Competition Tribunal **Tribunal de la Concurrence**

Reference: *The Commissioner of Competition v. Superior Propane Inc.,* 2002 Comp. Trib. 16
File no.: CT1998002
Registry document no.: 238a

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, and the *Competition Tribunal Rules,* SOR/94-290, as amended;

AND IN THE MATTER OF an inquiry pursuant to subsection 10(1)(b) of the *Competition Act* relating to the proposed acquisition of ICG Propane Inc. by Superior Propane Inc.;

AND IN THE MATTER OF an application by the Commissioner of Competition under section 92 of the *Competition Act.*

B E T W E E N:

The Commissioner of Competition
(applicant)

and

Superior Propane Inc.
ICG Propane Inc.
(respondents)

Dates of hearing: 20011009 to12, 20011015
Members: Nadon J. (presiding); L.P. Schwartz and C. Lloyd
Date of order: 20020404
Order signed by: Nadon J.

REASONS AND ORDER FOLLOWING THE REASONS FOR JUDGMENT OF THE FEDERAL COURT OF APPEAL DATED APRIL 4, 2001

TABLE OF CONTENTS **Paragraph**

I. INTRODUCTION ………………………………………………………………… [1]

II. THE REDETERMINATION PROCEEDINGS …………..………………… [6]

III. THE ROLE OF THE TRIBUNAL …………………………………………… [19]

A. JURISDICTION AND MANDATE OF THE TRIBUNAL ……………. [22]

B. ROLE OF LAY MEMBERS …………………………………………… [30]

IV. ROOTS OF THE MERGER PROVISIONS OF THE ACT ………………. [37]

A. 1969 INTERIM REPORT OF THE ECONOMIC COUNCIL OF CANADA …………………………………………………….... [40]

B. LEGISLATIVE HISTORY OF THE EFFICIENCY DEFENCE ……... [47]

C. THE PARLIAMENTARY COMMITTEE …………………………….. [59]

D. FREE COMPETITION ………………………………………………… [71]

E. TRIBUNAL'S CONCLUSIONS ………………………………………. [78]

V. THE STANDARD OR TEST TO ASSESS THE EFFICIENCY DEFENCE . [84]

A. PRICE STANDARD ………………………………………………….. [86]

B. MODIFIED PRICE STANDARD ………………………………………. [87]

C. CONSUMER SURPLUS STANDARD ……………………………… [90]

D. TOTAL SURPLUS STANDARD ……………………………………... [95]

E. BALANCING WEIGHTS APPROACH ………………………………. [102]

F. SOURCES OF THE CORRECT WEIGHT …………………………… [110]

G. STANDARD FOR EVALUATING EFFICIENCY GAINS IN THE UNITED STATES …………………………………………………… [114]

H. DIFFERENCES BETWEEN CANADIAN AND AMERICAN APPROACHES TO MERGERS AND EFFICIENCIES ………………. [131]

(1) Market Structure Considerations ………………………………. [132]

(2) Efficiencies and Competitive Effects …………………………… [134]
(3) Trade-off Analysis ……………………………………………… [138]
(4) Industrial Concentration …………………………………….. [141]
(5) Small Business ………………………………………………. [143]
(6) Foreign Ownership ………………………………………….. [145]
(7) Efficiencies: "merger-specific" v. "order-driven" …………….. [147]

I. AMERICAN COMMENTARY …………………………………….. [150]

J. DOES THE TOTAL SURPLUS STANDARD VITIATE SECTION 92? [160]

(1) Background …………………………………………………… [163]
(2) "Greater than and offset..." …………………………………… [170]

K. CAN THE CONSUMER SURPLUS STANDARD BE MET IN THIS CASE? ……………………………………………………… [174]

L. IS THE ENTIRE TRANSFER NECESSARILY INCLUDED? ……….. [182]

(1) Redistribution to Foreigners …………………………………….. [192]
(2) Pre-existing Monopsony ………………………………………… [199]
(3) General …………………………………………………………….. [202]

M. CONSUMER SURPLUS STANDARD CANNOT BE CORRECT IN LAW ………………………………………………………………. [209]

VI. THE EFFECTS ……………………………………………………………. [216]

A. DEADWEIGHT LOSS ………………………………………………. [219]

B. INTERDEPENDENT AND COORDINATED BEHAVIOUR ……….. [234]

C. SERVICE QUALITY AND PROGRAMMES ………………………… [238]

D. ATLANTIC CANADA ……………………………………………… [243]

E. INTERRELATED MARKETS ………………………………………… [250]

F. LOSS OF POTENTIAL DYNAMIC EFFICIENCY GAINS …………. [256]

G. MONOPOLY ………………………………………………………… [259]

(1) Definitional ……………………………………………………… [263]
(2) Statutory History and Related Provisions ……………………….. [270]
(3) Section 96 Applies to this Merger ………………………………. [276]
(4) Additional Effects ………………………………………………. [283]

H. SMALL AND MEDIUM-SIZED ENTERPRISES ………………………. [286]

VII. REDISTRIBUTIVE EFFECTS (THE WEALTH TRANSFER) …………… [306]

A. COMMISSIONER'S POSITION ……………………………………….. [307]

B. RESPONDENTS' POSITION ………………………………………….. [314]

C. DECISION OF THE COURT …………………………………………... [321]

D. TRIBUNAL'S ANALYSIS OF THE TRANSFER ……………………… [325]

(1) General ………………………………………………………… [326]
(2) Tribunal's Approach to the Redistributive Effects ………………. [333]
(3) Pecuniary Gains ………………………………………………….. [339]
(4) Professor Townley's Statistical Evidence ……………………….. [346]
(5) Interrelated Markets: Redistributive Effects …………………….. [358]
(6) Tribunal's Decision on Redistributive Effects …………………… [365]

VIII. CONCLUSIONS ……………………………………………………………… [369]

A. OBSERVATION …………………………………………………………… [372]

IX. CONCURRING OPINION (DR. L. SCHWARTZ) …………………………… [378]

A. CHICAGO SCHOOL ……………………………………………………….. [379]

B. IMPLICATIONS OF SUBSECTION 96(2) ……………………………… [386]

C. SMALL BUSINESS ……………………………………………………… [388]

D. DEADWEIGHT LOSS AND ELASTICITY OF DEMAND ……………. [393]

X. DISSENTING OPINION (MS. CHRISTINE LLOYD) ……………………… [399]

A. REDUCTION OR ELIMINATION OF CUSTOMER PROGRAMS …… [403]

B. PREVENTION OF COMPETITION IN ATLANTIC CANADA ………. [407]

C. THE EFFECTS IN INTERRELATED MARKETS …………………….. [410]

D. THE LOSS OF POTENTIAL DYNAMIC EFFICIENCY GAINS ……… [414]
E. EFFECTS ON SMALL AND MEDIUM-SIZED ENTERPRISES ………. [417]

F. THE CONSUMERS' SURPLUS TRANSFER ………………………….. [421]

G. REQUIREMENT TO QUANTIFY THE EFFECTS ....[425]

H. CONCLUSION .... [428]

(1) Observation .... [431]

XI. ORDER .... [433]

I. INTRODUCTION

[1] On April 4, 2001, the Federal Court of Appeal (the "Court") set aside our decision of August 30, 2000. *(Commissioner of Competition* v. *Superior Propane Inc.* (30 August 2000), CT 1998 0021192, Reasons and Order [2000] C.C.T.D. No.15 (QL) (Comp. Trib.)). More particularly, the Court concluded that we erred in interpreting section 96 of the *Competition Act*, R.S.C. 1985, c. C-34 (the "Act"). As a result, the Court remitted the matter to us for redetermination in a manner consistent with its Reasons for Judgment (the "Appeal Judgment").

[2] On December 7, 1998, an application was brought by the Commissioner of Competition (the "Commissioner") pursuant to section 92 of the Act for an order dissolving the merger of Superior Propane Inc. ("Superior") and ICG Propane Inc. ("ICG") or otherwise remedying the substantial prevention or lessening of competition that was likely to occur in the market for propane in Canada upon the implementation of the said merger. In our August 30, 2000, decision (the "Reasons"), we found that the merger of Superior and ICG would substantially prevent and lessen competition based on our analysis of the competitive effects with respect to two product markets (retail propane and national account coordination services) and 74 local geographic markets. Further, we concluded at paragraph 314 of our Reasons that "...the sole remedy appropriate in this case would be the total divestiture by Superior of all of ICG's shares and assets (including those of the previously integrated branches thereof)." The majority (Nadon J. and L. Schwartz) found that the merger was saved from divestiture by reason of the efficiencies resulting from the merger. Specifically, the majority concluded, pursuant to section 96 of the Act, that the efficiencies arising from the merger were greater than, and offset, the effects of lessening or prevention of competition attributable to the merger.

[3] When determining whether the efficiencies were greater than the anti-competitive effects, the majority adopted the "Total Surplus Standard". Under this standard, the gains in efficiency brought about the by merger are compared against the efficiency costs of the merger as represented by the deadweight loss. The Court found that the Tribunal erred in law by limiting the effects to be considered to resource-allocation effects and by failing to ensure that all of the objectives of the Act, and the particular circumstances of each merger, were considered in the balancing exercise mandated by section 96 of the Act.

[4] The purpose of these Reasons and Order is to redetermine the extent of the effects of the aforementioned anti-competitive merger in light of the Court's decision. Consistent with the redetermination proceedings contemplated by the Court and upon agreement among counsel, no additional evidence was adduced at the five day hearing.

[5] The redetermination proceedings raise several issues: (a) What is the scope of the redetermination proceedings? (b)Which findings of the Tribunal should or should not be revisited? (c)What is the jurisdiction and mandate of the Tribunal? (d)Which economic standard or test should be applied under subsection 96(1) of the Act? (e)What are the effects of the anti-competitive merger that must be considered by the Tribunal in this case? (f)How should they be treated and who bears the burden of proof? and (g)What is the result of the trade-off analysis conducted under subsection 96(1) of the Act based on the effects accepted by the Tribunal?

II. THE REDETERMINATION PROCEEDINGS

[6] *In Director of Investigation and Research v. Air Canada* (1993) 51 C.P.R. (3d) 131, [1993] C.C.T.D. No. 19, (QL) (Comp. Trib), the Tribunal had to define the nature and extent of redetermination proceedings which arose out of a decision of the Federal Court of Appeal. In 1992, after having issued a consent order governing the operation of what was then known as Gemini, a computer reservation system used by Air Canada and Canadian Airlines, an application was brought to the Tribunal to vary the consent order. The Tribunal made a decision as to the scope of its jurisdiction. On appeal to the Federal Court of Appeal, the Court reversed and remitted the matter back to the Tribunal for reconsideration. Mr. Justice Strayer, who presided the Tribunal in the redetermination proceeding, made the following remarks starting at page 135:

> ...we have decided that the hearing for purposes of reconsideration will focus on establishing that the preconditions for the making of an order in accordance with s. 92 of the Act have been met and determining the appropriate remedy in the circumstances...
>
> We are satisfied that the means that we have chosen are, as a practical matter, adequate, fair and consistent with our understanding of the decision of the Federal Court of Appeal. (at page 135)
>
> *The sole justification for the tribunal once again becoming seized of this matter is the judgment of the Federal Court of Appeal. Without the direction to reconsider, the Tribunal would effectively be functus.* Unfortunately and perhaps unavoidably given the complexity of the issues, the intentions of the Federal Court of Appeal with respect to the scope or nature of the hearing for reconsideration...are not entirely transparent. (at page 136)
>
> *...the tribunal has a limited mandate in this matter--to reconsider certain issues in accordance with the direction of the Federal Court of Appeal*. We are of the opinion that much of the ground to be covered in the reconsideration is broadly the same as was previously covered...
>
> It is our understanding of the Federal Court of Appeal decision that the tribunal has been directed to "reconsider" the "matter" on the basis that the condition precedent to the exercise of the power to vary has been met. *The "matter" that is referred to is the November 5, 1992, application of the Director...The hearing to be held commencing November 15, 1993, is not a "new" case. The tribunal is neither required nor authorized by the Court of Appeal to hold a hearing de novo. The only reason that the tribunal can readdress this matter at all is because of the Court of Appeal decision and it must act in accordance with that decision.* (at page 140)
>
> ...
>
> Further, although Air Canada may have some new evidence, the issue of the possible restructuring of Canadian through a sale of its international routes was raised at the original hearing. At that time, Air Canada had ample opportunity to canvass this issue thoroughly. The tribunal addressed the evidence put before it in its decision of April 22, 1993, and concluded that it was not convinced that a sale of its international routes would leave Canadian as a viable domestic competitor...This finding formed part of the decision which was considered on appeal before the Federal Court of Appeal. Even if we were not precluded by the finding of that court,

> *it would be an exceptional measure for the tribunal to reopen this issue which it has already decided and to hear new evidence...* (at page 141) [Emphasis added]

[7] The Appeal Judgment provides the Tribunal with some guidance for the redetermination proceedings relating mainly to (a) the scope of the proceedings, (b) the meanings of effects for the purpose of section 96, (c) the scope of the burden on the Commissioner and the respondents with respect to section 96, and (d) the nature of the balancing exercise to be performed by the Tribunal pursuant to section 96. At paragraphs 156-157 of the Appeal Judgment, the Court stated:

> The Tribunal need only identify and assess "the effects of the prevention or lessening of competition" for the purpose of section 96 and decide whether the efficiencies that the Tribunal has already found to have been proved by the respondents are likely to be greater than, and to offset, those effects.
>
> The Commissioner has the legal burden of proving the extent of the relevant effects, while the respondents have the burden, not only of proving the scale of the efficiency gains that would not have occurred but for the merger, but also of persuading the Tribunal on the ultimate issue, namely, that the efficiency gains are likely to be greater than, and to offset, the effects.

[8] The parties are not in agreement regarding the scope of the redetermination proceedings. The Commissioner argues that the scope thereof is described in paragraph 156 of the Appeal Judgment and that the "effects" that must be considered by the Tribunal are those described in paragraph 92 of the Appeal Judgment:

> Thus, although section 96 requires the approval of an anti-competitive merger where the efficiencies generated are greater than, and offset, its anti-competitive effects, the ultimate preference for the objective of efficiency in no way restricts the countervailing "effects", to deadweight loss. Instead, the word, "effects" should be interpreted to include all the anti-competitive effects to which a merger found to fall within section 92 in fact give rise, having regard to *all* of the statutory purposes set out in section 1.1.

[9] The respondents disagree with the Commissioner for what they submit is an attempt to relitigate matters that were previously decided by the Tribunal but also attempt to convince the Tribunal to revisit its express and implicit findings regarding the likelihood of price increases following the merger, the size of the deadweight loss and the corresponding size of the wealth transfer.

[10] The Appeal Judgment requires the Tribunal to conduct a broad assessment of all of the anti-competitive "effects" of the merger using a different standard or test, in lieu of the Total Surplus Standard, that reflects all of the objectives of the purpose clause of the Act. The Tribunal's initial findings were expressly tied to resource allocation and failed, according to the Court, to give adequate weight to the full range of objectives set out in the purpose clause of the Act. The Tribunal is now required to consider the wealth transfer that will result from the merger and to reconsider its prior findings with respect to the negative qualitative effects of the merger.

[11] One of the important related issues is whether certain findings made by the Tribunal in its Reasons should be re-examined. Most of the Tribunal's findings in its Reasons were not appealed, and thus were not in issue before the Court. These findings cannot be revisited at this time. However, there were a number of findings that were made by reason of the erroneous interpretation of subsection 96(1) of the Act. In light of the Court's reasons and its interpretation of that section, this Tribunal must now make certain additional findings.

[12] The respondents argue that the Commissioner is estopped from relitigating the qualitative effects of the merger on the basis of res *judicata.*

[13] The Commissioner submits that a distinction must be drawn by the Tribunal between those "findings" which must necessarily be revisited in order to comply with the Court's direction to "consider all of the anti-competitive effects bearing in mind the purpose clause" and those "findings" that should not be "abandoned". The Commissioner submits that the Tribunal's "finding" regarding the negative qualitative effects of the merger must be revisited because the Tribunal's assessment in this regard was limited to the "impact on resource allocation of the negative qualitative effects". The Commissioner also argues that the estimated deadweight loss of $3 million per year attributable to price increases by the merged entity should not be revisited.

[14] Further, the Commissioner submits that the doctrines of *functus officio and res judicat*a invoked by the respondents do not apply with respect to the assessment by the Tribunal of any "effects" which fall within the scope of the Court's direction and which must be reconsidered in light of a proper reading of the purpose clause and in light of the particular circumstances of this case.

[15] The majority of the Tribunal stated in its Reasons at paragraph 447, that:

> The Tribunal further believes that the only effects that can be considered under subsection 96(1) are the effects on resource allocation, as measured in principle by the deadweight loss which takes both quantitative and qualitative effects into account...

[16] It is on the basis of this erroneous interpretation of section 96 that the majority refused to consider the wealth transfer and limited its assessment of the negative qualitative effects of the merger to their impact on resource allocation. As a result of this narrow interpretation of the statute, the majority did not consider the wealth transfer or any of the other (i.e. non-resource allocation) impacts of the negative qualitative effects of the merger.

[17] At common law, the doctrine of res judicata only applies to a judicial decision which constitutes a final Judgment. In this instance, the Tribunal's decision with respect to the anti-competitive effects of the merger is not final, since the Court has remitted this matter to the Tribunal and has directed that the Tribunal reconsider the "effects of any prevention or lessening of competition" in accordance with a proper reading of the statute. Accordingly, the doctrine of res judicata has no application to the findings that were made as a result of our error in law. See Spencer Bower, Turner and Handley, The Doctrine of Res Judicata, 3d ed. (London: Butterworths, 1996), paragraph 19 (General Test), paragraphs 153-54 ("Finality"), paragraph 162 ("Decision subject to revision by tribunal itself") [hereinafter, *Spencer Bower, Turner and Handley*].

[18] Further, when an appellate court reverses the findings of an inferior tribunal on a particular issue, the tribunal's judgment on that issue is voided *ab initio* and the appellate judgment becomes the sole source of res *judicata* between the parties. To the extent that any operation of *res judicata* arises in this instance, the Commissioner submits it arises to preclude Superior from challenging the express findings of the Court:

> 60. When a tribunal with original jurisdiction has granted, or refused, the relief claimed and an appellate tribunal reverses the judgment or order at first instance, the former decision, until then conclusive, is avoided ab initio and replaced by the appellate decision, which becomes the res *judicata* between the parties. Even if the appeal fails the operative decision becomes that of the appellate court which replaces the earlier decision as the source of any estoppels.
>
> (Spencer Bower, Turner and Handley)

III. <u>THE ROLE OF THE TRIBUNAL</u>

[19] The Court made a number of remarks concerning the jurisdiction and mandate of the Tribunal, the selection and role of lay members of the Tribunal, and the significance that should be attached to section 1.1 of the Act (the "purpose clause") when interpreting specific provisions of the Act. We believe that it is important to expand on these remarks in order to provide for a better understanding of these issues.

[20] More particularly, the Court describes the Tribunal as an adjudicative body and the Court recognizes that the Tribunal lacks the wide powers of multi-functional administrative agencies such as provincial securities commissions (Appeal Judgment, at paragraph 48). The scope of the Tribunal's expertise is limited by virtue of not having broad policy development powers (Appeal Judgment, at paragraph 48), but like other regulatory administrative tribunals, it is charged with the responsibility of protecting the public interest by striking a balance among conflicting interests and objectives (Appeal Judgment, at paragraph 98). Yet, the composition of the Tribunal indicates a considerable level of expertise (Appeal Judgment, at paragraph 56) by virtue of the appointment process for lay members and their expertise (Appeal Judgment, at paragraph 54).

[21] Further, the Court finds the purpose clause of the Act to have the "...typically indeterminate quality and inherent inconsistencies of purpose or objective clauses...", yet "statutory provisions containing general statements of legislative purpose are integral to the statute and can carry as much weight as its other sections..." (Appeal Judgment, at paragraph 87), and that balancing competing objectives in order to determine where the public interest lies in a given case requires the exercise of discretion (Appeal Judgment, at paragraph 99). Finally, the Tribunal is as well-suited to this task as "other independent, specialized, administrative tribunals that are required to perform similar balancing exercises in the discharge of their regulatory functions." (Appeal Judgment, at paragraph 99).

A. JURISDICTION AND MANDATE OF THE TRIBUNAL

[22] Regarding the Tribunal's conclusion that advancing views on the social merit of various groups in society and achieving the proper distribution of income in society were not its role under the Act, the Court states at paragraph 98 of the Appeal Judgment:

> In my view, this conclusion gives insufficient weight to the range of experience and perspectives that the Act contemplates that the members of the Tribunal may possess, and overstates the degree of "social engineering" involved in considering a broad range of anti-competitive effects under section 96. *Like other regulatory administrative tribunals, the Tribunal is charged with the responsibility of protecting the public interest, which it does by striking a balance among conflicting interests and objectives in a manner that respects the text and purposes of the legislation,* is informed both by technical expertise and by the judgment that comes from its members' varied experiences, and is responsive to the particularities of the case. [Emphasis added]

[23] The Court's premise seems to lead to the conclusion at paragraph 116 of the Appeal Judgment that:

> Conversely, it is in my view far from a fatal objection to the balancing weights approach that its proponent at the hearing before the Tribunal, Professor Townley, testified that, as an economist, he was unable to determine what were the effects of the merger of Superior and ICG and whether the efficiencies likely to be produced thereby were greater than, and offset, them. I take his point simply to have been that he was called as a witness expert in economics and that the balancing exercise called for by section 96 required broader public policy judgments that were outside his area of expertise, *but were for the Tribunal to make as it thought would best advance the public interest within the parameters of the Act.* [Emphasis added]

[24] The Tribunal is, no doubt, an adjudicative body, subject to review by the Court. The Tribunal is a quasi-judicial body that is mandated to hear cases and make decision based on its interpretation of the legislation (section 9 of the *Competition Tribunal Act* (the "CTA")). It is of interest to compare the Tribunal with multi-functional administrative agencies. Whereas those agencies often have a quasi-legislative function as well as policy development and enforcement powers, the Tribunal does not. The chair of such an agency reports to the Minister or through the Minister to the legislature; the chair of the Tribunal, required to be a member of the Federal Court, does not. The Tribunal regulates nothing except its own proceedings.

[25] As a purely adjudicative body, the distinctive features of the Tribunal are its specialized area, competition law, and the presence of lay members who function in all respects as judges except that they do not decide matters of law. The lay members' contribution to the adjudication of matters arises from their specialized education and expertise, which enables them to understand the specialized evidence in fields of economics and commerce that typically appears in cases involving competition law. The presence of lay members recognizes that competition law is highly specialized, that judicial training in areas outside the law is limited, and that the judges of the Federal Court of Canada may be lacking in experience in commercial matters generally.

[26] Thus, it is true that the lay membership does not possess, nor will they develop, the detailed knowledge of a particular regulated industry. This can only suggest that the role of the Tribunal differs in critical respects from the role of multi-functional administrative agencies. Moreover, multi-functional administrative agencies will be entirely without the benefit of judicial members. This would be consistent with the quasi-legislative function that some, perhaps many, of these agencies discharge

in their rule-making. However, the Tribunal has only an adjudicative function in which the judicial and lay members play complementary roles.

