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Part of the Antitrust and Trade Regulation Commons

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Abstract
The object of this paper is twofold: to determine the extent to which enforcement of the Combines Investigation Act from 1970-1981 was guided by the goal of maximizing economic efficiency; and to ascertain the roles - facilitating or frustrating - played by the government and the Bureau of Competition Policy. The former is accomplished by correlating Bureau enforcement activity with estimates of allocative inefficiency. The latter is accomplished by treating the Bureau as a utility maximizer subject to the constraints imposed by the legislation and the structures set up to administer and adjudicate the statute. Our conclusions are that: enforcement activity is not guided by efficiency considerations; and the chief reason is the government constraints, particularly the wording of the legislation and its implicit support of the economic analysis of the courts.

Keywords
Canada. Combines Investigation Act; Antitrust law; Canada

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By Cynthia Shorthill and J.C.H. Jones

The object of this paper is twofold: to determine the extent to which enforcement of the Combines Investigation Act from 1970-1981 was guided by the goal of maximizing economic efficiency; and to ascertain the roles - facilitating or frustrating - played by the government and the Bureau of Competition Policy. The former is accomplished by correlating Bureau enforcement activity with estimates of allocative inefficiency. The latter is accomplished by treating the Bureau as a utility maximizer subject to the constraints imposed by the legislation and the structures set up to administer and adjudicate the statute. Our conclusions are that: enforcement activity is not guided by efficiency considerations; and the chief reason is the government constraints, particularly the wording of the legislation and its implicit support of the economic analysis of the courts.

Despite Carlyle's characterization of economics as the "dismal science," in policy matters economists tend to be, by turn, naive, optimistic, and cynical. Naive, because they think their models give rise to predictions which can have implications for policy; optimistic, because they feel that if the predictions are empirically validated then they have definitive policy implications; and, ultimately, cynical, because they realize that, in economic policy matters, economic analysis is frequently the first casualty. Consider, for example, resource allocation and antitrust.


Univ. of Victoria. The authors would like to thank L. Laudadio for helpful comments.

A basic prediction of neoclassical price theory is that, *ceteris paribus*, imperfect markets lead to allocative inefficiency. Since there is some empirical evidence to substantiate this proposition,² efforts to correct it should be judged, presumably, by their ability to improve economic efficiency. Thus, even though differences exist as to the seriousness of the misallocative problem and the best way to rectify it, there is a consensus among economists that the efficiency criterion is the one analytically justified goal of antitrust.³ Or, to paraphrase Elzinga, if not efficiency, what else counts?⁴

Unfortunately, in the real world of antitrust enforcement, a number of things count, all of which seem to result in downgrading the significance of the efficiency criterion. The literature suggests two reasons for this state of affairs. First, the existence of a menage of ends (equity, fairness, dispersion of political power, protection of small business, etc.), all of which appear incompatible with, but in the last analysis are ranked superior to, efficiency.

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Second, the activities of the enforcement agencies which frustrate the attainment of efficiency. 5

The common theme uniting these explanations is the assumption that governments and bureaucracies act so as to maximize their own self interest rather than consumer welfare. The argument is that governments, when drawing up legislation, respond primarily to the pressures exerted by those groups facilitating their re-election; and bureaux, in administering the legislation, seek to optimize some element(s) in their private utility functions. 6 The end result is that, in antitrust, the efficiency criterion – the economist’s grail – plays a distinctly minor role in the attempt to rectify the misallocative consequences of market failure.

While these criticisms have been directed most pointedly at U.S. antitrust, a similar situation for a similar set of reasons potentially exists in Canada. From the standpoint of ends, the Federal government has frequently articulated the promotion of economic efficiency as an antitrust goal. 7 Indeed, in the revision of the law in the Competition Act of 1986, to "promote ... efficiency" was finally made an explicit "purpose" of the legislation. 8 But, there is also a literature which argues that the operating ends embedded in the pre-1986 legislation have little to do with efficiency and merely represent the response of governments to the pressure from


7 The classic statement is by the Justice Minister in 1966, Commons Debates, 31 March 1966. It was explicitly written into the aborted legislation of 1970 (Bill C-256) and 1977 (Bill C-42); and, according to the Minister, was still an important goal in 1981. See A. Ouellet, "Notes for an Address to the Montreal Chamber of Commerce" (Mimeo, Ottawa: Department of Consumer and Corporate Affairs, 31 March 1981).

8 Competition Act, R.S.C, c. C-34, 1.1.
business groups;\(^9\) while "efficiency" in the 1986 Act appears in conjunction with several other ends all of which cannot be achieved simultaneously.\(^{10}\)

From the enforcement side, there is some empirical evidence to suggest that efficiency is not the guide to enforcement practice (at least in the mid-1960s),\(^{11}\) although the bureau responsible (The Bureau of Competition Policy, hereinafter shortened to the Bureau) claims allocative efficiency as its guiding end.\(^{12}\) In addition, there is also evidence that part of the Bureau's behaviour (merger enforcement, 1960-71) can be explained by a utility maximizing model in which the objective function is "security."\(^{13}\) Interestingly enough, however, and in contrast to the prevailing view on the U.S. antitrust bureaucracy, it was concluded that the Bureau's behaviour, in this instance, appeared to move Canadian society closer to

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\(^{10}\) Supra, note 8 reads: "The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices." See also M.J. Trebilock, "What are the Costs of Closure" (1986) 7 Can. Compet. Pol'y Rec. 1 at 1-2.

\(^{11}\) See Jones and Laudadio, supra, note 2.

\(^{12}\) Since 1961 the *Annual Report, Director of Investigation and Research,* (Combines Investigation Act) (Ottawa: Supply and Services) [hereinafter Annual Report] has contained the statement that the purpose of the legislation is to "assist in maintaining effective competition as a prime stimulus to the achievement of maximum production, distribution and employment in a mixed system of public and private enterprise." It is difficult to construe this as meaning anything but allocative efficiency. In 1981, the then Director explicitly said that "resource allocation" and "economic efficiency" was the main goal of the legislation. See L.A.W. Hunter "Notes for an Address to the ABA National Institute" (Mimeo, Ottawa: Department of Consumer and Corporate Affairs, 1981).

maximizing consumer welfare.\textsuperscript{14} Nevertheless, this conclusion is not universally accepted and there is continued concern about the Bureau’s behaviour.\textsuperscript{15}

The upshot is that it is not clear to what extent an efficiency criterion guides Canadian antitrust policy and what role political and bureaucratic considerations play in its enforcement. Accordingly, the object of this paper is twofold: to determine the extent to which enforcement of the \textit{Combines Investigation Act} from 1970-1981 was guided by efficiency considerations; and to ascertain the role – facilitating or frustrating – played by the government and the Bureau in the process.

The time period is particularly appropriate for three reasons. One, from 1970 to 1981 the government continually stressed the significance of efficiency as a policy goal, and the Bureau explicitly embraced it as a guide.\textsuperscript{16} Objectively, if these statements are a true reflection of preferences then the importance of efficiency should show up in enforcement policy over the period. Two, the period also encompasses a major effort to reform antitrust policy (the Combines Act was formally amended in 1976, and there were any number of aborted legislative changes prior to the introduction of the Competition Act in 1986),\textsuperscript{17} so that the political pressures on government (and the government’s response) should also be clear.

\begin{thebibliography}{99}

\bibitem{14} Ibid. at 296.

\bibitem{15} L.A. Skeoch and B.C. McDonald et al., \textit{Dynamic Change and Accountability in a Canadian Market Economy} (Ottawa: Supply and Services, 1976) at 391, were critical of the potential "single-minded enthusiasm of the investigators." While E.G West notes, with apparent approval, Shughart and Tollison’s dismissive comment that "The antitrust bureaucracy operates much like the regulatory bureaucracy ..." \textit{supra}, note 5 at 51. See E.G. West, "Canada's Competition Act in the Light of U.S. Experience: A Cautionary Tale," in W. Block, ed., \textit{Reaction: The New Combines Investigation Act} (Vancouver: The Fraser Institute, 1986) at 200.

\bibitem{16} \textit{Supra}, notes 7 and 12.

\bibitem{17} For a discussion of the history of the legislation in the 1960s and 1970s, see I. Brecher, \textit{Canada's Competition Policy Revisited: Some New Thoughts on an Old Story} (Montreal: The Institute for Research on Public Policy, 1982).

