COMMON OWNERSHIP IN CANADA WITH PARTICULAR REFERENCE TO REGULATION OF ACQUISITION OF MOTOR CARRIERS

BY IVAN R. FELTHAM*

Common ownership has apparently not been regarded as a problem by either the Canadian government or the regulatory agencies. The federal government itself owns one of the two transcontinental multi-modal transportation systems, which competes on a broad front with the privately owned Canadian Pacific system. The government owned system, Canadian National Railways and its subsidiary, Air Canada, comprises air, rail, highway, water, express and hotels. Canadian Pacific offers similar services, as well as having substantial ocean shipping and passenger capacity and extensive interests in natural resources and manufacturing. Together, Canadian Pacific and Canadian National operate a transcontinental telecommunications system. The Canadian Pacific trucking operation is by a wide margin the largest in Canada and ranks among the four largest in North America in terms of gross revenue. Both airlines have extensive international routes—Air Canada to the United States, the Caribbean and Europe including the U.S.S.R. and Canadian Pacific to the Orient, Australasia, Mexico and South America and Europe.

The international extensions of the two systems are generally not in competition, but the domestic air, rail and truck services are in competition on routes between many major cities. In transcontinental transportation, the two systems face other competition only in trucking.[1] Regional air carriers and truckers offering a great variety of routes and services also compete on the shorter hauls.

This is obviously a very generalized picture of transportation in Canada. Although no account is given of competition by region or market, the description will suffice for general comparison with the United States. Generally speaking, concentration and common ownership is a principal characteristic of transportation in Canada. By contrast, the U.S. scene is characterized by the existence of several competitors on major routes and little, if any, significant common ownership of two or more modes.

* Professor, and Director of the Business Law Program, Osgoode Hall Law School of York University, Toronto; Chairman of the Council and Acting Director of the York University Transport Centre; B.A., LL.B., University of British Columbia; B.C.L., Oxford University, England; of the Bars of British Columbia and Ontario.

1. Busses compete for passenger traffic.

The modern competitive climate in land freight traffic in Canada is generally considered to have developed only in the last twenty years.

> If there is any purpose served by putting a date on the emergence of our modern competitive transportation era it could be said that the events of August 1950, when a nation-wide rail strike tested the capabilities of the alternative forms of transport available, gave clear evidence that a breakthrough had been made and that the railways had finally lost the monopolistic position in Canadian transportation which they had maintained for almost a century.[2]

The 1961 Report of the Royal Commission on Transportation dealt at some length with railway company expansion into trucking and concluded that there was little, if any, cause for concern about this development if proper safeguards were imposed. Although the Royal Commission's conclusions do not constitute a statement of government policy, one can infer from the development of extensive trucking operations by the Canadian National that the Commission and the government were of one mind on this question. In the first volume of the Report, issued in March, 1961, the Commission stated:

> Another trend in transportation that certainly deserves serious consideration is the movement of the railways themselves into the trucking business. Initially this action was viewed in terms of a marginal operation on the part of the railways in their effort to improve and integrate their services—pick-up and delivery, short-haul feeder operations, substitute services, etc. Now, however, the railways are into the trucking business on an impressively large scale—the Canadian Pacific Railway in fact, owns or controls one of the largest trucking fleets in Canada, while the Canadian National has recently bought up several good-sized trucking lines and appears to be in the trucking business to stay. The implications of this trend are complex and difficult to assess. The railways view it as a natural development in response to competitive forces which, by integrating their transport services, will improve both their competitive position and the transportation services available to the public. The truckers, on the other hand, fearful of the very great financial resources of the railroads, have claimed that it represents a potential return to a monopoly era in transportation—once the railways have achieved a dominant position in trucking, say the

2. Report of the Royal Commission on Transportation, Ottawa, Queen's Printer, 1961, vol. I, p.4.

> independent truckers, the competitive stimulus in transportation now provided by this form of carrier will disappear. While there is cause for concern, certainly, in this trend toward a sort of "transportation supermarket", owned and operated by the railways, it would appear that the economics of the trucking industry, unlike that of the railways, inhibit the likelihood of monopoly tendencies becoming pervasive and, in particular, the ever present alternative provided by private trucking would seem to rule out the possibility of a re-emergence of a monopolistic transportation environment dominated by the railway companies. We would also assume, on the basis of our experience during this investigation, that the virile and articulate trucking industry, through its Associations, should be able to alert the public and the federal authorities in the event of cases of restraint of trade arising from this source.[3]

The Commission was even more definite on the point in the second volume of the Report issued in December, 1961.

> It is also likely that the business corporations who must face such specialization and possible retrenchment will seek to diversify by branching into investment in other modes. Railway company purchase of truck lines is the obvious example. We conclude that, in the environment of public investment in road building which has been developed at an increasing rate, it is normal for management in transportation to attempt to invest in resources where the larger proportion of costs are escapable. Railway companies are transportation entrepreneurs. As such, if their considered policy is to transfer resources and initiative to road hauling or to a combination of road and rail, there is no good reason why it should be inhibited by the National Transportation Policy. Arbitrary attempts to limit the possible growth of economic power by limiting conditions of ownership in the various modes we regard as unwise, for reasons set out in Chapter 3.[4] Such limitations can inhibit the withdrawal of investment from the less efficient mode, introduce rigidities into transport investment and delay the integration necessary for movements by two or more modes when efficiency calls for it.[5]

3. *Ibid.*, p. 11.
4. Reproduced below.
5. *Ibid.*, vol. II, pp. 20 and 21.

