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Canadian Merger Policy and Its International Implications

ERIC K. GRESSMAN

The implications of Canadian merger policy are of deep concern to U.S. and other foreign investors who have invested or are considering investing in Canada. U.S. interests own 60 percent of Canada's manufacturing industry. In 1978, approximately 250 mergers in Canada involved a foreign-owned or foreign-controlled buyer (usually U.S.). Therefore, it is not surprising that Canada's merger policy is no less important to the decisions of foreign investors in Canada than the Justice Department's policies are to domestic investors in the United States. At the same time, the Canadian government and public are concerned with their merger policy as a means of regulating foreign acquisitions that affect the economic well-being of Canada.

Canadian merger policy is also important to explain the past and future trends of U.S. investment in Canadian industries, the effects of foreign investment in Canada, and the response of Canadian authorities to transnational corporate concentration within their economy.

This article is divided into four sections: (1) the pre-1970 history of Canadian merger policy, (2) the development of Canadian merger policy during the 1970s, (3) the international ramifications of early and recent Canadian merger policy, and (4) the future changes in Canadian merger policy and their probable effects.


Canadian Anti-merger Legislation

Despite the importance of policies generated by the Crown and the courts, a study of Canadian merger policy must begin with an examination of Canada's antitrust statutes. The statutory language prescribes the limits within which Canadian judges and prosecutors can act. In contrast to the U.S. experience, the impetus for the original antitrust legislation in Canada
came from small businessmen rather than from the general populace. In the late nineteenth century, Conservatives felt pressure from powerful agricultural interests that were angry over the rising prices of farm implements, which they viewed as a result of the domination of the farm implement industry by a few combines. In response, the Conservatives attempted to show their concern about the inflationary economic conditions brought on by combines. Acting without government support, Clarke Wallace, a Conservative member of Parliament, proposed the creation of a Select Committee to examine the practices of combines. Parliament agreed to the proposal and appointed Wallace to head the “Committee to Investigate and Report upon Alleged Combines in Manufacturers, Trade and Insurance” (the Committee). The Committee found that the evils caused by combines justified some form of legislation, but only mildly condemned the actual combines investigated. The Committee demonstrated more concern over nonmembers of combines than in protecting consumers. Subsequently, Wallace introduced a bill which met opposition from powerful business interests. When the Senate received the bill for approval, it weakened its provisions by inserting the condition that competition be “unduly” limited and prices be “unreasonably” raised. Though Wallace and his followers opposed these changes, they decided that a compromise bill was better than none at all, and although the statute did not specifically mention mergers, it did set the tone for all future merger legislation during this period. Perhaps the provision of S.C. 1889 relating to sanctions is most significant. The 1889 Act provided only for criminal penalties, in part because legislators felt civil penalties might be unconstitutional. Criminal sanctions remain at the core of Canadian antitrust law.

The deterrent value of the legislation’s misdemeanor sanctions is inconsiderable when compared to the treble damage sanction found in U.S. antitrust laws. Moreover, Canadian criminal law’s burden of proof further depletes the government’s arsenal against anticompetitive practices. The Crown must prove beyond a reasonable doubt that the defendant violated the statute. This burden favors the defendant far more than the preponderance of the evidence standard applicable to civil cases.

In addition to the statute’s heavy burden of proof, enforcement under the combines laws must meet the requirements of mens rea and strict construction. The mens rea standard increases the burden placed upon the Crown and renders conviction more difficult. Should the combines laws be reformed, legislation sufficiently specific to meet the standard of strict construction of criminal statutes must be implemented.

Aside from limiting antitrust actions to criminal prosecutions, the statute favors alleged violators by requiring proof that defendants have conspired, combined, agreed or arranged “unlawfully” to restrain trade, limit production, and so forth. The 1889 Act thus implies that corporations could engage in anticompetitive practices lawfully. In this respect, the Canadian statute is in sharp contrast to Section 1 of the Sherman Act, which provides that
"[e]very combination in the form of trust or otherwise, in restraint of trade . . . is . . . illegal" [emphasis added].11 The Sherman Act on its face thus leaves corporations less room than the Canadian anticombines act to argue that their anticompetitive practices are somehow legal.

Finally, the defendant is favored by the requirement that a combination must "unduly" limit production or lessen competition to be unlawful. The government must prove substantial detriment to competition. This provision provides the basis for arguments over the effect of a combination.12

During the first decade of the twentieth century a merger boom occurred in Canada, and the public and press began to connect mergers with the rising cost of living. In response to public agitation over the perceived economic consequences of mergers, Liberal Prime Minister Laurier and his assistant, MacKenzie King, proposed legislation with primarily investigative and publicity provisions. The 1910 Act was the first attempt to establish the necessary administrative machinery at the federal level to enforce the anticombines laws. Although the government attorneys in the provinces had authority before 1910 to prosecute corporations,13 these attorneys placed a low priority on prosecuting white-collar crime, and none of the companies responsible for the forty-seven mergers occurring from 1900–1909 were prosecuted.14

The statute, known as the Combines Investigation Act of 1910, provided that if six or more Canadian residents made an application, a judge would arrange a meeting between the complainants and the defendants. Following the meeting, the judge could order an investigation, demand more information before proceeding, or refuse to investigate. If the judge decided to investigate, the minister of labor would be informed, and an ad hoc board would be appointed. If an investigation found the defendants guilty of a violation,15 penalties, set at a maximum fine of $1000 a day and restricted to conduct occurring after the report is filed, were imposed. Moreover, the 1910 Act relied upon publicity as an official sanction of the government. The investigation report, upon which a violation would be founded, could also be published in the Gazette for public dissemination.

Although Parliament included mergers within the definition of combines, King emphasized that the 1910 Act was not an attempt to legislate against mergers. Aside from more specific language concerning mergers and the penalty provision, the 1910 Act was similar to that of 1889.16 In retrospect, the 1910 Act was ineffective in controlling concentration because there was no permanent machinery to enforce the board's decisions and citizens were reluctant to come forward to complain.17 Attorneys in the provinces were similarly ineffective. Of 160 Canadian mergers occurring from 1910 to 1922, none were prosecuted.18

In response to the continued high cost of living after World War I, Parliament passed the Combines and Fair Prices Act as well as the Board of Commerce Act. In doing so it set up the Board of Commerce (Board), and gave it investigatory and judicial powers.19 In 1921, after the Supreme Court
of Canada split upon the question of the Board's constitutionality, the Privy Council declared the statute to be *ultra vires*, characterizing the Board of Commerce Act as emergency economic legislation which was no longer applicable or necessary.\(^\text{20}\)

In 1923, MacKenzie King, now prime minister, helped pass the new Combines Investigation Act (Combines Act). This act essentially continued the policies of the 1910 legislation, but imposed new penalties and simplified administrative procedures. Under this legislation the process of forming a combine became an offense if it "operate[d] to the detriment or against the interest of the public."\(^\text{21}\) However, the prime minister and most of Parliament maintained the view that mergers normally are beneficial to business and public.\(^\text{22}\) By 1934, the newly elected Conservative government could not ignore pressure for further legislation against corporate combinations. The Dominion Trade and Industry Act established a commission to administer the Combines Investigation Act. The Combines Act also permitted the government to control prices and production of all industries, but gave the Commission power to veto such control.\(^\text{23}\)

What may ultimately be the most important amendment to the merger provisions of the Combines Act, one that has been retained in present Canadian merger law, occurred in 1935.\(^\text{24}\) Parliament declared a merger to be illegal where it "... has operated or is likely to operate to the detriment or against the interest of the public, whether consumers, producers or others."\(^\text{25}\) The 1935 amendment created a heavy burden of proof upon the government and has recently been interpreted as affording a defense to the charge of illegal merger.\(^\text{26}\) In 1946, Parliament added an amendment to the Combines Act that "restored... a provision enabling the commissioner to proceed on his own initiative with an inquiry to determine whether a combine exists or is being formed."\(^\text{27}\)

This series of legislative enactments succeeded in establishing an administrative machinery for investigation; however, prior to World War II the Commission was greatly weakened by the lack of sufficient staff. The commissioner never had more than one or two professional assistants and some clerical staff during the prewar periods. Expenditures were at a maximum of $62,000 in 1940; however, $38,000 was used for legal fees and only $24,000 to cover the activities of the commissioner.\(^\text{28}\) From 1923 to 1940, only twenty reports were made, and only sixteen were published—an average of one per year.\(^\text{29}\) None of these reports concerned mergers. Only one merging corporation was prosecuted during this period, and it was not convicted.\(^\text{30}\)

From 1940 to 1949, thirteen reports were published. Expenditures reached a high of $169,000 in 1949 of which $65,000 went to legal fees and $86,000 to salaries.\(^\text{31}\) Of the reports, four concerned distribution of goods, two covered contractors' activities, and seven reported on combines among manufacturers.\(^\text{32}\) After the war, a study of international cartels in manufacturing was published. Large manufacturing firms thus became much more conspicuous among those investigated than before World War II.
The Combines Act was further amended to provide for appointment of deputy commissioners and to give such commissioners the power to gather information and produce studies on monopolistic conditions in Canada. Other amendments designed to facilitate prosecutions provided that in combines prosecutions, corporations would not have the option of trial by jury.