\end{thebibliography}
Finally, 1970-81 is the latest period for which the complete information necessary for our empirical work is available.

The analysis proceeds in two steps. First, to determine the degree to which enforcement activity is correlated with efficiency considerations, we produce estimates of welfare loss (due to allocative and other cost inefficiencies) by industry, and match them with the Bureau's case activity. If efficiency is the principal guide to enforcement practice, the relationship should be close, in so far as the Bureau, presumably, would concentrate its scarce enforcement resources where the efficiency loss is greatest. This is not our conclusion.

This failure of enforcement activity to mesh with efficiency loss obviously requires some explanation. Thus, the second step considers the impact of political and bureaucratic behaviour on enforcement activity. Since there is no way this can be quantified, our method is to treat it as a standard economic problem of utility maximization under constraint. The objective function is the bureaucracy's desire to maximize security, and the law, the courts, and other influences are constraints.

We then ask whether the pattern of enforcement activity is explicable by the Bureau acting to maximize utility rather than minimizing efficiency loss, or due to the nature of the constraints. Our conclusion is that, in most instances, it is the nature of the constraints (in particular the political ends underlying the legislation and the interpretations of the courts) which determine the pattern of enforcement activity. No matter what the Government or the Bureau claim, efficiency is not an operative guide to enforcement activity.

The analysis that follows details the rationale for this conclusion. It is organized into three parts: Part I, estimates of efficiency loss are reported and the relationship to enforcement activity is analyzed; Part II, the bureaucratic utility function is

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19 This, of course, assumes that the costs of bringing cases are the same so that net benefits are correlated with efficiency losses. Because of the impossibility of obtaining enforcement costs, this is the usual assumption. See Long, Schramm and Tollison, ibid.
outlined and the framework used to examine the results of Part I and Part III, conclusions are drawn.

I. THE EFFICIENCY CRITERION AND CASE ENFORCEMENT

The method we use to determine the relationship between efficiency and enforcement activity is to compare efficiency losses by industry with the case activity by industry. The working hypothesis is that, if an efficiency criterion is important, enforcement activity will be greatest in industries with the largest efficiency losses. This is because, ceteris paribus, the economic gains from enforcement will be greatest.

![Figure 1](image-url)

*Figure 1*

The particular model we employ to estimate efficiency losses (allocative and non-allocative) is a variation on Harberger's partial equilibrium framework and can be illustrated with reference to Figure 1.

1. The model

Given a linear demand curve (AR) and constant returns to scale (MC = AC), competitive price and quantity in a closed economy are $P_1$ and $Q_1$, respectively. The monopoly price and quantity ($P_2$, $Q_2$) reduce consumer surplus by the trapezoid $P_2BEP_1$, of which $P_2BHP_1$ is a "transfer" from consumers to the monopolist, and $BHE$ is the "deadweight loss." The latter is an estimate of allocative inefficiency and can be approximated as,

$$W_1 = \frac{1}{2} \sum \left( \frac{\pi}{TR} \right)^2 TRk$$

where $\pi$ is monopoly profit, TR total revenue, and $k$ the elasticity of demand.

In an open economy – which seems particularly relevant in the Canadian case – (1) can be modified by taking into account the export sector. Two extreme assumptions are possible. If export markets are assumed competitive so that monopoly profits are earned only in domestic markets, then, with $X$ representing the ratio of exports to total revenue, (1) becomes,

$$W_{2a} = \frac{1}{2} \sum \left( \frac{\pi}{(1-X)TR} \right)^2 (1-X) TRk$$

20 With the exception of the calculations of equations (2a) and (2b) below, the estimations of the efficiency loss follows Jones and Laudadio, supra, note 2.


If, at the other extreme, we assume that the rates of return on domestic and export sales are equal, then (1) becomes,

\[ W_{2b} = \frac{1}{2} \sum \left( \frac{\pi}{TR} \right)^2 (1-X) TRk \]

\[ W_{2a} > W_{2b} \] because profits earned on exports are a benefit to the domestic economy.

The non-allocative measures of cost inefficiency are based on the notion that costs \( AC^I = MC^I \) in Fig. 1) are too high in monopoly (where price and quantity are \( P_2 \) and \( Q_2 \)) as compared to the competitive case where \( AC^2 = MC^2 \) and price and quantity are \( P_3 \) and \( Q_3 \). In this instance, the addition to the original deadweight loss is HEDL and the area \( P_1HLP^3 \) represents the excess costs of producing \( 0Q_2 \). Although \( P_1HLP^3 \) potentially covers a number of elements\(^{23}\) for estimation purposes we focus on monopoly wages and advertising expenditures. Monopoly wages represent one item in the general class of excessive factor remuneration. The argument is that part of the firm's monopoly profit is passed on to unionized workers in the form of excess - greater than competitive - wages. This is approximated as,\(^{24}\)

\[ W_2 = \left( \frac{v}{1+v} \right) k \pi + \left( \frac{vk}{2} \right) (TR - \pi + k \pi) \]

where \( v \) is the percentage shift in the average cost curve due to the monopoly wage effect.

With advertising, the rationale for including it as a cost inefficiency is that most of this expenditure is persuasive, a waste of.

\(^{23}\) For a survey of the items which theoretically should be included as measures of cost inefficiency see J.J. Siegfried and E.H. Wheeler "Cost Efficiency and Monopoly Power: A Survey" (1981) 21 Q. Rev. Econ. & Bus. 25.

\(^{24}\) F.W. Bell, "The Effect of Monopoly Profits and Wages on Prices and Consumers' Surplus in U.S. Manufacturing" (1968) 6 West. Econ. J. 233 at 235.
resources, and useful only for creating entry barriers. It should therefore be added to monopoly profits.\textsuperscript{25} Thus, (1) can be written as,

\begin{equation}
W_4 = \frac{1}{2} \sum_k \left( \frac{\pi^k}{TR} \right)^2 TR_k
\end{equation}

where $\pi$ represents monopoly profits plus advertising expenditures.

While the elements in equations (1) to (4) do not describe all items which could lead to efficiency loss, they are the only ones – given the nature of the data – for which we could produce reasonable empirical estimates.\textsuperscript{26} The estimates of these equations represent, simultaneously, the size of the efficiency loss and a measure of the potential gross benefits from antitrust enforcement.

2. Data and estimation procedures

Estimates of equations (1) to (4) are derived for a set of 45, 3 digit SIC classified industries from the manufacturing sector.\textsuperscript{27} The size of this sample was determined by data availability and all estimates were made for every year 1970 to 1981. This allows us to track the changes in $W_4$ to $W_4$ inclusive, thus eliminating many of the transitory difficulties associated with single year estimates. It should be emphasized at this juncture that the focus on the industry to estimate $W$ is a matter of operational necessity. Antitrust legislation is normally constructed to apply to firms and groups of

\textsuperscript{25} In general see W.S. Comanor and T.A. Wilson, \textit{Advertising and Market Power} (Cambridge: Harvard University Press, 1974).

\textsuperscript{26} Posner, for example, would include, the entire "transfer" $P_1P_2BH$ in FIG. 1, as wasteful expenditure carried out by the firm to maintain its rents. See R.A. Posner, "The Social Costs of Monopoly and Regulation" (1975) 83 J. Pol. Econ. 887. This, however, may also be an understatement of the loss because consumers have to defend their "surplus." See J.T. Wenders, "On Perfect Rent Dissipation" (1987) 77 Am. Econ. Rev. 456. It is also argued that, under the United States' legislation, the Clayton Act and the Celler-Kefauver Amendments are not concerned with allocative efficiency but only with "wealth transfers." See A.A. Fisher and R.H. Lande, "Efficiency Considerations in Merger Enforcement" (1983) 71 Ca. L. Rev. 1582 at 1589. Thus $P_1P_2BH$ must be included.

\textsuperscript{27} The industry classification scheme, revenue, and profit figures come from Statistics Canada, \textit{Corporate Financial Statistics} (Ottawa: Supply and Services) for the years 1970-1981.
firms smaller than an industry. But, since firm data is simply not available, we are constrained to focus on the industry as the enforcement target. However, we note that the degree to which firms mirror their industry characteristics is highly questionable.

