feel that it would be an outrage to bring respectable businessmen before the criminal courts for violation of the antitrust laws". For a representative sample of the opinions of the Commission and the Minister's decisions based thereon see the Reports of the Commission for the years 1960-1962, Journal Officiel, Edition des Documents Administratifs, 1964, 7 Fevrier 1964, pp. 1-40. Private damage suits are recognized. See Fulda-Schwartz, *op. cit. supra*, note 25, p. 150.

³⁵ Edwards: Control of Cartels and Monopolies, An International Comparison (1967) p.43. (The countries involved are Austria, Belgium, Denmark, Finland, Ireland, Israel, Netherlands, New Zealand, Norway, Spain, Sweden, Switzerland, United Kingdom, Union of South Africa.)

³⁶ P. 122

transactions.³⁷ The foreign experience recounted above might be helpful in removing lingering doubts as to the reasonableness of such constitutional interpretation.

II. PRICE FIXING AS A *PER SE* OFFENSE

The Interim Report urges that "collusive arrangements between competitors to fix prices (including bid-rigging on tenders)" should be "subject to essentially *per se* prohibition under criminal law".³⁸ It weakens this recommendation, however, by equivocating on the question whether a revised Section 32 of the present Act should or should not retain the word "unduly". It suggests that striking the word may expose "to prosecution . . . certain cooperatives and relatively loosely organized chains of grocery supermarket and auto accessory stores whose emergence on the retail scene has by and large brought about an increase in effective competition". In addition, it is feared that without the word "unduly" the courts may be swamped "with a host of minor cases".³⁹

These considerations are not convincing. Enforcement authorities in all countries have limited staffs and budgets, and, therefore, are not likely to squander their resources on trivial cases. Moreover, it is difficult to determine when price fixing agreements are "minor" or "major". Consumers would always be victimized. In this connection it should be noted that even in the EEC, where cartels may be legalized by the exception contained in paragraph 3 of Article 85 of the Rome Treaty price fixing agreements affecting trade between member states have never been approved by the EEC Commission and probably never will be because one of the conditions for application of the exception is proof that the concerted anticompetitive practice "helps to improve production or distribution . . . or to promote technical or economic progress, *while allowing consumers a fair share of the resulting*

³⁷ For a brief discussion of the constitutional theory which, according to past decisions, requires that combines legislation be based on Section 91 (27) of the British North America Act, i.e. the power of the Federal Parliament to enact "criminal law", rather than on Section 91(2), which authorizes Federal "Regulation of Trade and Commerce", see Henry: *Mergers in Canada under the Combines Investigations Act*, 5 *Texas Internat. Law Forum* 1, at 15 et seq. (1969); for a critique of the decisions which seem to have nullified the Federal power over "Trade and Commerce" see Smith: "The Commerce Power in Canada and the United States" (1963), particularly pp. 175-181. See, also, Varcoe: *The Constitution of Canada*, (1965), pp. 85-110. These texts seem to suggest that Federal Civil Combines legislation may be sustained if limited to inter-provincial and foreign trade. In this connection see *Carnation Co. v. Quebec Agricultural Marketing Board*, [1968] S.C.R. 238, 253; *Regina v. Klassen*, 20 D.L.R. 2d 406, 412, 413 (Manit. Ct. of Appeal, 1959). The Interim Report calls for Provincial participation in future combines legislation (p.108); it presents charts showing the relative importance of interprovincial and international shipments by Canadian industries (pp. 225-230).

³⁸ P. 102. The same treatment is recommended for collusive market sharing and agreements to prevent entry, which typically accompany price fixing.