During the 1940s, the commissioner of the Combines Branch had authority to enter premises, search for documents, subpoena witnesses, and issue a report with or without government support. Businessmen claimed that the commissioner acted as detective, prosecutor, judge, and sentencer by publishing the report. The fact remains, however, the commissioner was hampered by a lack of funds and staff. No Ph.D. economists were Combines Branch employees until 1949.

Because of the complaints about inadequate administration of the anti- combines act, the government appointed the MacQuarrie Committee (Committee). The Committee recommended division of the functions of the commissioner into investigation and research agencies. The Committee also called for more use of empirical studies. Enacting only some of the MacQuarrie Committee's recommendations, the Parliament in 1952 divided the Combines Branch into the Director of Investigation and Research and the Restrictive Trade Practices Commission (RTPC).

The role of the Commission was to examine evidence presented to it by the head of the Director of Investigation and Research and by the parties injured by an alleged violation. The director of the Commission would then issue a report. Legislators felt that mere publication of this report would provide a deterrent effect and that the Commission could appraise the effect of the practices (for example, heavy conglomerate merger activity in a certain industry) upon the public interest. In practice, the director's inquiries were mainly the result of informal complaints or newspaper reports. During the 1950s, the Combines Branch examined 815 complaints and submitted thirty-one reports to the minister. Unlike the U.S.'s FTC, there was no requirement that all cases be disposed of by written ruling, and the director and minister had great discretion in dropping cases.

The 1951–52 amendments added the judicial remedy of dissolution to the merger and monopoly provisions. An order of dissolution could be issued even without a formal conviction, if the court found that an act constituting or leading to an offense was likely to occur. Despite the detailed procedures for investigation of combines that was established under the 1950s legislative enactments, the Commission remained handicapped in several ways. Until 1959 the Commission's permanent staff consisted only of clerical personnel. Its reports were often ignored by the Canadian press. Until 1957, the Commission sent a summary of published reports to the press, libraries, and both houses of Parliament. Only five summary reports were published, charging corporations in various industries with merging and monopolizing illegally. Though no action was taken by the minister on these charges, the government at least signalled businessmen that it now regarded illegal mergers as
worthy of investigation as price-fixing or resale price maintenance. However, since 1957, the Commission has only released a notice that a report has been published.

Moreover, under the established procedures, issuance of the report ended the job of the RTPC. The decision whether or not to prosecute a corporation became a political or policy decision residing with the minister of justice. After consulting an outside attorney, the minister could decide to prosecute, normally appointing the lawyer that recommended prosecution to try the case. However, if the corporation terminated its practice after the minister’s decision to prosecute, the case was usually dropped. The threat of prosecution thus became an important deterrent to the continued existence of an anticompetitive merger.

The government in 1960 appeased business by enacting legislation which separated mergers and monopolies from the rest of the Combines Act. The 1960 amendments were perceived as weakening “... the chances of proceeding against mergers...” From 1960 to 1969, nine charges of illegal merger were leveled at companies of various industries. Some of the investigations into these mergers were dropped because corporations decided to forego the merger rather than face prosecution. In 1965, however, the government issued an order of prohibition against a merger in the weed killer industry. In addition, corporations were fined $40,000 in 1966 for a merger in the chemicals industry, and in 1967 a merger was prohibited in the iron industry. Although many commentators accused the government of practicing a weak policy toward mergers, the Combines Branch did demonstrate, considering its limited resources, that prohibition of illegal mergers was a top priority. During the 1960s, the number of investigations into charges of merger was greater than the number of price discrimination investigations, and almost as great as the number of resale price maintenance investigations. In retrospect, although Canada was one of the first to legislate against combines, until the 1970s investigation and enforcement under the statutes have been minimal.


In the first eighty years of judicial interpretation, the courts developed important statutory and constitutional doctrines applicable to the Combines Act. These doctrines were to provide the basis for the startling case law developments concerning mergers during the 1970s.

The British North American (B.N.A.) Act, originally passed by England’s Parliament, established the Canadian constitution and distributed powers between the federal and provincial governments. Three grants of powers could conceivably support federal anticombines legislation. The B.N.A. Act provided the federal government with the general power to “make laws for the peace, good order and good government of Canada.” In addition, the power to regulate trade and commerce could provide authority for passage of
a federal merger law. Finally, the federal government had authority over criminal law which earlier was used to justify all Canadian merger law. The primary areas of provincial sovereignty are property, civil rights, and matters of a local or private nature.\textsuperscript{46} Since 1889, the courts have consistently upheld the federal combines law solely on the basis of criminal law powers. In cases as early as 1881 the courts restricted the general trade and commerce power to international and interprovincial trade and general trade affecting the entire country.\textsuperscript{47} Each time Parliament tried to move away from purely criminal restrictions in the antitrust field, its actions were nullified by the courts. In 1921 the Privy Council held in \textit{In Re the Board of Commerce Act, 1919 and the Combines and Fair Prices Act, 1919}\textsuperscript{48} that the Board of Commerce Act, which empowered a board analogous to the U.S. FTC to investigate the restraint of monopolies and mergers, fell beyond the constitutional authority of the federal government.

The Privy Council reiterated its opposition to any development of Canadian administrative remedies to combines violations in 1934, in \textit{O'Connor v. Walden}.\textsuperscript{49} The Judicial Committee of the Privy Council emphasized that the Commission at the Combines Branch had no constitutional authority to determine the legal rights of parties involved before it. The Privy Council regarded the Commission as a purely administrative tribunal whose reports had no legal significance. More recently, Justice Judson of Canada's Supreme Court in \textit{Canadian Fishing Co. v. Smith}\textsuperscript{50} emphasized in a dissenting opinion that the holding of \textit{O'Connor} was still valid.

Thus, in the constitutional area at least, the courts were a reactionary force during this early period. Whenever a Canadian court confronted the prospect of the development of an administrative tribunal similar to the FTC, it severely limited the tribunal's powers. Legislators did not propose extension of a private right of action in merger legislation fearing such amendments would be held unconstitutional.\textsuperscript{51} Therefore, the legislative enactments over this period only added more administrative machinery and penalties, but did not expand the scope of enforcement.

In the period prior to 1960, the courts increased the Crown's burden of proof in merger cases beyond that which appeared on the face of the statute. What emerged from the government's losses in the courts was the unstated rule that the government had to prove the existence of a virtual monopoly in order to win a merger case. In \textit{Rex v. Canadian Import Company},\textsuperscript{52} the government prosecuted a dealer of coal and coke in Quebec who had acquired all other such dealers in the area. The court acquitted the defendants of the charges, finding that the government had not proved sufficient detriment to competition. In \textit{Rex v. Staples},\textsuperscript{53} the court found that control of 50 percent of an industry was insufficient to establish control detrimental to the public.

The government's only successful case during this period came in 1953 in \textit{Rex v. Eddy Match Co.}\textsuperscript{54} In \textit{Eddy Match}, the government coupled its merger charges with charges of monopolization and monopoly. From 1927 to
1950 Eddy had a monopoly maintained by predatory practices, followed by acquisition of new entrants. The court held that in a case with such a long history of monopoly, merger with new entrants was detrimental to the public.