In specific terms, variable definitions, estimating procedures and data can be summarized as follows.

First, excess profit ($\pi$) in (1), (2a), (2b) and (4) is defined as the difference between the profit rate (after tax profits/equity, $P_i/E_i$) in a specific industry, and the average profit rate ($r$) for the sample. However, $\pi$ in (3) is based on estimating the general profit-concentration relationship and then applying the estimated concentration coefficient to specific industries. Second, TR is defined as "sales" ($S$) in all equations and $k$ is assumed to have a value of 2 throughout. Using a $k$ of 2 seems a reasonable compromise between using the typical unity assumption ($k=1$) or the more extreme Kamerschen formulation ($k=S/\pi$).

Third, the export data in (2a) and (2b) are obtained directly. Because we are unsure of which profitability assumption is appropriate in the Canadian case, we report the average of $W_{2a}$ and $W_{2b}$ as $W_2$ in Table 1 below. Fourth, the wage shift variable ($v$) in (3) is based on estimating the general relationship between

$$r = \frac{1}{n} \sum_{i=1}^{n} \frac{P_i}{E_i}$$

Briefly, if: $r = a_0 + a_1 X_1^i + \ldots + a_p X_p^i$, where $X_1^i$ is the concentration ratio and $X_p^i$ is a set of structural variables, then $p_i = (a_1 X_1^i)E_i$. However, because of the lack of data for the 1970s, problems of multicollinearity and simultaneity, a complete model could not be estimated. We therefore averaged the concentration coefficients estimated under OLS, 2SLS and 2SLS Ridge procedures for the mid 1960s and applied it (.04) to estimate $\pi$ for every year 1970-1981. The source was P.J. Coxon and J.C.H. Jones, "Positive Economics and Public Policy: Some Canadian Evidence on Policy Change and Antitrust" (1985) 30 The Antitrust Bulletin 365.

See D.R. Kamerschen, "An Estimation of the 'Welfare Losses' from Monopoly in the American Economy" (1965) 4 West. Econ. J. 221. The influence of different $k$ can be illustrated by the fact that the estimates of $W_1$ for the entire manufacturing sector in (c) in the text below were twenty times as great when $k = S/\pi$ than when $k = 2$.

wages and concentration and then applying the estimated concentration coefficient to individual industries. Finally, with \( \pi^* \), we assume that the only advertising expenditure which is non-informative and hence wasteful, is that carried out by consumer (as opposed to producer) good industries. Again this seems a reasonable compromise between the literature which sees all advertising as merely persuasive and entry barrier creating, and that which sees it as informative and pro-competitive.

The empirical results are outlined below.

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32 Briefly, if \( c = a_0 + a_1X_1 + a_2X_2 \), where \( c \) is average hourly earnings, \( X_1 \) the 4 firm concentration ratio, and \( X_2 \) the industry growth rate; and \( e_1 \) is the share of wages in total revenue; then \( v_i = e_i(aX_1/e_1 = a_1X_1) \). The calculations are made every year, 1970-1981. The concentration ratio (\( X_1 \)) and the share of wages in total revenue (\( e_1 \)) are from Statistics Canada, *Industrial Organization and Concentration in the Manufacturing Mining and Logging Industries* (Ottawa: Supply and Services, even years 1970-1982); the industry growth rate (\( X_2 \)), is the ratio of industry sales 1970 to industry sales 1981 and is from *Corporate Financial Statistics*, supra, note 27.

33 Consumer goods are defined as those in which more than fifty percent of the final output is of non-intermediate goods according to the Canadian Input-Output Table. The only three digit advertising data for the 1970s was for 1973 in H.E. English and R.F. Owen, *The Role of Marketing in the Concentration and Multinational Control of Manufacturing Industries* (Ottawa: Department of Consumer and Corporate Affairs, 1981). We assume that the ratio of advertising to sales is the same in all years as in 1973.

Estimates of Welfare Losses for a Sample of 45 Manufacturing Industries in Millions of Dollars ($) and as a Percentage (%) of the Sample, Averaged for 1970, 1976, and 1981.

<table>
<thead>
<tr>
<th>Industry</th>
<th>W1</th>
<th>W2</th>
<th>W3</th>
<th>W4</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tobacco Products</td>
<td>0.0763</td>
<td>0.3427</td>
<td>0.0756</td>
<td>0.2840</td>
</tr>
<tr>
<td>Dairy Products</td>
<td>0.1680</td>
<td>0.3623</td>
<td>0.1933</td>
<td>0.2883</td>
</tr>
<tr>
<td>Fish Products</td>
<td>1.1407</td>
<td>2.5933</td>
<td>1.5470</td>
<td>2.4230</td>
</tr>
<tr>
<td>Fruit &amp; Vegetables</td>
<td>0.0030</td>
<td>0.0107</td>
<td>0.0020</td>
<td>0.0063</td>
</tr>
<tr>
<td>Grain Mills</td>
<td>0.0697</td>
<td>0.3160</td>
<td>0.0743</td>
<td>0.2807</td>
</tr>
<tr>
<td>Bakery Products</td>
<td>2.5717</td>
<td>8.3437</td>
<td>2.6417</td>
<td>7.4683</td>
</tr>
<tr>
<td>Other Food Products</td>
<td>0.1257</td>
<td>0.5777</td>
<td>0.1480</td>
<td>0.3837</td>
</tr>
<tr>
<td>Soft Drinks</td>
<td>0.0790</td>
<td>0.2500</td>
<td>0.0243</td>
<td>0.2077</td>
</tr>
<tr>
<td>Distilleries</td>
<td>2.4517</td>
<td>9.3213</td>
<td>2.9497</td>
<td>8.4490</td>
</tr>
<tr>
<td>Breweries</td>
<td>0.6443</td>
<td>2.8520</td>
<td>0.6650</td>
<td>2.3763</td>
</tr>
<tr>
<td>Tobacco Products</td>
<td>0.1377</td>
<td>0.3457</td>
<td>0.1990</td>
<td>0.2500</td>
</tr>
<tr>
<td>Rubber Products</td>
<td>0.4077</td>
<td>1.2317</td>
<td>0.3623</td>
<td>0.9790</td>
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<tr>
<td>Leather Products</td>
<td>0.0033</td>
<td>0.0070</td>
<td>0.0070</td>
<td>0.0080</td>
</tr>
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<td>Hosiery</td>
<td>0.0073</td>
<td>0.0403</td>
<td>0.0087</td>
<td>0.0320</td>
</tr>
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<td>Knitting Mills</td>
<td>0.1867</td>
<td>1.8220</td>
<td>0.1770</td>
<td>0.5943</td>
</tr>
<tr>
<td>Veneer &amp; Plywood</td>
<td>0.4141</td>
<td>1.3167</td>
<td>0.4293</td>
<td>1.0053</td>
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<td>Planing Mills</td>
<td>0.0620</td>
<td>0.2007</td>
<td>0.0653</td>
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<td>Household Furniture</td>
<td>0.0280</td>
<td>0.1127</td>
<td>0.0270</td>
<td>0.0387</td>
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<tr>
<td>Pulp &amp; Paper</td>
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<td>17.7663</td>
<td>11.0523</td>
<td>19.8476</td>
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<td>Paper Box &amp; Bag</td>
<td>0.1320</td>
<td>0.3343</td>
<td>0.1183</td>
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<td>Iron &amp; Steel Mills</td>
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<td>6.8320</td>
<td>1.7993</td>
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<td>0.1153</td>
<td>0.2223</td>
</tr>
<tr>
<td>Boiler &amp; Pipe</td>
<td>0.0797</td>
<td>0.2233</td>
<td>0.0767</td>
<td>0.1793</td>
</tr>
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<td>Metal Stamping</td>
<td>0.0667</td>
<td>1.5073</td>
<td>0.6833</td>
<td>1.2057</td>
</tr>
<tr>
<td>Wire Products</td>
<td>0.0617</td>
<td>0.2487</td>
<td>0.0520</td>
<td>0.1890</td>
</tr>
<tr>
<td>Hardware</td>
<td>0.3150</td>
<td>0.3187</td>
<td>0.1053</td>
<td>0.2730</td>
</tr>
<tr>
<td>Heating Equipment</td>
<td>0.0440</td>
<td>1.5000</td>
<td>1.0153</td>
<td>1.1087</td>
</tr>
<tr>
<td>Misc. Machinery</td>
<td>0.0467</td>
<td>0.1490</td>
<td>0.0590</td>
<td>0.1537</td>
</tr>
<tr>
<td>Agricultural Imp.</td>
<td>2.5950</td>
<td>5.6437</td>
<td>3.4740</td>
<td>4.8377</td>
</tr>
<tr>
<td>Aircraft/Parts</td>
<td>0.1977</td>
<td>0.5953</td>
<td>0.1960</td>
<td>0.6053</td>
</tr>
<tr>
<td>Motor Vehicles/Parts</td>
<td>1.6110</td>
<td>3.8573</td>
<td>2.9087</td>
<td>4.4913</td>
</tr>
<tr>
<td>Major Appliances</td>
<td>0.0990</td>
<td>0.4373</td>
<td>0.0943</td>
<td>0.3460</td>
</tr>
<tr>
<td>Radio &amp; TV</td>
<td>0.2533</td>
<td>0.8790</td>
<td>0.2497</td>
<td>0.7357</td>
</tr>
<tr>
<td>Misc. Elec. Prod.</td>
<td>0.4987</td>
<td>0.8297</td>
<td>0.5517</td>
<td>0.5853</td>
</tr>
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<td>Concrete Products</td>
<td>0.0333</td>
<td>0.0597</td>
<td>0.0227</td>
<td>0.0523</td>
</tr>
<tr>
<td>Clay Products</td>
<td>0.0817</td>
<td>0.1230</td>
<td>0.0743</td>
<td>0.1137</td>
</tr>
<tr>
<td>Petroleum Ref.</td>
<td>1.5997</td>
<td>6.1113</td>
<td>5.1080</td>
<td>5.3083</td>
</tr>
<tr>
<td>Pharmaceuticals</td>
<td>0.4767</td>
<td>1.7007</td>
<td>0.5317</td>
<td>1.3830</td>
</tr>
<tr>
<td>Paint/Varnish</td>
<td>0.0303</td>
<td>0.1150</td>
<td>0.0290</td>
<td>0.0887</td>
</tr>
<tr>
<td>Soap/Chewing Corp.</td>
<td>0.1207</td>
<td>0.4473</td>
<td>0.1577</td>
<td>0.4057</td>
</tr>
<tr>
<td>Industrial Chem.</td>
<td>2.2410</td>
<td>3.5940</td>
<td>3.6443</td>
<td>3.5667</td>
</tr>
<tr>
<td>Sporting Goods/Toys</td>
<td>0.0487</td>
<td>0.1030</td>
<td>0.0416</td>
<td>0.0653</td>
</tr>
</tbody>
</table>
3. The empirical results