[27] At the time that Bill C-91, An Act to Establish the Competition Tribunal and to amend the *Combines Investigation Act and the Bank Act* and other acts in consequence thereof (1st Session, 33rd Parliament, 1984-85-86), was introduced, the Minister explained the need for, and the role of, the proposed tribunal:

> The Economic Council of Canada's 1969 Interim Report on Competition Policy stated that any shift of competition policy legislation out of the criminal law should be accompanied by the formation of a specialized tribunal to adjudicate these matters. In their 1976 Report, Lawrence A. Skeoch and Bruce C. McDonald endorsed this view but stressed the need for the adjudicator to be separate from departmental policing and policy making functions. This conflict in roles has also been the subject of comment recently by the Supreme Court of Canada.
>
> In the Southam case, the Supreme Court decided that the investigatory functions of the RTPC [Restrictive Trade Practices Commission], such as the power to gather evidence through hearings and to direct further investigation, impaired its ability to act as an impartial adjudicator in authorizing search and seizure. This finding, which was made under the Charter of Rights and Freedoms, signalled a need to create an adjudicative body which would be free of the dual roles of investigation and adjudication that the RTPC has carried out in the past.
>
> The issue of adjudication of competition matters has been the subject of much discussion over the long history of competition law reform. Many interested parties have proposed reliance on the ordinary courts to adjudicate competition matters. One factor often cited in support of the courts is their ability to produce consistent results with clear and full rights of appeal. Others have expressed a preference for the use of a specialized tribunal because it would provide greater potential for expertise in economics and business, and would permit more scope for response by the decision maker to social and economic change. In particular, lay experts are better able to reflect the reality of the business world.
>
> *On balance, the Government believes it is more appropriate that these matters be adjudicated by a highly judicialized tribunal.* This hybrid will allow the use of expert lay persons as well as judges in the decision-making process. Nevertheless, the Government agrees that it is very important to have in the law an adjudication system that ensures the impartiality, due process and certainty which is associated with the courts.
>
> ...
>
> The Tribunal's functions will be strictly adjudicative. It will have no role in supervising the investigative powers of the Director, initiating investigations or providing research of policy advice to the Government...

(Minister of Consumer and Corporate Affairs [Canada], The Honourable Michel Côté, *Competition Law Amendments: A Guide,* December 1985 at 10-11.) [Emphasis (italics) added] [hereinafter, *Competition Law Amendments:* A Guide]

[28] The reasons for replacing the RTPC with the Tribunal emphasize the Tribunal's strictly adjudicative role. Hence, the Tribunal's mandate is not to make decisions driven by "public interest concerns". In our view, the guardian of the public interest, if there is one in competition matters, is the Commissioner who has the statutory obligation to conduct inquiries, the discretion to initiate civil legal proceedings before the Tribunal and other courts and the powers to enforce the Act in the public interest. The Commissioner also has the right to intervene before administrative agencies to defend competition.

[29] Since the Tribunal is not an administrative body such as the Canadian Radio-Telecommunications Commission, the National Energy Board, the Ontario Securities Commission, etc., its lay members are called upon only to apply the Act based on their assessment of the evidence. For example, under section 92 of the Act, the lay members must determine whether a merger prevents or lessens competition substantially and they must contribute to the determination of the order that addresses such findings. Such assessments do not involve public interest consideration. Hence, the Tribunal does not fully understand the Court's remarks at paragraph 99 of the Appeal Judgment:

> Of course, balancing competing objectives in order to determine *where the public interest lies in a given case requires the exercise of discretion*...[Emphasis added]

B. ROLE OF LAY MEMBERS

[30] The Court drew attention to the selection process for lay members and noted that lay members were representative of the broad-based council that considers their appointment (Appeal Judgment, at paragraph 54). Accordingly, the Court holds that the Tribunal exercises discretion to act on its understanding of the public interest.

[31] It is true that the CTA provides for an advisory council to vet candidates for appointment of lay members and to make recommendations to the Minister regarding appointments. However, the members of the advisory council, while required to be chosen from different groups in society, are not representatives of those groups. The Parliamentary Committee that reviewed Bill C-91 in 1986 studied this matter at length and amended the Bill to clarify that lay members were "individuals chosen from" certain groups rather than "representatives of" those groups as the Bill had provided:

> **Mr. Ouellet:** Mr. Chairman, I would like that subclause 3.(3) of the bill be amended by striking out line 17 on page 2 and substituting the following:
>
> erality of the foregoing, individuals chosen from
>
> This is the reason for my amendment. As has been pointed out by some of the witnesses who have appeared before us, if we leave the end of this paragraph as it is, the business community, legal community, consumer group and labour group might believe that those who will advise the Ministers are advising the Ministers on behalf of these communities

> and groups. It might create a conflicting advisory board rather than an advisory board which is helping the Minister, in a sense, one that gives genuine and unattached recommendations.
>
> By changing a word there, it will be clear that these people are not representative of these so-called groups, but are chosen from among these groups.
>
> **The Acting Chairman (Mr. Cadieux)**: Mr. Domm.
>
> **Mr. Domm**: Mr. Chairman, to show how interested we are in getting along with the legal profession, and noting that the Canadian Bar Association made this point in their presentation to the committee, we would be prepared to accept that amendment as proposed by Mr. Ouellet.
>
> Amendment agreed to...
>
> (Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-91. House of Commons, Issue No. 10, Tuesday, May 20, 1986 at 10:37)

[32] Since the members of the advisory council itself were not selected in order to act as representatives of the groups from which they were chosen, it follows that the lay members recommended by the council were also not to be seen as representative of such groups. The amendment by the Parliamentary Committee makes it clear that the role of the advisory council was to consider lay appointments to the Tribunal based solely on the expertise and experience of candidates, rather than on the extent to which those candidates represented the interests of different groups in society. Indeed, the Minister had already made this clear:

> Parliament has long recognized the need for special investigatory powers to deal effectively with competition matters. However, as stated by the Supreme Court decision in the <u>Southam</u> case, certain procedural safeguards have to be met in order to satisfy the protections embodied in the <u>Canadian Charter of Rights and Freedoms</u>. There is also a very real need to reassess the adjudication of the non-criminal matters under the Act to ensure that the adjudicator has the economic and business expertise to deal with competition issues and yet still provide procedural fairness and consistency in decision-making.
>
> (*Competition Law Amendments: A Guide*, at 5.)

[33] The Tribunal further notes that the Minister is bound to consult the advisory council only when it has been constituted. The Tribunal understands that in 1992, an order-in-council terminated the appointment of each of the members of the advisory council established pursuant to subsection 3(3) of the CTA. Indeed, the February 1992-93 Budget announced the winding up of a list of agencies and committees as part of the deficit reduction initiatives. The list included the advisory council on lay members of the Competition Tribunal (Hon. Gilles Loiselle, President of the Treasury Board, *Managing Government Expenditures,* February 27, 1992, page 39). The document explained that "...with Canada's competition regime now mature and well functioning, there is no longer a need to maintain a separate statutory advisory committee [sic]." The elimination of the advisory council indicates to us that it is unlikely that the council was constituted to ensure the selection of members who may share their views about the public interest generally.

[34] Accordingly, in our view, there does not appear to be a basis for inferring that Parliament intended the lay members of the Tribunal to play the same role as members of multi-functional administrative agencies. In particular, lay members of the Tribunal do not exercise their discretion to determine the public interest in the face of conflicting objectives because (a) the Tribunal is adjudicative only and, like a court, has no public-interest mandate; (b) discretion to determine the public interest is not required to adjudicate; (c) the Act, which itself defines the public interest, clearly articulates what the Tribunal is to do when a merger that lessens competition substantially also generates efficiency gains, and (d) the party with the public-interest mandate, if there is one, is the Commissioner.

[35] The idea of the Tribunal as a court was readily accepted in 1991 by senior officials of the federal Justice Department:

> The 1986 amendment package, among other things, shifted the merger and monopoly provisions from the criminal law to a civil basis. Adjudication of these provisions, along with the existing civilly reviewable practices, was placed in the hands of the newly created Competition Tribunal. The Tribunal is a hybrid court which sits in panels consisting of judges of the Federal Court Trial Division and lay members possessing knowledge of economics and business matters.
>
> (D. Rutherford, Q.C., Associate Deputy Minister, Department of Justice, Canada and J.S. Tyhurst, Counsel, Department of Justice, Canada. "Competition Law and the Constitution: 1889-1989 and into the Twenty-First Century", chapter 8 of R.S. Khemani and W.T. Stanbury (eds.), *Historical Perspectives on Canadian Competition Policy*, The Institute for Research on Public Policy, Halifax, 1991 at 277) [hereinafter, *Rutherford and Tyhurst*]

[36] It is noteworthy that neither the Minister nor these senior officials made any mention whatsoever to any public-interest role for the Tribunal or any such role therein for the lay members of the Tribunal.

IV. ROOTS OF THE MERGER PROVISIONS OF THE ACT

[37] In the Appeal Judgment, the Court adopts the legislative history of section 96 as recited by Madame Justice Reed in the *Hillsdown* decision (*Director of Investigation and Research v. Hillsdown Holdings (Canada) Ltd.* (1992) 41 C.P.R. (3d) 289 [1992] C.C.T.D. No. 4 (QL) (Comp. Trib) and refers to Reed J.'s analysis of the preceding, unenacted versions of the efficiency defence in Bills C-42 and C-29. In the Court's view, these Bills "...did not require that the efficiencies gained from an anti-competitive merger be balanced against its effects." (Appeal Judgment, paragraph 129 at 50-51)

[38] To illustrate, the Court points out that

> [130] Thus, Bill C-42 would have permitted an anti-competitive merger to proceed, provided only that substantial efficiency gains could be proved "by way of savings of resources for the Canadian economy" that would not otherwise have been attained: clause 31.71(5). Bill C-29 called for a determination of whether "the gains in efficiency would result in a substantial real net saving for the Canadian economy": clause 31.73(c). Neither of these provisions calls for a balancing of efficiencies against effects. Instead

> they focus on resource maximization in the economy as a whole in the same way as the total surplus standard.
>
> [131] I agree with Reed J.'s conclusion that, seen against this background, the more open-ended direction given to decision-makers by section 96, namely to balance the efficiency gains against the "effects" of an anti-competitive merger, should not be interpreted in substantially the same manner as the above clauses, which explicitly permitted anti-competitive mergers when the resulting efficiency gains produced net savings of resources for the *Canadian economy*. While earlier bills seem clearly to have encapsulated the total surplus standard in the efficiency defences, section 96 does not.
>
> (Appeal Judgment, at page 51) [Emphasis in original]

[39] It appears to the Tribunal that both the Court and Reed J. have decided the meaning of subsection 96(1) of the Act solely by reference to its terms and to the terms of the corresponding subsection of preceding bills designed to amend the *Combines Investigation Act,* R.S.C. 1970, c.C-23, ("*Combines Investigation Act*"). We believe that a careful and detailed review of the legislative history of section 96 is essential to properly understand the true meaning of that provision.

A. 1969 INTERIM REPORT OF THE ECONOMIC COUNCIL OF CANADA

[40] The source of the various bills proposed by the federal government was the Interim Report on Competition Policy issued by the Economic Council of Canada in July 1969 (the "Report"). That Report was the second of three reports in response to a special Reference from the federal government dated July 22, 1966, requesting the Council:

> "In the light of the Government's long-term economic objectives, to study and advise regarding:
>
> (a) the interests of the consumer particularly as they relate to the functions of the Department of the Registrar General [now the Department of Consumer and Corporate Affairs];
>
> (b) combines, mergers, monopolies and restraint of trade;
>
> (c) patents, trade marks, copyrights and registered industrial designs."
>
> (Report, at 1)

[41] The Economic Council pointed out in the Report that the first part of the Reference was treated in the Council's *Interim Report on Consumer Affairs*, published in 1967, and that its next report would discuss the matters in (c) of the Reference (Report, at 1). The Economic Council wrote that:

> The present Report deals with the second part – that is, with "combines, mergers, monopolies and restraint of trade" or, as we prefer to call it, competition policy.

(Report, at 1)

Accordingly, the Economic Council distinguished competition policy from the federal role in consumer protection.

[42] Describing the objectives of previous competition policy, the Economic Council observed:

> In the past, the major objective of Canadian competition policy has usually been expressed in such terms as "the protection of the public interest in free competition". But it is necessary to go behind this and ask what the preservation of competition was intended to accomplish. One would be unwise to assume that what the legislators aimed at was a single, simple end such as economic efficiency. At least some role was likely played by considerations such as the desire to diffuse economic power (and thus, by implication, political power), sympathy for the plight of the small enterprise and entrepreneur, suspicion of big business, and concern for the fairness of competitive behaviour.
>
> On the whole, however, competition policy in Canada appears to have been directed towards more strictly economic ends. Two such ends may be distinguished, one being concerned with the distribution of income, the other with the allocation of real resources in the economy.
>
> Popular thinking about competition policy has tended to stress the first, or income, objective...
>
> Professional economists, while not ignoring income distribution effects, have tended to be more concerned with the second objective of competition policy–the resource-allocation objective. This is a less obvious objective, but a highly relevant one for broad economic goals such as productivity growth. To many economists, the greatest objection to monopoly (again using the extreme example) is that it distorts the way scarce human and physical resources are brought together and used to meet the many demands of consumers. It leads, in other words, to inefficiency. The monopolist's prices are too high, relative to other prices, and because the usual adjustment machinery is not operative, they remain so. As a result, "relative prices become unreliable as indexes of relative scarcities and relative demands ... too little will be produced and too few resources utilized in [monopolistic] industries with high margins; and too much will be produced and too many resources utilized in industries with low margins." ...
>
> (Report, at 6-7)

[43] The Economic Council concluded that competition policy (i.e. policies toward combines, mergers, monopolies and restraint of trade) should focus on economic efficiency:

> It will be a recurrent theme in this Report that Canadian competition policy should aim primarily at bringing about more efficient performance by the economy as a whole. *Competition should not itself be the objective but rather the most important single means* by which efficiency is achieved...
>
> (Report at 9) [Emphasis in original, underlined emphasis added]

> Essentially, we are advocating the adoption of a single objective for competition policy: the improvement of economic efficiency and the avoidance of economic waste, with a view to enhancing the well-being of Canadians...
>
> This concentration on one objective is not meant to imply any necessary disparagement of other objectives, such as more equitable distribution of income and the diffusion of economic power, which have been entertained for competition policy in the past. It is simply that we believe:
>
> (1) that a competition policy concentrated on the efficiency objective is likely to be applied more consistently and effectively; and
>
> (2) that there exist more comprehensive and faster-working instruments, particularly the tax system and the structure of transfer payments, for accomplishing the deliberate redistribution of income and the diffusion of economic power, to whatever extent these are thought to be desirable.
>
> (Report, at 19-20)

[44] Thus, the Report firmly established that redistributive effects of competition policy were separate matters. The Council also cautioned against the uncritical acceptance of competition policies in other countries, in particular, the United States:

> In drawing lessons from abroad, appropriate allowance must of course be made for differences between the Canadian and foreign economic environments. This has often been pointed out with reference to the United States. Although competition policies in Canada and the United States, as instituted in the late nineteenth century, were in many ways a response to common concerns, their subsequent divergence has been partly a reflection of certain rather deep-seated differences between the two countries...and the smaller size and greater openness and world-trade orientation of the Canadian economy. *Perhaps the most important implication of the latter difference is that the Canadian economy is less able than its U.S. counterpart to afford a competition policy that, on occasion, may be prepared to sacrifice economic efficiency for other ends, such as the preservation of small business.*
>
> (Report, at 48) [Emphasis added]

[45] The Economic Council recommended the creation of a tribunal that would adjudicate mergers to determine anti-competitive effects and “offsetting public benefits”:

> In its examination of a merger, the tribunal might be expected to have regard to all aspects of the merger that were related in any important way to the tribunal’s general terms of reference. It would be primarily concerned with whether the merger was likely to lessen competition to the detriment of final consumers, and whether there were likely to be any <u>offsetting public benefits.</u> In addition, and without restricting the generality of the foregoing, the tribunal would be

> requested to pay attention to the following matters in so *far as they appeared to be of substantial economic importance in any particular case:*
>
> ...
>
> (8) the likelihood that the merger would be productive of substantial "social savings", i.e. savings in the use of resources (including resources used for such purposes as research and development), viewed from the standpoint of the Canadian economy as a whole.
>
> (Report, at 115-116) [Underlined emphasis added]

[46] Given the Economic Council's overriding concern with efficiency and its belief that distributional concerns were not part of competition policy, it is clear that the tribunal was not to be concerned with the redistributional effects of an anti-competitive merger when it considered item (8) because those effects were not losses of resources and, as redistributions of income, were not losses to society when viewed from the standpoint of the Canadian economy as a whole. Accordingly, the use of the phrase "offsetting public benefits" could not be used to introduce re-distributional effects. Yet, the Economic Council did refer to a "balancing assessment":

> ...[The Director] would leave the consideration of item (8), dealing with social savings, to the , which in many cases would find itself required to perform *a balancing assessment between possible detrimental effects on competition and possible beneficial effects in the form of social savings*. It should be pointed out in this connection that what appear to be cost savings to individual firms are not always "social savings", i.e. savings for the total economy. Thus, for example, a firm that has grown larger by acquiring another firm may be able to obtain certain supplies more cheaply purely by virtue of its greater bargaining power. There are various possible outcomes in terms of profits and prices, but there is no saving in terms of the real resources (the physical amounts of labour, capital, etc.) required to produce and transport the supplies in question. No real resources are freed for other uses in the economy...
>
> (Report, at 117) [Emphasis added]

Accordingly, the Economic Council's "balancing assessment" referred, not to adverse redistributive effects on consumers, but to the detrimental effects of a merger on competition. In this assessment, the Economic Council emphasized the need to distinguish between real savings and pecuniary savings.

B. LEGISLATIVE HISTORY OF THE EFFICIENCY DEFENCE

[47] Bill C-256 was the government's first attempt to amend the Combines *Investigation Act* following publication of the Report. The government did not accept the Economic Council's insistence on economic efficiency as the sole objective of competition policy, as can be seen in the preamble to Bill C-256:

Whereas competition in the private sector is ordinarily the best means of allocating resources, of enhancing efficiency in the production and distribution of goods and services and of transmitting the benefits of efficiency to the public, and competition also furthers individual enterprise by decentralizing economic power and reducing the need for government intervention in the achievement of economic objectives;

And Whereas it is therefore desirable to promote competition actively and also to remove, throughout Canada, obstacles to competition whether created by combinations, mergers, monopolies or other situations or practices, and such objectives can only be achieved through the recognition, encouragement and enforcement of the role of competition as a matter of national policy;

And Whereas it is also recognized that in cases where a market is too small to support a sufficient number of independent firms of efficient size to promote effective competition, alternative means of promoting maximum efficiency may be required, *but that where such an alternative means is adopted, it is necessary to ensure that the resultant benefits will be transmitted in substantial part and within a reasonable time to the public and that the public will be protected against any abuses that the alternative means of promoting efficiency may facilitate;*

And Whereas it is necessary and desirable, in the interest of efficiency of production and distribution and the transmission of the benefits thereof to the public, to promote honest and fair dealing in the market;

Now therefore...

(House of Commons, Bill C-256, 3rd Session, 28th Parliament, 19-20 Elizabeth II, 1970-71. (First Reading, June 29, 1971) [Emphasis added]

[48] The preamble specifically calls attention to economic power, and to consumer welfare when it would be necessary, due to small market size, to depart from competition in order to achieve efficiency. The merger provisions of Bill C-256 addressed this concern with an efficiency defence that included a "passing on" requirement:

s.34(3) A merger shall not be prohibited or dissolved by order of the Tribunal if it is satisfied

(a) that none of the parties thereto could reasonably have commenced or continued to carry on business in the relevant market independently; or

(b) that

(i) the merger has led, is leading or is likely to lead to a significant improvement of efficiency over that which any of the parties to the merger could have achieved by commencing or continuing to carry on business independently or in any other manner that would have led to less restriction of competition than resulted or would be likely to result from the merger, and

> (ii) a substantial part of the benefits derived or to be derived from such improvement of efficiency are being or are likely to be passed on, through conditions imposed by the market or by order of the Tribunal, to the public within a reasonable time in the form of lower prices or better products.

[49] It was a clear concern of Bill C-256 that redistributional effects of anti-competitive mergers saved by efficiency gains not harm consumers beyond a reasonable time period. This concern was successively de-emphasized in subsequent bills.

[50] Section 1 of Bill C-42 contained as preamble:

> "An Act to provide for the general regulation of trade and commerce by promoting competition and the integrity of the market place and to establish a Competition Board and the office of Competition Policy Advocate
>
> WHEREAS a central purpose of Canadian public policy is to promote the national interest and the interest of individual Canadians by providing an economic environment that is conducive to the efficient allocation and utilization of society's resources, stimulates innovation in technology and organization, expands opportunities relating to both domestic *and export markets and encourages the transmission of those benefits to society in an equitable manner*;
>
> AND WHEREAS one of the basic conditions requisite to the achievement of that purpose is the creation and maintenance of a flexible, adaptable and dynamic Canadian economy that will facilitate the movement of talents and resources in response to market incentives, that will reduce or remove barriers to such mobility, *except where such barriers may be inherent in economies of scale or in the achievement of other savings of resources*, and that will protect freedom of economic opportunity and choice by discouraging unnecessary concentration and the predatory exercise of economic power and by reducing the need for detailed public regulation of economic activity;
>
> AND WHEREAS the effective functioning of such a market economy may only be ensured through the recognition and encouragement of the role of competition in the Canadian economy as a matter of national policy by means of the enactment of general laws of general application throughout Canada and by the administration of such laws in a consistent and uniform manner;
>
> NOW, THEREFORE,..."
>
> (Bill C-42, 2nd Session, 30th Parliament, 25-26 Elizabeth II, 1976-77. (First Reading March 16, 1977) [Emphasis added]

[51] Bill C-42's preamble expresses concern for efficiency and equity generally, and states that saving resources could entail a departure from competition. However, in contrast with the previous bill, Bill C-42 limited the availability of the efficiency defence and dropped the "passing on" requirement:

s.31.71(5) The Board shall not make an order under subsection (3) where it is satisfied by the parties to a merger or proposed merger to which this section applies that the merger or proposed merger has brought about or that there is a high probability that it will bring about substantial gains in efficiency, by way of savings of resources for the Canadian economy that are not reasonably attainable by means other than the merger.

...

(7) Where the Board finds that

(a) subsection (5) applies in respect of a merger or proposed merger to which this section applies, and

(b) the merger or proposed merger will or is likely to result in virtually complete control by the parties to the merger or proposed merger in respect of a product in a market,

the Board shall, notwithstanding subsection (5), make an order under subsection (3)...

[52] The new approach to equity in merger review was therefore not to require a "passing on" of the benefits of efficiency gains to consumers, but rather to deny the availability of the efficiency defence when the merger would lead to virtually complete control of a product in a market. However, when the efficiency defence was available, no measures for consumer protection in respect of an anti-competitive merger were provided in the merger provisions.

[53] The preamble and corresponding provisions in Bill C-13 (3rd Session, 30th Parliament, 26 Elizabeth II, 1977) were virtually identical to the above provisions of Bill C-42, although the efficiency defence in subsection 31.71(5) now required a "clear probability of substantial gains in efficiency that save resources for the Canadian economy". The limitation on the availability of the efficiency defence was retained.

[54] Bill C-29 (2nd Session, 32nd Parliament, 32-33 Elizabeth II, 1983-84) differed in several respects. It contained no preamble or purpose clause and hence no reference to any goal including equity. It assigned merger review to the courts with an efficiency defence:

s.31.73 The Court shall not make an order under section 31.72...

(c) where it finds that the merger or proposed merger has brought about or is likely to bring about gains in efficiency that will result in a substantial real net saving of resources for the Canadian economy and that the gains in efficiency could not reasonably be expected to be attained if the order were made.

Like Bills C-42 and C-13, there was no "passing on" requirement; however, unlike those Bills, there was no limitation on the availability of the efficiency defence.

[55] In December, 1985, the Minister introduced Bill C-91 (1st Session, 33rd Parliament, 33-34 Elizabeth II, 1984-85) with a purpose clause and an efficiency defence which survived subsequent Parliamentary review and were included in the Act.

[56] In *Hillsdown, supra*, Reed J. concluded that subsection 96(1) of the Act differed from the efficiency defences in Bills C-42 and C-29 only because it required the balancing of efficiency gains against the effects of the merger which those Bills did not apparently require. However, it does not appear that Reed J. took note

> (a) of the explicit concern with distributional equity in the preambles of Bills C-256, C-42 and C-13, and the explicit omission thereof in Bills C-29, C-91 and the Act;
>
> (b) that Bill C-42 and all subsequent bills and the Act had dropped the "passing on" requirement in the efficiency defence contained in Bill C-256, and
>
> (c) that the limitation on the availability of the efficiency defence in Bills C-42 and C-13 was omitted from Bills C-29, C91 and the Act.

