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# THE COMBINES INVESTIGATION ACT AND MASS MEDIA

D. H. W. HENRY, Q.C.\*

*Mr. Henry describes the rationale and scope of the Combines Investigation Act and its application to the mass media, particularly the press, to date. He notes the narrow interpretation given to the Act by the courts and raises several questions suggested by the application of a competitive policy to the mass media. Mr. Henry's comments reflect Commissioner Johnson's analysis of the use of anti-combines legislation to control undue concentration of ownership with its detrimental effect on diversity and creativity. The objectives of the mass media in Canada have been set out in the Broadcasting Act and any comparison between the Canadian and American anti-combines provisions to the media must be made in light of the different mandates of the Federal Communications Commission and the Canadian Radio-Television Commission.*

## INTRODUCTION

I should like to express the view that the problems of competition, concentration and monopoly are of very great relevance to the entire communications industry. Because the media of communications are, in effect, the nervous system of society, there is no field in which excessive concentration or anti-competitive practices can be of greater concern to society. It might be helpful, therefore, to mention the extent to which the anti-combines laws apply to various sectors of the communications industry.

### *Rationale of "Combines Investigation Act"<sup>1</sup>—Competition Policy*

The basic purpose of the legislation has been stated in the Supreme Court of Canada as being "for the protection of the public interest in free competition". In this statute Parliament has embodied what has been described as the competition policy of Canada. By enacting this legislation Parliament has assumed the continuation in Canada of a free private enterprise economy, actuated by the profit motive and governed by a competitive market. In such an environment, those who wish to compete for economic gain should be free to do so without being subjected to artificial restraints

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\*Director of Investigation and Research Combines Investigation Act. This paper was originally prepared as part of a presentation to the Special Senate Committee on Mass Media, January 20, 1970.

<sup>1</sup> Combines Investigation Act R.S.C. 1952 c.314.

imposed upon them by competitors or other members of trade or industry. In essence, the law contemplates the regulation of the economy, to the largest extent possible, by the impersonal forces of competition rather than regulation of the economy by members of industry itself.

This concept tends to emphasize the importance of economic efficiency and the passing on of the fruits of that efficiency to society. It is also true to say that another important objective of competition policy, although it is not one that has been emphasized in Canada, has been the diffusion of economic power whereby it is sought to avoid concentration of too much power in too few hands. This objective has been, perhaps, more clearly articulated and accepted in the United States. Nevertheless, it is obviously a very important objective and is indeed more so in relation to the field of communications where concentration of power has not only very important economic consequences but even more important social consequences.

In Canada, we do not, of course, have a state of perfect competition; this is, indeed, a textbook concept. Nor do we have many significant areas of pure monopoly. Our market economy is, in fact, a mix, in varying degrees, of elements of imperfect competition and public regulation, the latter occurring sometimes in industries that tend to be natural monopolies, such as transportation and public utilities. The state has also intervened in the areas of agriculture and resource industries by the formation of production and marketing boards; and for reasons of social policy, in the field of broadcasting. With respect to such interventions the Economic Council of Canada has observed:

"Among the most common reasons for instituting economic regulation is the desire to control business conduct and performance in industries with an inherent tendency towards natural monopoly. Presumably, regulation is here introduced in an effort to achieve what the market plus competition policy cannot do in the way of ensuring efficiency in the use of resources, the protection of consumers from exploitation and the preservation of the health and safety of the public. However, not all economically significant regulations are formulated exclusively on economic-efficiency or consumer-protection grounds. At times, governments have imposed regulations designed to achieve other objectives such as safeguarding national culture, ensuring a national presence in institutions considered vital to sovereignty, or limiting hours of work and the number of outlets offering particular goods and services in given locations. These may be valid objectives, but their pursuit may impose economic costs, which should as far as possible be estimated, publicly discussed, and taken continuously into account as the regulatory process goes forward."

### *Scope of "Combines Investigation Act"*

The anti-combines laws are now found entirely in the *Combines Investigation Act*. The original statute which dealt with agreements in restraint of trade was enacted in 1889. It is a criminal statute which seeks to give effect to the rationale that I have outlined by prohibiting certain defined conduct with penal consequences.