_Eddy Match_ did not lead to rulings favorable to the government in merger cases involving concentrated industries. In _Regina v. Canadian Breweries Ltd._, the Ontario Supreme Court reviewed the legality of a merger which substantially increased the concentration of the beer industry. The defendant brewery had gained control of thirty-seven other breweries in Ontario over a 30-year period. Though the defendant held 61 percent of the market, while Molson and Labatts together held 34 percent, the court failed to consider whether or not the high concentration of the industry operated to the public's detriment. Ruling for the defendant, Chief Justice McRuer noted that he was bound to favor the defendant in criminal cases because of the reasonable doubt standard, the circumstantial evidence rule, and the rule favoring the defendant in the construction of penal statutes. Thus, in _Canadian Breweries_, the court found that a merger which substantially increased concentration in an already oligopolistic market was not sufficient to convict a defendant of a criminal combines offense.

Aside from requiring proof of a virtual monopoly in merger cases, Canadian cases showed signs of changing the meaning of _public detriment_. Early decisions analyzed a combines case solely in terms of whether the activity reduced competition. The courts assumed that a reduction of competition was _prima facie_ detrimental to the public. As early as 1912 the Canadian Supreme Court emphasized that an alleged breach of a combines provision should be analyzed from the point of view of harm to free competition. The Supreme Court, in _Container Materials Ltd. v. The King_, reiterated that the anticombines provisions were enacted for the specific public interest in free competition.

The view that Canadian merger law should be analyzed solely from the perspective of the effect on free competition began to lose some of its force in 1958 when the Supreme Court decided _Howard Smith Paper Mills Ltd. v. The Queen_. In that case the appellants argued that their admittedly anticompetitive actions were designed to preserve a dying industry. The majority held that the public had a right to free competition and appellants would not be heard to argue that anticompetitive acts promote the public interests. However, in an important dissent, Justice Cartwright indicated that if the appellants had proved the alleged benefit to the public, he would have had some difficulty affirming the conviction.

Fearing that Justice Cartwright's view would gain majority support in the Supreme Court, Parliament deleted the portions of the conspiracy provision of the anticombines statute that required a showing of detriment to the public. However, Parliament retained the _detriment_ language in the merger and monopoly provisions. This apparent oversight allowed the Supreme Court in the 1970s to utilize Cartwright's position to destroy much of the merger provision's force.
RECENT DEVELOPMENTS IN CANADIAN MERGER POLICY

Legislative Developments in the 1970s
Both the proposed and enacted statutes of the 1970s concerning Canadian antitrust law in general, and merger law in particular, were radically different from those enacted in the previous eight years. From 1889 to 1969, Parliament’s amendments to the anticombines law were only moderate adjustments. On the other hand, the reforms of the 1970s, resulting in the passage of Foreign Investment Review Act of 1974 (FIRA), constituted fundamental changes in the justifications for, and the approach of, the combines law.

In 1966, responding to the concern of the populace over the increasing concentration of Canadian industries, the government requested that the Economic Council (Council) prepare a report on competition policy. The Council’s Interim Report on Competition Policy, published in 1969, stated that the prime purpose of competition law was the promotion of economic efficiency. The Council felt that some practices, such as price-fixing, market-sharing, and resale price maintenance, were inimical to the public interest, and should invariably be prohibited. The Council also believed that mergers and monopolies should not be dealt with as criminal offenses. The report’s rationale was that criminal law set up too onerous a burden of proof upon a government attempting to prevent a harmful merger. The report went so far as to declare that courts were improper forums for deciding whether to prohibit a merger. Instead, the Council recommended the formation of an expert tribunal. Such a tribunal would allow mergers bringing about cost savings, but would prohibit mergers increasing the market power of the defendants to the disadvantage of the consumer. The feeling was that an expert tribunal could weigh the economic costs and benefits of a merger better than a criminal court. The Council thus adopted Justice Cartwright’s position in Howard Smith Paper Mills that mergers should not be analyzed solely for their effect on free competition. At the same time, the Council went beyond the Justice’s opinion by conferring jurisdiction upon a quasi-judicial tribunal to make these economic judgments.

The report’s concept of splitting combines cases into criminal and economic tribunals according to the nature of the offense became the cornerstone of the government’s proposals to Parliament in the 1970s. Agreeing with the report, the government perceived the purpose of competition law as a means of achieving efficiency. The government also stood to gain the political support of small businessmen for any reform that lessened the market power of the large foreign and domestic conglomerates.

Despite the report’s theoretical soundness, the government realized that it stood on shaky constitutional grounds. To create an expert tribunal to oversee monopolies and mergers, the federal government of Canada had two options. It could seek to change the constitution to expand the trade
and commerce power. However, changing the constitution is always difficult because provincial authorities, fearful of an assault on their sovereignty, are likely to oppose any expansion of federal power. The other option was to refer the legislation to the Supreme Court to see whether the establishment of such a tribunal fell within the federal powers specified in the B.N.A. Act. Some recent cases indicated that the Supreme Court might uphold the constitutionality of a quasi-judicial tribunal, but the possibility that the Court would reach the opposite result in this instance could not be disregarded.

In spite of these constitutional problems, the federal government in 1971 sought, without success, passage of a bill that would have adopted the Council's recommendations. The bill provided that criminal procedures were applicable only to per se offenses such as price-fixing. It also required registration with a competitive practices tribunal for all mergers involving gross assets greater than $5 million or a foreign acquiring firm. The tribunal was empowered to prohibit or dissolve a merger when it would engender significantly less competition.

In evaluating a foreign takeover, the tribunal was instructed to examine whether the merger was likely to (1) extend the market power of the merged firm in Canada, (2) extend the influence of an international cartel or oligopoly into Canada, or (3) restrict production or exports from Canada.

In the face of intense criticism of the 1971 proposed bill, especially from large business interests, the government decided to redraft and resubmit it in two phases. A revised version comprising the first phase became law at the end of 1975. The new legislation abandoned the concept that certain anticompetitive practices were per se offenses. It further pleased big business by retaining the language of "undueness" and "unreasonableness" in proscribing trade restraints. However, the bill stated that an agreement can be undue even if the parties do not control virtually the entire relevant market.

Two major reforms instituted by the 1975 legislation signalled a commitment to more vigorous enforcement of anticompete laws. The act included provisions for a private right of action for damages resulting from a violation of the combines laws, although this was not extended to merger or monopoly violations. Another fundamental reform was the provision that the breach of an order issued by the Restrictive Trade Practices Commission constituted a violation of the 1975 Act. Any person injured by the breach was given a private right of action against the violator.

Some of the most controversial provisions of the government's legislation were reserved for the second phase of the legislation. Big business zealously opposed governmental regulation of mergers, monopolization, and volume discounts, and, as a result, the second bill was not passed. Whether a new version of that bill is reintroduced will depend upon political developments. Nevertheless, an examination of the contents of the proposed 1977 legislation is worthwhile, not only because it ultimately may be enacted, but also
because it reflects the new attitudes of the government and much of the Parliament toward changes in the merger laws.

Under the proposed amendments, the Competition Board (Board) is substituted for the Restrictive Trade Practices Commission. Consisting of five to seven permanent members, the Board has as its main objective the examination of trade practices referred to it. The Board can examine mergers and monopolies as well as trade practices specified in the Stage I amendments. Mergers and monopolies under the bill are not criminal offenses, but a court can impose criminal sanctions for violation of the Board's remedial orders.74

The proposed legislation would also replace the previous director of investigation and research with the competition policy advocate. The Canadian cabinet appoints the advocate and the deputy competition policy advocates. The advocate's functions are essentially the same as those of the director,75 but his quasi-judicial responsibilities include investigation of a greater number of practices that are reviewable by the Competition Board. The advocate also has a more active role in presenting the government's position before various administrative bodies.76

Violation of the merger provisions of the 1975 Act would no longer be considered a criminal offense under the proposed law. Instead of requiring proof beyond a reasonable doubt of detriment to the public, a burden of proof never overcome by the Crown in contested prosecutions, the bill substitutes the Board's review on the "preponderance of the evidence" standard. The Board can, if the advocate meets this standard, prohibit or dissolve a merger if it substantially lessens competition.77

The proposed legislation also addresses the coordination of review of mergers under the combines statute with review of mergers under the Foreign Investment Review Act, enacted in 1974.78 To understand this portion of the bill's provisions, one must first comprehend the details of the Foreign Investment Review Act.