[57] In the Tribunal's view, Bill C-29, by requiring the "substantial real net saving", did call for a comparison of gains in efficiency attributable to the merger with the effects that reduced the savings therefrom. This formulation was an indication that the gains in efficiency and the effects had to be expressed in like units, otherwise the netting could not be done. For example, it is not clear how adverse redistributive effects, which are not losses of real savings, could be netted against real savings. Moreover, Bill C-29 contained no preamble or purpose clause and no reference to equity.

[58] While, unlike Bills C-256, C-42 and C-13, Bill C-91 made no reference to equity, the issue of fairness to consumers came before the Parliamentary Committee reviewing Bill C-91.

C. THE PARLIAMENTARY COMMITTEE

[59] In its Appeal Judgment, the Court held the following:

> [100] Finally, I also find it difficult to accept the Tribunal's interpretation of the Act for the following two reasons. First, when Bill C-91 was introduced in Parliament it was widely regarded as a consumer protection measure. Thus, the Minister responsible stated in the House of Commons (Debates, supra, at 11927) that the Consumers' Association of Canada saw the Bill as promising "real progress for consumers". Indeed, the guidebook introduced when the legislation was first tabled states (Consumer and Corporate Affairs Canada, *Competition Law Amendments*: A Guide (December 1985), page 4):
>
> > Consumers and small business are among the prime beneficiaries of an effective competition policy.
>
> [101] In addition, the background document released when the amendments were previously tabled (Consumer and Corporate Affairs Canada, *Combines Investigation Act Amendments 1984: Background Information and Explanatory Notes* (April 1984), page 2), states that:

> the Bill is concerned with fairness in the functioning of markets–fairness between producers and consumers, fairness between businesses and their suppliers, and suppliers and their customers.

> [102] It thus seems to me unlikely that Parliament either intended or understood that the efficiency defence would allow an anti-competitive merger to proceed, regardless of how much the merged entity might raise prices, provided only that the efficiencies achieved by the merger exceeded the resulting loss of resources in the economy at large. As Reed J. noted in the *Hillsdown case, supra*, at pages 337-38, differences in the drafting of the efficiency defence in the precursors to Bill C-91, which were not enacted, point in the same direction, and are considered in paragraphs 129-131, post.

[60] The Court's extract from page 4 of the *Competition Law Amendments*: *A Guide*, is an extract from the Minister's statement noted above and, in the Tribunal's view, requires some examination. The quoted passage comes in the context of the following:

> The relatively small size of the Canadian market and the overall importance of international trade to the economy dictates that certain industries have to be concentrated in order to achieve scale or other efficiencies necessary to compete in world markets. However, the trend toward increasing concentration historically has been a cause for concern, and many industries are protected from competition by high economic and institutional barriers to entry, such as high tariffs. The Bill brings the law into focus with current economic realities so that it is better able to deal with the implications for Canadian industry of foreign competition in Canada and competition in world markets.
>
> *Consumers and small business are among the prime beneficiaries of an effective competition policy*. These two groups are afforded little protection from anti-competitive conduct on the part of large, dominant firms under the existing legislation. The Bill strengthens the law and makes it more effective, thus ensuring fairness in the marketplace. This will benefit consumers and will maintain and encourage the drive and initiative of the small business sector, which has the greatest potential for job creation.
>
> (*Competition Law Amendments: A Guide*, at 4) [Emphasis added]

The full extract makes it clear that the creation of dominant firms able to compete successfully is the policy goal, and that consumers and small businesses will be better protected from anti-competitive conduct by these firms. When viewed in context, the cited extract does not confirm that the civil matters under Act are primarily measures for consumer protection, although consumers and small businesses would be "among the prime beneficiaries" not only from improved protection but also from the greater ability to compete.

[61] In quoting the document *Combines Investigation Act Amendments 1984: Background Information and Explanatory Notes* (April 1984), the Court is referring not to Bill C-91 but rather to Bill C-29. As noted above, Bill C-29 differed from its predecessors by making no reference whatsoever to equity. Moreover, its efficiency defence explicitly ignored the redistributive effects that concerned its predecessor bills: the "passing on" requirement of Bill C-256 and the limitation on the efficiency

defence in Bills C-42 and C-13 were dropped from this Bill. The "fairness" in the sentence quoted by the Court refers not to social equity but, rather, the fairness of opportunity provided in a competitive marketplace; there is no presumption that the resulting distribution of income and wealth in a competitive economy will be fair or equitable. Indeed, competitive markets may distribute income and wealth inequitably.

[62] In the Tribunal's view, Parliament clearly understood that consumer protection was not the main goal of the amendments to the Act or of the merger provisions in particular. The Committee that considered Bill C-91 considered two amendments to the purpose clause that would have confirmed that view, but those amendments were not adopted by the Committee and not reported to the House of Commons:

> **Mr. Ouellet:** My amendment, Mr. Chairman, relates to the purpose of the bill, which is stated on page 7. I would like to strike out lines 14 to 26 and substitute the following:
>
> > The purpose of this act is first and foremost to provide consumers with competitive prices and product choices, and also in order to [e]nsure that small and medium-size enterprises have an equitable opportunity to participate in the Canadian economy and in order 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.
>
> The purpose of my amendment is to give priority to consumers interests. You will note, Mr. Chairman, that not one word of my amendment is different from clause 1.1.
>
> ...
>
> **Mr. Ouellet**: The reason for my amendment is to give priority to competitive prices and a choice of products for consumers. A Competition Act is first and foremost one that should protect consumers. The prime objective of a Minister of Consumer and Corporate Affairs should be to protect consumers. The way in which the purpose of the bill is presented suggest that consumer protection is the Minister's least concern. I do not think that this is the case. I therefore want to restore the normal order and refer to consumers first, then to competition in world markets and finally to the Canadian economy.
>
> ...
>
> **Mr. Domm:** Yes. I appreciate the opportunity to point out that the purpose of this clause we are discussing today is to encourage competition, and particularly participation in world markets. It is not to overlook consumers. But I think it is to act as a guide to the purpose and object of the legislation. Competition itself is not an end, but it is rather the most effective means of stimulating efficiency and productivity and Canadian industrial growth. I think that we have to be cognizant of efficiency, international competitiveness and fairness.

Consumers would benefit directly from increased competition because that of course results in lower prices and increased choice and better quality. I think there are some other factors that we should consider too, such as the Constitution. I would like to ask our gentleman from Justice to elaborate on that at this time.

...

Mr. Rosenberg: This morning, Mr. Ouellet, you raised the question about the constitutionality of the tribunal's jurisdiction. In looking at your amendment, I am a little bit concerned that in characterizing the purpose of the act as being first and foremost to provide consumers with competitive prices and product choices, essentially it seems to be characterized as a concern with individual contracts between consumers and the prices consumers pay for goods rather than with a concern for competition generally.

I am concerned when you start characterizing the business of the federal government as being individual consumer contracts, you are straying into an area which is within provincial jurisdiction; that is, contracts or property and civil rights in the province. I think it is important to characterize the goal of the law as being generally the encouragement of competition.

That being the purpose, one of the effects of it is going to be to lead to lower consumer prices and better product choice, but I think it is important not to lose sight of the fact the general purpose has got to be with respect to the competitive system generally throughout the country and not with respect to specific consumer concerns. The provinces have consumer protection statutes within their jurisdiction.

Mr. Domm: Thank you very much. We should also point out some positions taken by organizations like the Canadian Federation of Independent Business. On page 312 of their brief, they are very pleased with the inclusion of small business in the purpose clause. Also, the Canadian Manufacturers' Association, page 301: they are pleased with the wording of proposed subsection 1.1, which fully recognizes competition is international as well as domestic in today's marketplace, on page 1. The Chamber of Commerce, on page 316, point 2, is pleased that any framework legislation such as Bill C-91 must in itself be capable of being interpreted in a dynamic fashion. These are other reinforcing justifications for dealing specifically with the encouragement of competition in Canada.

Mr. Cadieux: I would just like to add, Mr. Chairman, that when you look at the title, whether you look at it in French or in English, loi sur la concurrence or Competition Act, and then go into the object–and if I read the English version of your text, which is perhaps more explicit, the purpose of this act is first and foremost to provide consumers with competitive prices, etc.–I think I agree more and more with the legal experts here that perhaps we are creating a horse of a different colour right now. We do have to deal with competition and of course, as a consequence, will ensure better prices for the consumer. Because of this, I will have to vote against the proposed amendment.

Motion negatived: nays, 3; yeas, 2

The Chairman: Mr. Orlikow's amendment now, on the same clause.

Mr. Orlikow: Mr. Chairman, I would move the following amendment to clause 19. I would move to strike out lines 14 to 26 and substitute the following words:

> 1.1 The purpose of this Act is to maintain and encourage competition in Canada in order to provide consumers with competitive prices and choice of goods and services wherever they may live, while at the same time ensuring that small and medium-sized enterprises have a full opportunity to participate in an economy with open markets.

The Chairman: Do I have some comment from Mr. Cappe or Mr. Domm? Mr. Cappe.

Mr. Cappe: Mr. Chairman, I do not have any comments on the reordering of the objectives. I think the dropping of the reference to promoting efficiency and adaptability of the Canadian economy is important, partly because of the way it affects consumers. I will just make that one comment.

Amendment negatived: nays, 3; yeas, 2

(Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-91. House of Commons, Issue No. 10, Tuesday, May 20, 1986 at 10:59-10:62)

[63] The Tribunal notes, for greater certainty, that Mr. Cappe and Mr. Rosenberg appeared before the Committee in their positions as Assistant Deputy Minister, Policy Coordination and General Counsel, respectively, for the Department of Consumer and Corporate Affairs and were co-drafters of Bill C-91.

[64] It is apparent that the Minister's comments regarding Bill C-91 to which the Court refers relate to the benefits of competition generally for consumers. As the Parliamentary Committee emphasized, the principal focus of the amendments to the Act was not to protect consumers directly because, *inter alia*, doing so intruded in the provinces' domain and restricted the attainment of other goals, including efficiency, that also benefit consumers.

[65] It is certainly true that Bill C-91 received support from the Consumers' Association of Canada, but only insofar as the Bill promoted its approach to consumer welfare. In fact, the Association was critical of the efficiency defence. A representative of the Association appeared before the Parliamentary Committee and made the following statement:

Mr. Thompson: ...I would just like to sum up our remarks at this stage by saying that we think Bill C-91 is substantially better that what we have now. It is progress; there is no question about that. This is probably a familiar refrain to this committee at this stage. However, we think that from the consumer perspective it falls a long way short of what we deserve...

> We have a very short list of suggestions for improvements, I think it is fair to say– improvements in the tribunal powers, opportunities for consumers to appear before the tribunal, the removal of "unduly" from the conspiracy section, the removal of the object or intent test from "abuse of dominant position", tightening up of the efficiency defence and mergers, and a lowering of pre-notification thresholds.
>
> We feel that those are proposals which would significantly improve price and choice for consumers in the economy...
>
> (Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-91, House of Commons, Issue No. 6, Tuesday, May 8, 1986 at 6:11)

[66] The Consumers' Association of Canada was not alone in its criticism before the Parliamentary Committee of the efficiency defence in Bill C-91. We wish to point out and emphasize the remarks of Professor William Stanbury who stated that the provision was vague because it required, in his view, comparing "...a redistribution of income and the other involves with real gains in terms of the savings of resources." (Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-91, Issue No.3 , Tuesday, April 29, 1986 at 3:7).

[67] Mr. D. O'Hagan, representing the Canadian Labour Congress, cited the position on the efficiency defence of the Consumers' Association of Canada with approval and insisted that

> ...the tribunal is empowered to attach structural conditions to assure that efficiency gains would be passed on to consumers in the form of better prices, better quality; to workers in the form of more stable jobs, better incomes and better working conditions; and to other community groups in ways that are relevant to them...
>
> (Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-91, Issue No. 9, Thursday, May 15, 1986 at 9:12-9:13)

[68] However, Mr. L. Hunter, former Director of Investigation and Research and co-drafter of Bill C-91, testified before the Committee as follows:

> Economic efficiency in the merger section, which is a defence as well, is really based on two fundamental premises. First of all, we want a law that will allow the government to be able to stop merger activity which has a serious effect on competition, however defined. "Substantially" happens to be the word that is used. At the same time, we want to recognize that mergers can truly bring about efficiency savings. They can lower costs. Those cost savings are important to the economy and to consumers.
>
> For many years, going back to the Economic Council of Canada's report in 1969, there has been the notion of trading off these two things. On the one hand we want to look at the effect on competition and how serious that is; on the other hand, we want to look at what cost savings or efficiency gains there will be from the merger activity. This proposal basically says that if those efficiency savings are greater than the likely cost of competition, you should allow the merger.

> Regarding what that efficiency test will come to mean, I think economists would tell you that it has a relatively precise meaning. It certainly means long-run economies of scale. By merging, you increase the production line you can undertake and that will lower your unit cost. That is an efficiency saving. There may also be economy efficiencies that arise from the dynamic nature of your business and the degree of innovation and research you undertake...
>
> (Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-91, Issue No. 7, Monday, May 12, 1986 at 7:27-7:28)

[69] Finally, the Committee debated at length an amendment to remove the efficiency defence from the proposed merger provisions of Bill C-91:

> **Mr. Ouellet**:...The purpose of this amendment is to remove from the bill the exception that is given there to the industry to plead before the tribunal that the merger should be approved where gain in efficiency would result.
>
> My feeling is that this gain of efficiency is of such a magnitude that it could in fact impair the tribunal in preventing some mergers from taking place. In almost every merger, it would be possible to plead with good economics experts, accountants and so on that there will be gains in efficiency...
>
> **Mr. Domm:** We would oppose the motion for amendment. I can talk to it at some length here, but I suppose in summary our reason for opposition would be that the purpose of this policy is basically to promote efficiencies. This is not an absolute override but rather a balancing defence of the benefits against the costs. For this reason, we would prefer to leave the proposed section 68 intact as printed.
> ...
>
> **Mr. Orlikow:** Yes, Mr. Chairman, I certainly want to support Mr. Ouellet's amendment. I am not going to make a long speech at this stage. It has already been argued and we have had witnesses who have pointed out that to a large extent mergers really bring no real efficiencies and no real reductions in prices and certainly do not lead to more competition. We have had a whole series of mergers. We had Imasco taking over Canada Trust, Brascan Housing taking over paper companies, and mining companies going into Trilon. I think it is in today's *The Financial Post or The New York Times*. We are talking about assets of $60 billion or $90 billion, which means they have more economic power than the major bank. You have power corporations taking over all sorts of businesses and now moving into power finance.
>
> There is no evidence these take-overs, these mergers, have done anything for Canadian, or have produced more jobs. If we could do the kind of in-depth study of those corporations we should be doing, we would find there are less jobs now than there were before the mergers, prices have not come down, and they have not spent more money on research and development.

It seems to me, and I have said this before, with this kind of clause in the bill, it is an open invitation for these mergers to be encouraged. These kinds of clauses give the people and the companies involved in mergers a defence to argue they are going to be more efficient and so on, if they should be charged under the provisions of this bill. I think it will be very difficult for the tribunal, as it has been for the courts with the old legislation, to take any effective action. For that reason, I would support Mr. Ouellet's amendment.

Mr. Domm: To refer to answer by Mr. Orlikow, page 7 of the bill, where we have outlined the purpose of the bill in proposed subsection 19.(1.1), is clearly to promote the efficiency and adaptability of the Canadian economy in order to expand opportunities for Canadian participation in world markets.

Regarding his concern, which has just been expressed–that there is no obligation to pass gains on to the consumer–I say such an obligation can be very difficult to objectively measure or to monitor, and unless the lessening of competition is overwhelming, competition in the market will result in gains passed on to consumers. For that reason, I would not be willing to support that amendment.

Mr. Orlikow: Just for the record, Mr. Chairman, I remind Mr. Domm and members of the committee that witnesses, including Professor Stanbury, were very emphatic that this bill would be and is quite deficient in its ability to attain the objectives which it sets out, if it does not give the tribunal the opportunity to deal with mergers.

Mr. Ouellet: I have a question to ask to the Parliamentary Secretary. As Professor Stanbury has pointed out to us, proposed section 68 contemplates a trade-off between gain and efficiency, and the lessening of competition. According to the government, which of the two is most important?

Mr. Domm: I think it goes back to a former statement I made in response to your original motion. It is a balancing defence we are looking for. It is not a question of which one, but rather a balancing defence of the benefits against the costs.

Mr. Ouellet: Do you agree that, as Professor Stanbury indicated to us, the matters which the tribunal will have to consider under this clause are not comparable, since one involves a redistribution of income and the other involves real gain and resource savings? Because Parliament does not seem to give any guidance to the tribunal and its priorities and the way to be applied to lessening competition and gaining efficiency, it seems it would be very difficult for the tribunal to choose. It seems clear it would be very difficult for the tribunal to choose. It seems clear there might be some gain of efficiency in any take-over, in any merger. Is this what government feels is more important, to the detriment of lessening competition?

Mr. Domm: The provision we are asking for provides "a simple redistribution of income shall not be considered to be a gain in efficiency."

...

> **Mr. Ouellet**: This satisfies my questions. I thank Mr. Cappe, but I still believe such exceptions represent a major loophole in the merger sections and such a wide loophole should not be in the legislation. If we really want to have a legislation that effectively deals with mergers which could lessen competition, such exceptions where gain and efficiency should not be accepted.
>
> Amendment negatived: nays, 4; yeas, 2
>
> (Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-91, Issue No. 11, Wednesday, May 21, 1986 at 11:38-11:42).

[70] The Tribunal notes that the Committee took issue with the absolute defence of "superior competitive performance" under the abuse of dominance provisions in Bill C-91. That defence had provided as follows:

> s.51(4) No order shall be made under this section where the Tribunal finds that competition has been, is being or is likely to be prevented or lessened substantially in a market as a result of the superior competitive performance of the person or persons against whom the order is sought.

The Committee rejected this absolute defence and instead provided that "superior competitive performance" was to be a factor that the Tribunal would be required to consider when deciding whether a practice lessened or prevented competition substantially in a market (Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-91, Issue No. 11, Wednesday, May 21, 1986 at 11:33, 11:35). This factor now appears as subsection 78(4) of the Act.

D. FREE COMPETITION

[71] In oral argument and in written reply, the Commissioner refers to the Court's treatment of the wealth transfer and to its acknowledgment of the "consumer protection" objective of the Act which, the Commissioner submits, is reflected in a long line of Canadian jurisprudence. The Commissioner emphasizes "...the protection of the public interest in free competition..." (Reply Memorandum of the Commissioner of Competition on the Redetermination Proceedings ("Commissioner's Reply Memorandum on Redetermination Proceedings"), paragraph 91 at 34) and argues that the extraction of wealth transfers from consumers through the exercise of market power represents injury to the public that the Supreme Court of Canada condemned in 1912 in *Weidman v. Shragge*, (1912) 46 S.C.R. 4, (Commissioner's Reply Memorandum on Redetermination Proceedings, paragraph 92 at 34).

[72] The Commissioner also draws attention to the 1992 Supreme Court of Canada decision in *Nova Scotia Pharmaceuticals (R. v. Nova Scotia Pharmaceutical Society* [1992] 2 S.C.R. 606) in which the appellants were charged with two counts of conspiracy to prevent or lessen competition unduly, contrary to the *Combines Investigation Act*, paragraph 32(1)(c). The Commissioner quotes Gonthier J.'s decision:

> ...As this Court has always held in its previous judgments, the aim of the Act is to secure for the Canadian public the benefit of free competition. Excessive market power runs against the objectives of the Act...

> (Commissioner's Reply Memorandum on the Redetermination Proceedings, footnote 84 at 34)

[73] The Tribunal notes that this quote omits the next and final sentence in that paragraph of Gonthier J.'s decision which states:

> When it occurs in the context of a conspiracy to restrict competition, s. 32(1)(c) will apply.

It goes without saying that Gonthier J. was referring to criminal conspiracy, and not to the merger provisions, including the efficiency defence, under the civil law regime introduced in 1986.

[74] As a subsidiary matter, the Tribunal notes that the Supreme Court of Canada declined to rely on the doctrine of "free competition" in its decisions in *R. v. K.C. Irving et al.* ((1977) 32 C.C.C. (2d) 1), which dealt with charges of both monopoly and merger and in *R. v. Atlantic Sugar et al*. ((1981) 54 C.C.C. (2d) 373). *In R. v. Aetna Insurance et al*. ((1977) 34 C.C.C. (2d) 157), the doctrine was discussed by the majority only in the context of the meaning of the word "unduly", and in *Jabour v. Law Society of B.C. et al*. ([1982] 2 S.C.R. 307), it appears that the Supreme Court of Canada ignored the concept in order to approve the exemption of regulated conduct.

[75] The inadequacy of the criminal law approach in light of the central goal of economic efficiency was pointed out by senior Department of Justice officials in 1991 who wrote, quoting Bruce McDonald with approval:

> Although the criminal law had provided a safe constitutional haven for nearly three quarters of a century, concerns began to be expressed in the 1960's that competition legislation founded on such a basis might not be effective. Bruce McDonald wrote in 1965:
>
>> The demands of 1889 are not the demands of the 1960's, and the combines cases illustrate the contortions through which the courts have been going in their attempts to accommodate the change absent any fundamental overhaul of the statute. The object of the statute has changed, and increasingly the control of combines is recognized as a sophisticated problem requiring analysis of economic data. The Canadian courts, aware of their deficiencies in the training needed for such evaluations, resist as much as possible any debate over or inquiry into economic data or theory.
>> The considerations of 1889 which impelled the legislators to make the combines law criminal no longer obtain. The undesirability of combines no longer stems appreciably from rejection on moral grounds; nor can the Act be specific in such a way as to bring combines offences within the other general category of moral element...This is not to suggest that combines ought to be in one of the two categories; but only that, if it is not, the use of the criminal law as the appropriate control device must be seriously questioned.
>
> This theme was echoed by the Economic Council in its 1969 *Interim Report on Competition Policy.* The Council had been asked in 1966 "In light of the government's longterm economic objectives, to study and advise regarding ... combines, mergers, monopolies and restraint of trade...". It concluded that the primary goal of competition policy should be the promotion of economic efficiency. That, to the Council, also meant moving from the strictures of the criminal law to a more flexible civil law basis:
>
>> The basic reasons for seeking to place some of the federal government's competition policy on a civil law basis would be to improve its relevance to economic goals, its effectiveness, and its acceptability to the general public. The greater flexibility afforded by civil law is especially to be desired in those areas of the policy that do not lend themselves well to relatively unqualified

prohibitions and that may in addition call for some case-by-case consideration of the likely economic effects of particular business structures or practices.

(Rutherford and Tyhurst, at 258-259)

[76] In the Tribunal's view, the statutory history and, in particular, the introduction of the civil law regime for mergers in the 1986 amendments to the *Combines Investigation* Act indicate that it would be wrong to adjudicate mergers on the basis of the "free competition" doctrine that has been applied by courts at various times in criminal conspiracy matters.

[77] The shift in the review of merger from criminal to civil law further indicates the correctness of the "full-blown rule of reason" approach that Gonthier J. distinguished from the "partial rule of reason" that he found to be required by the conspiracy provisions in the *Nova Scotia Pharmaceuticals* case. Except for refusals to deal under section 75 of the Act which does not require a finding of substantial lessening of competition, the Tribunal has decided all cases before it, including mergers, under the full-blown rule of reason. Accordingly, the Tribunal may review all of the effects of an anti-competitive merger when the efficiency defence in section 96 is invoked.