The Act prohibits activity in three main areas:

- (a) Combinations that prevent or lessen unduly competition in the production, purchase, sale, storage, rental, transportation or supply of commodities or in the price of insurance.

- (b) Mergers or monopolies that may operate to the detriment of the public.
- (c) Unfair trade practices including price discrimination, predatory pricing, certain promotional allowances, resale price maintenance and misleading advertising.

The combination provision is designed to prevent certain collusive restraints on competition by private arrangements made between businessmen. The most usual situations involve price-fixing, market-sharing, group boycotts of competitors or outlets, profit-sharing, and the like. Such agreements are found horizontally among competitors and can also exist vertically among suppliers and their distribution system.

While the combination and trade practices provisions are probably not of central interest to the Communications industry it is worth pointing out that they have some relevance to the study. It is of considerable importance to the continuation of a viable enterprise in the communications industry that it minimize its cost of doing business. Such a business is entitled to obtain the benefits of competition in the supply of the equipment and materials upon which it depends for its operation. If, for example, as has been suggested, there is a combine in the newsprint industry, that would inevitably have the effect of maintaining the price of newsprint at a higher level than it need be and would be of significance in increasing the cost of producing the newspaper.<sup>2</sup> In other words, the provisions of the legislation designed to maintain a competitive environment are of great importance to the industry in minimizing the cost of the goods which it has to buy, whether for use in the broadcasting media or the press.

### Mergers<sup>3</sup>

Only two merger cases<sup>4</sup> of any importance have reached the courts and in each case the court held that the merger did not constitute a breach of the Act<sup>5</sup>. These judicial decisions were made in proceedings brought under the predecessor of the present sections, but as the previously existing principles have been carried forward into the present provisions, there is little reason to expect that the courts will consider that the effect of these two decisions has been nullified or altered. Neither case was carried through to an appeal and the judgments therefore stand as judgments of the trial division in each case.

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<sup>2</sup> This situation was dealt with in the Report of the Director of Investigation and Research under the *Combines Investigation Act* for the year ended March 31, 1966, at pages 12-15.

<sup>3</sup> See *Combines Investigation Act* s. 33 (2) (c).

<sup>4</sup> *R. v. Canadian Breweries Limited* [1960] O.R. 601, (hereafter cited as *The Beer Case*); and *Regina v. British Columbia Sugar Refining Co. Ltd.* [1960] W.W.R. (n.s.) 577 (cited as *The Western Sugar Case*).

<sup>5</sup> In a recent case, *Regina v. Electric Reduction Company of Canada*, there was a plea of guilty on January 12, 1970.

To upset the principles established would require additional cases brought before the appellate courts and ultimately before the Supreme Court of Canada.

The following points may be made as a result of this experience:

- (a) A merger is not unlawful unless it limits competition to the "detriment of the public". This expression has not been defined by Parliament and it is therefore left to the courts to give it more particular meaning.
- (b) Where the industry was regulated by valid provincial legislation it was withdrawn to that extent from the operation of the *Combines Investigation Act*. The public agency concerned is expected to protect the public interest rather than the economic forces operating in the competitive market.<sup>6</sup>
- (c) Thus far, the courts have looked at the effect of the merger on competition, as the statute requires, but have held that competition must be virtually stifled before the merger can be struck down under the law.<sup>7</sup>
- (d) The court, in the *Western Sugar Case*,<sup>8</sup> placed the Crown under the additional burden of proving that prices and profits were excessive or exorbitant.
- (e) As the provisions create a criminal offence, the onus is on the Crown to prove the offence beyond a reasonable doubt.
- (f) The courts have been reluctant to enter into any sophisticated economic analysis of the situation resulting from the merger and have tended in lieu thereof to find a reasonable doubt in the face of evidence of some competition remaining.
- (g) The *virtual monopoly* test is open to challenge on the basis of other judicial pronouncements, but as long as a virtual monopoly test for mergers persists, the merger provision as a practical measure is rendered nugatory. There is clearly no possibility that it could be used to arrest monopoly in its incipiency; it could be invoked only in the final stages of monopolization when concentration has proceeded far beyond the degree where competition remains an effective force.