³⁹ P. 103

*profit. . .*⁴⁰ Price fixing conspiracies do not satisfy this requirement.⁴¹ In the U.S. their illegality *per se* is well settled regardless of the share of the market of the participants.⁴² Exceptions have been granted from time to time *by legislation*. For instance, concerted efforts by farmers for mutual help in marketing their products are explicitly authorized, subject to supervision by the Secretary of Agriculture to prevent them from unduly enhancing prices.⁴³ Labour organizations are exempt from the antitrust law so long as their activities are limited to improving working conditions of their members.⁴⁴ This method of legislative exception should lay to rest the concern of the Interim Report for cooperatives.

The Interim Report acknowledges that retention of the word "unduly" would involve "some loss of clarity and public understanding, and consequently of deterrence".⁴⁵ Undoubtedly, "undueness is at the core of the combination provisions".⁴⁶ Judge Gibson of the Exchequer Court of Canada explained in a recent opinion that there are two categories of cases: First, there are the "virtual monopolization situations",⁴⁷ and, second, there are cases "in which the object contemplated was something less than virtual monopoly, but in which . . . the courts are able to reach a conclusion of undue interference with competition. . ." In these latter cases, "the question of 'unduly' or not must be resolved case by case in the light of the particular evidence".⁴⁸ The most far reaching case of this kind to date is *R. v. Abitibi Power and Paper*,⁴⁹ where the Quebec Court of Queen's Bench condemned an

⁴⁰ 1 CCH 2051.

⁴¹ In addition to the cases cited *supra*, note 29, see 2 CCH 9085 (European Cement Cartel); *id.*, 9024, 9046 (Water Heater Agreement); *id.* 9066 (Natural Sand Cartel); *id.* 9018, 9056 (Cleaning Products). There were also market-sharing arrangements in addition to price fixing. The Interim Report (p. 102) would make collusive market allocations also illegal *per se*.

⁴² *U.S. v. Addyston Pipe & Steel Co.*, 85 F. 271, 279 (6th cir., 1898), *aff'd* 175 U.S. 211 (1899): 30% of market; *U.S. v. Trenton Potteries*, 273 U.S. 392 (1927): 82% of market; offer of proof that prices were reasonable rejected as irrelevant; *U.S. v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940): 83% "Even though the members of the price fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces. The Act . . . protects that vital part of our economy against any degree of interference." *U.S. v. McKesson & Robbins*, 351 U.S. 305, 310 (1956): Motives and Market control irrelevant; *Virginia Excelsior Mills v. Federal Trade Commission*, 256 F. 2d. 538 (4th Cir., 1958): 25% market control; *American Column & Lumber Co. v. U.S.*, 257 U.S. 377 (1921): one-third of total U.S. production.

⁴³ 7 U.S.C. §§291, 292; *Sunkist v. Winckler & Smith Co.*, 370 U.S. 19, 28 (1962).

⁴⁴ 15 U.S.C. §17. Agreements between unions and employers as to exclusion of competitors and prices have been held violative of the Sherman Act. *Allen Bradley Co. v. Local Union No. 3, International Brotherhood of Electrical Workers*, 325 U.S. 797 (1945).

⁴⁵ P. 103.

⁴⁶ Henry: Unfair Distribution and Pricing Practices, in Special Lectures of the Law Society of Upper Canada, Part II: Trade Competition and the Law (1963) p. 17.

⁴⁷ Citing *Stinson-Reeb Builders Supply Co. et al v. King*, [1929] S.C.R. 276; *Container Materials Limited et al v. King*, [1942] S.C.R. 147; *Howard Smith Paper Mills Ltd. et al v. Queen*, [1957] S.C.R. 403.

⁴⁸ *The Queen v. Canadian Coat and Apron Supply, Ltd.*, [1967] 2 Exch. Ct. 53, at 70, 71.