E. TRIBUNAL'S CONCLUSIONS

[78] The Court writes:

> Given the purposes historically pursued by competition legislation and, in particular, the expressly stated purpose and objectives of the *Competition Act*, it is reasonable to infer from Parliament's failure to state expressly that only deadweight loss is to be considered as an "effect" of a merger for the purpose of section 96, that other effects related to the statutory purpose and objectives, including the interests of the consumers of the merged entity's products, must also be taken into account when the trade-off is made between efficiencies and anti-competitive effects.
>
> (Appeal Judgment, paragraph 109 at 43)

[79] On the basis of the statutory history, the detailed and systematic review of Bill C-91 by the Parliamentary Committee, and the Committee's refusal to delete the efficiency defence or to amend the purpose clause to make consumer protection the primary focus of the legislation, the Tribunal can conclude only that the Committee was well aware that the 1986 amendments to the Combines *Investigation Ac*t sought goals that differed from the goals historically pursued by Canadian competition legislation. Historically, of course, Canada's merger law did not provide an efficiency defence to an anti-competitive merger. The introduction of section 96 itself indicates that the goals pursued by the 1986 amendments differed from those purposes historically pursued.

[80] That the Parliamentary Committee removed the absolute defence of "superior competitive performance" under the proposed abuse of dominance provisions, but accepted the efficiency defence for mergers without amendment is a clear indication that the Committee fully understood the concept of efficiency and the consequences of providing the efficiency defence in merger review. It is clear to the Tribunal that the Parliamentary Committee endorsed the view that efficiency was the paramount objective of the merger provisions of the Act. It is difficult to reconcile these considerations with the

Court's conclusion that Parliament did not intend or understand the outcome, or that it intended something else, particularly in light of the various preambles and purpose clauses after Bill C-13 that dropped all reference to equity as a goal of the legislation.

[81] When Bill C-91 was introduced on second reading, the Minister stated in the House of Commons that the bill was a major economically-oriented statute:

> ...The report of the Commission on the Economic Union and Development Prospects for Canada underlined the importance of international trade for the Canadian economy by saying that, as much as possible, Canada should use international trade to ensure a continued and aggressive competition on the domestic market.
>
> Mr. Speaker, economically oriented major statutes, such as the laws on competition, bankruptcy, corporations, copyright and trademarks provide the essential tools for orderly trade as they establish the basic rules for a competitive and fair market-based economy. However, most of these instruments are old, inoperative and out of date. Our rules are obsolete, inadequate, and in some cases, more an obstacle than an incentive to productivity. Canadian businesses will have difficulty in taking up the challenge to claim their fair share of international markets and facing the impact of international competition on the domestic market if they are paralyzed by inadequate legislation. Moreover, if our businesses are disadvantaged, all Canadians will suffer.
>
> I therefore believe, Mr. Speaker, that the Members of this House have a clear and pressing responsibility. They must update these statutes, eliminate such obstacles to growth and economic prosperity and see to it that businesses and consumers are treated fairly on the market.
>
> (*House of Commons Debates*, (April 7, 1986) at 11926)

While, quite obviously, the government was concerned with fairness "on the market", the primary reason for amending the *Combines Investigation Ac*t in 1986 was the need to strengthen Canadian business and provide an incentive for productivity in the face of aggressive international competition to which the government was committed and which would ultimately benefit consumers. Laws on bankruptcy, corporations, copyright and trademarks are concerned with fairness but fairness is not their purpose; those laws are principally concerned with promoting national economic development. Similarly, the Act is a key part of the fundamental framework for economic development. In the Tribunal's view, the portions of the Minister's speech cited by the Court (Appeal Judgment, paragraphs 89 and 91 at 36-37) are indeed consistent with the above-quoted remarks of the Minister.

[82] In its Reasons at paragraph 413, the Tribunal concluded that efficiency was the paramount objective of the merger provisions of the Act, and the Court has stated that the Tribunal was correct:

> [90] In spite of the existence of multiple and ultimately inconsistent objectives set out in section 1.1, in certain instances the Act clearly prefers one objective to another. Thus, section 96 gives primacy to the statutory objective of economic efficiency, because it provides that, if efficiency gains exceed, and offset, the effects of an anti-competitive merger, the merger must be permitted to proceed, even though it would otherwise be

> prohibited by section 92. In this sense, the Tribunal was correct to state that section 96 gives paramountcy to the statutory objective of economic efficiency.
>
> (Appeal Judgment, at 36-37)

The Court also stated that this conclusion did not limit the definition of effects to be considered:

> [92] Thus, although section 96 requires the approval of an anti-competitive merger where the efficiencies generated are greater than, and offset, its anti-competitive effects, the ultimate preference for the objective of efficiency in no way restricts the countervailing "effects" to deadweight loss. Instead, the word, "effects" should be interpreted to include all the anti-competitive effects to which a merger found to fall within section 92 in fact gives rise, having regard to *all* of the statutory purposes set out in section 1.1.
>
> (Appeal Judgment, at 37)

[83] The Court instructed the Tribunal to consider redistributive effects but it did not prescribe the method by which the Tribunal would perform its task. The Tribunal must follow this instruction in light of the clear legislative history that indicates that the merger provisions were not driven by the consumer interest. The Tribunal concludes that adopting an approach that prevents efficiency-enhancing mergers in all but rare circumstances must be wrong in law.

V. THE STANDARD OR TEST TO ASSESS THE EFFICIENCY DEFENCE

[84] The Commissioner asserts that the full amount of income redistributed by the merger is to be included in the assessment of "effects". The Respondents argue, *inter alia*, that when the appropriate treatment of the redistributive effects (i.e. the income/wealth transfer) is made, the gains in efficiency are sufficient to allow the instant merger to proceed.

[85] In the Tribunal's view, the appropriate standard for judging the sufficiency of efficiency gains in relation to the effects of an anti-competitive merger is without doubt the central issue in this matter. The different standards were addressed by the Commissioner's expert witness, Professor Townley, in his report (exhibit A-2081) and his testimony. The Tribunal dealt with alternate standards rather briefly given its acceptance of the Total Surplus Standard. However, in light of the Court's decision, we will now examine the various standards.

A. PRICE STANDARD

[86] Under a pure Price Standard, a merger can be approved only if it does not lead to an increase in market power. No consideration of efficiencies is allowed, even if efficiencies can be shown to lead to a price decrease.

B. MODIFIED PRICE STANDARD

[87] Although Professor Townley refers to a "price standard", he uses that label in connection with a merger where efficiency gains can be considered. In his description of the standard, efficiencies are considered as a positive factor in merger review but only when the post-merger price does not rise:

> If firms wish to merge, and if the merger would cause the price of the commodity in question to decrease, both consumers and firms would be better off than before the merger. That is, upward pressure on price is caused by increased market power while downward pressure is exerted by decreased marginal costs. If the latter is stronger than the former, then the potential for an overall price dec[r]ease exists, thus benefitting consumers.
>
> (Townley report, exhibit A-2081 at 28)

[88] For greater clarification, and due to its similarity to the Price Standard as discussed above, the Tribunal refers to this standard as the Modified Price Standard. By requiring that efficiency gains be so large that the post-merger price decreases as a result of the merger, the Modified Price Standard requires that at least some of the cost-savings be passed on to consumers in the form of lower prices. However, under a Modified Price Standard, there is no basis for attacking a merger simply because of the efficiency gains that can be attributed to it.

[89] Professor Townley notes that this standard is consistent with the Pareto Improvement Criterion, and can therefore be endorsed as a matter of welfare economics. He notes, however, that this standard assigns a distributional weight of zero to merging firms (i.e. to the gains to the shareholders thereof) while assigning an infinitely large weight to consumers. He further notes that

> ...The problem here is that application of this standard would disallow some mergers that are potentially welfare-enhancing.
>
> It was noted above that strict application of the Pareto Improvement Criterion would rule out some projects or policies that a reasonable person would support. For example, a policy that would make most people better off but a single person worse off would fail this criterion. Similarly, to rule against a merger that would involve only a slight price increase yet massive cost savings would seem unreasonable.
>
> (Townley report, exhibit A-2081 at 28-29)

Accordingly, Professor Townley does not advocate the Modified Price Standard.

C. CONSUMER SURPLUS STANDARD

[90] Professor Townley describes the Consumer Surplus Standard as applicable to the case of a merger characterized by a price increase and efficiency gains. If the gains in efficiency exceed the total loss of consumer surplus (i.e. the deadweight (or efficiency) loss plus the consumer surplus that is redistributed from consumers to shareholders as excess profits), then the merger would be approved (Townley report, exhibit A-2081 at 29).

[91] As presented by Professor Townley, the Consumer Surplus Standard does not require that the post-merger price decline or remain at the pre-merger level. It could allow a merger to proceed even if the post-merger price increased.

[92] Professor Townley adopts the following notation to describe the effects of the merger:

> (a) the portion of lost consumer surplus (B) transferred to shareholders;
> (b) the corresponding increase in the shareholder profit due to the higher price (B);
> (c) the cost-savings (gains in efficiency) from the merger (A); and
> (d) the loss of efficiency or deadweight loss (the remaining portion of lost consumer surplus) from the merger (C).

In principle, at least, Professor Townley's variables are quantifiable and completely describe all of the effects on economic efficiency and on consumer welfare. The merger is approved if the gains in efficiency exceed total loss of consumer surplus, i.e. if $A>B+C$. Where these variables are not completely quantified, the required assessment nevertheless remains the same: are the efficiency gains greater than all of the effects on efficiency and on consumers. (The Tribunal notes that subsection 96(1) requires that efficiency gains exceed and offset all of the effects of lessening or prevention of competition. It is not always clear whether advocates of the Consumer Surplus Standard regard this standard as sufficient to meet the requirement to offset.)

[93] Professor Townley is critical of the Consumer Surplus Standard. It "...is not consistent with any traditional welfare criterion (at least to my knowlege)..." (Townley report, exhibit A-2081 at 29-30). Moreover, by including the entire amount of the loss of consumer surplus experienced by all consumers, it treats all consumers alike (i.e. assigns the same weight to each) and protects all consumers even when some consumers are better off than the shareholders of the merged firm:

> From a welfare perspective, assigning distributional weights according to the Consumer Surplus Standard may be appropriate if consumers of the product in question are relatively poor. However, what if those who consume the product of the merged firms are relatively wealthy? That is, what if the commodity in question is a luxury produced by firms owned by relatively poor individuals? (This is akin to legislating rent controls on luxury apartments when the tenants are wealthier than the landlords.) I have no notion as to how likely this situation may be, but a Consumer Surplus Standard does not allow the discretion to deal with this type of case.
>
> (Townley report, exhibit A-2081 at 31-32)

Accordingly, Professor Townley is critical of the Consumer Surplus Standard because it does not discriminate among consumers, i.e. between relatively poor and relatively well-off consumers.

[94] Under the Consumer Surplus Standard, the lost consumer surplus that is transferred to shareholders equals the excess profits received. However, the loss of surplus matters but the corresponding profit gain does not offset that loss in any way whatsoever. Like the Modified Price Standard, the Consumer Surplus Standard assigns a zero weight to shareholder profits even when society benefits therefrom. As he is concerned with social welfare maximization, Professor Townley

does not ignore the possibility that gains to shareholders could be socially positive and hence he does not advocate the Consumer Surplus Standard either.

D. TOTAL SURPLUS STANDARD

[95] According to Professor Townley, the Total Surplus Standard, like the Consumer Surplus Standard, is applicable to a merger that results in both higher price and lower costs. The merger is approved if the loss of consumer surplus is exceeded by the increase in producer surplus. Using his notation, the merger is approved if: (A+B) > (B+C).

[96] In this formulation, the income loss by consumers (B) equals the corresponding excess profit to shareholders due to the higher price (B). Unlike the Consumer Surplus Standard, the Total Surplus Standard includes the effect on shareholders but regards these gains and losses as exactly offsetting, so the test reduces to whether A>C. Accordingly, total surplus increases if the cost-savings exceed the deadweight (or efficiency) loss.

[97] Professor Townley notes that the Total Surplus Standard is consistent with the Potential Pareto Improvement Criterion, i.e. that the shareholders could fully compensate the consumers and still be better off. He notes that the Criterion is met even though the compensation does not take place and he criticizes the Total Surplus Standard for regarding the gains in shareholder profit and consumer losses of income as completely offsetting:

> Therefore, like aggregate compensating variation and aggregate equivalent variation, a positive (negative) change in total surplus measure need not indicate a welfare increase (decrease) when income distribution issues exist but are ignored in the analysis. The total surplus method employs equal welfare weights across individuals and firms, and this may not be appropriate. That is, if price rises but the Total Surplus Standard is satisfied in a situation where consumers are relatively less wealthy than producers, aggregate economic well-being may decrease despite an increase in total surplus.
>
> (Townley report, exhibit A-2081 at 18)

[98] Professor Townley's principal objection to the Total Surplus Standard is that it does not distinguish between shareholders of the merged firm and consumers of the product of the merged firm. If shareholders are uniformly better off than consumers, then the redistribution of income arising from the merger may be unfair to the less well-off group, and hence be socially adverse.

[99] Presumably, however, if, as in his earlier illustration of the luxury commodity, the consumers were better off than the shareholders, Professor Townley would not be critical of a merger that was approved under a Total Surplus Standard. In that case, the redistribution of income would not be unfair to consumers because, by hypothesis, they are the better-off group to begin with. The merger would both increase efficiency and promote distributional fairness by transferring income to shareholders. Such redistributional effect would be socially positive.

[100] The Tribunal notes that if the consumer and shareholder groups were each characterized by variability of income and wealth of their members, it might be difficult to characterize the redistribution of income arising from a merger as being unfair to one group or the other.

[101] Professor Townley's concern is similar to his criticism of the Consumer Surplus Standard. In his view, that standard fails because it treats all consumers alike, hence protecting the better-off consumers from loss of income to supposedly equally well-off shareholders. However, his objection to the Total Surplus Standard is that it treats consumers and shareholders alike even when they are different. Indeed, his common objection to both is that they each prescribe a fixed weight and could hence fail to identify welfare-reducing mergers in particular cases.

E. BALANCING WEIGHTS APPROACH

[102] Accordingly, the key issue for Professor Townley is whether the distributional considerations are properly addressed by according the producers/shareholder group and the consumer group equal weights. Professor Townley stated that he, in his professional academic capacity, could not indicate what the appropriate weights were, but he advocated that the Tribunal had the capacity to do so.

[103] In his Balancing Weights Approach, Professor Townley invites the Tribunal to attach a weight of unity to all producer gains from a merger. He proposes that a weight (w) be determined for all consumers "...because information on individual affected consumers is lacking..." (Townley report, exhibit A-2081 at 33), such that the weighted surplus is zero, hence:

$$1(A+B) - w(B+C) = 0$$

where A, B and C are known quantitative estimates of the magnitudes of all of the effects of the merger. Solving this equation for w, the balancing weight, establishes the weight accorded to consumers as a group in order that the consumer loss and the producer gains are just balanced.

[104] In the instant merger, the Commissioner submits that A equals $29.2 million, B equals $40.5 million, and C equals $3 million. On these figures, the balancing weight is found to be 1.6 (Memorandum of the Commissioner of Competition on the Redetermination Proceedings ("Commissioner's Memorandum on Redetermination Proceedings"), paragraph 113 at 46). Then, the Tribunal would decide whether the balancing weight was reasonable "...Based on whatever quantitative and qualitative information is available regarding the distributional impacts of a merger..." (Townley report, exhibit A-2081 at 33).

[105] The Commissioner urges that, in employing Professor Townley's approach to the instant merger, the Tribunal should consider all relevant qualitative effects of the merger, not just the qualitative information that is available regarding the distributional impacts of the merger:

> Professor Townley recognized that the computed balancing weight only accounts for things that can be quantified and should be "assessed in light of qualitative factors".135 The other relevant qualitative effects of the merger should also be taken into account at this stage of the analysis. These include the extremely significant qualitative effects which are described in greater detail in Section III of this memorandum and in paragraphs 90 and 91 above.

(Commissioner's Memorandum on Redetermination Proceedings), paragraph 117 at 47)

[106] In oral argument, counsel for the Commissioner argued that the reasonableness of the balancing weight should be judged in relation to all the evidence and statutory considerations:

> MS STREKAF: Then, in order to look at those numbers, whether it's too high or too low, according to Professor Townley's approach what you would need to do is look at all of the evidence. You would need to look at 1.1 and the other guidance provided in the Act to see whether in fact the merger should be allowed or should be rejected.
>
> (Transcript, vol. 2, October 10, 2001, lines 1-8 at 270)

[107] It is not entirely clear to the Tribunal what the Commissioner is seeking here. In particular, Professor Townley did not indicate that the computed balancing weight should be assessed in light of information that is not relevant to the consideration of equity between consumers and shareholders (Townley report, exhibit A-2081 at 33).

[108] Moreover, Professor Townley advocates assigning the same weight to all consumers only because information on individual consumers is lacking. Since Professor Townley is concerned with welfare-maximizing mergers, where such information is available and describes significant differences among consumers, he would presumably want to take it into consideration.

[109] Using the Balancing Weights Approach to assess the distributional concerns in the instant case, the Tribunal must find that the weight that properly reflects the consumer loss is at least 60 percent higher than the weight on shareholder gains, assuming again that the consumer and shareholder groups are distinct and reasonably internally homogeneous. If it can so find, then that is a factor that counts against the merger, and must be considered with all other factors required to be considered. Indeed, if estimates of A, B, and C accurately described all of the effects of a merger, the appropriateness of the balancing weight would be determinative. Accordingly, if the Tribunal knew, or could derive, the correct weight, it would be able to determine whether or not that weight exceeded the balancing weight.

F. SOURCES OF THE CORRECT WEIGHT

[110] In the Tribunal's view, the correct weight should be established by society or should reflect social attitudes toward equity among different income classes. There may be several sources from which the proper weighting can be inferred, one such being the tax system, which is explicitly, although not solely, concerned with equity. It is clear that the prevailing system of taxation in Canada does reflect a social consensus about the desirability of imposing burdens on different income classes. If tax rates are progressive with respect to income, then society has decided that the marginal dollar of income is worth less to the high-income taxpayer than it is to the low-income taxpayer. If, for example, the lowest tax rate is 20 percent and the highest is 50 percent, there is clear indication that low-income individuals are favoured over high-income individuals; assigning a weight of 1.0 to the latter group, the corresponding weight on the former would be 2.5.

[111] Based on their recent review of the literature for the Canadian Tax Foundation, Professors Boadway and Kitchen conclude that:

> ...Taken overall, the tax system seems to be roughly proportional to income. This does not imply that government policy considered more generally is not redistributive. Much of what governments do on the expenditure side of the budget appears to be motivated by redistributive objectives, and it seems that a substantial amount of redistribution does, in fact, take place through expenditure programs – a consideration that further weakens the case for a highly progressive income tax structure.
>
> (See R. Boadway and H. Kitchen, *Canadian Tax Policy*, Paper No. 103, 3rd edition, Canadian Tax Foundation, 1999 at 45.)

[112] It appears to the Tribunal that if the proper weight is to be inferred from the tax system alone, then it is unlikely to be as high as 1.6 given the general proportionality of effective tax rates. However, the Tribunal would expect to have the benefit of expert opinion in matters as specialized as this.

[113] Having regard to the combined system of taxes and public expenditures in Canada, there appears to be a basis for attaching a greater weight to the income groups that could be described as poor or needy than to shareholders assuming they are neither. Professor Townley's report presents certain information in this regard which the Tribunal examines below.

G. STANDARD FOR EVALUATING EFFICIENCY GAINS IN THE UNITED STATES

[114] Commenting on the Total Surplus Standard, the Court writes as follows:

> [134] Finally, it was suggested in argument that the Tribunal's interpretation had the support of all economists who had studied the issue. I do not dispute that an impressive array of economists, and law and economic specialists, both in Canada and the United States, have argued that the total surplus standard is the appropriate basis for determining whether an anti-competitive merger that produces efficiency gains should be permitted.
>
> [135] Nonetheless, the *Horizontal Merger Guidelines, supr*a, in the United States continue to treat the exercise of market power leading to an increase in price above the competitive level as the most important anti-competitive effect of a merger, and the resulting wealth transfer from the consumers to the producers, as a misallocation of resources...
>
> [136] Of course, as I have already noted, since there is no specific efficiency defence in the United States' legislation, the approach of the Federal Trade Commission to efficiency gains when considering the approval of anti-competitive mergers has limited relevance to the problem before us. Nonetheless, it is interesting to note that efficiency gains are generally most likely to make a difference in merger review when the likely adverse effects of the merger are not great, and will almost never justify a merger to monopoly or near monopoly: *Horizontal Merger Guidelines*, supra, at page 150.

> [137] In addition, some commentators in the United States have expressed surprise at the interpretation of section 96 adopted in the *MEG*. See, for example, J.F. Brodley, "The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress, (1987) 62 *N.Y.U. L. Rev.* 1020, at 1035-36; S.F. Ross, "Afterword–Did the Canadian Parliament Really Permit Mergers That Exploit Canadian Consumers So the World Can Be More Efficient?" (1997) 65 *Antitrust Law Journal* 641...
>
> (Appeal Judgment, at 52-53)

[115] It is clear that the Court has placed weight on the treatment of efficiencies under U.S. antitrust law and has used it as the benchmark to evaluate the Tribunal's assessment under the Act. In the Tribunal's view, the differences between the American and Canadian approaches to merger review and efficiencies are very significant and cannot be appreciated without some knowledge of the history of American antitrust. (The Tribunal relies on two publications of the American Bar Association, Section of Antitrust Law: Monograph 12, *Horizontal Mergers: Law and Policy* (1986) *and Mergers and Acquisitions: Understanding the Antitrust Issues*, Robert S. Schlossberg and Clifford H. Aronson, eds. (2000) for its review of the American approach to efficiencies.)

[116] The Price Standard guided courts in the United States for much of the past century and created judicial hostility toward efficiency evidence and arguments. In Brown Shoe *(United States v. Brown Shoe Co.*, 179 F. Supp. 721, *aff'd* 370 U.S. 294 (1962)), the district court agreed with the government that certain advantages to Brown Shoe as a result of the acquisition would actually lower the price or raise product quality; however, the independent retailer would be less able to compete with the more efficient merged firm.

[117] On appeal to the United States Supreme Court, Brown Shoe strongly denied that the merger would produce any cost savings, while the government, believing that such savings existed, attacked the alleged efficiency gains, charging that they would allow Brown Shoe to lower its prices. The United States Supreme Court recognized that consumers might benefit from the merger, and further noted that the law protected competition, not competitors. Nonetheless, it was primarily concerned that American antitrust law protected viable, small, locally-owned businesses and resolved the competing considerations in favour of "decentralization" *(Brown Shoe Co. v. United States,* 370 U.S. 294, at 344 (1962)).

[118] In *Philadelphia National Bank* (*United States v. Philadelphia National Bank et al*., 374 U.S. 321 (1963)), the defendants attempted to justify the merger by arguing, *inter alia*, that the new firm would be better able to compete with large out-of-state banks and would benefit the economy of the local community. While not contesting the accuracy of these assertions, the United States Supreme Court held at page 371:

> ...We are clear, however, that a merger the effect of which 'may be substantially to lessen competition' is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial...

In *Proctor and Gamble* (*FTC v. Proctor and Gamble Co*., 386 U.S. 568 at 580 (1967)), the United States Supreme Court wrote:

> Possible economies cannot be used as a defense to illegality. Congress was aware that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition.

In *Foremost Dairies* (*F.T.C. v. Foremost Dairies,* 60 F.T.C. 944 (1962), the U.S. Federal Trade Commission held that significant gains in efficiency from the merger placed smaller rivals at a serious competitive disadvantage.

[119] These decisions illustrate the American hostility toward efficiencies. Under the Price Standard, efficiency gains from a merger could not constitute a defence, but could assist the government in defeating the merger.

[120] The judicial hostility toward efficiencies was reflected in the 1968 Merger Guidelines of the U.S. Department of Justice that allowed efficiencies as a justification for a merger otherwise subject to challenge only "under exceptional circumstances". Similarly, the 1982 Guidelines allowed for consideration of efficiency gains only in "extraordinary circumstances".