* * *

One final comment is appropriate in this chapter dealing with satisfactory competition. Representations have been made to us concerning the possibility of the great resources of the railways being used to assert a monopoly position in the trucking industry.[6] We are satisfied that already these resources have made the two largest railway companies between them the largest owners of truck fleets in Canada.

What reasons are set out for this fear? We can find no evidence that this large ownership will, except for very short periods, lead to higher prices for truck transport. Such a brief windfall can exist for any truck owner. If the danger is real, the principles enunciated below for significant monopoly can be applied, and the restrictive trade practices legislation invoked.

We have stated that, with free entry, and the ever present possibility of private trucking, the structure of the trucking industry is such that effective monopoly in prices cannot persist. With competition thus protecting shippers, the only other disadvantage of large-scale railway ownership of truck lines lies in the danger that it poses to independent truckers. This danger can only persist if railway ownership is more efficient than either independent or private trucking. Efficiency should not be penalized.

We re-emphasize also that, in the environment of increasing public investment in road building, it is normal for management in transportation to attempt to invest in resources where the larger portion of costs are escapable.

However, railway ownership of truck lines involves two policy recommendations concerning this diversification. The first concerns the real economic advantages of combining road and rail facilities. To the extent that these exist, railways must be required to offer to all truckers rail facilities at prices and under conditions the same as are offered to rail-owned trucks. When a trucker decides to use rail facilities for part or all of the distance, he is a shipper and should have the right to come before the Board of Transport Commissioners in that capacity, either singly or jointly with others. In order that the Board may determine the realities of any inter-carrier discrimination, railway companies, by virtue of being truck owners, must be required to make fully available to the Board the

6. Original footnote: "The establishment of realistic prices for capital to the publicly-owned railway is particularly important in the purchase of truck lines."

pertinent cost and revenue data including, particularly, costs of capital.

The second recommendation concerns the possibility of hidden subsidies from rail assets or income to trucking operations, or *vice versa*.

The Board must be given authority to require the railways to keep strictly separate accounting of their operations inter-modally. The costing section of the Board of Transport Commissioners must be able, at all times, to provide the Commissioners with pertinent cost separations for rail and road operations of the railway company. Undoubtedly this will require initial and recurring changes in the Uniform Classification of Accounts, to keep them applicable to costing operations rather than for strictly balance sheet requirements.

Under these conditions, and with the publicity attendant upon the discovery of revenue transfers, and the possibility of legislative or regulatory restraint, we see no reasons to limit the entrance of railway companies into any other mode of transport. The experience of other countries with such restrictions does not encourage us to recommend it in Canada.

The trucking industry

It is estimated that there are about 12,000 for-hire carriers in Canada, 11,000 of which have gross operating revenues of less than $100,000.[7] The Canadian Trucking Association comprises about 7,000 members in its constituent associations. In 1967, 57,000 people were employed in the for-hire sector of the trucking industry in establishments employing over 20 persons, including household moving and storage personnel. A Dominion Bureau of Statistics survey in June of the same year revealed a further 41,000 persons in firms with less than 20 employees. In addition, there are about 10,000 working proprietors in the industry. It is therefore apparent that the Canadian trucking industry as a whole is characterized by a large number of relatively small operations. However, estimates indicate that some 240 carriers accounted in 1966 for 73% of

7. Most of the statistical information about the industry is taken from "Trucking in Canada, 1957-1967", a paper presented at the annual meeting of the Canadian Trucking Association, June, 1969, by Earl T. Steeves, Chief, Transportation Section, Transportation & Public Utilities Division, Dominion Bureau of Statistics, Canada. A second paper with the same title was presented by Mr. Steeves at the 43rd Annual Convention of the Automotive Transport Association of Ontario, Toronto, November, 1969.

the total revenues earned by all for-hire motor carriers and that the top 50 carriers accounted for almost half the total freight revenue.[8]

Although for-hire trucks made up only about 6% of the 1.1 million trucks and road tractors licensed in Canada at the end of 1967, the D.B.S. survey indicates that for-hire trucks account for approximately half the total trucking activity in Canada. This estimate is based on "capacity-ton miles", that is, total number of miles travelled multiplied by the estimated capacity or the weight of the heaviest load carried, whichever was larger. For-hire trucking grew substantially in the 10-year period, 1957-1967. The tonnage carried increased an average of 5% per year. For-hire trucks in 1967 carried 220 million tons of freight compared to 128 million tons 10 years earlier and ton-miles more than doubled in the ten-year period to 14 billion. Private intercity trucking changed hardly at all during the 10-year period, although private urban trucking showed an increase of 50% over the decade. Forty percent of the tons carried in 1967 were accounted for by urban-area movements. The urban proportion of ton-miles was only 6%.

The relative position of intercity trucking in comparison with other modes of transport in Canada is indicated by the fact that intercity tonnage (including private carriers) amounted to 285 million in 1967 compared with rail tonnage of 249 million tons. However, measured by ton-miles, railways account for 41% and trucks about 10%. Water and pipelines are about equal at 24-25% and air is less than 1%. It is generally agreed that the factors which contributed to the growth of trucking in Canada in the past will continue to sustain a good rate of growth for the industry.[9]

There are no very useful data available with regard to the types of carriers and the work they do. Provincial regulations are not uniform in licence classifications and it is therefore difficult if not impossible to make a comprehensive national survey distinguishing general commodity common carriers, specialty carriers, contract carriers, etc. Data of this sort will be essential for any precise evaluation of concentration and competitive factors in the industry.