In response to public concern about the control of Canadian industries by foreign firms, the Canadian government sponsored a study of foreign investments. As a result of this study, Herb Gray, the minister of revenue, wrote a report entitled Foreign Direct Investment in Canada.79 The Gray Report, although noting the advantages of importing capital and technology, warned against the dangers of increasing dependence on the United States. The report recommended the establishment of a screening agency to review the operations and investment of foreign-owned firms. The Gray Report led the government to introduce a bill in Parliament to control foreign direct investments and new takeovers by foreign-owned firms. Following the election of the Trudeau government, Parliament enacted the Foreign Investment Review Act on April 9, 1974.

In general, the FIRA provides that no foreign person or foreign enterprise can "take over an existing Canadian business, or . . . establish a new Canadian business unrelated to any of its existing Canadian businesses, without first receiving the approval of the government of Canada."80 The
criteria used by the cabinet to decide whether to allow a foreign takeover or direct investment is whether the investment "is or is likely to be of significant benefit to Canada." This criterion is a significant switch from that used by the old combinations laws, which disallow mergers by a foreign or domestic acquirer only if they are "of significant detriment to the public."

Section 2(2) of the Foreign Investment Review Act enumerates five factors the cabinet should consider in deciding whether the merger or investment is "of significant benefit to Canada." These are:

(a) the effect of the acquisition or establishment on the level and nature of economic activity in Canada, including, without limiting the generality of the foregoing, the effect on employment, on resource processing, on the utilization of parts, components and services produced in Canada, and on exports from Canada;
(b) the degree and significance of participation by Canadians in the business enterprise or new business and in any industry or industries in Canada of which the business enterprise or new business forms or would form a part;
(c) the effect of the acquisition or establishment on productivity, industrial efficiency, technological development, product innovation and product variety in Canada;
(d) the effect of the acquisition or establishment on competition within any industry or industries in Canada; and
(e) the compatibility of the acquisition or establishment with national industrial and economic policies, taking into consideration industrial and economic policy objectives enunciated by the government or legislature of any province likely to be significantly affected by the acquisition or establishment.

The FIRA also designates a procedure for choosing a minister as the administrator of the FIRA, and establishes the Foreign Investment Review Agency (Agency) to "advise and assist the Minister in connection with the administration of the Act." The agency is purely an advisory body. Decisions as to whether to allow an acquisition by a foreign corporation or person remains with the cabinet.

Section 20 of the FIRA contains provisions for enforcement. The government can seek a court order to "render nugatory" a foreign direct investment or acquisition contravening the act. The court can prohibit a shareholder's exercise of voting rights, or require the divestiture of property or shares.

Prior to the passage of FIRA, the federal and provincial governments intervened ad hoc to prevent foreign acquisition of a greater control of Canadian markets. The federal government prevented the foreign acquisition of Denison Mines Ltd. in 1972 and the proposed foreign takeover of Home Oil Company Ltd. in 1972. Occasionally, the provincial governments during the early seventies took steps to prevent foreign acquisitions.
Since the passage of FIRA, the cabinet has approved most of the proposed takeovers but has rejected some undesirable acquisitions. In the first year of FIRA's operation, the cabinet allowed thirty-six Canadian-controlled companies to be acquired; three of these companies had assets exceeding $5 million. The primary reason given for disallowing a merger was that it decreased Canadian ownership without sufficient offsetting benefit to Canada.\textsuperscript{86}

The inconvenience foreign investors suffer as a result of FIRA may deter some acquirors. Approval by the cabinet of a proposed foreign acquisition rarely occurs within three months of registration with the Agency. Foreign corporations' officers must frequently attend Agency hearings and seek local legal advice. Recently, the Agency has begun to monitor the performance of undertakings by applicants whose investments were allowed. Naturally, some foreign investors would prefer that the government did not scrutinize their activities.\textsuperscript{87}

The federal government's commitment to opposing mergers was underscored by its efforts in the courts. The government secured two convictions of corporations that violated the merger provisions of the combines law in the cases of \textit{Regina v. Electric Reduction Co. of Canada} (the ERCO case)\textsuperscript{88} and \textit{Regina v. K. C. Irving Ltd.}, \textsuperscript{89} although the decision of the trial court was later overturned by the Supreme Court in \textit{K. C. Irving}.\textsuperscript{90} Thus, the government during the 1970s evinced a vigorous opposition to corporate concentration caused by mergers.

The 1977 proposed legislation had attempted to coordinate the efforts of the proposed Competition Board and the Foreign Investment Review Agency. Under the bill, when an acquisition is referred to the Agency for clearance, the Agency must advise the advocate of such application, after which the advocate has fifty days to proceed against the merger in question.\textsuperscript{91}

\textit{The Courts' Policies During the 1970s}

Although the courts have not directly ruled on the constitutionality of the new legislation, there are indications that they would uphold the use of the trade and commerce power to justify the establishment of federal quasi-judicial tribunals and agencies to review the legality of mergers. Courts during this era broadly interpreted the federal government's authority over interprovincial and international trade. In \textit{Burns Foods Ltd. v. Attorney General},\textsuperscript{92} the court upheld federal government direct regulation of commerce that affected interprovincial trade. In 1972, the year before \textit{Burns Foods}, Chief Justice Jackett of the Federal Court of Appeals broadly interpreted the general trade and commerce power to uphold federal regulation of general business standards in \textit{Vapor Canada Ltd. v. McDonald}.\textsuperscript{93}

Aside from enunciating a liberal interpretation of federal powers under the British North American Act, the lower courts have accepted federal power to enforce the merger cases. The dispositions of \textit{Regina v. Electric
Reduction Co. of Canada\textsuperscript{94} and Regina v. K. C. Irving Ltd.\textsuperscript{95} indicate that the government can win merger cases in the lower courts.

In the \textit{ERCO} case, the corporate defendant pleaded guilty to a merger charge, even though no company had ever before been convicted of a merger offense when the charge was contested. From 1956 to 1966, ERCO was the sole producer of industrial phosphates in Canada. In May 1959, ERCO purchased Dominion Fertilizers, a new entrant into the industrial phosphate market. ERCO also entered into reciprocal agreements with C.I.L. and Cyanamid under which both firms agreed not to enter the industrial phosphates market. ERCO apparently decided that the government could obtain convictions for these offenses if a trial were held, and therefore pleaded guilty.

In \textit{K. C. Irving}, the government convinced a trial court that a company had violated the merger provisions of the Combines Act. K. C. Irving, over a period of several years, acquired all five English-language dailies in New Brunswick. Though the conviction was later overturned,\textsuperscript{96} the legitimacy of the government's commitment to preventing mergers it considered illegal, and the perceived competence of the Combines Branch attorneys, was substantially enhanced by the trial court's decision.

The two cases may also have inaugurated a new approach to remedies for violations of the merger laws. This approach emphasizes the use of orders of prohibition rather than fines. Although ERCO was fined a total of $30,000, it was also subjected to an order prohibiting its anticompetitive practices. Realizing the failure of criminal fines as remedies, the court in \textit{ERCO} resorted to a prohibitive order to prevent abuses likely to occur as a result of the merger. Some commentators believe that \textit{ERCO} inaugurated a new conduct-oriented approach to the problem of corporate concentration.\textsuperscript{97} If this view is correct, the courts have decided that the criminal remedies are inadequate when applied to merger cases, and that a dissolution of the merger or a prohibitory order preventing abuses of the merger is necessary. This view is consistent with the trial court ruling in \textit{K. C. Irving}, since the court found it necessary to order K. C. Irving to sell both of its Mocton Papers as well as pay a $150,000 fine.

Perhaps the most important ruling of the 1970s was that of the Canadian Supreme Court in \textit{K. C. Irving}, in which the court reinterpreted the "public detriment" language of the merger and monopoly provisions. In a unanimous decision, the Supreme Court concluded that, to prevail on a charge of creating an illegal merger or monopoly, the Crown must do more than show that the accused extinguished all independent competition. Referring to cases citing Justice Cartwright's opinion in \textit{Howard Smith Paper Mills Ltd.},\textsuperscript{98} the Canadian Supreme Court held that the Crown must also show that the extinction of competition was, or was likely to be, to the detriment of, or against the interest of, the public. Since there was no finding of fact supporting this part of the merger and monopoly offenses, the Supreme Court dismissed the charges.

Professor Roberts of the University of Western Ontario law faculty as-
serts that prior to the Supreme Court's ruling in *K. C. Irving*, Parliament, the Economic Council of Canada, the minister of consumer and corporate affairs, economists, and legal scholars all regarded the public detriment elements of the merger and monopoly provisions as relevant only to the extent of injury to the competitive process. According to Roberts, the law before *K. C. Irving* contemplated just one public interest: the public interest in maintaining and encouraging competition. A detriment to the public interest occurs when there exists a real or threatened injury to the competitive process.