It should be observed that one important underlying factor in bringing about this state of affairs is the criminal nature of the merger provisions. The

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<sup>6</sup> See the *Beer Case* supra. n. 4.

<sup>7</sup> *Regina v. Canadian Breweries Ltd.* [1960] O.R. 601 particularly at 605 where the trial judge applies the dictum of Cartwright J. as he then was in *Regina v. Abitibi Power & Paper Co. Ltd.* (1961) 131 C.C.C. Ann. 201, CPR 188, establishing the virtual monopoly test.

<sup>8</sup> supra. n. 4.

Crown is required to demonstrate beyond a reasonable doubt that the effect of the acquisition, which is a matter of economic analysis and judgment, is detrimental to the public so as to vest the acquiring company with criminal liability. This is a very difficult onus to discharge in the field of economic analysis.

The emasculation of the merger provisions clearly limits the number of cases than can be responsibly brought forward for investigation and enforcement in the courts; yet without some further references to the courts, and particularly the Supreme Court of Canada, it is impossible to reinstate the provision judicially. While this might be done in time, the obvious practical alternative is revision of the legislation.

This need has been recognized and, indeed, the Economic Council of Canada has recommended that a different technique for controlling mergers in Canada should be introduced. This would call for the setting up of a tribunal which would deal with mergers referred to in a civil or non-criminal context and a decision made as to the desirability or otherwise from the standpoint of the public interest in the light of broad tests relating to the effect of the merger on competition and efficiency. To do so, however, raises questions of constitutional law that will have to be resolved. In the past the Privy Council and Supreme Court of Canada have held that the *Combines Investigation Act* is valid legislation under the criminal law power in section 91 of the *B.N.A. Act*, but have struck down two attempts to extend the provisions of the law into the civil field. Since these are matters of national concern, however, it becomes of obvious importance to find an effective way to place limits on the extent to which the operation of market forces can be seriously impaired through the merger route, at the same time giving scope to those acquisitions which increase economic efficiency without undue impairment of competition.

In the meantime, the existing legislation must be administered. The Director therefore proceeds on the assumption that the legislation must be given some meaning. For this purpose the virtual monopoly test is not applied but for purposes of administration and enforcement a decision is made on the basis of whether competition has been impaired by the merger, or concentration has increased to the extent that it may fairly and responsibly be argued before a court that the line has been crossed with resulting public detriment. The administrators, however, must recognize that Canadian trial courts are not likely to strike down a merger unless it produces a very high degree of concentration in the market which is not accompanied by some degree of competition.

### *Monopolies*<sup>9</sup>

Until this year there was only one judicial decision in a monopoly case in Canada, and that decision seems to have been made in the light of such clear

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<sup>9</sup> See *Combines Investigation Act* s. 33 (2) (f).

evidence of abusive practices that it does not provide a very useful criterion for determining what the judicial attitude is likely to be in future to monopolies as such. It is apparent that the legislation does not strike down monopoly as such but provides that abuse or likely abuse of monopoly, i.e., operation of the monopoly to the detriment of the public constitutes the proscribed conduct.

### *General Application of the anti-combines laws to the Communications Industry*

As stated earlier the problems of competition, concentration, and monopoly are of very great relevance to the entire communications industry. Some of the media of communication compete with others; some only compete with others to a limited degree; and others stand in a category by themselves. In some cases the message and the vehicle for communicating it go together; in other cases they are separate. One cannot obtain the printed message contained in a newspaper, magazine or book without buying the article at the same time, but in the case of broadcast messages one buys the radio or television set without at the same time buying the message which is conveyed in a separate operation. Similarly, one rents the telephone or computer without the message which is later separately conveyed over this equipment.

The *Combines Investigation Act* does not apply equally in all areas of the communications industry. In this respect there are two things that must be said.

In the first place, the Act generally speaking applies only to situations that involve goods. What may be termed "pure" services are not covered by the Act, although the specified services of storage, rental, and transportation of goods and the price of insurance are included. Apart from that, services are not specifically included.

In the second place, it has been held by the courts that, to the extent that an industry is regulated under valid provincial or federal legislation, the industry concerned is not subject to the *Combines Investigation Act*. Thus, where rates charged by a transportation company are fixed by a regulatory board, the industry is not subject to the Act in relation to the rates so determined.