There is a common assumption that there is a high rate of consolidation in the trucking industry. The available statistics do not bear this out, at least when one has reference only to the number of firms involved. The information is not yet available upon which one might

8. Maclaren, "Shippers will benefit", Canadian Transportation and Distribution Management, Southam Business Publications, Toronto, November, 1968, p.23, 24.

9. See Steeves, *ibid.*

form a judgment as to the rate of concentration in terms of gross revenues or other indicia of market share.

A study recently published by the Economic Council of Canada shows relatively little merger activity in the period studied.[10] The pertinent Dominion Bureau of Statistics industry classification is "transportation, communications and other utilities"[11] and the study distinguishes between foreign mergers and domestic mergers.[12] The study defines a foreign acquisition as one in which a foreign-controlled company, with or without Canadian operations either directly or through a Canadian subsidiary, acquires a company or division in Canada. The purchase of a company or division in Canada by a Canadian-controlled company is defined as a domestic acquisition. Both definitions apply regardless of the nationality of the ownership and control of the acquired company prior to the acquisition. The study states that "in most cases the acquired company has been owned and controlled by Canadians, but in a significant number of cases—18% of the foreign acquisitions and 6% of the domestic acquisitions—the acquired companies had been under foreign control".[13] The study also uses the term "international mergers" which I assume to refer to foreign mergers as defined.

The total number of domestic mergers in the industry classification was 109 for the 17-year period. During the same period, there were 27 foreign acquisitions. The annual figures show no particular distribution, although the statistics for domestic mergers do indicate more mergers toward the end of the period studied. In the foreign merger classification, the largest number was recorded in 1956 with 9. There were 4 in 1955, 4 in 1954 and 3 in 1961. In several years, there were none reported and in the other years there was only 1 per year. Figures for the characteristics of acquiring companies showed a total of 27 companies in the transportation field under the heading of foreign mergers and 102 under the heading of domestic mergers.

The foregoing information was collected through the instrumentality of an official enquiry under the Combines Investigation Act. Some further pertinent conclusions about the nature of the business and the relative sizes of the companies involved might be extracted from the data, but they are not yet available.

10. Reuber and Roseman, *The Take-Over of Canadian Firms, 1945-1961: An Empirical Analysis*, Ottawa, Queen's Printer, 1969.

11. These figures are, of course, not strictly comparable to those for trucking alone but, being the best available, they give some indication of the dimensions of the merger activity.

12. *Ibid.*, p.12. The words "merger" and "acquisition" are used interchangeably.

13. *Ibid.*, p.13.

A study prepared for the MacPherson Royal Commission on Transportation[14] summarized concentration in the industry to the date of the Report and concluded that in 1960

> the degree of concentration in the for-hire trucking industry in Canada was still not large, though the over-all CPR organization was approaching a dominant position.
>
> This relatively small degree of concentration was evident in the results of the survey of trucking firms. The survey included some of the largest scale for-hire operators in the industry. The five largest of these handled only about 2.8 per cent of the tonnage hauled by all Canadian for-hire trucks in Canada in 1959. [not including CPR and CNR trucking operations] This level of concentration may be attributed partly to the stage of development of the trucking industry in Canada. But, in addition, the possibilities for profitable large-scale operations were indicated to be fairly limited.[15]

For the period since 1961, there are no statistics comparable to those of the 1945-61 study. The Office of the Director of Investigation and Research under the Combines Investigation Act maintains a merger register in which is compiled information drawn from published sources such as the financial press. The merger register records some 38 transportation mergers in the period since 1961, of which 36 involved acquisitions of trucking firms. Information has not been compiled respecting the size and market share of the companies involved, the type of service involved, or other factors which might be pertinent to a judgment regarding impairment of competition.

The over-all picture is so unclear as to be hardly useful in assessing concentration and competition in the trucking industry in Canada. Although there is some information, as noted above, about concentration in the industry over a 25-year period, there is no information to which it can be related about any of the relevant markets within which the carriers operate. In particular, there is no information about the number of new operators who have come into the industry in the period with which might be compared the number of operators who have disappeared from the industry either through having been acquired or through bankruptcies and other situations which may result in

14. "Truck-Rail Competition in Canada", by D.W. Carr and Associates, Report of the Royal Commission on Transportation, Ottawa, Queen's Printer, 1962, vol.III, p.1.

15. *Ibid.*, p. 43.

liquidation of a business. Nor are there any precise data about the market impact of the more obvious concentrations which have been developed during the post-World War II period. This span of years has seen the growth of both the Canadian Pacific and Canadian National intercity truck fleet.

It will be useful to distinguish four general classes of mergers pertinent to the Canadian scene, namely, intra-modal, multi-modal, conglomerate and acquisition of Canadian operations by foreign interests. The data described above, sparse as they are, probably related principally to intra-model concentration. Apart from the one or two cases revealed in the annual reports of the Director of Investigation and Research under the Combines Investigation Act (referred to below), there is little evidence of impairment of competition. However, this statement may just be a reflection of the paucity of evidence, rather than an accurate indication of the state of competition in the relevant markets. Even if one were to double the number of takeovers reflected in the available statistics, it would still not represent a large number in relation to the total number of independent trucking operations in Canada. However, as noted, there is no published information assessing the size and market impact of the concentrations that have occurred.