[121] In our view, the hostility toward efficiencies in the United States arose not because the antitrust laws were opposed to efficiency per se, but rather because those laws were primarily concerned with "decentralization", i.e. preventing industrial concentration. In Brown Shoe, the United States Supreme Court was concerned that since the merged firm would have a market share exceeding 5 percent, a decision to approve the merger would result in the inability to prevent similar mergers by Brown's competitors. In *Philadelphia National Bank*, the Court was concerned with the relationship between market power and market structure as measured by market share and as endorsed by economists of that period. The Court held that a transaction that gave the merging firms a post-merger market share of 30 percent was presumptively illegal and could not be justified by other beneficial aspects such as efficiency gains. The "incipiency doctrine" arising from *Brown Shoe* and the "structuralist presumption" from *Philadelphia National Bank* are perhaps the principal results of the policy toward efficiencies embedded in the Price Standard.

[122] It appears to the Tribunal that the enforcement agencies in the United States have moved away from the Price Standard to either the Modified Price Standard or the Consumer Surplus Standard. Following revisions in 1984 and 1992 to the treatment of efficiencies in the Merger Guidelines, the current guidelines were adopted in 1992 and clarified in 1997:

> The Agency will not challenge a merger if cognizable efficiencies are of a character and magnitude that the merger is not likely to be anticompetitive in any relevant market. To make the requisite determination, the Agency considers whether cognizable efficiencies likely would be sufficient to reverse the merger's potential harm to consumers in the relevant market, e.g., by preventing price increases in that market...
>
> (*Horizontal Merger Guidelines*, *Issued* by the U.S. Department of Justice and the Federal Trade Commission, Revised section 4, April 8, 1997) [hereinafter, *Horizontal Merger Guidelines*]

[123] If the Agencies require that proven efficiencies must prevent price increases in order to reverse the potential harm to consumers, then the applicable standard is the Modified Price Standard. As

written, however, the guidelines appear to regard preventing a price increase as sufficient but not necessary to reverse the harm to consumers. Accordingly, the Agencies' applicable standard may be the Consumer Surplus Standard. Whatever the standard, it is clear that the impact on the consumer is the paramount concern when efficiency gains are considered in merger review in the United States.

[124] While there is no statutory defence of efficiency in American antitrust law, the enforcement agencies use their discretion in deciding whether to challenge a merger and will consider efficiencies as part of their assessment of the competitive effects of the merger. Accordingly, if cognizable efficiency gains are so large that the merger can no longer be said to harm consumers, then the agencies are prepared to approve the merger. In this sense, efficiency gains must "cleanse" the transaction in order to avoid challenge.

[125] It appears that the only litigated cases in the United States in which challenged mergers were allowed to proceed based on efficiency gains have involved the merger of non-profit hospitals (*FTC v. Butterworth Health Corp.*, 946 F. Supp. 1285 (W.D. Michigan 1996), *aff'd*,121 F.3d 708 (6th Cir. 1997) (*per curiam*)(table decision)) and *United States v. Long Island Jewish Medical Center,* 983 F. Supp. 121 (E.D.N.Y. 1997)). In these cases, the non-profit status of the merging parties was important in the courts' findings that the efficiency gains would ultimately benefit consumers.

[126] But for the case of non-profit hospital mergers, there are no litigated cases in the United States in which cognizable efficiency gains were found large enough to permit an otherwise anti-competitive merger to proceed. The practical effect of the shift from a Price Standard to the Modified Price Standard or the Consumer Surplus Standard by the government enforcement agencies in the United States has been to continue the traditional hostility to efficiency gains (see D. Garza. The New *Efficiencies Guidelines: The Same Old Wine in a More Transparent Bottle*, Antitrust, Summer 1997 at 6-10.).

[127] Exemplifying this hostility, the U.S. Federal Trade Commission recently referred to two recent cases involving efficiencies and submitted:

> ...Both *Cardinal Health and Staples* hold that, even if an efficiencies defense can be entertained, defendants must show that the "proven" efficiencies will be passed on and that they overwhelm any possible anticompetitive effects of the merger.
>
> (*Federal Trade Commission v. H.J. Heinz Company*, et al., Reply Brief for the Plaintiff-Appellant Federal Trade Commission, No.00-5362, November 29, 2000 at 43 footnote 20)

[128] The current head of the U.S. Federal Trade Commission provided a review of the recent litigation as of 1999 in which plausible efficiency claims were successfully attacked by the enforcement agencies and he concluded that the historical attitudes toward efficiencies remain:

> ...First, the government's attitude toward merger efficiencies has evolved toward greater acceptance. The days are long past when a merger will be attacked because it would lower costs. Moreover, at least in their Guidelines, the Agencies no longer argue that lower costs are not merger specific because of a hypothetical, but unlikely to be achieved

> in practice, alternative means to obtain the efficiencies. Nor is the “pass-on” requirement a basis for near automatic rejection of claimed lower costs.
>
> Second, problems nevertheless remain...Because the merging parties must show that the merger will likely lower costs, there is no justification for the government’s prejudice against certain efficiencies. Hostility reflects the long standing reluctance to accept fully the cost-reducing potential of mergers.
>
> Third, the Agencies’ attitude in court remains one of unrelenting hostility toward claims of lower costs...
>
> Perhaps these litigated cases do not accurately reflect the government’s attitude. Mergers are now rarely litigated, and it may be too much to expect that the Agencies eschew advocacy. Nevertheless, these cases provide evidence of the lack of change in governmental attitudes. Past studies have found that overly hostile Agency attitudes toward merger efficiencies were widespread, and these recent cases are completely consistent with those studies.
>
> (*Timothy J. Muris, The Government and Merger Efficiencies: Still Hostile After All These Years*, George Mason Law Review, vol. 7:3, 1999 at 729-752, at 751)

[129] The Tribunal concludes that in the United States, there is effectively no efficiency defence to an anti-competitive merger except in unusual cases such as non-profit hospital mergers. The courts and the enforcement agencies have adopted the position that no harm to consumers can be tolerated under the antitrust laws, and hence efficiency gains cannot justify an anti-competitive merger.

[130] Yet, as is clear from Muris’ critique, the Tribunal cannot but note that there is strong debate within the American antitrust regime over the appropriate treatment of efficiencies in merger review.

H. DIFFERENCES BETWEEN CANADIAN AND AMERICAN APPROACHES TO MERGERS AND EFFICIENCIES

[131] It is clear that the Court has placed weight on the American approach to antitrust and on the views of American commentators who, in line with that approach, are antagonistic to the Total Surplus Standard. In so doing, the Court does not appear to take account of the historic and continuing hostility toward efficiencies in merger review under American antitrust law and the reasons for that hostility, and it may not have completely realized the several critical, and perhaps subtle, ways in which the merger provisions of Canada’s Act differ from the antitrust statutes and the judicial histories thereof in the United States.

(1) Market Structure Considerations

[132] First, under subsection 92(2) of the Act, evidence consisting solely of market share or concentration is insufficient for the Tribunal to conclude that a merger will lessen or prevent competition substantially. This provision is a reaction to the incipiency doctrine adopted by the U.S. Supreme Court in *Brown Shoe* and to the structuralist presumption arising from *Philadelphia National*

Bank. It should not be forgotten that American merger review had, by the 1960s, focussed virtually entirely on whether the post-merger market share was large enough to support a finding of illegality. It was not until its decision in *General Dynamics (U.S. v. General Dynamics Corp*. 415 U.S. 486 (1974)) in 1974 that the United States Supreme Court departed from rigid reliance on calculated market shares and gave consideration to other pertinent factors.

[133] Whereas the decisions in *Brown Shoe* and *Philadelphia National Bank* reflected the economic learning of the day, the drafters of the amendments to Canada's Act in 1986 sought to take advantage of the more recent scholarship and research literature that placed the market power-market share relationship in considerable doubt. Accordingly, if "monopoly" is taken to mean one producer, then even in that extreme case a merger to monopoly cannot automatically be found to lessen competition substantially under section 92 just because the firm has a market share of 100 percent.

(2) Efficiencies and Competitive Effects

[134] Second, as noted above, the Horizontal Merger Guidelines of the American enforcement agencies ("Horizontal Merger Guidelines") require that efficiency gains "cleanse" the merger of its harmful effects. In this way, the analysis of efficiencies is directly tied to the analysis of the merger's competitive effects on consumers. Only when the agencies are convinced that the negative effects have been eliminated will they decline to challenge the merger.

[135] The requirement that proven efficiency gains "cleanse" the anti-competitive merger arises in the United States from the absence of a specific affirmative statutory defence that would permit an anti-competitive merger to proceed. The late Professor Areeda, perhaps the foremost expert on American antitrust law, addressed this matter succinctly:

> Although we have, to be sure, spoken of an economies "defense," it is not as a defense to a final conclusion that a merger "lessens competition" or is "illegal". Rather, the "defense" terminology refers to the rebuttal of a first order inference from a portion of the evidence (such as market shares) that a merger presumptively lessens competition and violates the statute. That is, it is a defense to a prima facie case...
>
> (P. Areeda et. al; *Antitrust Law*, Vol. IVA (Revised Edition), Aspen Publishers, 1998 at 28)

[136] The approach to efficiencies under subsection 96(1) of the Act is very different. There is no requirement for efficiency gains to prevent the effects of lessening or prevention of competition from occurring, and the Tribunal found accordingly (Reasons, at paragraph 449). Were this the requirement, efficiencies would be considered as a factor in the section 92 inquiry. Indeed, the respondents argued this in the liability phase when they sought to show that the cost-savings from the instant merger were so large that the price would actually fall, hence the merger would not be anti-competitive. The Tribunal rejected this argument in its entirety when it concluded that section 92 was about market power, the ability to influence price, rather than about whether price would, or would likely, rise or fall as a result of the merger (Reasons, at paragraph 258).

[137] It is plainly Parliament's intent that, in merger review, efficiencies are to be considered only under section 96 and not under section 92. As a result, the consideration of efficiency gains is not to be tied into the analysis of competitive effects of the merger. Section 96 is worded accordingly by requiring that gains in efficiency be "greater than and offset" the effects of lessening or prevention of competition, rather than prevent those effects from occurring. Accordingly, "cleansing" of those effects is not required under the Act and, indeed, effects of lessening or prevention of competition may remain even when the test under section 96 is met.

(3) Trade-off Analysis

[138] Third, as the Horizontal Merger Guidelines note, efficiencies are considered at the level of the individual relevant market. Consequently, in a merger where several relevant product and/or geographic markets have been delineated, the efficiency gains must reverse the harm in each such market. Accordingly, the insufficiency of those gains in even one relevant market can lead the enforcement agencies to disregard efficiency gains produced by the merger entirely.

[139] With one exception, the Horizontal Merger Guidelines allow no trade-off whereby, for example, efficiency gains in one part of the country offset the anti-competitive effects in another part. According to those Guidelines, the reason for this treatment is found in the *Clayton Act* (15 U.S.C. (1993)):

> Section 7 of the Clayton Act prohibits mergers that may substantially lessen competition "in any line of commerce . . . in any section of the country." Accordingly, the Agency normally assesses competition in each relevant market affected by a merger independently and normally will challenge the merger if it is likely to be anticompetitive in any relevant market. In some cases, however, the Agency in its prosecutorial discretion will consider efficiencies not strictly in the relevant market, but so inextricably linked with it that a partial divestiture or other remedy could not feasibly eliminate the anticompetitive effect in the relevant market without sacrificing the efficiencies in the other market(s). Inextricably linked efficiencies rarely are a significant factor in the Agency's determination not to challenge a merger. They are most likely to make a difference when they are great and the likely anticompetitive effect in the relevant market(s) is small.
>
> (*Horizontal Merger Guidelines*, section 4, footnote 36)

Accordingly, it is only when efficiencies are inextricably linked that inter-market trade-offs can be considered, but even that exception is rare and related to the inadequacy of the remedy.

[140] By contrast, section 96 of the Act applies to the transaction in its entirety. There is no requirement that gains in efficiency in one market or area exceed and offset the effects in that market or area. Rather, the tests of "greater than" and "offset" in section 96 require a comparison of the aggregate gains in efficiency with the aggregate of the effects of lessening or prevention of competition across all markets and areas. Accordingly, the Act clearly contemplates that some markets or areas may experience gains in efficiency that exceed the effects therein, while others may not.

(4) Industrial Concentration

[141] The Court recognizes that the American antitrust laws do not contain an explicit efficiency defence, but does not explain the rationale. Given the historical American concern with preventing increases in industrial concentration and the possible political ramifications of conjoining economic and political power, efficiency concerns have been given much less importance. The same cannot be said for Canada. Since industrial concentration was already high in certain sectors and because of the increased openness of the Canadian economy to foreign competition, further increases in domestic concentration were deemed less important than the gains in economic efficiency that could be obtained, if proven. Moreover, the express concern in 1971 with economic and political power in Bill C-256 was dropped from subsequent attempts to amend the Combines Investigation Act.

[142] Commentators on the penultimate version of the amendments to the Act, while calling attention to mergers that increase concentration in the small Canadian economy, write:

> On the other hand, smallness of market also means a greater probability of the existence of non-captured scale and other economies. For this reason, it seems to us essential that when a Canadian merger is challenged, the parties to it be given ample opportunity to offer an economies-capture defence. We must add, however, for this defence to be valid, the economies must occur in real resource use, as contrasted with the mere use of the new-found market power of bigness to squeeze extra “pecuniary” gains out of the profit margins of upstream suppliers, or of downstream processors and distributors.
>
> (B. Dunlop, D. McQueen and M. Trebilcock, *Canadian Competition Policy: A Legal and Economic Analysis*, Canada Law Book Inc., Toronto 1987 at 186)

Given the size of the American economy and the historic purpose of American antitrust laws, it is not surprising that the potential for losing scale economies was not a significant concern; indeed, under the Price Standard, such economies worked against the merger.

(5) Small Business

[143] As noted above, small business historically received special consideration in the United States. The survival of small, locally-owned enterprises was a key goal of antitrust laws and, as noted above, efficiency considerations in mergers that created large competitors to small business were treated with hostility. While the emphasis of the U.S. antitrust laws on protecting small businesses from competition from larger firms has diminished very markedly, the hostile attitudes toward efficiencies have not.

[144] The treatment of small business under Canada’s Act is again very different. As the Tribunal noted, the purpose clause of the Act does not protect small businesses from large competitors; rather the Act provides that, under competition, small businesses have an “equitable opportunity” to participate in economic activity. Accordingly, if by virtue of greater efficiency, a merged firm obtains a competitive advantage over smaller, less efficient competitors, the Act finds no violation. If however that merger is anti-competitive, then if the test under section 96 is satisfied, the merger would proceed nonetheless.

(6) Foreign Ownership

[145] Another important difference between the two countries is the implicit concern with Canadian ownership and economic control. In light of the degree of industrial concentration in Canada, mergers among large Canadian companies in the same industry would frequently be denied absent a recognized defence. One consequence of this is that large Canadian companies could more easily merge with foreign enterprises since the resulting merged company would less frequently cross the anti-competitive threshold in Canada.

[146] It must be remembered that the Act was amended and the efficiency defence inserted therein at the same time as the debate on free trade with the United States and the growing trend toward privatization. In a globally more liberal environment for international trade and investment, the efficiency defence in section 96 allows the possibility that mergers among major Canadian businesses may produce entities that may possibly compete more effectively with large foreign enterprises at home and abroad.

(7) Efficiencies: "merger-specific" v. "order-driven"

[147] As stated in the Horizontal Merger Guidelines, claimed efficiency gains must be "merger-specific". Although those Guidelines do not elaborate, this requirement appears to mean that a claimed efficiency gain is not cognizable if it could be achieved in another, presumably less anti-competitive, way.

[148] The Tribunal found that the gains in efficiency in the instant merger would not be achieved absent the merger (i.e. if the order were made) and hence could be included in the test under subsection 96(1) (Reasons, at paragraph 462). This requirement is not the same as the one used by the American enforcement agencies. After satisfying itself that the two approaches were not identical, the Tribunal noted the same distinction was addressed in *Hillsdown, supra*, which supported the view that the Act did not require that claimed gains in efficiency not be achievable in another, less anti-competitive way, although this was the requirement of the Commissioner's Merger Enforcement Guidelines ("MEGs").

[149] The Commissioner may require that efficiency gains be merger-specific when deciding whether to challenge a merger. However, once an application is brought under the Act, included efficiency gains are "order-driven" rather than "merger-specific". Since an order of the Tribunal is formulated based on its findings under section 92 of the Act, efficiency gains are evaluated in light of the order. Hence, efficiencies can have no influence on the order that the Tribunal formulates.

I. AMERICAN COMMENTARY

[150] The Court refers approvingly (Appeal Judgment, at paragraph 137) to American commentators who clearly articulate consumer protection as the overriding objective of U.S. antitrust laws. However, the merger provisions of Canada's Act are not so focussed on consumer protection. It appears to the Tribunal that American commentators have generally not realized this. Instead, they have been quick to attack section 96 of Canada's Act, and always on the basis that it diverges from the approach under American antitrust law. In this, the commentators are entirely correct, but they ignore Canadian economic conditions and concerns, in particular, the comparatively small size of the Canadian economy.

[151] For example, in his analysis of the Act, Professor Ross advocates that the phrase "prevention or lessening of competition" in subsection 96(1) be interpreted in the same way as the phrase "restrain or injure competition unduly" in section 45 (presumably paragraph 45(1)(d)) and hence prevent redistributions of wealth from anti-competitive mergers as Parliament intended for criminal conspiracy (S. Ross, *Afterword-Did the Canadian Parliament Really Permit Mergers That Exploit Canadian Consumers So That The World Can Be More Efficient?*, Antitrust Law Journal, vol. 65, Issue 1, Fall 1996 at 641) [hereinafter, Ross]. The Tribunal disagrees with this view. If Parliament had intended the same meanings to these phrases, it would have used the same language when it added section 96 to the Act in 1986.

[152] Secondly, Professor Ross notes the concern that the Consumer Surplus Standard would "...effectively read an efficiency defence out of the *Competition Ac*t" (Ross, at 647). Referring to the *obiter dicta* comments of Reed J. in the *Hillsdown* decision, he concludes that that standard would permit mergers where the efficiency gains are "...almost certain" and the "threat of substantially lessened competition is only likely..." (Ross, at 648). However, nothing in the Act suggests this, and in the Tribunal's view, the requirement that efficiency gains be shown on a balance of probabilities applies equally to any effects that are asserted.

[153] Professor Ross may be correct to conclude that subsection 96(2) is inconsistent with the Total Surplus Standard (Ross, at 648), but it is also inconsistent with the Consumer Surplus Standard and the Modified Surplus Standard.

[154] Professor Ross defines and criticizes a "total Canadian welfare model" because, when it results in blocking a merger by excluding efficiency gains and effects outside of Canada, it violates the non-discrimination requirements under international treaties and agreements (Ross, at 643-644). In the Tribunal's understanding, the "total Canadian welfare model" as defined by Professor Ross includes consideration of the deadweight loss to the Canadian economy and losses due to income transfer from Canadian consumers to foreign shareholders. Accordingly, it is a version of the Consumer Surplus Standard in which effects are limited to those experienced in Canada. As discussed below, the Tribunal disagrees with his conclusion regarding Canada's international obligations and his interpretation of the purpose clause of the Act.

[155] In the Tribunal's view, Professor Ross appears to be antagonistic to any approach that differs from the approach adopted in the United States. Indeed, although his position is not entirely clear, his view appears to the Tribunal to be that no harm from an anti-competitive merger should be tolerated, regardless of proven efficiency gains. Although he refers to a consumer welfare standard, he appears to articulate the Modified Price Standard, which was criticized by Professor Townley at the first hearing.

[156] The Court's reliance on Professor Brodley's article is puzzling since that article does not discuss Canadian law at all (Joseph F. Brodley, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress* (1987) 62 N.Y.U. Law Review, 1020) [hereinafter, Brodley]. It cites neither the Act nor the Canadian MEGs, and it does not express surprise at the interpretation of section 96 adopted in the MEGs. Instead, addressing the on-going debate within American antitrust law Professor Brodley writes that one approach to reconciling efficiency and consumer welfare would be to abandon the consumer interest. In light of Congressional and judicial decisions, he finds this unacceptable (Brodley, at 1035-36).

[157] Professor Brodley emphasizes that consumer protection is the goal of American antitrust law. Regarding economic goals, he concludes:

> ...These economic objectives can be implemented by placing greater emphasis on stability and predictability of antitrust rules, preventing exclusionary conduct that threatens production efficiency, and recognizing a limited efficiencies defense when otherwise restrictive conduct would enhance production or innovation efficiency. (Brodley, at 1053)

Professor Brodley's article serves as a reminder of the debate within American antitrust law as it adapts to economic conditions a century after the antitrust laws were first introduced. It discusses Canada's approach not at all.

[158] The Tribunal does not criticize the American antitrust regime, but it notes that it is the result of circumstances, policies, and judicial interpretation of the pertinent statutes that are unique to the United States. The opinions of American commentators on Canada's Act, whether cited by the Court or by the Commissioner, should be seen in the context of historical and continuing hostility toward efficiencies in merger review in the United States.

[159] In the Tribunal's view, the prevailing hostile approach to efficiencies in American antitrust law derives from the primary focus of that regime on consumer protection. The adoption of the American approach to efficiencies under the Act would, without question, introduce the hostility that characterizes that approach. As noted above, the amendments in 1986 to the merger provisions of the *Combines Investigation Act* were primarily focussed on economic efficiency.

J. DOES THE TOTAL SURPLUS STANDARD VITIATE SECTION 92?

[160] In its Reasons, the Tribunal emphasized that the Consumer Surplus Standard could not be correct in law because it frustrates the attainment of efficiency that was Parliament's paramount objective in passing the merger provisions of the Act (Reasons, at paragraph 437).

[161] The Commissioner now takes issue with that conclusion, and submits that adopting the Total Surplus Standard leads to the opposite situation, wherein anti-competitive mergers would routinely be saved because relatively small gains in efficiency will need to be proven in order to exceed the deadweight loss (Transcript, vol. 5, October 15, 2001, at 809-815).

[162] In the Tribunal's view, these matters are extremely important for the proper understanding of the merger provisions of the Act.

(1) Background

[163] In its Reasons regarding the Consumer Surplus Standard, the Tribunal took note of the observation of Professors Trebilcock and Winter that the deadweight loss of a price increase is typically quite small and the Tribunal confirmed this observation using data from the instant merger and Table 8 of Professor Ward's expert report (exhibit A-2059 at 34) to determine the deadweight loss of a hypothetical 15 percent price increase (Reasons, at paragraphs 434-436).

[164] In describing the effects of an anti-competitive merger, the Tribunal distinguished between the efficiency effects and the redistributive effects thereof, and it did so under the assumption that competitive conditions prevailed before such a merger (Reasons, at paragraph 422). In the Tribunal's understanding, this is the typical approach in applying economic theory and, accordingly, when that theory is properly applied, the deadweight loss typically will be small.

[165] The Tribunal notes that where competitive conditions do not prevail before the merger, then the deadweight loss from an anti-competitive merger may be much larger. In final argument in the first hearing, the Commissioner discussed this possibility at length and presented alternate estimates of the deadweight loss (Commissioner's Memorandum of Fact and Law, at paragraphs 744-756). The Commissioner concluded:

> It is our submission therefore that in order to perform an accurate total surplus standard test, the measure of deadweight loss to be contrasted to the efficiency gains must be done without the limitation imposed by the pre-merger perfectly competitive price assumption. The evidence shown in this case strongly supports the view that there exists at least a degree of market power in the market such that firms do not pre-merger set price exactly equal to average variable cost or marginal cost and that, given this markup, the true deadweight loss measure is that provided by Table T3.
>
> (Commissioner's Memorandum of Fact and Law, at paragraph 756)

[166] In final argument, the Commissioner presented Table R3 to address an error in Table T3. The Tribunal excluded R3 and certain other estimates of the deadweight loss because they were based on information in respect of which expert opinion was required. As the Commissioner had not led any expert evidence in this regard, the respondents did not have the opportunity to address the matter raised in R3 (Reasons, at paragraph 451).