⁴⁹ 131 Can. Crim. Cases 201, 256 (1960).

agreement between parties which accounted for somewhere between 56 and 73.8% of the market. On the other hand, agreements involving sales varying between 21% and 34% of the national market would not be classified as "undue".⁵⁰ Apparently it is impossible to tell at what precise percentage point of market power a group of firms bent on collusion crosses the line between "due" and "undue" restrictions. This uncertainty must have been the major reason for the conclusion of the Watkins Report⁵¹ that "Canadian anti-combines policy appears generally to have been ineffective in creating price competition among firms, foreign and domestic, within Canada. . ."⁵²

Elimination of the word "unduly", at least with respect to price fixing,⁵³ would, then, seem to be necessary. This would be particularly appropriate in view of widespread anxieties about foreign, notably U.S., ownership of Canadian industry. The Watkins Report indicates that U.S. control of manufacturing and mining and smelting in Canada in 1963 amounted to 46% and 52% respectively, and to 62% of petroleum and natural gas.⁵⁴ In some manufacturing sectors U.S. control is particularly high: For instance, U.S. citizens control 97% of automobiles and parts, 90% of rubber, 54% of chemicals and 66% of electrical apparatus.⁵⁵ The U.S. parents controlling these sectors of Canadian industry live under the *per se* rule at home; one may wonder whether it is sensible Canadian public policy to subject their Canadian subsidiaries to a more lenient rule in Canada, particularly since "foreign control in Canada is substantially embodied in firms with economic power".^{55-a} Moreover, the *per se* rule as to price fixing would also serve to prevent collusion and the resulting inefficiencies in industries with low percentages of foreign control.⁵⁶

III. SPECIALIZATION AGREEMENTS

The Interim Report recommends that "specialization agreements" between competitors should be scrutinized by a proposed "specialized tribunal" whose membership would consist of experts in economics, business

⁵⁰ Restrictive Trade Practices Commission: Distribution and Pricing of Pesticides (1965) p. 38.

⁵¹ Foreign Ownership and the Structure of Canadian Industry, Report of the Task Force on the Structure of Canadian Industry (1968) (hereafter cited as Watkins Report)

⁵² *Id.*, p. 84.

⁵³ As noted above, note 38, the Interim Report also recommends *per se* treatment of market sharing and agreements to exclude competitors. Market allocations frequently are combined with price fixing and exclusionary agreements may rarely be justifiable. Nevertheless, the experience of the EEC with regard to Art. 85 (3), to be discussed below, may indicate that in some special situations flexible treatment may be advisable.

⁵⁴ Watkins Report p. 442. Foreign control other than U.S. in manufacturing, mining and smelting and petroleum and gas amounted to 14%, 7% and 12% respectively.

⁵⁵ *Id.*, p. 11. Foreigners other than U.S. citizens control 24% of chemicals and 12% of electrical apparatus.

^{55-a} Watkins Report, p. 149.

⁵⁶ According to the Watkins Report, p. 144, these are cotton goods, steel, cement, food and utilities and insurance. The Report notes that there are "leading firms, and giant firms, which are Canadian-owned".

and law.⁵⁷ Such agreements should be exempted from the prohibitions of a revised Combines Act if they were found "to accomplish a restructuring of production and distribution with a view to increasing the scale and specialization of Canadian output and, in this way, reducing costs".⁵⁸

This recommendation raises a fundamental problem of cartel policy: To what extent should competitors be permitted to cooperate? The present Combines Act deals with this question in paragraphs (2) and (3) of Section 32: Paragraph 2 lists a number of permissible subjects (exchange of statistics or credit information, definition of product standards or trade terms, cooperation in research and development, restriction of advertising, or "some other matter"), but paragraph 3 states that agreement as to these subjects shall be punishable if it "has lessened or is likely to lessen competition unduly in respect of . . . prices, . . . quantity or quality of production, markets or customers, or channels of distribution" or if it is likely to restrict entry. Again, the presence of the word "unduly" beclouds the reach of the exception, and, as we have seen before, uncertainty in the criminal law is self-defeating if not intolerable.