The following therefore may be said with respect to particular areas of the field of communications:

- (a) Newspapers (including dailies, weeklies, periodicals and magazines): In this case the publisher sells an article, i.e., the newspaper, periodical, etc., to the consumer. While the objective is to convey a message, the message cannot be obtained without buying the thing; therefore, restraint of trade activities with respect to these products are subject to the Act.
- (b) Books: The position is the same as with newspapers.

- (c) **Films:** This is somewhat more complicated. The exhibitor of the film, for example, the theatre owner, rents the film from the distributor in order to exhibit it. This appears to be an article within the meaning of the Act and its production and rental are subject to the provisions of the Act. The exhibiting of the film to the patrons of a theatre, however, is a service which does not at present come under the terms of the Act.
- (d) **Broadcasting (radio, television and CATV):** The broadcasting of the message constitutes a service which does not come within the scope of the Act. This is distinct from the equipment needed to receive the message. It is purchased or rented by the consumer in a separate operation and this equipment, like other consumer goods, is subject to the provisions of the Act. In addition, this part of the industry is subject to important regulatory control through the Canadian Radio-Television Commission which is intended to protect the public interest.
- (e) **Telephone, telegraph and telex services:** As in the case of broadcasting, these are services that do not fall within the provisions of the Act. However, to the extent that equipment is rented by the user of the service, such as in the case of the telephone instrument and the telex equipment, these transactions could be subject to the Act, but charges for the actual communication of the message would not. In addition, the rates charged the user of the service are set by the Canadian Transport Commission.
- (f) **Computers and data banks:** The process of programming and information retrieval by itself constitutes a service which would not come under the Act. However, the purchase or rental of equipment necessary to make use of the service would be subject to the Act.
- (g) **Advertising:** Except for sections 33C and 33D which prohibit misleading advertising, this activity is not as such subject to the Act.

From the foregoing it will be seen that printed publications are to be regarded as articles within the meaning of the anti-combines laws so as to justify formal inquiry under the Act in relation to mergers, monopolistic situations, combines and other prohibited activities. In the field of telecommunications, however, the situation is different. The services concerned are not covered by the Act. This may not, however, preclude a formal inquiry under the Act into certain aspects of the activities of firms in this area. While it may not be possible to apply the Act to the services themselves, it may be possible to approach the situations involving undue concentration in another way. For example, in the case of the current inquiry into Bell Telephone (which is public knowledge), the line of inquiry concerns the impact on the independent manufacturers of telecommunications equipment



of Bell's near monopoly position as a purchaser of such equipment and of its control of an important unregulated supplier. It would similarly be of concern if a telecommunications company insisted that its own or designated makes of computer or information retrieval equipment could alone be attached to its system, as this could give it control over the development of the equipment and ultimately, remotely over sources of information.

### *Formal Inquiries Involving the Communications Media*

There have been eight formal inquiries under the *Combines Investigation Act* into various aspects of the mass media. Three of these involved newspaper mergers and have been the subject of reports by the Restrictive Trade Practices Commission which have been published.<sup>10</sup> The other five are current matters,<sup>11</sup> which being, so to speak, *sub judice*, it would not be proper to dis-

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<sup>10</sup> The inquiries are:

(a) An inquiry concerning the Production and Supply of Newspapers in the City of Vancouver and elsewhere in the Province of British Columbia (R.T.P.C. report dated August 16, 1970). [Recognizing the importance of the press and consequently the necessity of diversity and independent editorial policy but also the economic realities the Restrictive Trade Practices Commission approved a merger of the two Vancouver papers subject to a series of undertakings to insure editorial independence. The Commission also rejected the use of a "package" advertising scheme used by the two papers as being contrary to the public good.]

(b) Inquiry into the Production, Distribution and Supply of Newspapers in the Sudbury-Copper Cliff area (R.T.P.C. report dated February 26, 1964). [The Commission did not find any abuse of monopoly power to eliminate a potential competitor where the established monopolistic daily paper, after hearing of the plans regarding the commencement of a weekly, started its own weekly so that its competitor never operated at a profit and ceased publication.]