Roberts believes that the Supreme Court came to its surprising conclusion because it felt that two premises of the competition laws were inconsistent without the newly established rule in *K. C. Irving*. The merger and monopoly provisions did not contemplate the prohibition of all monopolies. Yet, the prime purpose of competition law is to promote competition. Logically, all monopolies fail to promote competition and should therefore be prohibited. Because the Supreme Court could not square the two premises without invalidating all monopolies and mergers, the Canadian Supreme Court reinterpreted the detriment standard to conform to Justice Cartwright's opinion and thus avoid the logical inconsistencies of the Act.

Roberts labels the *K. C. Irving* decision a disaster to the enforcement of merger laws, because it asks trial courts to act as economists and social scientists. Trial courts under *K. C. Irving* must decide whether the merger or monopoly constitutes an injury to the public interest and whether the injury, if it exists, is outweighed by the social benefits of the merger or monopoly. This would require trial judges to identify and rank countless public policies and then derive and apply the same kind of standards as are applied to detailed public regulation of industry. To be meaningfully applied, the criteria implicit in the *K. C. Irving* decision require continuous supervision of industry.

Though Roberts is probably correct in his assessment of *K. C. Irving* as a blow to the reforms of the merger laws, he overstates his argument by concluding that *K. C. Irving* renders the merger and monopoly laws unenforceable. The *K. C. Irving* ruling would be enforceable if Parliament passed a bill establishing a specialized tribunal capable of analyzing a merger case according to the *K. C. Irving* criteria. In addition, Roberts neglects to analyze the impact of the FIRA. FIRA is not subject to the *K. C. Irving* decision and could in the future constitute a major deterrent to foreign acquisitions.

THE INTERNATIONAL RAMIFICATIONS OF CANADIAN MERGER POLICIES: 1889–1979

The most discernible effect of Canadian merger policy has been upon the number of foreign acquisitions. A regression analysis would provide a quantitative measure of the effect of weak and strong merger policies on the number of foreign acquisitions. There are difficulties with determining the effect
of merger policy through the use of regression analysis. It would be difficult to subject the merger policy variable to regression analysis, since policy is a nebulous notion. One also encounters difficulties determining when a policy begins to become effective. Moreover, policies can be contradictory when one branch of government pursues a course of conduct different from another.

Regressing Canadian merger policies on the number of foreign mergers is thus difficult, though not impossible. The difficulty in this process, however, does not mean that some conclusions concerning the effect of Canadian policies are totally speculative. Policies of one branch are often consistent with those of another. The effect of coordinated policy is easier to perceive since one could connect a weak or strong policy to a change in the number of foreign mergers when all branches adopt the same rather than different policies. Moreover, observers of U.S. merger policy have generally agreed that antitrust laws do have demonstrable effects on business activity. The growth of conglomerates in the United States during the 1960s is often attributed to the application of more per se rules against vertical and horizontal acquisitions. In addition, many cite the Burger Court decisions against the government in antitrust cases as contributing to the merger boom of the mid-1970s.

From 1889 to 1969, the three branches of Canadian government generally followed a consistent policy toward mergers. Thus, one need not worry about evaluating conflicting influences of the courts, legislature, and agencies during the early period. From an examination of the three merger-boom periods, the effect of policy is evident. The greatest expansion of the number of foreign mergers occurred at four times: 1900 to 1913; the 1920s; the late 1950s to the late 1960s; and 1975 to 1978.

In analyzing the merger booms, there is some indication that the number of foreign acquisitions in Canada depended upon the relative development of Canadian and U.S. merger law. The early 1900s witnessed increases in the number of total and foreign mergers in Canada, with the British accounting for most of the foreign acquisitions.

Apparently British investors compared the merger policy positions of the United States and Canada and often found Canada preferable. During this period, merger policy seems to have had an influence. The 1889 Act was still very new and uncertain in application. Moreover, the Canadian government brought no prosecutions against mergers and hence there was no case law on mergers in Canada. In contrast, the United States did have an established antitrust case law. From 1904 to 1911, the Sherman Act was interpreted as prohibiting every contract in restraint of trade. Although the Sherman Act was not directly applied to mergers, it is conceivable that businessmen hesitated to merge in the United States because courts might find the acquisition to be in restraint of trade.

The United States did not experience a merger boom from 1900 to 1913. During this period, the number of U.S. mergers declined significantly. United States and foreign businessmen contemplating a merger may have
found Canada a safer legal environment, and this phenomenon fueled the merger boom in Canada. It is interesting to note that the subsequent decline in merger activity coincides with Parliament's passage of the 1910 Act, which included mergers within the definition of combines.\textsuperscript{10}

Merger booms occurred in both the United States and Canada during the 1920s. During the 1920s, U.S. investment continued to erode the dominance of British investment in Canada. The high correlation between U.S. and Canadian mergers indicates that decisions to merge in Canada were based on the economic conditions in the United States rather than merger policies. However, Canadian law probably encouraged U.S. firms to merge with companies in Canada. During the 1920s, Canadian antitrust law was in a state of chaos. The temporary nullification of all merger policy by the Canadian Supreme Court in 1921 coincides with the beginning of the merger boom.\textsuperscript{11} Americans may have perceived that new legislation on mergers in the 1920s would take time to implement and would be similar to the 1910 Act under which the prosecutors took no action against mergers.\textsuperscript{12}

Statistics reveal that the growth of foreign mergers in Canada was more sustained than the increase in mergers in the United States during the 1960s. Canadian merger law probably appeared relatively more attractive than U.S. acquisition law to U.S. and other foreign investors. In the United States, the Warren Court almost always ruled against the defendant in merger cases.\textsuperscript{13} The law on mergers was far less developed in Canada than in the United States. The Cellar-Kefauver Amendment to the Clayton Act in the United States strengthened the Justice Department's position against mergers by expanding the jurisdictional reach of Section 7.\textsuperscript{14} In contrast, the 1960 amendments to Canadian antitrust law ensured that corporations could merge unmolested by Canadian regulation. Though there was much public debate during the 1960s over the problem of transnational corporate concentration, major reforms did not occur until the 1970s.

The number of foreign acquisitions in Canada grew at an unprecedented rate from 1975 to 1978, though at a slower rate from 1977 to 1978. This occurred in spite of a decline in the number of domestic mergers.

One can devise a number of theories explaining these trends by focusing upon the reaction of foreign investors to the reforms of the 1970s. Perhaps foreigners believed, as did Professor Roberts, that the Canadian Supreme Court in 1975 announced the death of merger policy in \textit{K. C. Irving}.\textsuperscript{15} Foreign businessmen may have reasoned that Canadian criminal courts did not have the capacity to convict a corporation of a merger offense using the complex economic criteria specified in \textit{K. C. Irving}. Moreover, the foreign corporations may have decided that the Phase II amendments, which would have set up machinery that could enforce the merger laws according to economic criteria, had no chance of passage since the big business lobby in Canada was vehemently opposed to them. According to this theory, the foreign corporations decided that they could take over Canadian firms without molestation from government authorities.
The above theory ignores the effect of the FIRA on the decision making of foreign corporations. Professor Douglas F. Lamont demonstrates that the anticipation of FIRA and the ad hoc intervention of the Crown and provincial governments to prevent foreign acquisitions led to a decline in foreign investment.116 The decline of foreign mergers in Canada in the early 1970s is consistent with a theory that the first year of FIRA and the ad hoc intervention of Canadian governments induced foreign corporations to look elsewhere. Professor Lamont asserts that U.S. firms from 1970 to 1973 did not choose Canadian firms for acquisitions because of radical change in the investment climate. During this three-year period, the U.S. share of total foreign investment in Canada decreased from 82 percent to 78 percent.117 The Germans apparently perceived in like manner the new Canadian attitudes toward foreign investment. From 1970 to 1973, the percentage of total foreign investment decreased from 36 percent to 34 percent.118 According to Lamont, the rate of increase in U.S. foreign investment in Canada slowed during the early 1970s because U.S. corporations decided better opportunities could be found elsewhere.119

It was possible that the impact of FIRA would lead to less foreign investment. Certainly the power granted the cabinet under the FIRA could have provided a deterrent to foreign investment. However, the increase in the number of foreign mergers in Canada during the late 1970s indicates that foreign investment via acquisition did not decrease. This phenomenon cannot be explained by comparison with the state of U.S. merger law. The Burger Court during this period almost inevitably held for the defendant in antitrust cases.190 Firms would probably find the United States a more conducive legal environment for mergers, at least with respect to conglomerate mergers.