The civil Combines Legislation of the future contemplated by the Interim Report would adopt the European approach rather than the U.S. law. The latter condemns agreements as to prices, limitations of output and exclusion of competitors and allows cooperation by trade associations only when no inference can be drawn that any of these purposes are being pursued by collective action.⁵⁹ The European policy, by contrast, is epitomized by Article 85, paragraph 3 of the Rome Treaty, which permits the EEC Commission to declare the cartel prohibition of paragraph 1 inapplicable to any agreement or concerted practice

"which helps to improve the production or distribution of goods or to promote technical or economic progress, while allowing consumers a

⁵⁷ Interim Report, pp. 109, 110.

⁵⁸ *Id.* p. 119. The Report makes similar recommendations for export agreements without discussing present Section 32(4) and (5) of the Combines Act which contain a qualified exemption for export agreements. Such an exemption was first granted by the American Webb-Pomerene Act of 1918 (15 U.S.C. §§61-65) for the purpose of enabling American exporters to "meet aggressive competition from powerful foreign combinations". Summary of Federal Trade Commission Report to Congress, reprinted in part in Fulda-Schwartz, *op. cit. supra*, note 25, p. 156. The provision was copied by §6 of the West-German Law against Restraints of Competition, and other countries. In the U.S., there are only 29 export associations accounting for 2.5% of all U.S. exports. Statement by W. F. Mueller, Director, Bureau of Economics, in Hearings on International Aspects of Antitrust before Senate Subcommittee on Antitrust and Monopoly, 90th Cong., 1st Sess., at 31-60 (1967). Export associations are of small usefulness in the modern world of liberalized trade and competition policies: they tend to increase rather than decrease export prices and, therefore, provoke retaliatory measures from importing countries, and it is difficult to exempt export activities from the requirement of competitive behavior while insisting on competition by the same firms in their domestic business. For details see Fulda-Schwartz, *supra*, pp. 157-177.

⁵⁹ Compare *American Column & Lumber v. U.S.*, *supra*, note 13, with *Maple Flooring Mfrs. Assoc. v. U.S.*, 268 U.S. 563 (1925): Price reporting plan limited to past transactions and not revealing data as to operations of individual members sustained. See, generally, Lamb and Kittelle: Trade Association Law and Practice (1956) and Wilcox: Competition and Monopoly in American Industry, Temporary National Economic Committee Monograph No. 21, pp. 225 *et seq.* (1940).

fair share of the resulting profit and which does not:

- (a) subject the concerns in question to any restrictions which are not indispensable to the achievement of the above objectives;
- (b) enable such concerns to eliminate competition in respect of a substantial part of the goods concerned.”⁶⁰

Similarly, the French Technical Commission may allow concerted actions “to the extent that their authors can justify these practices when they have the effect of insuring economic progress, particularly by increased productivity”.⁶¹ The German law defines specific types of cartels which are lawful if approved by the Federal Cartel Authority, or not objected to by that Authority within a specified period. Perhaps the most important of these are rationalization cartels⁶² and specialization cartels. The latter, defined as “contracts and resolutions which are intended to achieve rationalization of economic processes through specialization. . .”, are declared not objectionable if “significant competition remains in the market.”⁶³ Specialization has been defined as a “long-term allocation of production programs among several producers”.⁶⁴ The British law requires registration of all agreements by which two or more parties accept restrictions over prices, terms and conditions of supply, limitations of territories or customers, and declares such agreements contrary to the public interest, unless the Restrictive Trade Practices Court finds that these agreements may be justified by one of the statutory “gateways”.⁶⁵

Common to all these Systems is the idea that cooperation arrangements among competitors should be subject to scrutiny by an expert tribunal which, guided by the statutory standards,⁶⁶ shall draw up a balance sheet weighing the “good” against the “bad” aspects of the challenged transactions.⁶⁷

⁶⁰ 1. CCH 2051.

⁶¹ Art. 3(2) of the Ordinance on Fair Competition of September 28, 1967, *supra*, note 34.