With regard to multi-modal mergers, I have already noted the development of the very large Canadian National and Canadian Pacific highway transport operations. These companies operate, as is well known, the two trans-continental rail systems in Canada and their intercity highway transport fleet places them among the largest truck operators in North America. In addition, they operate the two-trans-continental airlines in Canada and both airlines have extensive overseas operations. The foregoing description is not intended to be in any way a statement about coordination of the several modes of transportation within these companies. It is commonly understood that the Canadian Pacific system operates on a profit-center basis and it has been often oberserved that the trucking fleets of both companies compete in some instances with their own rail services. It is also commonly understood that both companies offer their services to all truckers for piggyback ("T.O.F.C.") operations without discrimination.

Evaluation of the advantages of multi-modal operations is beyond the scope of this paper. Suffice it to say for present purposes that the Canadian transportation scene is characterized by the existence of two very large rail-highway-air multi-modal operations. There is also at least one major ship-road multi-modal operation: the Canada Steamship Lines-Kingsway Transport system. The Kingsway operation covers

points between and including Quebec City on the east and Vancouver, British Columbia, on the west and in its eastern regions parallels the St. Lawrence Seaway and Great Lakes systems which are served by Canada Steamship Lines. Again, the foregoing is intended only to be a factual statement and not to imply any judgment with regard to the competitive impact of the system. If a study of that impact has been made, it has not been published.

The picture regarding conglomerates does not have any particular characteristics. Recent reports have noted a few of significance, for example, the 1968 acquisition of Direct Winters Transport Limited by Fuqua Industries, Inc., which operates the Interstate Motor Freight system in the United States. Neonex International Limited, a Canadian-based conglomerate, has made a couple of trucking acquisitions which give the company substantial trucking capacity between the west coast and points in the St. Lawrence area. There may be others, but reports of them are not readily available.

Concern is expressed from time to time about acquisitions of Canadian operations by non-Canadian interests. As noted above, the 1945-61 study of the industry disclosed 27 such acquisitions in the classification "transportation, communications and other utilities" for the 17-year period and the merger register maintained by the Office of the Director of Investigation and Research under the Combines Investigation Act for the period since 1961 discloses acquisition activity by about half a dozen American companies. Again, it has to be stated that the readily available information is far from complete and more data are required before a judgment can be made about the acquisition activity in the Canadian trucking industry by non-Canadian interests.

The Combines Investigation Act

The Combines Investigation Act[16] prohibits mergers and acquisitions "whereby competition is or is likely to be lessened to the detriment or against the interest of the public."[17] A merger offense must relate to a "business" which is defined in the Act as "the business of manufacturing, producing, transporting, purchasing, supplying, selling, storing or dealing in articles".[18] A fine in the discretion of the court may be imposed in addition to or in lieu of imprisonment[19] and further

16. Revised Statutes of Canada, 1952, c. 314, as amended.
17. *Ibid.*, s.33 and s. 2 (e).
18. *Ibid.*, s. 2(a).
19. Criminal Code, ss. 622 and 623.

commission of the offence may be enjoined and the merger dissolved.[20] The merger provision clearly applies to the transportation industry.[21]

There have been only two significant court decisions involving the predecessor to the present merger section and none under the section as it stands in the present Act.[22] The predecessor section contained the same essential element of detriment to the public and in both cases the court determined as a matter of fact that the mergers in question did not operate against the public interest. Neither of the cases involved transportation enterprises directly and neither of the cases proceeded beyond the trial division. However, the annual reports of the Director of Investigation and Research under the Combines Investigation Act indicate that the merger provisions of the Act are not without effect.[23] The existence of the anti-merger provision may, depending upon the circumstances, operate to deter business activity which might otherwise be thought desirable in terms of acquisition and development of larger units in the transportation industry and it is, therefore, an important element in the legal framework within which transportation enterprises operate. As with the other provisions of the Combines Investigation Act, the anti-merger provision applies generally to extra-provincial and intra-provincial undertakings.

In the two leading merger cases, the findings of fact indicated that the judges applied a test requiring a very high degree of limitation of competition before the borderline of legitimate activity has been crossed. In the *Manitoba Sugar* case,[24] the mere possibility of competition from eastern sugar producers was held sufficient to protect the interest of the public, as required by the Combines Investigation Act.

It may also be significant that there have been relatively few merger prosecutions instituted by the Attorney General of Canada.[25] However,

20. Combines Investigation Act, s. 31.

21. For a full discussion of the merger provisions, see D.H.W. Henry, "Mergers in Canada Under the Combines Investigation Act", 5 Texas International Law Forum 1 (1969).

22. *Regina v. Canadian Breweries Ltd.* [1960] O.R. 601 and *Regina v. British Columbia Sugar Refining Co. Ltd.*, 32 W.W.R. (N.S.) 577 (1960). Electric Reduction Company of Canada Ltd. recently pleaded guilty to monopoly and merger charges in connection with the industrial phosphate industry, was fined $40,000 and prohibited for 12 years from making contracts running more than one year with customers or suppliers. Source: News reports Jan. 13, 1970.

23. Annual Reports of the Director of Investigation and Research under the Combines Investigation Act, Ottawa, Queen's Printer. The last report is for the year ended March 31, 1969.

24. *R. v. B.C. Sugar Refining Co. Ltd., supra.*

25. The Director's annual report for 1969 records that two prosecutions charging, *inter*

the possibility of an inquiry by the Director of Investigation and Research, acting under his statutory duty to do so if he concludes that a violation of the Act is being or is about to be committed,[26] undoubtedly operates as a substantial deterrent to merger activity which might approach the border line. The prospect of having records seized and copied, and executives, business associates and even competitors interrogated under the broad investigatory power conferred on the Director of Investigation and Research[27] is sufficient to discourage a prospective merger even if the parties are reasonably satisfied that their proposed activity does not violate the Combines Investigation Act.