There are a number of theories which could explain the recent increase in foreign acquisitions. Foreign corporations may have developed expertise in dealing with the FIRA. In anticipation of FIRA, multinational corporations may have reduced their acquisitions for fear that obtaining government approval would be difficult and costly. As soon as it was clear that the Foreign Investment Review Agency would approve the majority of applications for acquisitions, foreign firms may have decided to apply for as many acquisitions as possible before the Agency became more suspect of foreign takeovers.

A contributing factor to the increase in foreign acquisitions may have been that many of these acquisitions were in service industries outside the jurisdiction of the Agency. The legislature apparently was of the belief that the national interest was threatened less by foreign acquisitions outside the manufacturing and resource industries; moreover, such acquisitions usually involved a small amount of assets. This attitude reflects a Canadian sensitivity to foreign takeover of their natural resources.121

Moreover, since coal and rubber industries were already heavily concentrated in foreign hands,122 much of the foreign investment in the 1970s occurred in other areas. In addition, during the 1970s the Agency demon-
Table 1.
Percentage Distribution of Types of Mergers, Canada and the United States

<table>
<thead>
<tr>
<th>Country</th>
<th>Type of Merger</th>
<th>1945—61</th>
<th>1972</th>
<th>1973</th>
<th>1974</th>
</tr>
</thead>
<tbody>
<tr>
<td>Canada</td>
<td>Broad horizontal</td>
<td>68.25</td>
<td>66.9</td>
<td>68.9</td>
<td>67.7</td>
</tr>
<tr>
<td></td>
<td>Horizontal</td>
<td>40.23</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Geographic market extension</td>
<td>12.71</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Product extension</td>
<td>9.71</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Other</td>
<td>5.60</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Vertical</td>
<td>22.43</td>
<td>12.3</td>
<td>12.5</td>
<td>9.2</td>
</tr>
<tr>
<td></td>
<td>Conglomerate</td>
<td>9.31</td>
<td>18.8</td>
<td>18.6</td>
<td>23.1</td>
</tr>
<tr>
<td>United States</td>
<td>Broad horizontal</td>
<td>67.02</td>
<td>58.6</td>
<td>56.2</td>
<td>62.9</td>
</tr>
<tr>
<td></td>
<td>Horizontal</td>
<td>23.21</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Geographic market extension</td>
<td>5.64</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Product extension</td>
<td>38.17</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Vertical</td>
<td>19.89</td>
<td>17.2</td>
<td>11.0</td>
<td>4.8</td>
</tr>
<tr>
<td></td>
<td>Conglomerate</td>
<td>12.74</td>
<td>24.1</td>
<td>32.8</td>
<td>32.3</td>
</tr>
</tbody>
</table>

strated a tendency to allow foreign mergers which did not involve a great deal of assets.\(^{123}\)

Another radical change that occurred in Canada during the 1970s was an increase in the number of conglomerate acquisitions. Table 1 shows the changes in percentages distribution of types of mergers in Canada and the United States.

From table 1, it is apparent that the percentage of broad horizontal mergers has not changed in Canada from the immediate postwar years through the early 1970s. Meanwhile, broad horizontal mergers have declined over the same period in the United States. One of the reasons for the decline in U.S. horizontal mergers is the Supreme Court's application of more stringent rules of illegality to horizontal and vertical mergers.\(^{125}\) In Canada, the courts did not develop any per se rule against horizontal mergers. Thus, Canada became a safe area for merging with a competitor, and the steady percentage of horizontal mergers throughout these years is not surprising.

In both the U.S. and Canada, vertical mergers decreased throughout the 1970s. The decrease in the United States can be attributed to the per se rules of illegality applied by the Supreme Court to many vertical acquisitions. The decrease in the Canadian percentage may be attributable to the exhaustion of foreign investment opportunities in the mining and natural resource indus-
tries. In the earlier period, foreign interests sought control of the natural resources of the industry. By the 1970s foreign manufacturers may have exploited all the possibilities of gaining control of Canada's natural resources and may have sought to expand their markets by merging with a firm in an unrelated industry.

At the same time, FIRA and ad hoc government interaction may have reduced the number of vertical mergers. Foreign manufacturers arguably desire to gain control of the natural resources necessary for the production of their products. If the foreign manufacturers could not merge vertically in their own countries, Canada would be a logical alternative location for such a merger during the immediate postwar era, since the Canadian government was not prohibiting such acquisitions. This theory accounts for the high percentage of vertical mergers from 1945 to 1961. The change in the government's attitude toward foreign acquisitions of natural resources may have triggered a drop in the percentage of vertical mergers during the 1970s.

Finally, conglomerate mergers have been on the rise in both countries. A contributing reason for the increase in percentage of conglomerate mergers in the United States could be that the Supreme Court has not been able to apply traditional market acquisition analysis to conglomerate acquisitions.\(^{126}\) Merger policy may also have contributed to the rise in conglomerates in Canada. There is no Canadian case law on conglomerate mergers. Furthermore, it is very difficult to prove a lessening of competition from a conglomerate merger. Conglomerate mergers do not alter the number of firms in an industry. One must therefore resort to theories of potential competition to prove a violation. Since Canadian courts have not enunciated a potential competition theory, proof of a violation of the law as a result of a conglomerate merger is exceedingly difficult. This difficulty may have contributed to the increase in the number of foreign conglomerates in Canada.

Aside from altering the number and type of foreign acquisitions in Canada, merger policy or lack of it has not impeded foreign ownership of Canadian industries. As a result of mergers and direct investments, foreign interests in Canada own 95.5 percent of petroleum and coal industries; 93.1 percent of rubber products; 86 percent of the transportation equipment including automobiles; 84 percent of tobacco products; 81 percent of the chemicals industry; and over 50 percent of the machinery and electrical industries.\(^{127}\) Despite reforms, the merger laws have not prevented this high level of foreign ownership. Such ownership has several important impacts.

Many Canadians of the 1970s view U.S. control as detrimental to their international trade. Many argue that multinational firms use factors of production that are extremely mobile; such firms would therefore not make decisions solely on the grounds of the most efficient use of Canadian resources.\(^{128}\) Canadian observers emphasize that foreign firms are ethnocentric and that the host country will tend to end up with fewer economic benefits from the foreign investor. The net result of concentration of industrial control in foreign hands is seen as a less favorable trade balance and
fewer collateral benefits such as research and development and management training.\textsuperscript{129}

This line of argument is not unassailable. Much of Canada's production must be exported because the home country itself consumes less than half of its products. Canada exports over 50 percent of the goods it produces, whereas large industrial countries consume 80–85 percent of their domestic production.\textsuperscript{130} Furthermore, Canada benefits from exposure to the more sophisticated techniques of research and development and management training practiced by some large U.S. firms.

Even if Canadians have a less than fully realistic view of the impact of transnational corporate concentration, their perceptions may be the most important result of such concentration. Canadian scholars have written many volumes concerning their fears of domination by such U.S. firms as Exxon and General Motors.\textsuperscript{131} Some fear the rejuvenation of the discredited continental thesis, which asserts that Canada and the United States will merge their respective economies to form one North American market.\textsuperscript{132}

These fears can be explained by the recent increase in foreign acquisitions and control of markets. During the 1950s and 1960s, Canadians openly admired the United States, and some called for continentalism.\textsuperscript{133} However, throughout the 1970s Canadians became disillusioned with the U.S. presence. Opposition to U.S. investment in Canada was directly correlated with U.S. control of Canadian industry.\textsuperscript{134}

Since high foreign investment and acquisition led to discontent among the more densely populated provinces, the federal government became convinced that something had to be done to counter the economic power of U.S. firms in Canada. This conviction led to the passage of FIRA and to various investments undertaken by the government of Canada to prevent foreign acquisitions.\textsuperscript{135} Discontent in areas like Ontario led to several investments by provincial governments to counter U.S. acquisitions of Canadian firms.\textsuperscript{136}

Because of foreign domination, Canada's economy is subject to some extent to changes in the economies of other countries. On the other hand, Canada benefits in several ways from U.S. domination of industry, such as the advantages of economies of scale achieved by big U.S. firms and cultural exchanges inherent in transnational investment.