⁶² A rationalization cartel “serves to rationalize economic processes and tends to raise substantially the efficiency or productivity of the participating enterprises from a technical, economic or organizational point of view and thereby to improve the satisfaction of demand. The restraints on competition must bear a reasonable relation to the rationalization achieved”. Section 5(2) of the German Law, *supra*, note. 31.

⁶³ Section 5a of the German Law.

⁶⁴ Langen: Kommentar zum Kartellgesetz, 4th ed. 1967, note 7 to Section 5a, citing a decision of the Federal Cartel Authority. See, also, Fulda and Schwartz, *op cit. supra*, note 25, p. 151.

⁶⁵ See Restrictive Trade Practices Act of 1956, Sections 20 and 21 (4 & 5 Eliz. 2c. 68; 36 Halsbury's Statutes of England, 2d ed., 1956 Continuation Volume 931); Interim Report, pp. 30, 31; Edwards: Trade Regulations Overseas, the National Laws (1966) 453-466.

⁶⁶ These may be supplemented by administrative guidelines such as the EEC Commission's Notice Concerning Agreements, Decisions and Concerted Practices in Cooperation between Enterprises, July 23, 1968, 2 CCH 9248, Fulda and Schwartz, *op. cit. supra*, note 25, pp. 141-144. The tribunal recommended by the Interim Report (pp. 109 *et seq.*) seems to be a Canadian version of the German, French, or British bodies exclusively dealing with cartel matters.

⁶⁷ Results in specific cases may vary. In the United Kingdom and France there have been a few decisions permitting price fixing. See Black Bolt and Nut Association's Agreement, 2 R.P. 50 (1957), 6 R.P. 1 (1965), sustaining a price fixing cartel by small manufacturers on the ground that prices were reasonable and satisfactory to consumers. As to France see Edwards, *op. cit. supra*, note 65, pp. 52, 53. See, generally Edwards, Control of Cartels and Monopolies, an international comparison (1967).

This European philosophy of cartel control allows the "restructuring of production and distribution"⁶⁸ for the sake of greater efficiency, which the Interim Report advocates. Some significant illustrations may be helpful. In the *Transocean Marine Paint Association* decision⁶⁹ the EEC Commission granted an exception under Article 85(3) to an international organization of 18 "medium-size" producers. Each was free to set his own prices, but was to devote his energies exclusively to promoting sales of Transocean paints, manufactured according to a uniform formula (sold under the same trademark and subject to quality control by the group) in his territory. A sale in the territory of another member required that member's consent. However, any member receiving an order to be delivered in the contract territory of another member may transfer it to that member against payment of a commission. It was held that this agreement improved distribution with resulting advantages to consumers: It made it possible to furnish high quality products to buyers whenever and wherever they need them. "Without the agreement the members would have to set up their own distribution networks . . . , which would have involved too large an investment and too great a risk for medium-size enterprises . . ." Last, but not least, the members of the Association could *not* eliminate competition; rather, their agreement made it possible for them to compete more effectively with "*the large international marine paint combines*"⁷⁰ that offer such paints in the Common Market and for which access to that market is in no way hampered by the agreement".

In a similar vein joint ventures of producers pooling specialized manufacturing skills have been approved. For instance, Berliet, a French manufacturer of motor coaches, and ACEC, the owner of a patent for electric transmission systems especially designed for motor coaches, agreed to collaborate in the development and mass production of a vehicle. ACEC would furnish the electrical transmission parts and Berliet the engine, chassis and body. Berliet was to purchase transmissions only from ACEC, which promised not to deliver its transmissions to anyone else in France, and to only one manufacturer in each of the other member states. The Commission found that the joint research of the parties would lead to a new and better motor coach, that the restrictions were necessary for the launching of a new enterprise, and that substantial competition with other manufacturers of motor coaches, with and without electrical transmissions, would remain.⁷¹

These cases, to which others could be added,⁷² typify the treatment which the Interim Report recommends for similar transactions in Canada. In the Canadian context it would seem to be particularly important to stress the last

⁶⁸ *Supra*, text to note 58.