In his 1966 Annual Report, the Director sets out the sort of information that the Combines Branch looks for in attempting to assess the significance of a particular merger.[28]

> 1. Is there a sensibly defined product for which there are no close substitutes?
>
> 2. Is there evidence that a substantial market (even though this may be regional) is likely to be affected by the merger and is capable of fairly unambiguous definition?
>
> 3. In the absence of competition among domestic suppliers, is there evidence in the form of a substantial tariff or statistics showing that only a small proportion of the market is supplied by imports, that foreign suppliers cannot be looked to, to protect the public?
>
> 4. Is there reasonable assurance that there is no significant government regulation?
>
> 5. Is there evidence that existing concentration ratios are high or that there is a large size-differential between the acquiring company and its rivals?
>
> 6. Is there evidence that the barriers to entry in the industry are high or that they will be raised by the merger or that new firms have not in fact entered the industry for some significant period of time?
>
> 7. Is there evidence that competition remaining in the market is likely to be ineffective?
>
> 8. Does the acquiring firm have a history of growth by merger

alia, illegal mergers are presently under way. Report of the Director for the Year Ended March 31, 1969, p.37. One company has pleaded guilty.

26. Combines Investigation Act, s. 8.

27. *Ibid.*, sections 9, 10, 11 and 12.

28. At p. 19. The Director has often repeated this list in public statements. See the article referred to in footnote 21, at pp. 5 and 6.

or a history of coercive or predatory action or any other anti-competitive behaviour?

9. Is there any evidence of intent to reduce competition or to dominate the industry?

10. Is there any likelihood that there will be foreclosure of an important market or source of supply to firms unconnected with the acquiring company?

11. To what extent is there evidence of a real possibility of increased efficiency via economies of scale or the transfer of assets from incapable into capable hands?

12. Is there direct evidence of detriment such as excessive profits or price enhancement following the merger?

He went on to explain the position that he had taken in rejecting the "virtual-monopoly test" of detriment to the public that some counsel had drawn from the available judicial authorities on the subject.[29]

In his annual reports, the Director records in summary form his disposition of merger matters and proposed mergers which have come to his attention either through the program of compliance or otherwise. The latest annual report refers to a proposed acquisition by a specialized carrier of three of its competitors, notice of which was given to the Director of Investigation and Research under Section 20 of the National Transportation Act.[30] The Director reports that the acquiring company held authorities permitting transportation of the products of the industry which it serves from Ontario to the three prairie provinces and British Columbia. Each of the acquired companies held similar authorities with respect to the transportation of these goods from Ontario to the relevant provinces and also between certain of the four western provinces.

> Information obtained from one of the major customers served by the acquired companies indicated that developments in railway transportation in recent years had led to the use of railway transportation for movement of its products to off-loading points in each of the four western provinces from which haulaway truck transportation was used to distribute these products throughout the provinces. This same customer indicated some concern about monopolization within the motor vehicle transportation sector servicing it. Information received from other major customers using this particular transportation service confirmed the use of

29. See also the discussion in the recent article (footnotes 21) at pp. 26-28.

30. Report, pp. 45-46.

railway transportation as indicated above. These customers also indicated the existence of alternative haulaway truck companies offering their services in each of the four western provinces. This was also confirmed by information in the Trade Directories published by the motor vehicle transportation industries.

After taking account of the three acquisitions by the acquiring company, there remain four additional alternative shippers in Manitoba, three in Saskatchewan, two in Alberta and three in British Columbia besides the acquiring company. With respect to British Columbia; two of the alternative shippers were active primarily in the Vancouver area.

It was clear that this sector of the motor vehicle transport industry was becoming quite concentrated, doubtless in part as a result of the changes in railway transportation noted above. Moreover entry to the industry was unlikely to be easy due to heavy investment in specialized equipment. However, the major customers for the specialized transportation service include several of the largest manufacturing companies in Canada. They possess very considerable bargaining strength which would be sufficient to minimize and probably eliminate any monopoly profits which might be accruing to the specialized shippers. It was concluded that the available evidence would not support an allegation of a merger offence and the inquiry was discontinued. This was reported to the Minister on March 27, 1969.[31]

The Director's conclusion appears to emphasize the bargaining strength of the customers, rather than the potential for continuing competition among the carriers. His conclusion that the available evidence would not support an allegation of a merger offence is undoubtedly a reflection of the two decided cases.[32]

However, the Director's Report goes on to refer to five other merger proposals involving in each case firms which were members of a highly concentrated industry of very small numbers.[33] The firms involved were also leaders in their field. In each case the Director concluded that the consummation of the proposed mergers would result in the commencement of a formal inquiry and the consulting manufacturers each indicated after such notification by the Director that the merger proposals had been abandoned. It cannot be assumed therefore that the

31. *Ibid.*, p. 46.
32. See footnote 22.
33. *Op. cit.*, p. 46.

Combines Investigation Act is without teeth. Although the transportation merger was permitted to proceed without interference by the Combines authorities, the five other proposed mergers (about which we have very little detail) were in effect prevented by the existence of the statutory prohibition against certain mergers.