Table 1 shows the results of calculating the various estimates ($W_I$, $W_2$, $W_3$, $W_4$) of the efficiency loss for the 45 industry sample from the manufacturing sector. The losses are averaged for 1970, 1976, and 1981. This seems a reasonable representation as there is very little change in industry ranking by any component of welfare loss over the period. In any given industry the size of the loss depends on which estimate of $W$ is used, but, more important from the potential enforcement point of view, the losses for any estimate of $W$ are unevenly distributed between industries. Indeed, the bulk of the efficiency losses are concentrated in a small number of industries.

This is illustrated by Table 2 which shows the total losses ($W_4 - W_I + W_2 + W_3$) for the 10 leading loss industries in 1970, 1976, and 1981. Not only are the losses relatively large as a proportion of the 45 industry sample in Table 1, but the ranking of the industries shows a remarkable consistency over the period. This suggests that, if "efficiency" is a serious operative goal of antitrust as the Bureau has suggested, then enforcement activity should not only focus on those industries with the largest efficiency losses but need only concentrate on a relatively small number of industries.

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35 It is possible to estimate a welfare loss for the maximum 87 industries in the manufacturing sector ($W_{m87}$), by extrapolating maximum actual sub-sample sizes ($W_I, 87$; $W_2, 70$; $W_3, 52$; $W_4, 87$) to the 87 industries. The actual sub-sample sizes are determined by data availability. The difference between these sample sizes and the 45 industry sample in Table 1 is that the 45 industries were the same every year from 1970 to 1981. The average $W_{m87}$ from 1970 to 1981 was $441.09$ million, or .321 per cent of National Income, calculated as $W_4 - W_I + W_2 + W_3$. The welfare loss for a 172 industry sample covering all sectors of the economy ($W_{E172}$) can be obtained by extrapolating the manufacturing sector results ($W_I$ can be estimated for all 172 industries). The average $W_{E172}$ from 1970 to 1981 was $2974.07$ million, or 2.28 per cent of National Income, calculated as $W_4 - W_I + W_2$.

36 The results for every year from 1970 to 1981 can be obtained from the authors on request.

37 The rank correlation coefficients between these three years are .92 and .87 respectively.
Has this, in fact, been the case?

Table 2

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>323,325</td>
<td>Motor Vehicles/Parts</td>
<td>14.926</td>
<td>30.688</td>
<td>62.792</td>
</tr>
<tr>
<td>143</td>
<td>Distilleries</td>
<td>10.217</td>
<td></td>
<td></td>
</tr>
<tr>
<td>151,153</td>
<td>Tobacco Products</td>
<td>9.820</td>
<td>14.077</td>
<td></td>
</tr>
<tr>
<td>105,107</td>
<td>Dairy Products</td>
<td>9.547</td>
<td>20.533</td>
<td>36.551</td>
</tr>
<tr>
<td>376</td>
<td>Soap and Cleaning Compounds</td>
<td>8.068</td>
<td>18.068</td>
<td>37.580</td>
</tr>
<tr>
<td>161−169</td>
<td>Rubber Products</td>
<td>7.371</td>
<td>10.933</td>
<td>27.630</td>
</tr>
<tr>
<td>374</td>
<td>Pharmaceuticals</td>
<td>7.228</td>
<td>12.035</td>
<td>22.755</td>
</tr>
<tr>
<td>321</td>
<td>Aircraft and Parts</td>
<td>6.584</td>
<td></td>
<td>30.662</td>
</tr>
<tr>
<td>271</td>
<td>Pulp and Paper Mills</td>
<td></td>
<td>14.171</td>
<td>27.005</td>
</tr>
<tr>
<td>112</td>
<td>Fruit and Vegetable Canners</td>
<td>9.306</td>
<td></td>
<td></td>
</tr>
<tr>
<td>251</td>
<td>Sawmills</td>
<td></td>
<td></td>
<td>30.255</td>
</tr>
</tbody>
</table>

1. The Welfare loss for each industry is calculated as
   \[ W_4 - W_1 + W_2 + W_3 \]

38 This conclusion is similar to that derived in the mid 1960s for Canada, see Jones and Laudadio, supra, note 2. A similar pattern has consistently emerged in the U.S. See J.J. Siegfried and T.K. Tiemann, "The Welfare Cost of Monopoly: An Inter-Industry Analysis" (1974) 12 Econ. Inq. 190, and Olson and Bumpass, supra, note 34.
B. Enforcement Activity, 1970-1981

In Table 3 we have tabulated the cases investigated (both prosecutions and discontinued inquiries)\(^{39}\) by the Bureau for the 45 industry sample of Table 1 from 1970-1981. The cases are broken down by those statutory offenses which have some implication for efficiency, and the only ones omitted cover "misleading advertising" which borders more on fraud than anything else.\(^{40}\) Comparison of these tables indicates that, overall, attempts to rectify inefficiency play a minor role in enforcement activity: there is little correlation between the size of the efficiency loss (Table 1), and the number and inter-industry distribution of investigations (Table 3). This latter point is reinforced by a comparison between Tables 2 and 3. It seems that little investigative attention has been paid to motor vehicles, iron and steel mills and miscellaneous food products -- the leading three loss industries, while distilleries, aircraft, and soap and cleaning compounds are apparently immune.

Therefore, if we assume that cases against firms in specific industries represent attempts by the Bureau to come to grips with efficiency losses in those industries, the inescapable conclusion is that there is a gap between the declared intention of promoting efficiency and actual enforcement activity. Preference for efficiency is not revealed by the Bureau's enforcement behaviour.