[167] The Tribunal notes the estimates of deadweight loss shown in Table R3 were $54.89 million, calculated on an assumed price increase of nine percent, and $23.44 million calculated on an assumed price increase of four percent. Because Table R3 and other estimates of the deadweight loss premised on the existence of pre-merger distortions in price were excluded, the Tribunal did not discuss in its Reasons the Commissioner's argument that the measurement of the deadweight loss should take such distortions into account.

[168] However, both of the estimates of deadweight loss shown in Table R3 were substantially larger than the $3 million estimate of deadweight loss, predicated on an average price increase of 8 percent, on which the Commissioner now relies. If these estimates had been properly introduced and had withstood cross-examination, the Tribunal might have concluded, using the Total Surplus Standard that it adopted, that the estimated efficiency gains of $29.2 million did not exceed and offset the effects of lessening of competition so measured.

[169] The Tribunal cannot and will not revisit its decision. Nevertheless, it appears to the Tribunal that the typical analysis of effects, based on the assumption that pre-merger conditions were competitive, may not have been appropriate in this case and that the deadweight loss may be much

larger than the estimate thereof on which the Commissioner now relies. It therefore cannot be said that the Total Surplus Standard necessarily would have led the Tribunal to approve the instant merger had the deadweight loss been measured properly.

(2) "Greater than and offset..."

[170] The Commissioner suggests that under the Total Surplus Standard, an anti-competitive merger could be saved by minor cost-savings:

> It is our submission that is in fact what the Act was intended to address, to address situations where you had very substantial efficiency gains that resulted from the merger. It was in those circumstances that the efficiency defence is intended to apply, not intended to apply to authorize mergers where you simply can demonstrate that by getting rid of a president and a vice-president it is enough to allow otherwise a merger that reduces competition and increases prices to pass the test.
>
> (Transcript, vol. 5, October 15, 2001, lines 15-25 at 815)

[171] In the Tribunal's view, this submission is premised on the conventional assumption that competitive conditions prevail prior to an anti-competitive merger, hence the resulting deadweight loss must be relatively small. The Tribunal used the same approach in its Reasons, at paragraph 422, when explaining and analyzing the effects in the typical case; it was not, however, illustrating the entire statutory requirement. While the Tribunal agrees that in such cases, relatively small gains in efficiency will be needed to exceed the typically small deadweight loss, the Act requires more under section 96.

[172] Indeed, as the Tribunal pointed out in its Reasons (at paragraphs 449-450 and 468), subsection 96(1) makes it quite clear that the efficiency defence is not available if efficiency gains merely exceed the effects of lessening or prevention of competition. To be available, those gains must also offset the effects, and it cannot be concluded that the Tribunal would find that efficiency gains (whether large or small) that marginally exceeded the effects (whether large or small) would also offset those effects. In particular, it cannot be concluded that an anti-competitive merger would be approved under section 96 if the only savings were the salaries of two senior executives.

[173] In the instant case, the Tribunal found that the proven gains in efficiency were substantial in comparison to the losses in efficiency as measured by the deadweight loss, and this finding allowed the Tribunal to conclude that the statutory requirement to offset had also been met (Reasons, at paragraph 468). In the Tribunal's view, the application of the Total Surplus Standard in merger review under the Act does not result in the automatic acceptance of an anti-competitive merger, even where the pre-merger environment can properly be characterized as competitive. As noted above, when the evidence shows that pre-merger conditions are not competitive, it cannot be concluded that the deadweight loss would necessarily be so small that only minor gains in efficiency would exceed and offset that loss under the Total Surplus Standard.

K. CAN THE CONSUMER SURPLUS STANDARD BE MET IN THIS CASE?

[174] The Commissioner submits that:

> ...As a result, once the estimated size of the transfer is quantified by the Commissioner, it represents a relevant "measured effect" that should be added to the other measured effects for the purpose of determining the combined measured and qualitative effects, unless the Respondents demonstrate with appropriate evidence that some other treatment for the transfer is appropriate in the performance of the tradeoff in the circumstances of a particular case...
>
> (Commissioner's Memorandum on Redetermination Proceedings, paragraph 93 at 38-39)

In stating that the measured transfer of income (i.e. the measured redistributive effect) should be added in its entirety to the measured deadweight loss, and combined with those qualitative effects which are themselves efficiency effects or re-distributive effects on consumers, the Commissioner is advocating the Consumer Surplus Standard in respect thereof. Moreover, the Commissioner cites with approval the "...pragmatic approach of adding the wealth transfer to the allocative efficiency losses for the purposes of performing the section 96 defence..." suggested by American authors Fisher, Lande and Ross (Commissioner's Reply Memorandum on Redetermination Proceedings, paragraph 102 at 39).

[175] Referring only to measured effects, the Commissioner submits that the instant merger could succeed if the proven annual efficiency gains were at least 7.5 percent of annual sales (Transcript, volume 5, October 15, 2001, at 814, line 12 to 815, line 2). On annual sales of $585 million, proven efficiencies of at least 7.5 percent thereof would exceed the Commissioner's measured total ($43.5 million) of the deadweight loss and income transfer.

[176] The Tribunal notes that proven efficiencies, in this case equal to $29.2 million per year for ten years, are five percent of annual sales and hence are insufficient to exceed the total loss of consumer surplus as measured by the Commissioner.

[177] The Tribunal disagrees with the Commissioner's submission: if the instant merger had produced proven efficiency gains equal to 7.5 percent of sales, then they would still be less than the measured loss of consumer surplus; hence, the Consumer Surplus Standard as applied only to measured deadweight loss and the income transfer would not be satisfied. The Commissioner's total measured loss of surplus is based on price increases averaging 8 percent across all business segments, and on a demand elasticity of -1.5; referring to Table 8 in Professor Ward's report (exhibit A-2059), the Commissioner finds that the components of lost surplus, the deadweight loss and the transfer, are 0.5 percent and 7.0 percent of sales respectively under those conditions.

[178] However, the evidence in this case is that propane demand is inelastic; hence the demand elasticity could not be less than -1.0. Indeed, as the Tribunal noted in its Reasons, the respondents had argued that the measured deadweight loss was overstated because it was calculated at the demand elasticity of -1.5 and they noted that it was inconsistent with the estimation of price increases at a demand elasticity of -1.0 which the Commissioner had done by adopting and rounding down the estimated price increases in Table 2 of Professor Ward's Reply Affidavit to the Rebuttal Affidavit of Dennis W. Carlton & Gustavo E. Bamberger (exhibit A-2060) (Reasons, at paragraph 456)

[179] The Commissioner acknowledged that the combined deadweight loss and redistributional effect are larger when calculated at a demand elasticity of -1.0 than when calculated at a demand elasticity of -1.5:

> Second, the majority noted that the respondents pointed out the deadweight loss estimates would be lower if they had been calculated at an industry demand of -1.0. As previously noted in oral argument, Professor Ward's Table 8 demonstrates that as demand becomes more inelastic, the deadweight loss for a particular price increase becomes smaller but the transfer becomes larger by an amount that makes the combined deadweight loss and transfer larger. As a result, if an elasticity of -1.0 had been used to prepare the table in Appendix A instead of an elasticity of -1.5, the deadweight loss would have been smaller, the transfer would have been larger, and the combined deadweight loss and transfer in the aggregate would also have been larger.
>
> (Commissioner's Memorandum on Redetermination Proceedings, paragraph 22 at 14)

[180] While there is no evidence on the deadweight loss and transfer calculated at a demand elasticity of -1.0, it is clear that the lost surplus would exceed 7.5 percent of sales when calculated at a demand elasticity of -1.0. Accordingly, the Commissioner is incorrect to state that proven efficiency gains of 7.5 percent of sales would be required in order to meet the Consumer Surplus Standard.

[181] In the Tribunal's view, the inability of efficiency gains of five percent of sales to meet the Consumer Surplus Standard in this case, and the insufficiency of gains of 7.5 percent to do so, amply illustrates that the required level of proven efficiency gains thereunder is unlikely to be attained except in the rarest of circumstances. We are of the view that the defence in subsection 96(1) would, for all intents and purposes, never succeed under this standard.

L. IS THE ENTIRE TRANSFER NECESSARILY INCLUDED?

[182] The Commissioner's position is that the statistical and other evidence that informs the assessment of adverse redistributional effects is unnecessary in light of the Appeal Judgment of the Court. In the Commissioner's view, the redistribution of income and wealth as measured by the transfer of $40.5 million is the effect to be included in its entirety with no inquiry into the adverse elements thereof. In addition, the Balancing Weights Approach is nothing more than a tool to assist the Tribunal.

[183] However, if the Commissioner is correct that the entire $40.5 million is to be included, then the Balancing Weights Approach is no longer necessary because it adds nothing to the decision that the Tribunal must make.

[184] The Commissioner's position is that the measured redistributive effect must be taken into account in its entirety even when the consumers and shareholders are the same people:

> The Commissioner submits the merger clearly reduces the competitiveness of propane prices and this "effect" of the merger reduces the benefits of competitive propane prices to Canadian propane consumers by at least the amount of the consumers' surplus transfer. While it may be true that individual shareholders

> of Superior are, in some sense, consumers of propane themselves, it is the competitiveness of propane prices to consumers as consumers of the relevant product, and who are affected by the price increase, that is at issue here. Indeed, since all producers are in some sense consumers, competitive prices that benefit consumers will benefit all producers as well. The important consideration is that the consumers' surplus transfer is the immediate result of the anti-competitive merger. There is no preference for one or another class of consumer, but simply a public interest decision embedded in the Act that requires the likelihood of consumers being deprived of the benefits of more competitive prices (consumers' surplus transfer) as a result of an anti-competitive merger to be negatively weighted. Because in any given case competitive prices benefit the consumers of a product, but not the producers of that product, the identification of "competitive prices to consumers" as a goal of the *Act* effectively makes a policy choice to favour consumers.
>
> (Commissioner's Memorandum on Redetermination Proceedings, paragraph 29 at 16-17)

[185] In recognizing that shareholders are also consumers, the Commissioner draws attention to the simultaneous positive and negative redistributional effects on those individuals. Yet the Commissioner asserts that no consideration of positive redistributional effects is warranted even in those circumstances. In our view, this situation would more reasonably be judged socially neutral in the analysis of effects under section 96 of the Act.

[186] In the Tribunal's view, there is no policy choice to favour consumers in the merger provisions of the Act. The Tribunal concluded that efficiency was the paramount objective of the merger provisions of the Act, and the Court agreed while requiring that the transfer be considered under subsection 96(1). A similar policy choice to favour efficiency is found in section 86 of the Act which permits higher prices to consumers if efficiencies are large enough to justify the specialization agreement.

[187] A second reason for rejecting the necessity of including the entire amount of the transfer is that doing so vitiates the statutory efficiency defence. In their earlier influential article on American antitrust, Fisher and Lande observed:

> In approaching wealth transfers for a tradeoff analysis, the first problem is that the legislative history provides us with no guidance as to the precise relative weights of wealth transfers and efficiency effects. Giving any weight at all to redistribution would greatly affect the welfare tradeoff, because in general the redistribution effect (area S in Diagram IV-1) is many times greater than the deadweight loss (area D in Diagram IV-1)...As the percentage increase in price or the elasticity of demand decreases, the redistribution effect becomes dramatically larger than the deadweight loss. *Since the elasticity of demand and the probable percentage price increase are interrelated, in most mergers fitting theWilliamsonian conditions the redistribution effect is likely to be between approximately four and forty times the deadweight loss.*

> (A. Fisher and R. Lande, *Efficiency Considerations in Merger Enforcement*, California Law Review, vol. 71, December 1983, no.6, 1582, at 1644-1645) [Emphasis added] [hereinafter, *Fisher and Lande*]

[188] As an example of Fisher and Lande's analysis, where the price elasticity of demand is -1.0 and the consequential price increase is 10 percent, the wealth transfer will be 20 times the deadweight loss (for constant elasticity of demand). Accordingly, proven efficiency gains would be insufficient unless they were at least 21 times greater than the deadweight loss. For linear demand under the same conditions, the wealth transfer will be 22 times the deadweight loss. Hence, proven efficiency gains would be insufficient unless they were at least 23 times greater than the deadweight loss (Fisher and Lande, Table IV-4 at 1645).

[189] By comparison, the proven efficiency gains in the instant merger ($29.2 million) are approximately 10 times the measured deadweight loss. Thus, even where the deadweight loss is relatively small and the proven efficiency gains are substantial in comparison, the latter will almost always be insufficient if the entire transfer were required to be included. In the Tribunal's view, the Fisher-Lande calculations demonstrate that including the entire transfer would result in the availability of the efficiency defence in section 96 only in rare circumstances.

[190] A similar conclusion was reached in 1993 by a former official of the Bureau of Competition Policy who noted:

> ...If the words "the effects of any prevention or lessening of competition" are not limited to the deadweight loss resulting from a merger...but are also considered to contemplate the wealth transfer associated with any price increase expected to result from the merger... merging parties will very rarely, if ever, be able to meet the requirements of s. 96. The combined effect of the deadweight loss and the neutral wealth transfer resulting from a price increase typically far exceeds in order of magnitude any efficiencies which may be brought about by a merger. The Director recently stated that he is not aware of any merger that would have generated efficiencies sufficient to outweigh the sum of the likely wealth transfer and deadweight loss of the merger, and that he does not believe that such a merger will likely present itself in the future.
>
> (P. S. Crampton, *The Efficiency Exception for Mergers: An Assessment of Early Signals from the Competition Tribunal*, the Canadian Business Law Journal, vol. 21, 1993, 371, at 386)

Accordingly, a second reason for not requiring the full inclusion of the transfer, as a matter of law, is that it would make the defence of efficiency in section 96 unavailable except in rare circumstances, hence vitiating a statutory provision the paramount objective of which is economic efficiency.

[191] Although arguing that the full amount of the transfer should be included in the measured effects, counsel for the Commissioner suggests two situations in which the transfer could be treated as neutral, or reduced and not given full effect. In the first such situation, excess profits from sales to non-residents should be excluded. The second is the case of pre-existing monopsony.

(1) Redistribution to Foreigners

[192] While advocating that the entire amount of the redistributed income be included as an effect for the analysis under subsection 96(1), counsel for the Commissioner suggests, in response to a question from the Tribunal (Transcript, vol. 1, October 9, 2001, at 68, lines 18-23) that there may be circumstances where the Tribunal should use its discretion to do otherwise. One instance is a merger of Canadian exporters following which the price increase is paid very largely by foreign consumers. In this case, counsel submits that the domestic component of the wealth transfer may be quite modest and the large component falling on foreign consumers could be ignored. The Tribunal should use its discretion to disregard the latter and therefore give the total wealth transfer less weight; accordingly, significant efficiency gains in comparison with the loss of efficiency (i.e. a small deadweight loss) and other effects could well allow the anti-competitive merger to proceed (Transcript, vol. 1, October 9, 2001, at 72, line 15, at 73, line 6).

[193] The respondents argue, similarly, that many of Superior's largest customers are foreign-owned companies and that the effect of the transfer on these foreign shareholders is not an adverse effect that should be considered (Memorandum of the Respondents Superior Propane Inc. and ICG Propane Inc. in Relation to the Redetermination Proceedings ("Respondents' Memorandum on Redetermination Proceedings"), paragraph 136 at 62).

[194] The Tribunal notes that international aspects of the application of section 96 have been raised previously, most notably by Madame Justice Reed in *obiter dicta in the Hillsdown* decision. Reed J. queried whether the Act required neutral treatment of the redistribution of income consequent to an anti-competitive merger of foreign-owned firms located in Canada, as the excess profits earned on sales to Canadian consumers would flow to the foreign shareholders. It appears that the hypothetical situation posited by counsel to the Commissioner is the opposite of that characterized by Reed J.

[195] The international ramifications of section 96 have been discussed by the American Professor Ross whose article was cited with approval by the Court. He posits an anti-competitive acquisition under the Act in Canada of a Canadian-owned firm by an American-owned firm where efficiency gains are large but accrue only in the United States; yet consumers pay higher prices, there are significant layoffs in Canada, and the deadweight loss is small. He concludes that under a "...*total world welfar*e" standard, such merger would be approved, but under the "...consumer surplus model (roughly followed in the United States)", it would be blocked. He further concludes that under a "...*total Canadian welfare* model", the merger could be blocked by excluding the efficiency gains in the United States, but this raises serious questions of discrimination under Canada's international obligations under NAFTA and GATT. Accordingly, for this reason, and because he endorses the American approach to efficiencies generally, he doubts that the Canadian Parliament intended a standard other than the Consumer Surplus Standard (Ross, at 643-644).

[196] Under the purpose clause of the Act, the purpose thereof is to maintain and encourage competition in Canada in order, *inter alia*, to promote the efficiency and adaptability of the Canadian economy. Accordingly, in the Tribunal's view, efficiency gains and deadweight loss (i.e. losses in efficiency) in foreign markets resulting from an anti-competitive merger in Canada are to be excluded in the application of section 96. This is clearly stated in the statute and is not a discretionary matter for the Tribunal. Accordingly, if the deadweight loss in foreign markets is an excluded effect, so are all

other effects in foreign markets. In the Tribunal’s view, the Act does not endorse a “*total world welfare*” standard.

[197] A “*total Canadian welfare* standard” as defined by Professor Ross may or may not be discriminatory under Canada’s international obligations, but the Act is not. In the Tribunal’s understanding, those obligations require “national treatment” in the application of Canadian laws. Accordingly, if efficiency gains and effects in foreign markets are excluded when reviewing an anti-competitive merger of two Canadian-owned firms in Canada, the same exclusion must be accorded if those merging firms are owned by non-residents. In Professor Ross’ hypothetical, the anti-competitive merger of an American-owned and a Canadian-owned firm would be blocked under the Total Surplus Standard (even if consideration of the layoffs was excluded) because there are no gains in efficiency in Canada.

[198] Accordingly, the Tribunal agrees with counsel for the Commissioner that the portion of the transfer experienced by foreign consumers should be excluded in the section 96 analysis. However, the Tribunal does not agree that so doing is a matter of discretion.

(2) Pre-existing Monopsony

[199] Counsel for the Commissioner submits that a second such instance for the Tribunal’s exercise of discretion under subsection 96(1) arises in the case of an anti-competitive merger that offers countervailing power to an existing monopsony. Where consumers have organized to extract a subcompetitive price from producers in an industry, the gain in consumer surplus is not a gain to society because it comes at the expense of a corresponding loss in producers’ profits. A subsequent merger that conferred market power on producers might be allowed to proceed in light of efficiency gains by ignoring the loss of the consumer surplus due to the pre-existing monopsony; only that portion of the wealth transfer that resulted from the increase in price above the competitive level would be considered (Transcript, vol. 5, October 15, 2001, at 825, line 23 to 826, line 17).

[200] The Tribunal agrees that, if it is to consider redistributional effects under a standard other than the Total Surplus Standard, it should not automatically count the loss of consumer surplus attributable to pre-existing monopsony power against the merger if section 96 is invoked. The appropriate treatment of the various redistributional effects depends on the evidence presented, and that portion of the wealth transfer from consumers to producers may not be an adverse effect of the merger.

[201] Although the Tribunal agrees with the submission of counsel, it notes that a merger policy that favours consumers over producers/shareholders would object to the loss of pre-existing monopsony benefits and, hence, in the scenario offered by counsel, the loss to consumers of their monopsony benefits would be counted against a merger that offered countervailing market power. Yet this is not the approach offered by counsel for the Commissioner, presumably because it is not what the Act requires. As noted previously, the Tribunal held and the Court agreed that the paramount objective of the merger provisions of the Act is efficiency.

(3) General

[202] Accordingly, it is not clear to the Tribunal why it should take less than the full amount of the transfer into consideration in the subsection 96(1) analysis only in these two situations advanced by counsel for the Commissioner. In light of the concerns of Madame Justice Reed and Professor Townley, both of whose concerns are given weight by the Court, and having regard for the approach taken by the Commissioner's advisers in light of the Commissioner's dissatisfaction with the approach published in the 1992 MEGs, it is clear to the Tribunal that it should consider all effects routinely for their socially adverse, positive and neutral impacts.

[203] In the Tribunal's view, the monopsony example raises a critical issue. Why should the merger provisions of the Act deny the consumer benefit in that instance? There must be some reason why merger policy concerns itself with the competitive price, even when achieving that price harms consumers by denying their monopsonistic gains.

[204] The answer to that question, which has never been discussed in any part of the review of the instant merger is, clearly, economic efficiency itself. Competitive prices are desirable, not because they are low or fair to consumers–indeed, they may be quite the opposite–but rather because, in a wide range of circumstances, they promote economic efficiency quite generally. If this were not true, then there would be no particular reason to favour competitive markets. Clearly, there are more effective ways to ensure low and fair consumer prices over the economy as a whole than through a policy of maintaining and encouraging competition in Canada, but these other ways risk substantial, widespread bureaucracy and inefficiency, and reduction in economic growth and living standards, and they would not long be tolerated by Canadians.

[205] Doubtless, there will be mergers that redistribute income adversely. If these redistributive welfare losses cannot be addressed more effectively in other ways, then there is a strong argument for taking them into account in merger policy. As noted by the Report of the Economic Council of Canada, and also in our Reasons, it was the Tribunal's view (Reasons, at paragraph 438) that redistributional issues were better handled outside of competition law. An example was offered by Madame Justice Reed in the *Hillsdown*, supra, decision: the merger of two drug companies where the relevant product is a life-saving drug.

[206] The Tribunal notes that Parliament established the Patented Medicine Prices Review Board ("PMPRB"), an independent, quasi-judicial body, on December 7, 1987. Its regulatory function is to protect consumer interests by regulating the maximum prices charged by manufacturers for patented medicines to ensure that they are not excessive. The PMPRB's mandate extends to all patented drugs, prescription and non-prescription medicines sold in Canada for human and veterinary use (see generally www.pmprb-cepmb.gc.ca).

[207] It thus appears that Parliament had already fully addressed Madame Justice Reed's concern when it established the PMPRB, equipped it with expert board members and professional staff, and mandated it specifically to ensure that prices of medicines were not excessive. There is no proper role for the Tribunal in this aspect of drug company mergers, as it would duplicate the role of the PMPRB which, unlike the Tribunal, has the relevant expertise and authority to regulate medicine prices in the consumer interest. Moreover, patentholders have rights which extend beyond the Tribunal's jurisdiction.

[208] The regulation of retail propane prices is an option that is open to government. There is no doubt that Parliament does not hesitate to use all of the means at its disposal to raise the welfare of all Canadians. The Tribunal's proper role, especially since it deals only with the civil matters under the Act, is to ensure that the benefits of a competitive economy are achieved within the law.

M. CONSUMER SURPLUS STANDARD CANNOT BE CORRECT IN LAW

[209] In describing the Consumer Surplus Standard, the Court did not expressly endorse, neither did it reject, it. Rather, the Court stated:

> [22] The "consumer surplus standard" posits that a merger should be permitted only if the resulting efficiency gains exceed the sum of the wealth transferred to the producers and the deadweight loss occasioned by increases in price charged by the merged entity. In practice, this standard will also be difficult to establish and consequently will tend to narrow the availability of the efficiency defence.
>
> (Appeal Judgment at 12)

[210] While the Court concluded that the Tribunal erred in law by adopting the Total Surplus Standard, it declined to prescribe the correct methodology:

> [139] ...Such a task is beyond the limits of the Court's competence.
>
> [140] Whatever standard is selected (and, for all I know, the same standard may not be equally apposite for all mergers) must be more reflective than the total surplus standard of the different objectives of the *Competition Act*. It should also be sufficiently flexible in its application to enable the Tribunal to fully assess the particular fact situation before it.
>
> [141] It seems to me that the balancing weights approach proposed by Professor Townley, and adopted by the Commissioner, meets these broad requirements. Of course, this approach will no doubt require considerable elaboration and refinement when it comes to be applied to the facts of particular cases.
>
> [142] Further, while the adoption of the balancing weights approach is likely to expand the anti-competitive effects to be considered, and hence narrow the scope of the defence, I see no reason why it should, as the respondent submitted, practically write section 96 out of the Act.
>
> (Appeal Judgment at 54-55)

[211] It is clear however that the Commissioner's expert witness on welfare economics, Professor Townley, rejected the Consumer Surplus Standard because it failed to distinguish between those consumers for whom the merger's impact would be socially adverse and those for whom it would not (i.e. it applied a "fixed weight *a priori*").