The Director mentioned in his 1967 Report a complaint by a company operating in a specialized field of transportation of measures used by the largest company in the field allegedly to restrict and discourage the entry of new firms into the industry. After considerable investigation, the Director concluded that the most important barriers against new companies entering this field had not been due to the activities of the company complained about, but rather to the nature of the service itself. In addition he concluded that the major customers in the field were in effect potential competitors in the event that the carrier should attempt to abuse its monopoly position. He therefore concluded that the matter did not justify further inquiry.

The Director's report of March 31, 1969 discloses that he entertained with regard to Section 33 of the Act three inquiries in 1965, four in 1966, seven in 1967 and seven in the first nine months of 1968. His report also discloses that in the same period inquiries with regard to Section 33 of the Act (total of 21 inquiries) included 18 from manufacturers and the balance of 3 were classified as "other or unspecified" as distinct from being from manufacturers, wholesalers or retailers. There were apparently no inquiries with regard to proposed mergers in 1964. The report further discloses that of the 21 inquiries with reference to Section 33 of the Act, 11 were given qualified approval and 6 were given qualified disapproval. The other 4 could not be categorized. The compilation of information regarding Section 33 starts with the year beginning April 1, 1963.[34]

This listing of inquiries does not include general requests for information which were not related to actual or proposed business activities and those which were really complaints of infraction. In view of the number of acquisitions and mergers consummated in recent years, the consultation covered only a small portion of the growing concentration of industry.[35]

34. Report for the Year Ended March 31, 1969, pp. 16-20.

35. The total numbers recorded in the merger register are shown at p.31 of the 1969 Report.

Provincial regulation operating as an exemption from the Combines Investigation Act

One of the two merger decisions is significant in respect of the relation between the Combines Investigation Act and provincially regulated activities. One of the bases for the decision of the court in *R. v. Canadian Breweries Ltd.*[36] was that the Liquor Control Board of Ontario had the duty and power to regulate the price and other aspects of the distribution of beer and therefore the price, as fixed by the L.C.B.O., and other regulated activities could not be deemed to be contrary to the public interest. Put another way, the proposition is that, for the purposes of the Combines Investigation Act, it must be assumed that the public interest is protected by the provincial regulatory agency. Since by definition a prohibited merger is one whereby competition is or is likely to be lessened to the detriment or against the interest of the public, a merger of enterprises in an industry controlled by provincial legislation is in effect free of the anti-merger provision of the Combines Investigation Act, at least in respect of regulated activities.

In his Annual Report for the year end of March 31, 1969, the Director of Investigation and Research deals with the relation between the Combines Investigation Act and other legislation controlling certain competitive activity, as follows:[37]

> To the extent that the controls which may have an effect on competitive patterns are imposed pursuant to valid special legislation, the position is generally taken that the Combines Investigation Act does not apply. In *Container Materials, Ltd., et al. v. The King*, Mr. Justice Kerwin (as he then was) said: "the public is entitled to the benefit of free competition except insofar as it may be interfered with by valid legislation. . ."

In a recently published article, the Director states

> It may be observed that, in the *Beer Case*, once it was established that the brewing industry was regulated by the provincial boards under valid provincial legislation, it was accepted that *pro tanto* its operations did not fall within the scope of the Combines Investigation Act. This is consistent with views expressed on several occasions by the Supreme Court of Canada. This would be

36. [1960] O.R. 601 (Ont. High Court).
37. Report, pp. 9-10.

> sufficient to dispose of that case, any arguments with respect to market shares and concentration being thereafter irrelevant.[38]

The precise relation between the Combines Act prohibitions and regulated activity (whether under provincial or federal jurisdiction) has not been defined.

Recommendations of the Economic Council of Canada: Interim Report on Competition Policy, July 1969[39]

The transportation industry may be affected by changes which may result from the recently published recommendations of the Economic Council. These are recommendations only and there has been no indication with respect to government policy. The Report covers a number of points touching on the regulated industries such as transportation, as well as dealing with general competition policy.

The Economic Council concludes that the objective of Canadian competition policy should be the encouragement of economic efficiency, and the Council assess the current legislation by that test.

> It is unlikely that the Act has done much to affect efficiency via changes in the structure of the Canadian economy. The main claim that might be advanced is that the banning of resale price maintenance has probably encouraged the entry into some sectors of price-cutting retailers. It is possible too that other prohibitions of conduct in the Act may have had some indirect effects on economic structure. But in respect of corporate mergers, which are one of the most important means by which changes in industrial concentration and other dimensions of economic structure take place, the Act has been all but inoperative. The only two cases brought to court under the merger provision (the *Canadian Breweries* and *Western Sugar Refining* cases) were both lost by the Crown, and were not appealed. There may have been certain deterrent effects in this area (the Director's *Annual Reports* indicate that some prospective mergers have been abandoned following consultations under the "program of compliance" discussed below), but the Crown's lack of success in the courts has presumably limited the amount of deterrence achieved.[40]

In minimizing the impact of the Combines Investigation Act with

38. *Loc. cit.*, footnote 21, pp. 24-25.
39. Ottawa, Queen's Printer.
40. *Ibid.*, p. 64.

regard to mergers, the Economic Council appears to depart from their own test of relevance, namely, whether the competition policy has promoted economic efficiency. To be relevant to their own test, they should have concluded that the lack of effective deterrence of merger activity has adversely affected economic efficiency or, put another way, that the merger activity which has occurred has had an adverse effect on economic efficiency.