\(^{39}\) That is, those cases actually taken to court or investigated but not prosecuted.

\(^{40}\) In this time period misleading advertising has been a growth industry. Between 1970-71 and 1981-82 over 66,000 "files were opened." This followed a change in the legislation in 1969. In 1969-70, 412 "files were opened," it jumped to 2520 in 1970-71 and peaked at over 10,000 in 1979-80. See Annual Report, 1974, 1979 and 1982, supra, note 12.
Table 3
Cases Investigated\(^1\) Under the Combines Investigation Act for 45 Manufacturing Industries, 1970 – 1981

<table>
<thead>
<tr>
<th>Industry</th>
<th>Conspiracy Section 32</th>
<th>Merger-Monopoly Section 33</th>
<th>Price Discrimination Section 34</th>
<th>Resale Price Maintenance Section 38</th>
</tr>
</thead>
<tbody>
<tr>
<td>Meat Products</td>
<td>2</td>
<td>1</td>
<td>–</td>
<td>–</td>
</tr>
<tr>
<td>Dairy Products</td>
<td>2</td>
<td>–</td>
<td>–</td>
<td>3</td>
</tr>
<tr>
<td>Fish Products</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>–</td>
</tr>
<tr>
<td>Fruit and Veg</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>–</td>
</tr>
<tr>
<td>Grain Mills</td>
<td>–</td>
<td>1</td>
<td>–</td>
<td>–</td>
</tr>
<tr>
<td>Bakery Products</td>
<td>1</td>
<td>1</td>
<td>–</td>
<td>–</td>
</tr>
<tr>
<td>Other Food Prod.</td>
<td>1</td>
<td>2</td>
<td>1</td>
<td>–</td>
</tr>
<tr>
<td>Soft Drinks</td>
<td>1</td>
<td>–</td>
<td>–</td>
<td>–</td>
</tr>
<tr>
<td>Distilleries</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>–</td>
</tr>
<tr>
<td>Breweries</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>–</td>
</tr>
<tr>
<td>Tobacco Products</td>
<td>–</td>
<td>1</td>
<td>–</td>
<td>–</td>
</tr>
<tr>
<td>Rubber Products</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>1</td>
</tr>
<tr>
<td>Leather Products</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>4</td>
</tr>
<tr>
<td>Hosery</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>2</td>
</tr>
<tr>
<td>Knitting Mills</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>–</td>
</tr>
<tr>
<td>Sawmills</td>
<td>3</td>
<td>–</td>
<td>–</td>
<td>–</td>
</tr>
<tr>
<td>Veneer and Plywood</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>–</td>
</tr>
<tr>
<td>Planing Mills</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>–</td>
</tr>
<tr>
<td>Household Furniture</td>
<td>1</td>
<td>–</td>
<td>–</td>
<td>4</td>
</tr>
<tr>
<td>Pulp and Paper</td>
<td>2</td>
<td>1</td>
<td>–</td>
<td>–</td>
</tr>
<tr>
<td>Paper Box and Bag</td>
<td>1</td>
<td>1</td>
<td>–</td>
<td>–</td>
</tr>
<tr>
<td>Iron and Steel Mills</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>–</td>
</tr>
<tr>
<td>Iron Foundries</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>–</td>
</tr>
<tr>
<td>Boiler and Plate</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>–</td>
</tr>
<tr>
<td>Metal Stamping</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>–</td>
</tr>
<tr>
<td>Wire Products</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>–</td>
</tr>
<tr>
<td>Hardware</td>
<td>2</td>
<td>–</td>
<td>–</td>
<td>1</td>
</tr>
<tr>
<td>Heating Equipment</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>–</td>
</tr>
<tr>
<td>Misc. Machinery</td>
<td>–</td>
<td>1</td>
<td>–</td>
<td>–</td>
</tr>
<tr>
<td>Agricultural Imp.</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>–</td>
</tr>
<tr>
<td>Other Machinery</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>–</td>
</tr>
<tr>
<td>Aircraft/Parts</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>–</td>
</tr>
<tr>
<td>Motor Vehicles/Parts</td>
<td>1</td>
<td>–</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Major Appliances</td>
<td>–</td>
<td>1</td>
<td>–</td>
<td>3</td>
</tr>
<tr>
<td>Radio and T.V.</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>11</td>
</tr>
<tr>
<td>Comm. Equipment</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>–</td>
</tr>
<tr>
<td>Misc. Elec. Prod.</td>
<td>2</td>
<td>2</td>
<td>–</td>
<td>–</td>
</tr>
<tr>
<td>Concrete Products</td>
<td>4</td>
<td>2</td>
<td>–</td>
<td>–</td>
</tr>
<tr>
<td>Clay Products</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>–</td>
</tr>
<tr>
<td>Petroleum Ref.</td>
<td>–</td>
<td>1</td>
<td>–</td>
<td>1</td>
</tr>
<tr>
<td>Pharmaceuticals</td>
<td>1</td>
<td>2</td>
<td>1</td>
<td>–</td>
</tr>
<tr>
<td>Paint/Varnish</td>
<td>–</td>
<td>–</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Soap/Cleaning Comp.</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>–</td>
</tr>
<tr>
<td>Industrial Chem.</td>
<td>4</td>
<td>6</td>
<td>–</td>
<td>–</td>
</tr>
<tr>
<td>Sporting Goods/Toys</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>3</td>
</tr>
</tbody>
</table>

Source: Annual Reports of the Director of Investigation and Research 19781-1982.

1. Includes cases prosecuted and discontinued.
The pertinent question is, why? Is the Act itself responsible, and by extension the political decisions which put together the legislation? After all, successive Canadian governments have embraced efficiency as a clear antitrust goal. Or is it the Bureau, in attempting to maximize its private utility function, which has subverted the intent of the legislation? It is to these issues we now turn.

II. UTILITY FUNCTIONS, CONSTRAINTS, AND THE EFFICIENCY CRITERION

It is impossible to quantify the political and bureaucratic reasons for the failure of the efficiency criterion to guide enforcement practice. Therefore, our method is to approach the problem in a more qualitative manner by modeling the Bureau as a rational self interest utility maximizer, subject to the constraints imposed by the legislation and the structure set up to administer and adjudicate the statute. We then ask whether it is the difference in objective functions – minimizing efficiency loss versus whatever elements the Bureau is assumed to maximize – or the nature of the constraints which lead to the enforcement pattern in Table 3 rather than that implied by Tables 1 and 2.

If the Bureau’s objective function gives rise to behavioural predictions consistent with Table 3, then there are grounds for believing that the goal of maximizing efficiency is being frustrated by the bureaucracy maximizing its own private interests. Alternatively, if it is the constraints that produce Table 3 compatible behaviour, then it is due either to the actors in the adjudication process (the courts, the Attorney General) maximizing their own utility functions, or the legislation itself which, in turn, reflects the utility function of the government.

It is useful to proceed as follows by: (i) specifying the Bureau’s objective function; (ii) identifying a disturbance, predicting the Bureau’s reaction in terms of case enforcement given (i), and comparing these predictions with what we would expect if the Bureau maximized efficiency; (iii) identifying the constraints and analyzing their potential impact on the predictions in (ii); and (iv)
assessing the constrained predictions of (iii) in terms of their ability to explain the enforcement pattern of Table 3.

A. The Utility Function

We assume a modified Downs type utility function,\(^{41}\) and following Jones,\(^{42}\) further assume that the primary goal to be maximized is security and its minimum state survival. Downs defines security\(^{43}\) as "a low probability of future losses in power, income, prestige or convenience," where these items are other potential objectives in the utility function.

In the present context to maximize security means that the Bureau would take an activist stance in an attempt to restore its position because a removal or diminution in any of its functions reduces prestige and power and hence security — reduces the Bureau's raison d'etre — and ultimately survival. Faced with any disturbance (an adverse legal decision, a change in the legislation) which reduces security, several mutually consistent activist options are open to the Bureau.