[212] It appears that, on appeal, the respondents argued that the Balancing Weights Approach would vitiate the efficiency defence in subsection 96(1). The Court disagreed with the respondents' submission, but the Court's response at paragraph 142 of the Appeal Judgment indicates that it was concerned that section 96 not be vitiated by reason of the standard adopted by the Tribunal.

[213] The Tribunal accepts, as it must, the Court's directive that the Balancing Weights Approach does not vitiate the efficiency defence. Recognizing the Court's concern, the Tribunal also takes the instruction that, as a matter of law, it cannot adopt a standard that vitiates section 96.

[214] The Tribunal concludes that the Consumer Surplus Standard, which requires that the full amount of the transfer be added to the deadweight loss in establishing the effects of an anti-competitive merger, is so limiting that its adoption in all cases would be contrary to the conclusion of the Court, would rule out the inquiry that Professor Townley regards as necessary to assess the welfare effects of the merger, and generally makes the efficiency defence unavailable under the Act, and so cannot be correct in law because it vitiates the statutory provision in subsection 96(1).

[215] The fact that in this case proven efficiency gains of 7.5 percent of sales would not satisfy the Consumer Surplus Standard adequately demonstrates that the requirement therein is so high that it would be met, if ever, only in rare circumstances. Based on its review of the legislative history of the Act and the Parliamentary review of the 1986 amendments, the Tribunal concludes that the efficiency defence (and the exclusion of the limitations thereon in preceding bills) was not inserted into the Act for such limited use; rather, it was meant to be an essential part of the Canadian merger policy that emphasizes economic efficiency.

VI. <u>THE EFFECTS</u>

[216] The Commissioner accepts, as he must, the Tribunal's finding of estimated efficiency gains of $29.2 million per year for ten years, although he insists that the measured deadweight loss of $3 million per year for ten years is correct despite the Tribunal's attempt to quantify certain qualitative effects. The Commissioner maintains that the full amount of the estimated income transfer of $40.5 million per year should be included and asserts several effects that the Tribunal should consider qualitatively in light of the purpose clause of the Act and the ruling of the Court. The Commissioner submits that regardless of the way in which the Tribunal performs the analysis under section 96 of the Act, it will find that the respondents have not met their burden to show that efficiencies both exceed and offset the effects.

[217] The respondents assert that the Tribunal must make specific findings regarding the deadweight loss because it did not do so in its Reasons following the first hearing. Moreover, the Tribunal should consider that Professor Ward's evidence failed to find price increases in certain segments, hence the Commissioner's estimates of deadweight loss and transfer in these segments should be reduced or disregarded. Regarding qualitative effects and certain other matters, the Tribunal is *functus officio* and cannot revisit its findings. In addition, the Commissioner is prevented from introducing new evidence in the current hearing and therefore cannot establish certain effects.

[218] The respondents further assert that whereas the Commissioner is now advocating the Consumer Surplus Standard, only the adverse portion of the income transfer can be considered.

Since propane expenditures account for a relatively small portion of total expenditure for all consumers, the effect of the predicted price increase is small as is the impact of the transfer. Propane consumers are not generally poor or needy, and accordingly, the entire transfer of income should be regarded as neutral. On this basis, the Tribunal should allow the merger to proceed.

A. DEADWEIGHT LOSS

[219] The Commissioner submits that the resource misallocation effect (loss of efficiency) of the merger was correctly measured by the deadweight loss of $3 million per annum and should not be revisited by the Tribunal. In response to the Tribunal's conclusion in its Reasons that the measured deadweight loss was probably overstated, the Commissioner states that any overstatement due to the estimation based on total combined sales rather than combined sales of the parties in overlapping markets is de *minimus* (Commissioner's Memorandum on Redetermination Proceedings, paragraphs 19- 20 at 13).

[220] In response to the Tribunal's conclusion that the measured deadweight loss was overstated since it had been calculated incorrectly with a demand elasticity of -1.5 rather than -1.0, the Commissioner refers to Table 8 of Professor Ward's expert report (exhibit A-2059) that demonstrates that the deadweight loss for a particular price increase becomes smaller as demand becomes more inelastic, and that while the deadweight loss would have been smaller if calculated at a demand elasticity of -1.0, the redistributive effect would have been larger and the combined deadweight loss and transfer would also have been larger (Commissioner's Memorandum on Redetermination Proceedings, paragraph 22 at 14). See paragraph 178 supra. However, the Commissioner does not argue that the Tribunal should revisit its conclusion regarding the overstatement of the deadweight loss on this basis.

[221] The Commissioner states that the measured deadweight loss of $3 million was based solely on the price increase by the merged entity and did not include the mis-allocation effect (i.e. deadweight loss) due to interdependent pricing in certain markets by competing firms (Commissioner's Memorandum on Redetermination Proceedings, paragraphs 23-24 at 14-15).

[222] The Commissioner states that the deadweight loss estimate does not include the mis-allocation of resources due to the prospective elimination of certain programs and services by the merged firm. The Commissioner notes that the Tribunal concluded that the impact thereof would be minimal and most unlikely to exceed, in amount, the estimated deadweight loss, implying a maximum effect equivalent to that of a price increase in the range of 7-11 percent. It appears that the Commissioner does not seek to disturb the Tribunal's conclusion (Commissioner's Memorandum on Redetermination Proceedings, paragraph 40 at 20-21).

[223] Pointing out that the Tribunal concluded that the upper limit on the deadweight loss was $6 million, the respondents submit that the Tribunal did not make a specific finding on the size of the deadweight loss and they submit that the Tribunal should do so now. The respondents further assert that the Tribunal did not find that any specific price increase was likely when it made findings about the anti-competitive effects (Respondents' Memorandum on Redetermination Proceedings, paragraph 21 at 8) and that, on Professor Ward's evidence, the Tribunal could not conclude that a price increase would occur on a balance of probabilities (Respondents' Memorandum on Redetermination Proceedings, paragraph 25 at 10). They also maintain that only sales volumes in overlapping markets can be used

when estimating the deadweight loss and the redistributive effect, and then only for residential and industrial business segments because Professor Ward did not make any estimates of price increases for his "Other" segment and his estimate for auto-propane was statistically insignificant (Respondents' Memorandum on Redetermination Proceedings, paragraph 26 at 10). They introduce calculations that the deadweight loss is $1.8 million and the transfer of income is $23.7 million which estimates are themselves overstatements (Respondents' Memorandum on Redetermination Proceedings, paragraphs 61-64 at 26-28).

[224] The respondents submit that the proper estimation of the deadweight loss would exclude Superior's sales in Atlantic Canada because it is not an overlapping market, would exclude sales in "Category 1" markets since there is no substantial lessening of competition therein and would reduce sales in the automotive segment for lack of statistically significant evidence of a price increase, *inter alia*. The respondents' further estimates of the deadweight loss and transfer are substantially lower; the Commissioner offers rebuttal thereto in reply.

[225] The respondents submit that the Tribunal's Reasons included consideration of the deadweight loss in Atlantic Canada, hence the Tribunal is *functus officio* in that regard (Respondents' Memorandum on Redetermination Proceedings, paragraph 74 at 35). They further submit that any deadweight loss arising from interdependent and coordinated pricing behaviour has already been considered by the Tribunal when it accepted the measured deadweight loss of $3 million (Respondents' Memorandum on Redetermination Proceedings, paragraph 76 at 36). The respondents also state that the Tribunal fully considered the deadweight loss implications of the negative qualitative effects of the merger, found them minimal, and is functus officio in that regard (Respondents' Memorandum on Redetermination Proceedings, paragraphs 66-67 at 29-31).

[226] The purpose of this Redetermination Hearing is the consideration of effects that were not considered in the Reasons which followed the first hearing. The Tribunal made certain findings in respect of the deadweight loss and those findings were not disturbed by the Court. Those findings will not be revisited.

[227] In its Reasons, the Tribunal did not consider separately the deadweight loss arising from interdependent and coordinated pricing by competitors of the merged firm because the Commissioner did not argue for consideration of this effect. Rather, the Commissioner argued that interdependent and coordinated pricing was itself the effect to be considered, and the Tribunal disagreed (Reasons, at paragraph 465). Since the Commissioner did not propound deadweight loss from interdependent and coordinated pricing by competitors of the merged firm at the first hearing, the Tribunal did not make a specific finding in that regard. Rather, the Tribunal found, after all of the evidence, that the full extent of the measured (or estimated) deadweight loss was $3 million.

[228] In any case, the Tribunal notes that there is no evidence of deadweight loss from interdependent and coordinated pricing on the record. Professor Ward did not address this issue at all in his expert report, and in his oral testimony cited by the Commissioner, Professor Ward said in regard thereto only "...There could possibly be two different effects..." (Commissioner's Memorandum on Redetermination Proceedings, paragraph 24 at 14-15). It appears to the Tribunal that Professor Ward did not examine these effects or present any opinion thereon. Accordingly, the Tribunal can reach no conclusion about deadweight loss from interdependent and coordinated pricing by competitors.

[229] The Tribunal agrees with the respondents that it did not adopt a specific price increase for the purpose of assessing the deadweight loss. Rather, it accepted the Commissioner's estimate of $3 million as the deadweight loss and the Tribunal augmented it by its assessment of the maximum deadweight loss that could be attributed to changes in the product line by the merged firm. Accordingly, the Tribunal concluded that the deadweight loss would not exceed $6 million.

[230] The Tribunal agrees with the respondents that it did not make a specific finding on the deadweight loss, for the reason that it was not necessary to do so in light of the small magnitude thereof in relation to proven efficiency gains. The Tribunal did, however, accept the $3 million estimated deadweight loss that the Commissioner proposed was the effect of the price increase by the merged firm. The Tribunal finds merit in some, but not all, of the respondents' claims that this estimate is overstated. Subsection 96(1) requires consideration of all effects of lessening or prevention of competition in Canada. Hence, there is no basis for excluding sales in Atlantic Canada just because it is not an overlapping market. Similarly, there is no basis for excluding sales in Category 1 markets just because no substantial lessening of competition was shown therein in the section 92 inquiry. On the other hand, the respondents may be correct that no deadweight loss in auto-propane should be considered because Professor Ward's estimated price increase in auto-propane was statistically insignificant and because his was the only statistical evidence before the Tribunal regarding the magnitudes of likely price increases.

[231] Given the express purpose of this Redetermination Hearing, the Tribunal will not revisit its conclusion that Professor Ward did give an opinion about price increases generally and in certain segments such as auto-propane. Accordingly, the Tribunal will not revisit its conclusions that the $3 million estimate of deadweight loss submitted by the Commissioner is probably over-stated and that the total deadweight loss is most unlikely to exceed $6 million.

[232] The Commissioner further quotes the American authors noted above who make the point that the redistributive effects can have additional negative implications for efficiency. Citing articles by R. Posner and by R. Lande, these authors argue that the redistributed income will eventually be transformed into efficiency losses because the merged firm may become complacent and allow costs to rise (Commissioner's Reply Memorandum on Redetermination Proceedings, paragraph 103 at 39). To the Tribunal, this interesting observation suggests that the estimated deadweight loss from the instant merger is too low. However, these inferences are unsupported by anything on the record and the Tribunal will not consider them further.

[233] In the Tribunal's view, the requirement in subsection 96(1) that efficiency gains must be "greater than" the effects of lessening or prevention of competition favours a quantification of efficiency gains and the effects to be considered, where possible. That a particular effect cannot, even in principle, be quantified does not relieve the Tribunal of assessing that effect in the "greater than" test. Accordingly, where it is possible to quantitatively estimate such effects even in a rough way, perhaps by establishing limits as the Tribunal has done regarding certain qualitative effects, it is desirable to do so where the evidence permits. On the other hand, effects that are, in principle, measurable should be estimated; failure to do so will not lead the Tribunal to view them qualitatively.

B. INTERDEPENDENT AND COORDINATED BEHAVIOUR

[234] The Commissioner argues now that the redistribution of income arising from the coordinated pricing behaviour of competitors should be considered as a qualitative effect by the Tribunal.

[235] The Commissioner did not propound this effect at the first hearing.

> MEMBER SCHWARTZ: Apart from Dr. Ward's testimony here, which I don't want to minimize, I don't recall that the Commissioner advocated it in the first hearing that these were sources of deadweight loss and transfer that needed to be considered. Rather that the Commissioner said, as I understood it, that interdependence and coordination were themselves, I suppose, so important that they needed to be given a qualitative consideration outside of any deadweight loss or transfer issues.
>
> So am I wrong when I say the Commission did not seek to have deadweight loss and transfer from the coordinated effects considered?
>
> MS. STREKAF: Well, I think that – I guess two responses.
>
> First of all, there was no calculation put forward with respect to what the deadweight loss and transfer would be with respect to category two and three markets in the original case. I think the second response, and that relates to – part of the scope of this hearing is to now focus in and drill down very specifically in accordance with what the Federal Court of Appeals direction has been and to examine the effects in their totality. And in looking –
>
> ...
>
> MS. STREKAF: In this context here, we are not – we had not put forward a specific number as to what those deadweight loss and transfers would be. But relying on the evidence that was at the hearing of Professor Ward, he recognized that there would be an additional deadweight loss and a transfer, and in discussing the coordination effects more specifically later on in the brief, we attempt to try and put some boxes around what those numbers might be to give you kind of an order of magnitude of how you might view that from a qualitative perspective rather than trying to quantify those numbers.
>
> MEMBER SCHWARTZ: Thank you very much.
>
> (Transcript, vol. 1, October 9, 2001, at 116, line 25 to 118, line 22)

[236] In the Tribunal's view, the same evidentiary issues that attend the claim of deadweight loss from interdependent and coordinated behaviour attend the claim of redistributional effect. There is no evidence thereof on the record. Again, Professor Ward did not address this redistributional effect in his expert report. His oral evidence is, as noted above, speculative. Indeed, his oral evidence cited by the Commissioner addresses the possibility of loss of producer surplus by the competing independent

firms, not the possible loss of consumer surplus by migrating customers (Commissioner's Memorandum on Redetermination Proceedings, paragraph 24 at 15).

[237] Since the Tribunal had adopted the Total Surplus Standard, it would not have considered the redistributional effect of interdependent and coordinated behaviour by competitors had it been propounded at the first hearing. In light of the Appeal Judgment, the Tribunal is of the view that it should consider the submissions of the parties in this matter. However, as there is no evidence on which the Tribunal could assess the claimed redistributive effect of interdependent and coordinated behaviour, the Tribunal rejects the Commissioner's submission.

C. SERVICE QUALITY AND PROGRAMMES

[238] The Commissioner maintains that the Tribunal, while it considered the deadweight loss effect of the removal or reduction of services and pricing arrangements offered by ICG, should now consider the redistribution of income associated with that exercise of market power. It should further consider the qualitative impacts associated with the elimination of or reduction in consumer choice in, for example, the national account coordination services product market (Commissioner's Memorandum on Redetermination Proceedings, paragraphs 34-41 at 19-21).

[239] The respondents point out that the Tribunal stated in its Reasons that there was no evidence regarding the scope of any program removal or service reduction. In addition, they argue that the Commissioner has not explained why consumers value choice *per se*, i.e. beyond the effect it has on price or quality of service, which matters have already been considered by the Tribunal (Respondents' Memorandum on Redetermination Proceedings, paragraphs 68-73 at 31-34).

[240] The Tribunal recognized that ICG had established certain services and pricing arrangements that Superior and other propane marketers did not offer. (However the Commissioner notes that, in western Canada, Superior offers a program similar to ICG's "Cap-It" arrangement.) In the Tribunal's view, GolfMax and similar arrangements are specialized marketing arrangements and represent ways in which ICG has sought to differentiate itself from its competition in selling propane. The removal of certain specialized marketing arrangements by the merged company would cause a buyer for whom that arrangement was its preferred way of acquiring propane, to select a less-preferred arrangement. As with switching induced by a direct increase in price, this change of arrangements would entail a loss of efficiency as measured, in principle at least, by the deadweight loss and a redistribution of income from buyer to seller. If estimates of these effects could be made, the effects of reduced choice would be captured in the conventional way. If such estimates could not be made, then the effects would have to be established in some other way per the evidence.

[241] On the evidence that propane demand was inelastic, the Tribunal concluded that propane consumption would not decline significantly if those marketing arrangements were eliminated. On the evidence, the Tribunal concluded that to the extent that certain marketing arrangements were removed, the deadweight loss therefrom would be "minimal" and "...most unlikely to exceed in amount the estimated deadweight loss..." of $3 million. (Reasons, paragraphs 466-467). In this way, the Tribunal used the available evidence to place an upper bound on the effect on efficiency brought about by the reduction or removal of certain marketing arrangements argued by the Commissioner as a qualitative factor.

[242] The Tribunal was directed by the Court to consider the redistributive effects that it ignored initially. However, the Tribunal notes that at the first hearing, the Commissioner did not adduce any evidence on this matter. Rather, the Commissioner was content to argue that the removal/reduction of programs and services should be considered as (negative) qualitative effects. The Commissioner never argued, and hence adduced no evidence, regarding the redistributive effect resulting from this removal/reduction of programs and services.

D. ATLANTIC CANADA

[243] The Commissioner submits that the prevention of competition in Atlantic Canada that the Tribunal found in its section 92 inquiry is an effect to be considered qualitatively under section 96 of the Act. The respondents state that there is insufficient information on the record to assess the effect of this prevention of competition and that the Tribunal is *functus officio* in regard to the effects of prevention in Atlantic Canada, except for redistributional effects.

[244] The Tribunal accepted that the merger prevents ICG's plans to expand in Atlantic Canada from being implemented. As a result, the price of propane will likely be higher than it would be if the merger did not take place. Accordingly, the possible effects of this prevention of competition in Atlantic Canada would be the efficiency gains and reduction in excess profits that would have resulted from the additional competition that the merger precludes.

[245] Having identified and accepted the prevention of competition in Atlantic Canada, the Tribunal must assess the effects of such prevention. The prevention itself is distinguishable from its effects in the same way as above where the Commissioner distinguished between interdependent pricing and the effects thereof. There is no evidence on the record about the extent to which the price of propane would have fallen if ICG's expansion had occurred, and accordingly the possible efficiency gains and redistributional effects that the merger prevents in Atlantic Canada are not directly measured.

[246] With respect to the prevented efficiency gains, the Tribunal notes that the Commissioner's calculation of the $3 million deadweight loss included sales by Superior in Atlantic Canada. Such calculation is an indirect way of including the prevented efficiency gains in Atlantic Canada. Though it might be a poor estimate, it was not criticized as such and accordingly, there is no basis or need for the Tribunal to reconsider the deadweight loss effect in a qualitative way. The Tribunal is *functus officio* in regard to the deadweight loss in Atlantic Canada.

[247] Regarding the redistribution of income in the form of reduced excess profits to incumbents, the Tribunal agrees with the respondents that there is no evidence that would assist it in evaluating this effect from either a qualitative or quantitative perspective.

[248] The Court states that the Tribunal found that, while the merged entity will eliminate "...all consumer choice, and remove all competition, in the propane supply market, as it is likely to do in Atlantic Canada, for example...", these effects were not to be considered under section 96 (Appeal Judgment, paragraph 107 at 43).

[249] It appears to the Tribunal that, with respect, the Court may have confused prevention of competition and choice with reduction of competition and choice. There is no evidence that this merger

will remove all competition in Atlantic Canada. Moreover, the Tribunal did not find that the merger would, or likely would, remove all competition in the propane supply market in Atlantic Canada. Finally, if the Court's statement concerning the elimination of consumer choice is a reference to Atlantic Canada, the Tribunal notes that it did not find that the merger would, or would likely, eliminate all consumer choice there.

E. INTERRELATED MARKETS

[250] Referring to the Appeal Judgment, the Commissioner submits that the merger will result in additional losses of efficiency (i.e. deadweight loss) and additional redistribution of income in interrelated markets. The Commissioner points out that only 10.7 percent of the combined volumes of propane sold by Superior and ICG in 1998 were for residential end-use applications, and that propane is used as an intermediate input in a variety of industries and businesses (Commissioner's Memorandum on Redetermination Proceedings, paragraphs 30-33 at 17-18).

[251] The Commissioner submits further that:

> An increase in the price of propane for these customers has the potential to increase the cost of goods produced or the services provided by these customers. Where an increase in propane prices results in a price increase for those other products, there will be additional resource misallocation (deadweight loss) and transfer effects beyond those identified above. These additional effects also result from the merger. While it is not feasible to quantify these effects, where, as here, the product involved represents a significant input in other products, this effect should be taken into account...
>
> (Commissioner's Memorandum on Redetermination Proceedings, paragraph 33 at 18)

[252] The respondents assert that the Commissioner has provided no evidence on the effects from the merger in interrelated markets.

[253] In the Tribunal's view, the issue here is whether an intermediate purchaser of propane will absorb the propane price increase or pass it on in some way. Whether the increase is large or small or whether propane is a significant input is not the issue.

[254] The statutory wording of section 96 requires the showing of "...effects of any prevention or lessening of competition that will result or is likely to result...". In the Tribunal's view, the Commissioner's reference to the "...potential to increase the cost of goods..." is an insufficient basis for inferring that the effects or likely effects thereof will occur or for estimating the magnitudes thereof even in a rough way. In the Tribunal's view, the Commissioner has alluded to, but has not established, the effects and consequently the Tribunal agrees with the respondents. The Tribunal comments further on this matter below.

[255] However, the Tribunal agrees that effects in related markets, where they are shown to arise from the lessening or prevention of competition, are important considerations under the Act and notes that the wording of subsection 96(1) provides for their inclusion. In particular, it is important to identify in

which of the interrelated markets the effects occur in order to assess whether the redistribution of income occurs from consumer to shareholder or between shareholders of different businesses.

F. LOSS OF POTENTIAL DYNAMIC EFFICIENCY GAINS

[256] The Commissioner submits that the merger will result in the loss of dynamic efficiency gains that would have been achieved by ICG's "transformation project". While these foregone gains are difficult to predict, the Commissioner submits that qualitative consideration thereof is warranted because this concern relates to the objective of efficiency and adaptability in the purpose clause of the Act. The respondents state that the Tribunal is functus officio as regards dynamic efficiencies.

[257] The Tribunal notes that ICG had adopted a new business model and was in the process of implementing various technologies when the merger occurred. The Commissioner notes:

> ...Whether the ICG model or the Superior model would have ultimately proved to be the more efficient remains an open question, however, what has been lost as a result of the merger are any potential dynamic efficiencies or enhanced competition that might have resulted over time from ICG's adoption of a technology-based approach to propane distribution...
>
> (Commissioner's Memorandum on Redetermination Proceedings, paragraph 78 at 32)

[258] To accept the Commissioner's claim, the Tribunal would have to accept that ICG's transformation plan would succeed in achieving dynamic efficiency gains and cost savings. While there is evidence that ICG planned to introduce certain new technologies, there is no evidence on the gains or savings therefrom; for example, no expert witness testified to the likelihood of these gains being achieved, their "dynamic" character, or their quantum, and accordingly, the loss of such gains appears speculative even, apparently, to the Commissioner. Accordingly, the Tribunal rejects the Commissioner's submission.

G. MONOPOLY

[259] In written argument, the Commissioner asserts that the creation of monopolies in 16 geographic markets for retail propane and the creation of monopoly in the "national accounts coordination services" market are qualitative effects that must be considered in the section 96 inquiry pursuant to the purpose clause of the Act (Commissioner's Memorandum on Redetermination Proceedings, paragraphs 67-73 at 29-31).

[260] In oral argument, the Commissioner characterizes the instant merger as a monopoly having regard not only to those 16 geographic markets, but also to the much larger number of geographic markets where market power will be created or enhanced and will be expressed in coordinated pricing behaviour by other propane suppliers therein (Transcript, vol. 1, October 9, 2001, at 92, lines 9-24 and at 94, lines 1-11).