**PROBABLY FUTURE CHANGES IN CANADA’S MERGER POLICY AND THEIR EFFECTS**

Canadian merger law in the 1980s will in all probability be more aggressive than in the past toward preventing foreign acquisitions. Parliament is unlikely to pass all of what was contained in the proposed 1977 legislation because of the intense business lobby against any regulation of mergers. However, some form of civil legislation dealing with mergers will probably emerge. The government now realizes that application of criminal law to
merger violations is inappropriate, particularly in light of the unrealistic standards of review imposed upon criminal courts by K. C. Irving. Furthermore, Parliament should feel confident of its constitutional authority to enact such provisions since recent Supreme Court decisions have expanded the federal government's general trade and commerce power.

The federal government in the 1980s will probably seek to enforce anti-merger laws more vigorously, especially against foreign firms. Even if Parliament makes no changes in the merger law, the government has the power under FIRA to prevent most foreign acquisitions. Since nationalism is growing within Canada, the government may feel political pressure to demonstrate its opposition to U.S. domination of Canada's industries, particularly if the increase in foreign acquisitions continues. The government also seems convinced that foreign control of key industries must be curtailed in order to promote economic efficiency.

The courts are probably the only branch of government in Canada that will lack vigor in their policy against mergers in the 1980s. As K.C. Irving demonstrated, the Supreme Court is not overly concerned with ensuring that the merger laws are efficiently enforced, because it established standards of review for mergers which could not possibly be applied by lower courts. However, it is unlikely that the Supreme Court, using the recent expansive interpretations of federal powers, would declare a civil law covering mergers unconstitutional.

If Canada does institute a more vigorous policy against foreign acquisitions, the overall number of foreign mergers should decline. But assuming that foreign investors maintain interest in the Canadian market, the number of foreign conglomerate mergers should increase, since foreign corporations would perceive that the Crown has the greatest difficulty proving a lessening of competition in cases involving conglomerate acquisitions. The percentage of horizontal mergers should remain about the same unless the Canadian courts or quasi-judicial tribunals develop per se rules against such mergers, and foreign vertical mergers will probably decline because Canadians fear the control of their natural resources by foreign manufacturers and are likely to enforce vigorously their antitrust laws in this area.

The decline in the level of foreign investment may ultimately lead to a demand for reform of the merger laws to encourage such investment. As stated above, the rise of nationalism and opposition to foreign investment is directly related to the amount of foreign investment. If vigorous merger laws result in a drastic reduction in foreign investment, antagonism toward such investment will wane considerably. Foreign investment in urban areas may become as negligible as it is in rural areas of Canada. In areas of low foreign investment, the people and laws favor foreign investment in order to stimulate their local economy. Eventually, the Canadian populace in urban areas will demand that greater foreign investment be allowed. Thus, ironically, vigorous foreign merger laws may ultimately lead to a call for merger policies favoring foreign investment and acquisitions.
NOTES

2. Id.
3. In the late nineteenth century, the populist and Granger movement in the United States agitated for public control over price-fixing, railroad rebates, and other harmful business practices. In response, Congress created the Interstate Commerce Commission in 1887 to control railroad power and the Sherman Act in 1890 to condemn trade restraints and monopolies. Some observers assert that Congress passed the original antitrust statutes only to appease the reform movement, and therefore purposely left the Sherman Act vague and seemingly innocuous to please powerful business interests. See P. Areeda, Antitrust Analysis 43–44 (2d ed., 1974) (discussing the political background of the Sherman Act).
5. Id. at 43.
7. For example, an effort was made to weaken Wallace’s bill by deleting the provision that a combines conviction would result in a corporation losing its charter. Wallace asserted that these changes were the result of “... those men who have formed those illegal combinations and who came down... with a great array of lawyers from Montreal and Toronto and with amendments carefully considered, to legislate the bill out of existence.” H. C. Deb. 1889, quoted in L. Reynolds, supra note 6, at 134 n. 5.
8. C. Goff & C. Reasons, supra note 4, at 45. The Act, S. C. 1889, as finally enacted, read:
   1. Every person who conspires, combines, agrees or arranges with any other person, or with any railway, steamship, steamboat, or transportation company, unlawfully, (a) To unduly limit the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article or commodity which may be a subject of trade or commerce; or—
      (b) To restrain or injure trade or commerce in relation to any such article or commodity; or—
      (c) To unduly prevent, limit, or lessen the manufacture or production of any such article or commodity, or to unreasonably enhance the price thereof; or—
      (d) To unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply of any such article or commodity, or in the price of insurance upon person or property;
   Is guilty of a misdemeanor and liable, on conviction, to a penalty not exceeding four thousand dollars and not less than two hundred dollars, or to imprisonment for any term not exceeding two years; and if a corporation, is liable on conviction to a penalty not exceeding ten thousand dollars and not less than one thousand dollars. [Emphasis added.]
9. See text accompanying notes 45–51 infra which discuss the constitu-
tional issues raised by Canada's competition laws. This is in sharp contrast to American antitrust statutes which provide both civil and criminal penalties.


12. Despite all of the 1889 Act's pitfalls, it did enunciate a statutory philosophy of free competition. One might have hypothesized that Parliament would develop more vigorous provisions over the course of eighty years. However, the true reforms have come only very recently in the history of Canadian merger legislation.


14. C. Goff & C. Reasons, supra note 4, at 105.

15. The substantive provisions of the 1910 Combines Act were similar to those of the 1889 Act.


18. C. Goff & C. Reasons, supra note 4, at 105.


22. C. Goff & C. Reasons, supra note 4, at 59.


29. Id.

30. C. Goff & C. Reasons, supra note 4, at 105.


32. Id.

33. Id. at 8.

34. Id. at 17–26.

35. C. Goff & C. Reasons, supra note 4, at 70; see also Quinland, The RTPC: Its Function and Duties, 44 ABA ANTITRUST L.J. 492 (1975).

36. This process begins when a combines investigation officer conducts the preliminary investigation into an alleged merger or other antitrust violation. If the officer finds conflicting or inconclusive evidence, the director usually drops the matter. If the director decides to continue the investigation, he is ordinarily reasonably confident that the law is being broken. The director has authority to search the records of a company without prior notice, to require the officers of a corporation to testify, and to subpoena a company's records. Unless the director reaches the stage of taking the testimony of corporate officers, he may drop his investigation without reference to the RTPC. C. Goff & C. Reasons, supra note 4, at 33–37; see also Quinlan, supra note 35.

If the Director continues, he will submit to the RTPC a statement of
evidence explaining the nature of the industry investigated, as well as the director's allegations and supporting evidence. In an in camera proceeding before the RTPC, combines officers usually represent the director, while lawyers present the firm's position. After the evidence is presented, the director states his conclusions, the opposing counsel replies, and the director then has a chance for rebuttal. Use of empirical economic as well as legal evidence is permitted.

The RTPC's Report to the Minister describes the industry involved, the events leading up to the director's allegations and the remedies deemed advisable. Normally, the report will give no advice as to whether prosecutions are necessary. G. Rosenbluth & H. Thorburn, supra note 17, at 38.

37. This standard is comparable to the American "incipiency test" found in Section 7 of the Clayton Act, 15 U.S.C. §18 (1976), which prohibits acquisitions or mergers whose effects "may be substantially to lessen competition . . ." Arguably, the Canadian amendments could be interpreted more broadly than the Clayton Act since, under Canadian law, even the likelihood of events leading to an offense can result in remedial enforcement action.

38. Prior to 1952, no reports had been issued concerning charges of illegal mergers. C. Goff & C. Reasons, supra note 4, at 94–97.


40. Id. at 93. By separating mergers and monopolies from the rest of the act, Parliament effectively confined the reform efforts to anticompetitive practices other than monopolies and mergers. The 1960 amendments specified that disputes over the existence of combines offenses other than mergers and monopolies are confined to proof of the effect of such practices on competition. Parliament made no such specification in the merger and monopoly provisions and thus allowed the Canadian Supreme Court in Regina v. K. C. Irving Ltd., 72 D.L.R.3d 82 (1976), to hold that defendants could introduce evidence of the effect of an anticompetitive merger and monopoly on the public interest such as increasing returns to scale or efficiency.