The Council deal at length, but not definitively, with the implications of concentration through mergers and acquisitions, particularly in the chapter on the "Structural Aspects of Canadian Industry".[41] Their conclusion and recommendation is that a Competitive Practices Tribunal should be set up to examine mergers that appear to contain a significant potential for harm. The Council further stipulates eight considerations that would be applied by the Competitive Practices Tribunal to determine whether a particular merger was likely to lessen competition to the detriment of consumers or whether there was likely to be any offsetting benefit.[42] The eight heads amount to a very wide range of relevant factors to be considered by the proposed tribunal. The tribunal would be empowered to block a merger unconditionally, allow it to proceed unconditionally, or allow it to proceed in altered form or subject to conditions designed to insure that potential disadvantages were reduced to the point where they were outweighed by potential good effect.[43]

National Transportation Act—regulation of acquiring companies

The National Transportation Act requires a transportation company subject to the legislative jurisdiction of the Parliament of Canada to notify the Canadian Transport Commission if it "proposes to acquire, directly or indirectly, an interest by purchase, lease, merger, consolidation or otherwise, in the business or undertaking of any other person whose principal business is transportation, whether or not such business or undertaking is subject to the jurisdiction of Parliament".[44] The Commission is required to give or cause to be given such public or other notice of any proposed acquisition as appears to be reasonable in the circumstances, including notice to the Director of Investigation and Research under the Combines Investigation Act.[45] If any person affected

41. *Ibid.*, p. 73.
42. *Ibid.*, p. 116.
43. *Ibid.*, p. 114.
44. National Transportation Act, Statutes of Canada, 1966-67, c. 69, s. 20(1).
45. *Ibid.*, s. 20(2).

by a proposed acquisition or any association or other body representing carriers or transportation undertakings affected by such acquisition object to such acquisition on the grounds that "it will unduly restrict competition or otherwise be prejudicial to the public interest",[46] the Commission is required to make an investigation and it may disallow any such acquisition if in its opinion "such acquisition will unduly restrict competition or otherwise be prejudicial to the public interest".[47] The disallowance power can operate only if the acquirer is within federal jurisdiction. It cannot be used directly to prevent acquisitions by trucking companies operating only intra-provincially, nor does it apply to Canadian or foreign acquirers who are not in the transportation business. Moreover, it does not appear to cover a holding company that is not itself directly in the transportation business.

It will be noted that the Commission may act under section 20 only if objection to the acquisition is made by certain specified persons or associations. It may not act itself in the absence of such objection; nor does inaction by the Commission or its failure to disallow an acquisition when objection has been received amount to approval of the acquisition. The National Transportation Act does in section 16 give to the Commission wide power to investigate acts of carriers which it thinks may prejudicially affect the public interest, but the purport of the section seems to be confined to rate-making activity. Further, the specific mention of acquisitions in section 20 might be taken to exclude that subject matter from the operation of section 16.

Those required to report a proposed acquisition include "a person operating a motor vehicle undertaking"[48] and "person" clearly includes an individual or a corporation. There is a statutory definition of "motor vehicle undertaking",[49] but there is no indication as to whether the undertaking is limited to the operation itself or whether it is broad enough to encompass the total corporate structure a part or all of which is engaged in transportation. The acquisition of an indirect interest is covered in section 20 and it might properly be inferred from the omission of any such extended definition with regard to an acquirer that it is only a company or individual directly operating a motor vehicle undertaking within the jurisdiction of the Parliament of Canada that is required to give notice under that section. Further, section 20 refers specifically to acquisitions by "railway companies" etc., which are pretty clearly

46. *Ibid.*, s. 20(3).
47. *Ibid.*, s. 20(4).
48. *Ibid.*, s. 21.
49. *Ibid.*, s. 3(d).

defined terms, and the specific reference to the operating company would lead to the inference that, although the reference to a person operating a motor vehicle undertaking is possibly broader in scope, it is intended to be confined to the operating companies or individuals. Whatever the constitutional or other justification for the limited scope of section 20, the fact of the limitation has to be noted in assessing the effectiveness of the Commission's review power under that section. The limited scope of section 20 is important because the result of the limitation is to bring under review by the Canadian Transport Commission only acquisitions by the named companies and not others. Therefore, a proposed acquisition by a company not now in the transportation business is clearly not covered nor, as indicated, is it clear that the section covers acquisitions by a holding company, least of all a conglomerate.

The provisions of the National Transportation Act do not specifically derogate from the general effect of the Combines Investigation Act and the duties of the Director of Investigation and Research under that Act. Whether or not objection is received to a proposed acquisition of which notice is given under section 20, it would appear that the Director of Investigation and Research would be free to consider the acquisition as he would any other acquisition. Indeed, it would be his duty to do so. However, the only objection the Commission may consider is that the proposed acquisition "will unduly restrict competition or otherwise be prejudicial to the public interest". Although the Commission is not required to disallow such acquisition even if in its opinion such acquisition will unduly restrict competition or otherwise be prejudicial to the public interest, it is hard to imagine a situation in which the Commission would decide not to disallow an acquisition but where it would still be appropriate for the Director of Investigation and Research to act against the acquisition under the Combines Investigation Act. There still appears to be some uncertainty with regard to the role of the Commission and of the Director, particularly in a case where objection has been filed and the Commission has determined not to disallow a proposed acquisition.[50]

Federal regulation of acquired companies

The Canadian Transport Commission would have the power under Part III of the National Transportation Act to make regulations "prohibiting the transfer, consolidation, merger or lease of motor vehicle undertakings except subject to such conditions as may be prescribed by

50. See the Report of the Director for the Year Ended March 31, 1968, pp. 17-18.

such regulations."[51] This power is not in force, but the Minister of Transport has announced the Government's intention to implement federal regulation at an early date.[52] There is as yet no indication as to how much of the possible federal jurisdiction will be assumed, nor whether regulations will be promulgated to deal with acquisition of federally regulated motor carriers. The broad power of this provision contrasts with the relatively limited scope of section 20 discussed above.