⁶⁹ CCH Common Market Reporter: Transfer Binder New Developments 1965-1969, No. 9188.

⁷⁰ Emphasis supplied.

⁷¹ CCH Common Market Reporter, *supra*, note 65, No. 9251.

⁷² For comparable decisions granting exception to specialization agreements see, *id.*, No. 9316 (Specialization in specific types of air conditioning equipment, each firm to act in his home market as exclusive distributor of the products of his partner) and No. 9317 (Specialization in manufacturing electric clock movements and large mechanical alarm clocks). The existence of numerous competitive enterprises was emphasized in both cases.

of the four requirements of Article 85(3) of the Rome Treaty that such agreements shall not enable the parties to eliminate competition in respect of a substantial part of the market. In other words, specialization and rationalization agreements in Canada should not be used to strengthen existing oligopolies, but, as the European examples show, to permit "medium size" firms to compete more effectively against large firms, some of which are foreign-owned.⁷³

IV. MERGERS

In this area the existing Canadian law to-date frustrates competition policy.⁷⁴ As already noted, treating otherwise legitimate transactions as criminal offenses because their economic effect is or may be incompatible with public policy is a uniquely Canadian method; its impracticality may be the ultimate explanation for lower court decisions defeating attacks by the Crown against mergers resulting in very substantial concentrations.⁷⁵ The new recommendations of the Interim Report that mergers should be "examined for evidence of possible detrimental effects on the public interest" and be prevented or unraveled when such effects are found⁷⁶ would require the establishment of some criteria applicable to such cases. The yardsticks proposed by the Interim Report⁷⁷ emphasize the effect of the merger on competition: Inquiry should be made into the degree of control over the acquired firm, the history of previous acquisitions, the shares of the relevant market involved and the effect of the merger as a barrier to new entries. All these are also relevant in U.S. law, where under the policy of curbing concentration in its incipency⁷⁸ relatively low combined market shares of the acquiring and acquired firms will suffice to condemn a merger. Indeed, "if concentration is already great, the importance of preventing even slight increases in con-

⁷³ See Watkins Report pp. 307, 308: "Many foreign-controlled firms in Canada are oligopolists and many oligopolistic firms in Canada are foreign-controlled."

⁷⁴ See Henry: Mergers in Canada under the Combines Investigation Act, 5 Texas Internat. Law Forum 1 (1969).

⁷⁵ *Regina v. Canadian Breweries*, [1960] Ont. Rep. 601: Accused had 60.9% of Ontario 'gallonage, 50% in Quebec, 40.9% in Manitoba, 34% in Saskatchewan, 36% in British Columbia. The Court also held, in the alternative, that the Combines Act was not applicable because the price of beer was fixed by the Ontario Liquor Control Act. *Regina v. British Columbia Sugar Refining Co. et al.*, 32 Western Weekly Reps. 577 (Manit. Queen's Bench, 1960): Virtual monopoly in Western Canada, but Eastern refiners may still sell in the West. Compare the U.S. merger guidelines stating that in markets in which the shares of the four largest firms amount to approximately 75% or more, mergers between firms accounting for 4% will ordinarily be challenged. Antitrust Developments 1955-1968, Section of Antitrust Law, Am. Bar Association, p. 314. For a successful Canadian prosecution of a merger case see *Eddy Match Co. v. Queen*, 18 Crim. Reps. 357 (1954), involving *complete control* throughout Canada and practically no foreign competition; this was brought about by predatory practices.

⁷⁶ Interim Report pp. 85, 86, 114.

⁷⁷ *Id.*, p. 116.