One, it can attempt to restore the status quo (maintain the pre-disturbance security level) by administrative means. This may entail attempting to replace court cases with administrative rulings, for example. Two, if the disturbance affects one particular section of the legislation, then internal enforcement resources could be shifted to unaffected sections. The implication is that increasing case activity in one section offsets the security losses in another section. Three, it can attempt to change the impact of the

\(^{41}\) Strictly speaking, Downs' function applies only to individual bureaucrats. But here we adopt the common assumption made in organization theory that there is agreement among the members of some group responsible for the direction of the organization on the nature of the organization's goals. See Jones, supra, note 13 at 273; and K. Acheson and J.F. Chant, "Bureaucratic Theory and the Choice of Central Bank Goals: The Case of the Bank of Canada" (1973) 5 J. Mon. Cred. & Bankg. 637.

\(^{42}\) Ibid.

\(^{43}\) Supra, note 6 at 84.
disturbance by challenging the case law, or pressuring the
government to change the legislation. In effect, the Bureau itself
becomes a pressure group.\textsuperscript{44}

In only two circumstances would the Bureau be passive.
One, a reduction in security could be followed by the acquisition
of some equally prestigious and powerful function. This represents a
straight non-security losing substitution. The second circumstance is
if the Bureau maximizes "convenience" which Downs defines as "a
resistance to changes in behaviour that increase personal effort, and
a willingness to accept those that reduce personal effort."\textsuperscript{45}

Thus, any disturbance which reduces security should result in
the Bureau attempting to restore its position.

B. Disturbances and Unconstrained Predictions

What disturbances took place which affected security and
which would be expected to generate a reaction in case enforcement
in those sections of the Act covered by Table 3 in the 1970s?
While there have been a number of disturbances which potentially
affected the Bureau's security,\textsuperscript{46} we choose to concentrate initially
on the 1960 Beer-Sugar decisions which made horizontal merger an
offence only if monopoly was achieved and specific detriment

\textsuperscript{44} The power of the bureaucracy to influence policy in Canada should not be under
estimated. See K. Kernaghan and D. Siegel, \textit{Public Administration in Canada} (Toronto:
Admin. 14.

\textsuperscript{45} \textit{Supra}, note 6 at 84.

\textsuperscript{46} On a case enforcement basis, the 1960 amendments to the Act gave the conspiracy,
resale price maintenance (RPM), and price discrimination (PD) sections added defenses. This
presumably made the Bureau's enforcement task more difficult and thus potentially reduced
security. But, there was virtually no impact in conspiracy cases, while RPM and PD were not
that important before or after 1960, so that case information is limited. In 1969, the addition
of the misleading advertising sections potentially increased power as it increased case
enforcement (see \textit{supra}, note 40). The administrative change in 1966 which shifted the
Combines Investigation Branch (renamed the Bureau of Competition Policy) from Justice to
Consumer and Corporate Affairs, probably reduced prestige since the latter is a junior
ministry. However, it is difficult to isolate any case by case impact. All disturbances in the
1970s (changes in the case law and the 1976 amendments to the Act), resulted in attempts
to change the Act so that there was only limited case reaction.
followed. The reason for our focus is that the alternative predictions about case enforcement which arise from different maximization assumptions (security versus efficiency) are somewhat clearer for mergers than for the other offenses covered by Table 3; and we believe that what we have to say about the effects of the constraints on merger enforcement generalizes to most other sections of the Act.

The impact of the Beer-Sugar decisions was de facto to remove merger as an offence under the Act, thus amputating a very important function of the Bureau. Obviously, power (the ability to determine who would be allowed to merge with whom), prestige (a bureau’s success in carrying out its social goals), and hence security, were reduced and consequently survival threatened. We would, therefore, expect some attempt to reassert the Bureau’s position. Of the alternatives considered in Part II, section A, above, we focus, at this juncture, solely on case enforcement, although we shall argue in section D below that a number of alternatives eventually came into play. If constraints were absent, we would expect the Bureau to actively attempt to reassert its pre-Beer-Sugar position: to formally investigate cases substantially different from the extremes of Beer-Sugar using a similar set of pre-Beer-Sugar economic criteria.

Does this expectation, based on a security-maximizing assumption, conflict with a prediction about the Bureau’s behaviour based on the maximizing efficiency criterion? The answer is, only if the courts are considered correct in economic terms. Suppose we

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48 There is also more information available on case enforcement for mergers. In addition, we do not know how many instances of conspiracy, PD, or RPM occurred over 1970-1981; but we do know at least 4729 mergers took place. See Annual Report 1982, supra, note 12 at 59.

49 It should not be imagined that the decisions had anything to do with economic criteria. In Beer the court rejected any consideration of efficiencies. Scale economies were not considered because they would constitute "benefits" and the Act only mentioned "detriments." See, R. v. Canadian Breweries, Transcript of Proceedings, 1960, at 4206; and Part II, section C,
accept the extreme Austrian and Chicago generalizations that all mergers promote efficiency.\textsuperscript{50} This implies that the Bureau should adopt a non-activist (non-interventionist) stance so that no investigations need take place. Hence, there is a difference in predictions – a difference in expected behaviour – depending on whether the Bureau wishes to maximize security or economic efficiency.

But, if we make any other assumption about mergers and efficiency maximization, an activist approach (that is, an investigation of cases which depart from Beer-Sugar) is \textit{de rigueur}. Consider the Williamson cost-benefit (market power/efficiency) approach, the most widely accepted framework for analyzing mergers.\textsuperscript{51} Under Williamson assumptions mergers require investigation only in extreme situations because, normally, efficiency outweighs market power. The difficulty, of course, is that it is virtually impossible, \textit{a priori}, to identify those mergers which create net benefits.\textsuperscript{52} Clearly, however, they would be different from those identified by Beer-Sugar criteria. Therefore, under Williamson assumptions, we would expect an investigation of mergers before Beer-Sugar proportions are reached.

The pre-Beer-Sugar approach of the Bureau was also to investigate extreme cases where mergers resulted in high market shares.\textsuperscript{53} If the Bureau, in maximizing security, tried to restore this

\textsuperscript{50} Singleton, \textit{supra}, note 3, c. 4-5.


\textsuperscript{53} This can be seen, for example, in the cases sent to the Restrictive Trade Practices Commission (see \textit{infra}, note 54) by the Bureau, which formed the basis for the Commission Reports: Report Concerning an Alleged Combine in the Manufacture, Distribution and Sale of Beer in Canada (Ottawa: Queen’s Printer 1955); Report Concerning the Sugar Industry in Western Canada and a Proposed Merger of Sugar Companies (Ottawa: Queen’s Printer, 1957); Report Concerning the Production, Distribution and Sale of Zinc Oxide (Ottawa: Queen’s
position, then this yields roughly the same activist prediction – only extreme cases would be investigated – as we expect from the Williamson approach. This is not to argue that the cases would be identical or the conclusions would be the same; only that, if mergers occurred amongst the leading firms in the industries in Table 2, there is no reason to believe that they would be treated differently whether the Bureau maximized security or efficiency.

By way of contrast, if the Bureau maximized power we would assume that it would tackle a whole range of mergers significantly different from those liable under either Beer-Sugar or security-maximization assumptions. In effect and by analogy, power maximization would be consistent with the 1968 Clayton Act merger Guidelines, but security-maximization (defined by the Bureau’s case activity prior to, and the compliance program after, Beer-Sugar) is more compatible with the 1982 and 1984 versions of the Guidelines.54

In general therefore, the Bureau’s wish to act in accordance with its announced intention (to maximize efficiency), by focussing its merger enforcement activity on cases in those industries in which the efficiency loss is greatest, is not incompatible with behaviour based on the desire to maximize security. But we know from the evidence of Tables 1, 2 and 3 that industries with the largest efficiency loss were not preferred targets. Since this failure of enforcement activity to mesh with efficiency is not the result of conflicting objective functions, it must be due either to the fact that no mergers justifying investigation took place in the industries with

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54 The point is, that under the 1968 Guidelines market share was relatively small; but under the 1982 and 1984 Guidelines market share is a lot larger. For a survey see, R.D. Anderson and S.D. Khosla, "Recent Developments in Canadian and U.S. Merger Policy" (1986) 7:3 Can. Compet. Pol'y Rec. 46.
the largest welfare losses, or else, the constraints are such that they restrict the Bureau's ability to deal with efficiency losses through the merger laws.

It is to the constraints we now turn.