(c) Inquiry relating to the Acquisition in 1962 of the Times-Journal Newspaper published in Fort William, Ontario (R.T.P.C. report dated March 30, 1965). [The Commission, on an analysis of circulation patterns, rejected the allegation that the acquisition of the Fort William paper by the Port Arthur News Chronicle was an unlawful merger, on the ground that the two papers were not in competition, as each were a monopoly in their own independent market prior to the merger.]

<sup>11</sup> (a) Inquiry relating to the Production, Purchase, Sale and Supply of books in the Province of Quebec. This inquiry involves a price-fixing conspiracy in relation to two classes of French language books sold in the Province of Quebec — school text-books and other books. Legal proceedings have been instituted against a number of publishers and suppliers of books in the Province of Quebec. The case is at present before the courts.

(b) Inquiry relating to the Distribution and Rental of Motion Picture Film. This inquiry, the existence of which was made public by the trade, concerns alleged restrictive practices in relation to the distribution of films through motion picture theatres.

(c) Inquiry relating to the Manufacture, Production, Distribution, Purchase, Supply and Sale of Communications Systems, Communications Equipment and Related Products. See the Annual Report of the Director of Investigation and Research for the year ended March 31, 1968, at page 54 and Proceedings of the Standing Committee on Transport and Communications, December 7, 1967, p. 385.

(d) One other inquiry is in progress in the sector relating to the press which cannot be identified until a report is published or legal proceedings are commenced.

(e) Inquiry relating to the Production, Supply and Distribution of Newspapers in the Province of New Brunswick.

cuss except to the extent that they have clearly become public knowledge.<sup>12</sup> These inquiries may be taken to indicate that a considerable degree of attention has been given to restrictive situations or practices in the field of the mass media, having regard to the limitations of the law and the need to spread the resources of the Director's office over a very wide range of activities in the economy.

*Conclusion:*

This in general is how competition principles have been applied to the mass media. In concluding I would like to make a number of points and raise questions directed particularly to the mass media.

In the background is the fact that the mass media are businesses. Commercial profitability becomes the dominating necessity for the publisher or owner. The publication of news and opinions must be secondary to this, certainly in the long run.

Secondly, while an information medium is a business, the way that business is handled has far more important consequences for society than in the case of, say, manufacturing. Because the media of communications are, in effect, the nervous system of society, there is no field in which the structure and control of the industry, as well as the quality and availability of the product are more important.

What is here in issue is a very important aspect of power in the state. The broad national objective regarding the mass media is presumably that set out in the *Broadcasting Act*.<sup>13</sup> The communications system should be effectively owned and controlled by Canadians so as to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada.

There are important sub-objectives:

- (a) Freedom to inform, interpret and comment and to stimulate debate: With this is the necessity of editorial independence sufficiently certain to withstand economic and political pressures.
- (b) Variety: Because of the paramount public interest in the development of informed opinion, diversity assumes an importance in itself. The public is entitled to hear all points of view.
- (c) The public is entitled to a high standard of excellence of the product and that it be readily available at a reasonable cost.

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<sup>12</sup> The existence of these last inquiries has been disclosed in the press and elsewhere. Further information about them, however, cannot be disclosed until a report is published or legal proceedings are commenced. The long-standing policy relating to the confidentiality of inquiries was explained by the Government leader in the Senate on December 9, 1969, in answer to question No. 1, Senate Hansard, page 296.

<sup>13</sup> Broadcasting Act S.C. 1967-68 c. 25.

- (d) An economically viable industry which will be, firstly, a commercial base for operations of the particular publication, and secondly, will permit the continued distribution of information, ideas and entertainment, as well as advertising, from that base.

Thirdly, it is submitted that any study of a particular medium must be in the context of the total communications industry. One element ought not to be considered in isolation. This industry is a mix having several characteristics. While some areas are regulated under legislation, (radio, television, CATV, and telecommunications, including satellites), others are free of direct regulation and are operating in a competitive market (the press, motion picture films, computers and information storage and retrieval). Practically all, however, are in the private sector operating as businesses in the free competitive enterprise system — CBC is the notable exception. The various media may in some respects compete with each other, but they are not necessarily perfect substitutes for each other or fully competitive with each other. Each has its own particular role to play and its own identifiable market. It is perhaps best to say that they complement one another. The future relationship between broadcasting, the press and information retrieval systems is not likely to be static. It is important, therefore, to lay a framework for future flexibility so as to make the media responsive to public demand from time to time in order to provide the public with the best product and service from all.