⁷⁸ *Supra*, text to note 15.

centration and so preserving the possibility of eventual deconcentration is correspondingly great".⁷⁹

The Interim Report suggests, in apparent disregard of the incipency theory^{79-a} that only mergers in "rather highly concentrated industries" should be subjected to "a public interest examination". As we have seen, most of the criteria offered by the Interim Report for such an examination are in accord with U.S. law and would compel scrutiny of 118 mergers which occurred from 1945 to 1961 in industries where eight or fewer of the largest firms accounted for 80% of total shipments.⁸⁰ Only two criteria would be irrelevant in the U.S.: The existence of possible alternative buyers^{80-a} and the likelihood of "social savings, i.e. savings in the use of resources . . . viewed from the standpoint of the Canadian economy as a whole".⁸¹ The last item would be consistent with the Interim Report's proposal to allow rationalization and specialization agreements between independent firms, since only a relatively small step separates such agreements from mergers.⁸²

One of the important results of a revitalized Canadian law on mergers would be its impact on foreign takeovers. The Watkins Report noted a "tendency of foreign-controlled firms to engage in merger to a greater extent than domestically-controlled firms".⁸³ If this is so, the question arises how acquisitions of Canadian firms by foreign concerns should be treated under the anticombines legislation of the future.

A recent U.S. case may be helpful. In 1964 the Department of Justice brought suit against Monsanto and Bayer, leading U.S. and German producers of chemicals, and their jointly-owned U.S. subsidiary, Mobay, for violation of the Anti-Merger Law. A consent judgment ordered Monsanto to sell to Bayer

⁷⁹ *U.S. v. Philadelphia Nat. Bank*, 374 U.S. 321, at 365, note 42 (1963); *U.S. v. Aluminum Co. of America*, 377 U.S. 271 (1964); Acquisition by leading firm in oligopolistic market for aluminum conductor of concern accounting for 1.3% of that market disapproved. See, also, *U.S. v. Continental Can Co.*, 378 U.S. 441 (1964), *U.S. v. Von's Grocery Co.*, 384 U.S. 270 (1966), and U.S. Merger Guidelines, *op. cit. supra*, note 75.

^{79-a} The Interim Reports suggests on p. 129 that monopoly should be fought in its incipency. The statement is plausible with respect to its recommendations on exclusionary trade practices (*id.* p. 122), but inconsistent with the notion that mergers should be scrutinized only when the industries involved are already concentrated.

⁸⁰ Interim Report p. 86. It is not stated whether a new law should apply retroactively to these mergers. The Report emphasizes that only a relatively small percentage of all mergers would have to be challenged (*Id.*, p. 88).

^{80-a} The British Monopolies Commission has had occasion to weigh the relative advantages of a takeover of a British firm by a foreign and a British applicant for approval of a merger. See Korah: Legal Regulation of Corporate Mergers in the United Kingdom, 5 *Texas Internat. Law Forum* 71, at 98 (1969).

⁸¹ *Id.*, p. 116. Compare *F.T.C. v. Procter & Gamble*, 386 U.S. 568, at 580 (1967): "Possible economies cannot be used as a defense to illegality." Accord: *U.S. v. Philadelphia Nat. Bank*, 374 U.S. 321, at 371 (1963).

⁸² For a discussion of the comparable British approach see Korah: Legal Regulations of Corporate Mergers in the United Kingdom, 5 *Texas Internat. Law Forum* 71, at 106 et seq. (1969): Government Attitudes Toward Rationalization. See, also, *Mergers, a Guide to Board of Trade Practice*, London, 1969.