C. The Constraints

The constraints on the Bureau's ability to maximize security or efficiency are the Act itself, the prosecution and adjudication process encompassing the Courts and the Attorney General, and the administrative latitude possessed by the Bureau in its investigative activities. The process works as follows. If the Bureau believes, or has reason to believe, that an offence has been committed under the Act it launches a formal investigation. If evidence is found to support this belief, the "normal" procedure is for the Bureau to submit the evidence to the Attorney General who may, or may not, decide to prosecute. Should the decision be to prosecute the venue is the criminal courts since the Act is criminal law.

Although all these constraints are interrelated, for our purposes it is most appropriate to start with the Act and work sequentially through the courts, the Attorney General, to the Bureau.

1. The Act

The most obvious expression of the government's political preferences is found in the wording of the Act. Two points are


56 Prior to 1976 the de facto "normal" procedure was for the Bureau to submit evidence to the Restrictive Trade Practices Commission which subsequently published a report (see supra, note 53). This practice was effectively discontinued in 1976 (Annual Report, 1976 supra, at 17) and the new "normal" procedure was to go directly to the Attorney General. Hence we will not discuss the continuing role of the Commission here.
particularly relevant for viewing the Act as a constraint on merger enforcement in particular and all offenses in general.

First, the one consistent commitment implicit in the legislation is to the lack of "abuse."{57} Hence, the Act either singles out specific abuses (price discrimination, predation, misleading advertising, etc.) or, more generally, covers conspiracy, monopoly and mergers with the word "unduly" and the phrase "to the detriment of." The implication of the wording (and its interpretation) is that the offenses are behavioural and any market structure is acceptable as long as there are no actions "abusing" market position. There is no emphasis on structural and/or performance alone.

Thus, if firms in the industries in Tables 1 and 2 did not engage in some demonstrable anticompetitive conduct, there would be no challenge from the Bureau. It should be noted that the efficiency loss calculations of Tables 1, and 2 are based on measures of excess profits ($W_1$, a performance measure), or the supposedly close relationship between structure and performance ($W_3$), or advertising expenditure ($W_4$). Since, in general, there is no indelible relationship between structure and/or performance on the one hand, and "abusive" anticompetitive behaviour on the other hand, the wording of the Act is a substantial constraint on the Bureau's ability to pursue industries with large efficiency losses.

Second, the reason for the longevity of the abuse criterion is that the Act appears to be a continual response to the wishes of the business community. This is clear from the attempts to revise the Act which took place from 1970-1986.\(^{58}\) Canadian business, displaying no commitment to efficiency or competition, fought successfully to retain "unduly" and "to the detriment of" in the

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legislation. It is almost ironic that the 1976 amendments to the Act which were supposedly directed at clarifying the meaning of "unduly," only specified what unduly did not mean.\(^{59}\) However, accentuating the negative is always a growth in industry in Canada.

To summarize, a political response to the demands of the business community has resulted in the legislation being cast in behavioural terms which may be at variance with efficiency losses measured in performance or structural terms. The result is to constraint the Bureau's activities even if it wished to challenge those industries with the largest efficiency losses.

2. The Courts

While the wording of the Act emphasizes abusive behaviour, the type of behaviour subject to stricture – the limits to "unduly" and "to the detriment of" – is defined by the courts. The courts are, therefore, pivotal as a constraint on the Bureau's activities.

Although the courts have been scorned for being too mechanical in their application of precedent and too restrained in their use of economic analysis, during the 1960s and 70s they introduced substantive (perhaps quantum) interpretive changes in the law which severely limited the behaviour which could be questioned and the relevant economic analysis\(^{60}\) which could be applied. The most important interpretive changes are as follows.\(^{61}\)

First, as noted above, in the Beer-Sugar judgments, merger was an offence only if monopoly resulted and specific detriment followed. This was based on an interpretation of "unduly" which was contrary to established legal precedent at the time. However, the Beer-Sugar view of mergers was confirmed by the Supreme Court in the Irving Newspaper (1977) case. Thus, merging firms in industries

\(^{59}\) Under s. 32(1.1) it was not necessary to prove that "unduly" meant "... eliminate, completely or virtually, competition in the market."


in Tables 1 and 2 would not be subject to an investigation unless they monopolized the industry and specific detriment followed.62

Second, with monopoly there is no "structural" offence. The ERCO (1970), Allied Chemical (1975), and Irving (1976) cases establish that without price discrimination, predatory or exclusionary behaviour, or any other such anticompetitive conduct there is no offence.63 For all intents and purposes this is almost identical to the merger sections of the Act.

Third, the Aetna (1977) and Atlantic Sugar Refineries (1980) cases seemed to establish that in conspiracy cases it is necessary for the Crown to establish both the "intent" to enter an agreement and the "intent" to reduce competition. Contrary to established jurisprudence, this implies a monopoly market structure plus specific detriment and sets standards unlikely to be met by the Crown.64 With conscious parallelism – which might be applicable in some of the oligopolistic industries in Tables 1 and 2 if one accepts the structuralist view that concentration facilitates collusion – the key is what conduct constitutes sufficient evidence of agreement and thus again involves behaviour. This makes it extremely difficult to obtain a conviction.65

Fourth, in the Beer case it was established that any act of regulation by federal or provincial governments took precedence over the Combines Investigation Act. The Bureau has taken the


position that it will therefore not launch an investigation if some degree of regulation is involved.\(^6\) Thus, one possible reason why Tables 1 and 3 do not match is that there could be a degree of regulation involved in some industries. Unfortunately, we do not know for sure because there is no data on the degree of regulation in any industry. However, what we do know is that the extensive amount of regulation that does exist in Canada, reduces the potency of the Act to deal with efficiency loss.\(^6\)\(^7\) Certainly, when we move from manufacturing losses detailed in Table 1 to economy wide losses many industries – agriculture, utilities, transportation – are not covered by the Act. In the same vein, the \textit{Jabour} (1982) case effectively removed most "professions" from the Act; and, if we include the \textit{Uranium} (1981) decision, Crown agencies are also immune.\(^6\)\(^8\)

In summary then, the courts have further narrowed the code of conduct the Bureau could attack and at the same time seem to focus on monopoly market structure. It is difficult to say what utility function the courts are trying to maximize but the evidence is consistent with the view that in the 1970s the Supreme Court of Canada seems to have come out (intentionally?) from a Chicago closet. It also means that few industries in Table 1 would be eligible for investigation.

\(^6\)\textit{Annual Report}, 1966, \textit{supra}, note 12 at 19. This is a legacy of the \textit{Beer} judgement. At issue, perhaps, is how much regulation should be involved. Kaiser feels it may be very little, \textit{ibid}. 11:02 at 5.

\(^7\)In 1978 industries representing close to 30 per cent of the GDP were subject to some form of direct regulation. See Economic Council of Canada, \textit{Reforming Regulation} (Ottawa: Ministry of Supply and Services, 1981). See also \textit{supra}, note 35.

3. The Attorney General and the Department of Justice

The Attorney General is the normal interface between the Bureau and the court system. Here the decision is made as to which of the Bureau's proposed prosecutions are to be translated into legal action and, subsequently, if the cases are lost, whether they are to be appealed. The bureaucracy here marches to a strictly legal drummer and thus the decision to proceed will be made in terms of legal criteria no matter how attractive (or unattractive) a case may look in economic terms. Thus, the demonstrated antipathy of the courts towards economic analysis will have a bearing on which cases go forward for prosecution or appeal. If we assume that the Attorney General wants to win cases – the primary element in the objective function is to win\(^6\) – then we do not expect cases to test the limits of the law or to be based on complex economic arguments.

This adds to the constraints on the actions of the Bureau in the general sense that it reinforces the actions of the courts. Indeed, there is evidence that a substantial difference exists between the cases proposed for prosecution by the Bureau and their subsequent disposal by the Attorney General.\(^7\) We are not arguing that the Attorney General is specifically responsible for the ill-matching of Tables 1 and 3 but, that as a constraint on the Bureau's actions, the Attorney General validates the constraints imposed by the courts.


4. Administrative latitude

The final constraint on the Bureau's ability to maximize security and/or efficiency on an industry basis is the administrative latitude possessed by the Bureau. This is given either directly by the statute or established by administrative practice. The latter is possible because statutes are rarely drawn so tightly as to preclude some administrative degrees of freedom. Thus, in some instances, a bureau may circumvent the written word of the legislation to pursue its own interests.