41. C. Goff & C. Reasons, supra note 4, at 98.

42. Id. at 99.

43. See Borgsdorf, Virtually Unconstrained Legal Environment for Mergers in Canada, 18 Antitrust Bull. 809 (1973); Canada's Merger Muddle, supra note 1.

44. See C. Goff & C. Reasons, supra note 4, at 97–100.


46. See Bertrand, supra note 10, at 466.


48. [1922] A.C. 191 (P.C. 1921) (Can.).

49. [1935] A.C. 76 (P.C. 1934) (Can.).


52. 61 C.C.C. 114 (1933).

53. 4 D.L.R. 699 (1940).


56. Professor Borgsdorf believed that by requiring proof of monopolistic conditions to convict a corporation of a
merger offense the Canadian courts in effect eliminated the merger provision of the Combines Act. According to Borgsdorf, a government intent upon prosecuting a merger offense had to examine whether the monopoly provisions of the Combines Act had been violated. If the government could not prove the defendant had violated any provision related to monopoly, then it could not gain a conviction for a merger offense. Borgsdorf, supra note 43.


60. Professor R. J. Roberts labels Justice Cartwright's position as unrealistic because it attempts to convert judges into economists. Judges do not have the expertise to analyze whether anticompetitive acts harm the public interest more than the alleged beneficial economic consequences of such acts promote the public interest. Roberts points out that, to be truly workable, Justice Cartwright's position would require establishing a public agency with extensive regulatory power over industries to ensure that the public interest is truly promoted by an anticompetitive merger or other act. Parliament specifically rejected public regulation of industry in the 1889 Act, and thus the Justice's position is inconsistent with Parliament's original intent. Roberts, supra note 24, at 219–20.


63. See text accompanying notes 3–44 supra for an explanation of pre-1970 amendments to the merger laws.


65. Id. at 6–8.

66. Id. at 7.

67. Id. at 8.

68. See text accompanying notes 92–95 infra for a discussion of recent constitutional holdings of Canadian courts.


71. Id. at § 12 (amending Can. Rev. Stat. c. 23 § 31.1 (1) (1970)).

72. Realizing the possibility of controversy concerning the proposals, the government commissioned a group of nongovernment experts to gain support for their position. The recommendations of the government-sponsored Skeoch-McDonald Report were similar to those of the Economic Council. The new report recommended a case-by-case approach to mergers. Not having to conform to criminal procedures, the tribunal in the Skeoch-McDonald conception would have great flexibility in choosing decisional criteria for each case. The report left the impression that certain mergers should be encouraged.

The government first presented the Stage II amendments to Parliament as Bill C-42 on March 16, 1977. This bill received considerable criticism in the Senate and had to be withdrawn. The government then resubmitted the amendments as Bill C-13 on November 18, 1977, without substantial change from the provisions of Bill C-42. L. Skeoch, Dynamic Change and Accountability in a Canadian Market Economy (1976).
73. C. Flavell, supra note 64, at 12.
75. Id. at § 6.
76. Id.
77. Id. at § 29. A merger is defined broadly as "any acquisition or establishment by one or more persons . . . of any control over or interest in the whole or any part of the business of a competitor . . ." Id. A joint venture is included within the definition of a merger if it is effected by the creation of a new corporation.

The provisions of the proposed law are applicable to all conglomerate and vertical mergers. Horizontal mergers are subject to review only if they result in control of more than 20 percent of the market. Subsection 4 of the proposed Section 31.71 specifies the factors that the Board should use in analyzing a merger case. The most important of these are:

(1) the size differential between the businesses of the parties to the merger and those remaining;
(2) the barriers to entry into the market in question and the effect the merger might have on them;
(3) any history of growth by merger by any party to the merger;
(4) any history of anticompetitive behavior by any party;
(5) any likelihood of removal of a vigorous or effective competitor; and
(6) any likelihood that a firm is about to fail or has failed. [Id.]

The use of "any" in many of these factors indicates that the Board can even consider marginal factors.

The companies involved could also defend the propriety of their merger on grounds of an increase in efficiency of the Canadian economy. If the Board is satisfied that a merger brought about or will probably bring about a substantial increase in efficiency through savings of resources, it cannot issue an order. However, even where the merger generates efficiency gains, the Board must rule against the merger if it would reduce the relevant market to a virtual monopoly. Id.

82. Id.; Spence, supra note 80, at 308–9.
84. Id.
87. Id. at 309–11.
89. 16 C.C.C.2d 49; 45 D.L.R.3d 45 (1974).
90. 72 D.L.R.3d 82 (1976); see text accompanying notes 94–102 infra for an analysis of ERCO and K. C. Irving.
91. C. Flavell, supra note 64, at 395.
95. 16 C.C.C.2d 49; 45 D.L.R.3d 45 (1974).
96. 72 D.L.R.3d 82 (1976).
97. McFetridge, The Emergence of a Canadian Merger Policy: The
99. See Roberts, supra note 24, at 222.
100. Id. at 223.
101. Id. at 226.
102. See text accompanying notes 74–78 supra.
103. Such a regression could be performed by using dummy variables. One could set the years in which more effective policies were instituted equal to one and those years in which no or ineffective policies were instituted equal to zero. Various variables, such as fluctuations in stock market prices, could be controlled for. Also, certain adjustments could be made to account for lag time between passage of legislation and institution of the policy. Thus, the regression of the dummy and control variables on the number of foreign mergers would generate a crude measure of the effect of merger policies on U.S. and other foreign merger activity in Canada.
104. In his concurring opinion in the case of FTC v. Proctor & Gamble Co., 386 U.S. 568, 581 (1967), Justice Harlan emphasized that the rules that have evolved in connection with mergers of the horizontal or vertical varieties are often not appropriate when applied to market extension and conglomerate mergers. He suggested that the courts should attempt to formulate separate standards for judging the legality of conglomerates, rather than applying the more mechanical per se rules used in horizontal and vertical cases. [Emphasis added.]
105. See R. Posner, Antitrust Law: An Economic Perspective 227–32 (1976) (contrasting the Supreme Court of the 1960s that “wrote antitrust enforcement virtually a blank check” with today’s Supreme Court which is more conservative in antitrust cases).
106. C. Goff & C. Reasons, supra note 4, at 104.
107. For these early years statistics did not divide mergers into domestic and foreign categories, but the number of foreign mergers is probably highly correlated with the number of total mergers in Canada.
108. In 1911, Chief Justice White, in Standard Oil Co. v. United States, 221 U.S. 1, 60, 65 (1911), first applied a “rule of reason” construction to Section 1 of the Sherman Act. The standard is further discussed in United States v. American Tobacco Co., 221 U.S. 106, 179 (1911).
110. C. Goff & C. Reasons, supra note 4, at 104.
111. See text accompanying note 20, supra.
112. See C. Goff & C. Reasons, supra note 4, at 104.
115. See Roberts, supra note 24.
117. Id.
118. Id.
119. Id.
120. See R. Posner, supra note 105.
121. See Lamont, supra note 116.
123. See Spence, supra note 80.
124. Royal Commission on Corporate Concentration, Report on Corporate Concentration 147.
126. Id.
127. Dickey, supra note 122, at 84.
129. Id. at 74–75.
131. Lamont, supra note 116, at 121.
132. Id.
133. Id. at 122.
134. Citizens are most discontented with U.S. investment and most nationalistic in Ontario and other urban centers, the heartland of U.S. investment. In contrast, Canadians in the Atlantic and Prairie provinces, where American investment is low, welcome foreign acquisitions and tend to be less nationalistic. Dickey, supra note 122, at 86–87.
135. See Lamont, supra note 116.
136. Id. There are several other consequences of the foreign corporate presence in Canada which exceed the scope of this study. One of the more important of these consequences is the extraterritorial application of foreign laws to much of Canadian industry. The United States and the EEC assert that their antitrust laws apply to their corporations in Canada so long as the effect of the U.S. or European company’s transaction in Canada affects competition in the United States or Europe, respectively. United States tax and other corporate laws apply to U.S. firms investing in Canada. Canada has attempted to legislate against the extraterritorial application of such laws but the validity of the Canadian Legislation is in doubt. Sutherland, Rio-Tinto Zinc Corporation v. Westinghouse Electric Corporation: Extra-territorial Jurisdiction in Antitrust Matters, 5 Monash L. Rev. 76 (1978).