A similar power to control transfers of commercial air services is conferred upon the Commission under the Aeronautics Act.[53] The question of acquisition of control through publicly traded shares is not dealt with in the statutes, nor in the Commercial Air Services Regulations. The latter provide simply that no acquisition of control of any commercial air service or transfer of shares or capital interest that results in transfer of control shall be effective without the Commission's approval.[54]

Provincial regulation of acquisition of motor carriers

The power to regulate the transfer of control of motor carriers is conferred upon the provincial regulatory agencies by some of the provincial statutes. For example, the Ontario Public Commercial Vehicles Act prohibits the transfer of an operating licence without approval[55] and

> The Board may in its discretion require the directors of a corporation that is the holder of an operating licence to present to the Board for approval any issue or transfer of shares of its capital stock, and, where, in the opinion of the Board, a substantial interest is issued or transferred, such issue or transfer shall be deemed to constitute a transfer of all operating licences held by such corporation, and the corporation shall forthwith pay the fees prescribed by the regulations for the transfer of operating licences.[56]

It will be noted that the section does not require notification of the Board of a proposed transfer. Although the section is far from clear, it

51. Section 35(n).

52. Address to the Annual Convention of the Automotive Transport Association of Ontario, Toronto, November 25, 1969.

53. Revised Statutes of Canada, 1952, e.g., as amended, s. 13(e); Commercial Air Services Regulations, SOR/65-369, s.14.

54. *Ibid.*

55. Revised States of Ontario, 1960, c.319, as amended, s.4a and 10.

56. *Ibid.*, s. 5.

appears to give the Board power to disapprove any transfer of shares. Where the Board considers that a substantial interest is being transferred, fees applicable to the transfer of operating licences are payable. Looking at the section as a whole, one might infer that it was intended primarily to give the Board power to disallow only transfers of a substantial interest[57] which would be tantamount to the transfer of an operating licence. In any event, it is not broad enough to cover holding companies, nor does it deal with publicly traded shares.[58] Data are not readily available (if at all) on which to base a systematic analysis of the practice of the Ontario Higway Transport Board with regard to acquisition of motor carriers within its jurisdiction.

The Quebec Transportation Board Act contains the following broad provision:

> Any merger, sale or transfer of any transportation service, or any transaction, agreement or contract of such a nature as to bring about a change in the control of such service, must be previously approved by the Board, on pain of nullity.
>
> In the case of a transaction, agreement or contract relating, at the same time, to a transportation service and to other matters, the nullity enacted by this section shall apply only with respect to the transportation service.[59]

A recent decision of the Quebec Transport Board[60] reviews several decisions of the Board, including the 1958 decision the result of which was that the intra-provincial operation of H. Smith Transport Ltd. was separated from the inter-provincial operation, Smith Transport Ltd., controlled by Canadian Pacific Railway Co. The instant case involved the proposed transfer to Smithsons Holdings Ltd., a wholly owned subsidiary of Canadian Pacific, of 51 per cent of the shares of H. Smith Transport Ltd. The balance of 49% was already owned by Smithsons. The Board approved the transfer and, in the course of its Order, relied on the recommendations of the MacPherson Royal Commission.[61] The

57. There is no guidance to the Board in the statute or regulations as to what constitutes a "substantial interest".

58. See Sommerville, "Dialogue: On Growth", Truck Transportation, Mil-Mac Publications, Toronto, July, 1969, pp.15 and 23.

59. Revised Statutes of Quebec, 1941, c. 16, as amended, s.35.

60. Bruce Smith, Theodore Smith, Harry Smith (Petitioner-Vendors) and Smithsons Holding Ltd. (Petitioner-Purchaser) and H. Smith Transport Limited (Mise-en-cause), Quebec Transport Board Role M#1056, 1969.

61. Discussed *supra*, p. 114 *et seq.*

burden was on the opponents to show that the transfer of shares would be contrary to the public interest and this burden was not satisfied.[62] Reviewing the factors leading to its decision, the Board stated:

> . . . intra-provincial, interprovincial, international and inter-continental transport require a narrow [close] cooperation between all the modes of transport involved: highway, rail, water and air.[63]

Conclusion

Generally speaking, neither federal nor provincial laws and regulations distinguish between multi-modal,[64] intra-modal or conglomerate mergers or mergers involving non-Canadian interests. The "public interest" test is wide enough to enable the regulatory agency or other approving authority to draw any such distinction relevant to public interest, but there is as yet no indication of the development of a general policy by the regulatory authorities.

62. *Op. cit.*, p. 7.

63. *Ibid.*, p. 6.

64. Section 27 of the Canadian National Railways Act, Statutes of Canada, 1955, c.29, may restrict the authority of the Canadian National to acquire and operate motor vehicles only "in conjunction with or substitution for rail services under their management or control". This section was added in the 1955 revision of the Canadian National Railways Act. There is a general provision of the same Act, which was continued without alteration in the 1955 revision (s.31) which confers on the company a wide power to acquire, subject to the approval of the federal government, shares of any other transportation company and "any business which in the opinion of the Board of Directors may be carried on in the interests of the Company."