Both statutory and administrative "degrees of freedom" come into play here. The Bureau must initiate an inquiry if directed by the Minister, or if six citizens complain (sections 8(c) and 7(1)). But, an inquiry "shall" be initiated if there is "reason to believe that ... an offence ... has been or is about to be committed ..." (section 8(b)(iii)). Therefore, the Bureau can initiate inquiries without the benefit of formal direction or a six person complaint and thus it has a degree of administrative discretion in its case selection. However, the existing evidence suggests that most inquiries are based on business complaints.71 This is defended by the Bureau on the grounds that the word "shall" makes investigation mandatory and insufficient resources do not allow greater latitude in inquiry selection.

One area, however, in which latitude is practiced is in the "compliance program," a situation where the Bureau vets, informally, practices brought to its attention by business with a view to determining whether a formal inquiry would be launched should the practice continue.72 The evidence is that in the 1960s this practice allowed the Bureau some discretion with mergers; but after Irving it has degenerated almost solely into a vetting system for the pricing practices sections of the Act.

The Bureau then has some administrative leeway, but the evidence suggests that it has not used it as much as it could.

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72 *Ibid.* at 175-78.
However, given the constraints imposed by the Act, the courts, and the activities of the Attorney General, it is hardly surprising.

5. The constraints and the objective functions

What impact do the constraints have on the competing utility functions? By and large, the effects of the constraints are the same for merger offenses whether the Bureau wishes to maximize efficiency or security. In our view, only if we take the extreme Austrian-Chicago position (since efficiency is promoted by complete non-interference with the market no merger should be challenged) would the constraints have a differing impact on the objective functions. The cause of maximizing efficiency would be promoted because the constraints confine the Bureau’s security maximizing case activism.

This position can also be carried over to most other offenses (Table 3) in the Act: collusion is transitory and can be safely ignored because the transaction costs involved in maintaining the agreement are too large; most private monopolies arise because of efficiency considerations unless promoted by the State; price discrimination can usually be efficiency justified; resale price maintenance is almost always efficient; and predation just does not happen. In short, the constraints promote efficiency. The corollary of this position is that in Tables 1 and 2 we were not measuring efficiency losses. The excess profits on which the calculations are based are merely rewards to efficiency and innovation and not expressions of market power.

However, under any other scenario of how efficiency and the market work, it is the nature of the constraints that preclude enforcement activity in those industries with the largest welfare losses. If we believe that the offenses in the Act can reduce efficiency loss, for a prosecution to succeed, given the constraints 1 through 4, the case would have to have the following profile: there should be anti-competitive behaviour (predation, price discrimination, price fixing, etc.) in an industry characterized by monopoly, in which there is no hint of regulation, and neither a Crown agency nor profession is involved. Trying to find any industry to match these
virtues is obviously the major reason why Tables 1, 2 and 3 do not jibe.

As far as the particular constraints are concerned, the most important consideration appears to be the political one. In our view this covers not only the wording of the legislation — which is a response to business pressure — but also the activities of the courts. We include the courts as a political constraint not because of any evidence that the judiciary is susceptible to business pressure, but because the wording of the Act is "explicitly ambivalent." The politicians have deliberately turned policy determination over to the judiciary. Since this is a considered choice, governments should be held accountable for the interpretations of the courts. If governments disagree with the judicial interpretation of the Act then they have the power to change the Act. Not to change the Act signifies government endorsement of the courts' legal economics. This is, again, revealed preference.

D. Corollaries and Alternatives

Given that the constraints are the prime determinants of enforcement activity (or the lack thereof) there are three corollary issues which should be addressed. Is a utility maximizing model useful for explaining the Bureau's behaviour? If efficiency is not the Bureau's operative goal, why does the Bureau continually claim it is? Why does the government maintain that efficiency is the prime concern of the Act when this is patently false?

The answer to the first question is that the reaction to the Beer-Sugar disturbance may not be reflected solely in the Bureau's case activity. As noted in Part II, section A, above, the security maximizing Bureau has several options which can be pursued more or less simultaneously. Thus, if utility maximization is not achieved via one option it will turn to the others. In particular, it appears as if the Bureau pursued two options.

73 The phrase is used by Bruce Dunlop in "Bora Laskin and Competition" (1985) 35 U. T. L. J. 429, to indicate that the government may have been deliberately passing the buck to the courts.
First, on a case basis, the Bureau could attempt to circumvent the *Beer-Sugar* decision either "administratively" or by formerly challenging the decision in court. It achieved the former until the mid 1970s through the compliance program, and accomplished the latter in the *Irving* case. However, the *Irving* judgement put an end to the case approach.

The second option would be for the Bureau to attempt to change the legislation. There is little doubt that in the protracted drive to change the legislation, which began in 1970 and ended in 1986, the force keeping the process alive in the face of fierce business pressure was the Bureau.\(^7\) While the 1986 legislation may not be everything the Bureau wanted, it should be noted that the new merger sections are quite close to the economic criteria the Bureau has always touted.\(^5\) To this extent the second option was clearly successful.

In short, the predictions of the security maximizing model as to the options employed by the Bureau are in rough conformity with the evidence on its behaviour. This suggests that the utility maximizing model is a useful device for examining the Bureau's behaviour.

Nevertheless, this leaves unanswered the question of why the Bureau would claim that it is guided by efficiency considerations. The answer that seems most reasonable to us is that the Bureau was attempting to create, as Downs put it, an "ideology."\(^6\) That is, an image of its operations (aspirations?) which does not reflect what it actually does. With an "ideology" there is always a difference between stated intentions and actual performance.

\(^7\) Of the "disturbances" that took place in the 1970s – primarily the legal decisions discussed in Part II, section C, 2 above – the reaction of the Bureau was to attempt to rectify them by changing the legislation rather than exercising any of the other options.

\(^5\) The criteria – a combination of structural, behavioural and efficiency factors – have consistently appeared in every version of the legislation and proposed legislation since Bill C-256 in 1970. For earlier Bureau versions see Jones, *supra*, note 13 at 281-82. For legislative versions see Consumer and Corporate Affairs, *Proposals for a New Competition Policy for Canada, Second Stage* (Ottawa: Supply and Services, 1977); and *Competition Act* 1966, s. 65.

\(^6\) Downs, *supra*, note 6 at 243.
Roughly the same explanation applies to the issue of why the government chose to emphasize the goal of "efficiency." "Efficiency" is a useful "symbol." No government could come out against promoting efficiency. But to put the means in place to actually improve efficiency is something else. "Symbols" like "ideologies" are ultimately empty.

III. CONCLUSIONS

There are three major conclusions from the analysis in Parts I and II. First, there is no relationship between efficiency, as measured by the efficiency loss by industry, and case enforcement activity by industry in Canada. Indeed case enforcement selection appears to have little relationship to economics at all. This is the same result as yielded by similar studies in the United States.

Second, the reason why there is no relationship is due primarily to the political efforts of the government as encapsulated in the wording of the statute and the implicit support of the economic analysis of the courts. The Competition Act is largely a response to the pressure of the business community. The fact that the Bureau may wish to maximize its own utility function is not responsible for the failure of efficiency based enforcement activities. This is contrary to much current thinking about the antitrust bureaucracy in the United States.

Finally, what is distressing to some economists is that we are dealing with economic policy, the goals of which are supposedly economic, but which is enforced on some other grounds. Economists know that economists qua economists do not solely determine ends. Nevertheless, if ends are drawn in economic terms


78 After examining the Bureau's internal case files on the case enforcement that took place from 1960-1975, Gorecki concluded that economic criteria play a minor role in case selection. However, Bureau officials claim the converse. See supra, note 69 at 247-48.

79 Supra, note 18.
(efficiency for example) then economists have a right to expect that economic means (economic analysis) be applied to determine the best way to achieve the given ends. It is not a case of arguing that since there is less than unanimity over economic means (are you a structuralist, a Chicagoite, an Austrian?), economic analysis should be ignored. If some non-economic analysis is to be substituted then economists and the general public have the right to expect policy makers to explicitly specify that, although ends are economic, means are not. By the same token, if ends are non-economic then policy makers should say so. Unfortunately, this is too easy, too clear, and therefore in the world of policy to be avoided.