⁸³ P. 148. "In the petroleum and natural gas industries, mining, and merchandising, the Canadian share of merger activity is low and the United States share is high." *Id.* p. 147.

all of its interest in Mobay, which thus became 100% foreign-owned. Interlocking directors between Monsanto and Mobay were forbidden and Bayer and Mobay were prohibited, for ten years, of selling any shares of Mobay to a manufacturer of chemicals without prior approval by the Department of Justice. Any agreement restraining Monsanto from competing with Mobay or Bayer was also prohibited.⁸⁴ The theory of this action was that the joint venture between a U.S. and a foreign firm was "a means of taking out somebody who might have been a principal competitor".⁸⁵ In other words, competition was to be fostered without regard to its national origin: a very strong company, Bayer, may enter the U.S. on its own or through a subsidiary, but Bayer may not combine with a leading American competitor. In the Canadian context this means that a foreign firm should not be permitted to take over or engage in a joint venture with a domestic firm when the effect of that transaction would be a diminution of competition in Canada.⁸⁶ This is not to suggest that a U.S. firm could never buy a Canadian firm because this would remove a Canadian competitor. The power of the two firms and the impact of the acquisition on the structure of the Canadian market should be decisive.

It should be added at this point that, apart from the coal and steel industries, there are no legal prohibitions of mergers in EEC, where concentration is being encouraged on the ground that it would create countervailing power against American economic penetration.⁸⁷ However, the president of the German Cartel Authority, one of the most distinguished European experts on competition policy, recently told a Committee of the U.S. Senate that he regretted the absence of legal machinery to prevent mergers, because this made it impossible not only to "do something about undesirable domestic mergers, but also against takeovers by foreign enterprises when competition is seriously threatened".⁸⁸ Hence, the Interim Report wisely refrained from adopting the present EEC approach on mergers.

⁸⁴ *U.S. v. Monsanto et al.*, 1967 Trade Cases 72,001 (Western Distr. of Pennsylvania 1967).

⁸⁵ Mr. E. M. Zimmerman of the Department of Justice testifying before the Senate Subcommittee on Antitrust and Monopoly, quoted in Fulda-Schwartz, *op. cit. supra*, note 25, p. 668.

⁸⁶ The question whether the foreign firm should be permitted to operate in Canada on its own would have to be decided under the guidelines for foreign investment, which at this writing (April 1970) are being prepared by the Canadian Government. Compare *U.S. v. Standard Oil Co. et al.*, 1970 Trade Cases 72,988 (N.D. Ohio, 1970) requiring Sohio to divest itself of retail outlets in Ohio as a condition of its acquisition of British Petroleum Co.

⁸⁷ Fulda-Schwartz *op. cit.* note 25, pp. 643-652. See, also, Markert: Antitrust Aspects of Mergers in the EEC, 5 *Tex. Internat. Law Forum* 32 (1969)

⁸⁸ 1968 International Antitrust Hearings (Sen. Subcomm. on Antitrust and Monopoly) p. 3481, quoted in Fulda-Schwartz, p. 653. Dr. Guenther mentioned the acquisition of the leading German manufacturer of razor blades by the "American giant" Gillette Co., which the U.S. Dept. of Justice now seeks to prevent. Fulda-Schwartz, pp. 640-642.

CONCLUSIONS

The Interim Report of the Economic Council is an important document of proposed law reform. It was prepared for the purpose of advising the Government of Canada as to national policy regarding "combines, mergers, monopolies and restraints of trade".⁸⁹ Significantly, it contains not only a "History and Assessment of Canadian Competition Policy"⁹⁰ of the past, but also a brief survey of "Competition Policy in Europe and the United State".⁹¹ The Council thus acknowledged that the matters involved in its reference are of concern for Canada's neighbors and trading partners on both sides of the Atlantic and that Canada may profit from examining the experience of other nations. Under these circumstances a foreign observer may be forgiven for having tried to discuss in more detail some of the most important aspects of the international comparisons briefly sketched by the Interim Report. The Recommendations of that Report represent a judicious adaptation to Canadian conditions of European and U.S. methods dealing with similar problems. They point the way in the right direction for any future attempt to strengthen the present Canadian law.

⁸⁹ Interim Report p. 1.

⁹⁰ *Id.*, pp. 51-72.

⁹¹ *Id.*, pp. 29-49.