As a general principle, regulation should be kept to a minimum. This means regulation by the state as well as regulation by entrepreneurs holding the reins of power. Where competition can operate and is allowed to operate, it will ordinarily produce a more efficient enterprise and a better product and service than under regulation. In the field of the mass media, there is, of course, the added need to protect freedom of expression from unnecessary and unacceptable restraints. Moreover, administration of an industry by its own members in the long run is not likely to accord with the true public interest.

Recognizing existing areas of regulation, it is submitted that any regulatory measures should be aimed at preserving a competitive environment and limiting or restraining monopoly, monopolization and anti-competitive practices. The Royal Commission on the Press in Great Britain observed:

“ . . . The danger in a newspaper monopoly — that is, a newspaper without any competition — is that the monopolist, by its selection of the news and the manner in which it reports it, and by its commentary on public affairs, is in a position to determine what people shall read about the events and issues of the day, and to exert a strong influence on their opinions. Even if this position is not consciously abused, a paper without competitors may fall below the standards of accuracy and efficiency which competition enforces. . . ”<sup>14</sup>

Lack of competition tends to deprive the publication of its virility and to make it insipid, seeking to please everybody. It may sidestep issues, notably

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<sup>14</sup> Royal Commission on the Press 1947-1949, (Great Britain) Report, para. 274 (in part).

election issues, which should be debated, thus dampening discussion; at other times it may straddle the fence on controversial matters.

There are certain aspects of ownership that are pertinent; it is submitted that common ownership or control of a number of competing media in the long run negates true competition. Notwithstanding the common owners policy of the independence of the various units, the power exists to stifle that independence in an instant; at the very least the policy may change with changes in ownership. Chain ownership is thought by some to be too impersonal and too neutral, thus affecting the quality of the product. Foreign ownership, which at present does not characterize the mass media, may be the means of injecting new capital into the industry but is at variance with the broad objectives of Canadian ownership. The anti-combines laws in their present form constitute too blunt an instrument to deal with concentration in its incipency and are probably too flexible to deal effectively with the real issues involved in continuing concentration in mass media.<sup>15</sup>

I suggest this analysis raises the following questions:

- (1) If we must accept some degree of concentration has it gone too far? This must be considered in relation to
  - (a) individual markets,
  - (b) Canada as a whole, and
  - (c) the larger market of all communication media.
- (2) How can further concentration be arrested if necessary?
  - (a) by facilitating new entries through encouraging technological change or by means of subsidies or guaranteed loans?
  - (b) by prohibiting monopolization through new statutory provisions?
  - (c) by statutory regulation of the industry structure such as requiring public approval of mergers and take-overs within a medium or between media?
- (3) Can complementary media be made more directly competitive so as to stimulate improvement of their quality and performance?
- (4) Is the public getting the media it deserves? Can the public need for more information and viewpoint be better identified? Can a vehicle be found to enable the public to be more effective in shaping editorial policy on news coverage and controversial issues? (e.g., if a Press Council is a possible development, should it not contain strong reader representa-

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<sup>15</sup> Following the Interim Report of the Economic Council of Canada on Competition Policy, July, 1969, revisions of the Act are being studied.

tion?). Just as university students are now more effectively articulating their needs and influencing academic programs, ought not the public too be given a similar opportunity vis-a-vis the media?

- (5) Can the competitive performance of media be improved by awards for excellence in journalism or scholarships and other incentives to attract greater numbers of capable students into the field?
- (6) Would a provision comparable to section 20 of the *National Transportation Act*,<sup>16</sup> which requires mergers of transportation companies to be reported to the Director of Investigation and Research by the Canadian Transport Commission, be appropriate in relation to the Canadian Radio-Television Commission and the broadcasting media?

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<sup>16</sup> National Transportation Act, 1966-67 c. 69.