[261] The respondents maintain that since section 96 concerns the "...effects of any lessening or prevention of competition...", the Commissioner must show additional effects of monopoly beyond

those which have already been included in the deadweight loss and redistribution of income, and that no such additional evidence has been presented. They also maintain that the decision of the Court requires consideration of monopoly as a factor under section 96 only when the merged firm will have a market share of 100 percent, such not being the case in the instant merger. Finally, the respondents introduce calculations showing that the effects (deadweight loss and redistribution of income) in the Commissioner's monopoly markets are small.

[262] The Court referred to the creation of monopoly as follows:

> [107] Another consequence of limiting the anti-competitive "effects" of a merger to deadweight loss is that it is irrelevant that the merger results in the creation of a monopoly in one or more of the merged entity's markets. According to the Tribunal, the fact that the merged entity of Superior and ICG will eliminate all consumer choice, and remove all competition, in the propane supply market, as it is likely to do in Atlantic Canada, for example, is not an "effect" that legally can be weighed under section 96 against the efficiency gains from the merger.
>
> [108] Again, such a conclusion seems to me to be so at odds with the stated purpose of the Act, namely "to maintain and encourage competition", and the statutory objectives to be achieved thereby, as to cast serious doubt on the correctness of the Tribunal's interpretation of section 96.
>
> (Appeal Judgment at 43)

(1) Definitional

[263] The Tribunal did not find that the merged entity of Superior and ICG would eliminate all consumer choice and remove all competition, in the propane supply market, and in particular it did not find that this was likely in Atlantic Canada.

[264] Even in those 16 markets described by the Commissioner's experts as "monopoly or near-monopoly markets", many consumers will have other product choices. The Tribunal accepted that, for the purposes of the section 92 inquiry, the product market was limited to "retail propane" and hence excluded other fuels pursuant to the criterion it adopted for market delineation (i.e. the five percent price increase of the "hypothetical monopolist" test). The result of that approach is the exclusion of alternatives that exist but are unlikely to be chosen. While other choices are available, it appeared to the Tribunal that they would not be chosen in sufficient quantities to meet the criterion it adopted, and hence those choices were excluded from the product market.

[265] To further illustrate the issues of market definition, the Tribunal refers to its finding that "national account coordination services" constitutes a separate product market and that the instant merger is a merger of the only two firms in Canada that currently provide the service (Reasons, at paragraphs 73-82). In the sense that only one supplier will remain after the merger, the merger can be said to create a monopoly in "national account coordination services".

[266] Nevertheless, it is not clear that a purchaser with propane requirements at many different locations will have "no choice". As the respondents argued, such firms will be able to obtain propane through regional and local suppliers and would even get a lower price for propane that would cover the apparently small incremental staffing cost to the national buyer. Moreover, as the Tribunal indicated in its Reasons, some national buyers of propane do in fact purchase propane this way. The Commissioner did not challenge that evidence at the first hearing.

[267] However, the Tribunal based its decision to delineate a separate product market on the witness testimony that indicated that certain national buyers would bear a significant increase in the price of propane by the merged firm rather than switch to these regional and local suppliers despite the apparent monetary savings. Accordingly, the merger cannot be said to eliminate all choice for those buyers; all that can be said is that after the merger, the remaining choices will be so unattractive to some national buyers that, despite the apparent economic advantage, they will not choose them. Hence, it was appropriate to delineate a separate product market for the purposes of the Tribunal's inquiry under section 92. The Tribunal did not characterize the merger as a monopoly in "national account coordination services".

[268] In the Tribunal's view, the term "monopoly" should be used with some appreciation of the definitional issues. The difficulty of defining monopoly outside of pure economic theory has been emphasized by Professors Trebilcock and Winter in an article cited by the Tribunal at paragraph 427 of its Reasons:

> ...To the layperson or undergraduate economics student, "monopoly" refers to a firm that sells free of any competitive discipline a product with no substitutes. A monopoly so-defined is fictional. Every product has some alternatives, if only because a consumer can keep the "cash" to purchase other commodities and services. Market power is a matter of degree, so a "monopoly" is not categorically defined...
>
> (M. Trebilcock and R. Winter, *The State of Efficiencies in Canadian Merger Policy*, Canadian Competition Record, Winter 1999-2000, vol. 19, no. 4, at 108)

[269] Professor Ware made similar observations:

> Monopolies are much in the news in turn of the century Canada. Perhaps prompted by the Propane case as well as the merger of Air Canada and Canadian Airlines, there has been a virtual cacophony of "monopoly" allegations in the press. The implication seems to be that one only has to make this label stick to a proposed grouping or reorganization in order to bring down the wrath of competition law justly upon it.
>
> Although the term "monopoly" has a ring of precision to it, and forms a foundation stone for every student's introduction to economics, many would be surprised to learn that as an economic concept, the term monopoly is quite misleading and almost vacuous...
>
> The fact that monopoly is not a robust economic concept does not mean that competition policy and antitrust economics are ill-conceived. Rather, they are properly concerned

with the search for market power and its abuse, not for monopoly, or even "monopolization". If predicated on the search for market power, the term monopoly can be understood more accurately as the product of an exercise in the definition of an antitrust market. What a merger to monopoly in this sense would mean is that for some products, firms involved in a proposed merger would have sufficient market power post-merger to profitably raise price by 5% (holding all other prices constant and abstracting from several factors...). The process of market delineation, as set out in the merger guidelines of Canada (and the United States) is not a process of identifying "monopoly" or even pure economic market power. It is a legal and procedural device designed as a step, albeit an important step, in a sequence of investigations established to identify the possibility that market power will increase as a consequence of a merger. Note that this exercise does *not* conclude that there are no other substitutes for the candidate products (so that the merger actually creates, in an economic sense, a monopoly); but, rather that a merger has the potential to create a minimum degree of market power. I use the term potential because subsequent steps in the analysis must consider the likelihood of entry within an adequate time period, the effect of capacity constraints, whether countervailing buyer power might exist, the implications of the merger for innovation, etc.

> Monopoly, then, is at best an elusive concept. The Tribunal and the Competition Bureau have, hitherto, largely recognized that such structural identifiers are only tools in the evaluation of market power and its consequences for economic efficiency...
>
> (R. Ware, *Efficiencies and the Propane Case*, International Antitrust Bulletin, Vol. 3, Issue 3, Fall/Winter 2000 at 17-18)

(2) Statutory History and Related Provisions

[270] Although the Act does not provide a definition of the term "monopoly", its predecessor statute did. Section 33 of the *Combines Investigation Act* stated:

> Every person who is party or privy to or knowingly assists in, or in the formation of, a merger or monopoly is guilty of an indictable offence and is liable to imprisonment for two years.

Section 2 thereof provided a definition of "monopoly":

> "monopoly" means a situation where one or more persons either substantially or completely controls throughout Canada or any area thereof the class or species of business in which they are engaged and have operated such business or are likely to operate it to the detriment or against the interest of the public, whether consumers, producers or others, but a situation shall not be deemed a monopoly within the meaning of this definition by reason only of the exercise of any right or enjoyment of any interest derived under the *Patent Act*, or any other Act of the Parliament of Canada.

[271] Under the amendments of 1986 to the *Combines Investigation Act*, merger is now a civil rather than a criminal offense. Since the definition of monopoly under section 2 of the *Combines Investigation Act* was not carried into the new Act, the Tribunal can assume only that that definition was not intended

to be used. Indeed, the absence of any definition of monopoly indicates only that Parliament felt that none was needed under the Act as amended.

[272] Under section 92, the Tribunal must decide whether a merger lessens or prevents competition substantially and, per subsection 92(2), it cannot so find solely on the basis of evidence of market share or concentration. Accordingly, even a merger to market share of 100 percent does not automatically violate section 92. Only after its consideration of entry and other factors can the Tribunal conclude that such merger will lessen or prevent competition substantially. Labelling such a merger as a "monopoly" neither adds to, nor detracts from, the Tribunal's required inquiry, which concerns the ability to exercise market power. The Tribunal is of the view that the creation of monopoly is irrelevant to its task under the merger provisions of the Act.

[273] It is noteworthy that the offence of "monopolization" under the *Combines Investigation Act*, was decriminalized in 1986. The provisions thereof were amended and were included under "abuse of a dominant position" in section 79 of the amended Act. Accordingly, assuming a monopoly could be adequately defined, its formation does not constitute an offence under that section; indeed, nor is the occurrence of an anti-competitive act by such entity proscribed. Rather, the Commissioner is required to demonstrate dominance, a practice of anti-competitive acts, and the substantial lessening or prevention of competition that results from that practice.

[274] As further indication that the civil provisions of the Act are not hostile to monopoly per se, the Tribunal refers to section 86 which allows the Tribunal to order the registration of a specialization agreement, and thereby to permit monopoly or elements thereof, when gains in efficiency are sufficiently large, i.e. when:

> ...the implementation of the agreement is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from the agreement and the gains in efficiency would not likely be attained if the agreement were not implemented...
>
> (Act, paragraph 86(1)(a))

Thus, an agreement that might otherwise be struck down as a criminal conspiracy may be registered when the gains in efficiency from the agreement are shown to meet essentially the same test as applies to mergers under subsection 96(1).

[275] If the Court intended the creation of a monopoly to be a factor to be considered in conducting the subsection 96(1) inquiry then, *mutatis mutandis*, that view must also apply to specialization agreements because the efficiency test is the same. However, section 86 specifically authorizes the creation of monopoly or elements thereof through specialization agreements. It would make no sense to require the Tribunal to consider the creation of a monopoly as a negative effect of a specialization agreement when, by law, monopoly is permitted, indeed, desired, in that form.

(3) Section 96 Applies to this Merger

[276] Writing in partial dissent of the Court, Létourneau, J.A. states that

> ...section 96 was not meant to authorize the creation of monopolies since it would defeat the purpose of section 1.1. This section was not intended to authorize mergers resulting in monopolies whereby, contrary to section 1.1, competition is eliminated, small and medium-sized enterprises are not able to enter or survive in the market and consumers are deprived of competitive prices.
>
> (Létourneau, J.A., Appeal Judgment, paragraph 15 at 8-9)

[277] If, as it appears, Létourneau, J.A. is suggesting that the efficiency defence should not be available when mergers lead to structural monopolies then, with respect, he must be wrong. Defining monopoly as 100 percent market share, the Commissioner argued at the first hearing that section 96 was not available to such mergers as a matter of law, although mergers to a market share of 96 percent would be reviewed in a different way. As discussed in its Reasons, at paragraphs 418-419, the Tribunal held otherwise and the Court did not disturb this conclusion saying, rather, that the Tribunal should consider the purpose clause of the Act when analysing the effects under section 96. For this reason, the Commissioner no longer maintains the position taken at the first hearing.

[278] As noted above, Bills C-42 and C-13 made the efficiency defence unavailable when the merger would result in virtually complete control of a product in a market. This provision was not included in Bills C-29, C-91 or the Act.

[279] If Létourneau, J.A. is commenting on the instant transaction then, with respect, he must be largely mistaken about its effects. The merger, while it lessens and prevents competition substantially, does not eliminate all competition and does not prevent entry by small and medium-sized businesses and does not prevent their survival in the market. Yet it is an anti-competitive merger and it does deprive consumers of competitive prices.

[280] It follows therefore, that in terms of the section 96 inquiry, the finding of monopoly according to any particular definition thereof is irrelevant. If the creation of a so-called monopoly is not per se sufficient to justify a conclusion of substantial lessening or prevention of competition under section 92 of the Act, then its creation cannot be a bar to the application of section 96. The Court did not interfere with the Tribunal's decision that the defence in section 96 applies to the instant merger. Since section 96 compares efficiency gains with the "...effects of any prevention or lessening of competition that will result or is likely to result from the merger...", the Court must have meant that there were effects of the substantial lessening on the record that the Tribunal had not considered.

[281] Absent a statutory definition of monopoly, the Tribunal concludes that for the purposes of the Act, monopoly can be defined only as an entity with a high degree of market power. Indeed, by referring to markets not considered to be "monopoly or near-monopoly", the Commissioner advocated such in oral argument. Accordingly, its effects for the purposes of section 96 of the Act are those efficiency and redistributive effects associated with any other exercise of market power; if there are other effects associated with the concept of monopoly, then they must be proven. However monopoly may be defined, a merger thereto is not more objectionable under the Act than other instances of substantial lessening or prevention of competition unless additional effects are shown.

[282] In the Tribunal's opinion, the definitional problem reflects differences of opinion regarding the relationship between section 96 and the purpose clause. As it stated in its Reasons, the Tribunal views section 96 as a clear instruction that competition is not be to maintained or encouraged as otherwise required by the purpose clause. On this view, the Tribunal's task is clear; there is no conflict in the operation of these two important provisions.

(4) Additional Effects

[283] It is clear from the history of American antitrust law that the conjoining of economic power and political power was a clear concern. Other values were also protected under American antitrust law, including job loss, effects on local communities, and decentralization by the absolute protection of small businesses. These effects are clearly matters that would have to be considered qualitatively if they were held to be effects for the purpose of section 96. Apart from the effect on small and medium-sized enterprises, such effects were not held to result from the instant merger.

[284] The larger issue in regard to most of these concerns is that they are not connected to any of the objectives of Canadian competition policy, so it will be difficult to introduce them into the inquiry under section 96. For example, the Tribunal observed that job loss resulting from an anti-competitive merger was not an effect of lessening of competition for the purpose of section 96 because such losses also result from mergers that are not anti-competitive and in that case the Commissioner can take no notice thereof under the Act (Reasons, at paragraphs 443-444).

[285] The Tribunal agrees with the respondents that, having considered all of the concerns raised by the Commissioner (i.e. deadweight loss, interdependent pricing, service quality, etc.) to consider, in addition, the creation, *per se*, of monopoly as a qualitative factor under section 96 is to double-count those effects (Respondents' Memorandum on Redetermination Proceedings, paragraph 87 at 40). Accordingly, the Commissioner must demonstrate those effects of monopoly which have not yet been considered; however, no such effects have been shown.

H. SMALL AND MEDIUM-SIZED ENTERPRISES

[286] Referring to the Appeal Judgment, the Commissioner submits that, in its inquiry under section 96, the Tribunal should consider the impact of the merger on small and medium-sized enterprises in view of the reference thereto in the purpose clause of the Act.

[287] The Commissioner cites the following:

- expert evidence that the market power this merger confers on Superior will allow it to discipline competitors by selectively lowering prices and thereby squeezing competitors in certain markets (Commissioner's Memorandum on Redetermination Proceedings, paragraph 56, at page 26)

- an internal document in which a Superior branch manager states that ICG and Irving each gained a commercial account at Superior's expense and that Superior would retaliate if the "trend" continued (Commissioner's Memorandum on Redetermination Proceedings, paragraph 58, at pages 26-27)

- an internal ICG document in which an ICG employee in Alberta states that ICG retaliated against Canwest and Cal-Gas and that the latter is now “pricing responsibly” (Commissioner’s Memorandum on Redetermination Proceedings, paragraph 59, at page 27)

- the testimony of Mr. Edwards that he did not want to establish operations in a market with only one major competitor (Commissioner’s Memorandum on Redetermination Proceedings, paragraph 60, at page 27)

- evidence that Superior retaliated against Imperial Oil’s attempted entry (Commissioner’s Memorandum on Redetermination Proceedings, paragraphs 61-62, at pages 27-28)

- one witness’ testimony that he was concerned with predatory pricing and the confidential testimony of another that prices are sometimes so low that he finds it difficult to survive (Commissioner’s Memorandum on Redetermination Proceedings, paragraphs 63-64, at page 28)

- expert evidence that the acquisition of ICG makes it more likely that Superior will discipline competitors engaged in aggressive discounting by meeting their prices (Commissioner’s Memorandum on Redetermination Proceedings, paragraphs 63-64, at page 28)

The Commissioner also asserts, but does not show, that the merger increases Superior’s ability to effectively deter expansion or entry of small and medium-sized propane suppliers with restrictive practices known to increase rivals’ costs or decrease rivals’ revenues (Commissioner’s Memoramdum on Redetermination Proceedings, paragraphs 56-66 at 26-29).

[288] The respondents state that small competitors will benefit from the merger to the extent that they follow the price increases of the merged firm and hence will not be harmed. They also state that the Tribunal is *functus officio* regarding deterrence of entry and expansion, disciplining of competitors, and the qualitative effects flowing from entry restriction (Respondents’ Memorandum on Redetermination Proceedings, paragraphs 79-85 at 37-40).

[289] The Tribunal takes the witness claims of predatory pricing seriously, but regards the testimony of the two competitors cited by the Commissioner as insufficient to establish predation. The Act is concerned with predation but there is no indication that any of these firms complained to the Commissioner about the pricing behaviour of Superior or of ICG prior to the merger. Moreover, the suggestion of predatory pricing is made by two competitors that remain in the industry. Distinguishing between predatory conduct and aggressive competition requires more evidence than is available here. In this regard, some of the cited testimony is confidential. Having reviewed the confidential transcript, however, the Tribunal regards this evidence as speculative and it cannot find predation or the likelihood thereof on the strength of such testimony.

[290] The Tribunal accepted the evidence that new entrants or smaller firms seeking to expand find it difficult to compete for customers of Superior and ICG, in part, because of those firms’ practice of writing customer contracts with certain anti-competitive provisions; 90-95 percent of both firms’ customers are under standard form contracts (Reasons, at parapraph 132). As the Tribunal noted, there

was some suggestion that Superior was considering relaxing some of these provisions if the merger proceeded, and there was discussion whether Superior's plans in this regard would be effective. Nonetheless, there is no evidence that the conditions of entry will be more difficult in this regard after the merger.

[291] The Commissioner's examples of competitor discipline do not establish that Superior disciplined its small competitors; ICG, Irving, and Imperial Oil are certainly not small or medium-size businesses. That ICG apparently disciplined the regional firms is not evidence that Superior did so.

[292] The Commissioner cites the experience of Mr. Edwards, who chose to locate his new propane business near London, Ontario. A former president of Superior, Mr. Edwards testified that he established his propane marketing business near London for a combination of personal and business reasons. His complete testimony is:

> MR. EDWARDS: One was a personal one. I had moved from Toronto to London to do something else, and that didn't work out, so when I decided to re-enter the business, I was in London. Also, it's very close to the Sarnia infrastructure, which is the principal supply point in North America. The economies between Windsor and Toronto are very stable and often buoyant and steady, stable kinds of economies. There was – I didn't want to find myself competing in a market where I had one competitor.
>
> MR. MILLER: Why is that?
>
> MR. EDWARDS: Well, I had experienced that previously when I was out in Atlantic Canada. I competed nose to nose with the Irvings. If you move to Atlantic Canada to compete against the Irvings, I think you have an appreciation for what nose-to-nose competition with the Irvings would be like. It would be aggressive, at best.
>
> I chose London because there is a variety of competitors serving a variety of markets, so I thought if I was going to enter the business, I would be better to enter it in that form.
>
> MR. MILLER: In that there is more room to move against smaller independents?
>
> MR. EDWARDS: If you duke it out with one major competitor, I suppose – my experience with the Irvings was that the duking out, it can be fairly punishing for a new entrant.
>
> I thought if I positioned myself amidst a variety of competitors, I could incrementally compete with them a little bit here, a little bit there.
>
> (Transcript, vol. 8, October 6, 1999, at 1070, line 11 to 1071, line 20)

[293] Mr. Edwards was president and chief executive officer of Superior until May 1996, and he incorporated his propane business in London, Ontario in June 1997 (Transcript, vol. 8, October 6, 1999, at 1063). Accordingly, his experience with the Irvings must have been during his tenure at Superior. Hence, his testimony must be taken to mean that Superior found it difficult to compete with Irving in

Atlantic Canada, not that Irving "punished" small and medium-sized competitors, although it may be true.

[294] The Commissioner cites the expert evidence of Professors Schwindt and Globerman, who testified that by eliminating ICG as a competitor, the merger would provide a greater incentive for Superior to meet price reductions by independent firms that competed actively on price; it would not have to share the eventual benefits of this disciplining strategy with ICG. In this way, independent firms (presumably, small and medium-sized enterprises) would be less inclined to compete on price. This expert opinion evidence was not challenged by the respondents at the first hearing, and the Tribunal accepted that evidence of the likely market structure in many geographic markets in coming to its decision that the merger lessened competition substantially.

[295] The respondents submit that the Tribunal is *functus officio* with respect to the evidence of deterrence of entry and expansion, disciplining of competitors, and the qualitative effects flowing from entry restriction. The Tribunal considered the evidence on these matters in connection with its inquiry under section 92 of the Act. It cannot reconsider its findings or entertain new evidence. However, in light of the Appeal Judgment of the Court, the Tribunal must now consider, based on evidence available on the record, the effects of the merger on small and medium-sized enterprises in its inquiry under section 96 that it did not consider in its first Reasons.

[296] In the Tribunal's view, while the Commissioner has not shown that Superior behaved aggressively toward its small and medium-sized competitors, the Commissioner has provided a reasonable basis for believing that this merger will likely result in coordinated pricing by its small and medium-sized competitors. The Commissioner does not dispute the respondents' claim that these competitors will likely experience higher margins and profits in consequence as the respondents suggest; rather, the Commissioner maintains that the resulting market structure is contrary to the goal of competition in the purpose clause of the Act, and that the impact on small and medium-sized competitors is inconsistent with an equitable opportunity to participate in economic activity as stated therein.

[297] According to the Court, the impact of an anti-competitive merger on small and medium-sized enterprises is an effect of lessening or prevention of competition to be considered under subsection 96(1). The Court expresses its concern at several points in its Appeal Judgment. At paragraph 4, the Court suggests that "...the elimination of smaller competitors from the market..." is an effect that should be considered.

[298] The Tribunal observes that there is no evidence in this case that the merger eliminates smaller competitors from the market, and the Commissioner does not submit such. In the Tribunal's view, the Commissioner is concerned that smaller competitors will choose to price interdependently rather than offer competitive challenge to the merged firm. The concern expressed by Professors Schwindt and Globerman was not predatory behaviour by the merged firm; rather, they used the words "retaliation" and "squeeze" to indicate interdependence. In their expert report, predation is not mentioned even once (Report of R. Schwindt and S. Globerman, exhibit A-2056, (August 16, 1999) at 25-41).

[299] At paragraph 69 of the Appeal Judgment, the Court concludes that the determination of the effects to be considered under section 96, including "...the impact on competing small and medium sized businesses...", is a question of law. At paragraph 88, the Court concludes that these effects should

> ...include the other statutory objectives to be served by the encouragement of competition that an anti-competitive merger may frustrate, such as the ability of medium and small businesses to participate in the economy...

[300] The purpose clause of the Act states that when competition is maintained and encouraged, an equitable opportunity to participate in economic activity will be afforded to small and medium-sized enterprises. If the Tribunal is to consider the effect of an anti-competitive merger on small and medium-sized enterprises in the inquiry under subsection 96(1), then it must determine whether the merger denies those enterprises an equitable opportunity to participate in economic activity.

[301] When those enterprises are competitors of the merged firm, it will not suffice to determine that the merger has a negative impact on them. Many mergers that are not anti-competitive will negatively affect smaller competitors and may indeed cause them to reposition or exit, but such mergers do not deny an equitable opportunity of smaller competitors to participate in economic activity. What must be shown is that the effect on small and medium-sized enterprises is an effect of the lessening or prevention of competition. That smaller competitors will begin to price in an interdependent/coordinated fashion in many relevant markets is a lessening of competition. While there may be deadweight loss and redistributive effects, there is, as noted above, no evidence thereof.

[302] Alternatively, the small and medium-sized enterprises may be customers of the merged firm. In reply, the Commissioner states that the opportunity to charge anti-competitive prices is incompatible with the objective of the purpose clause of the Act that relates to an equitable opportunity for small and medium-sized businesses to participate in the economy:

> The paragraph quoted in fact says the opposite of the Respondents' characterization. It says that the Tribunal should not focus on one effect of the merger to the exclusion of the others; it does not say that any effect that benefits small business must be considered as a positive effect. *It refers to the wording of the Act, which relates to an equitable opportunity for small and medium-sized businesses to participate in the economy. That does not include an opportunity to charge anti-competitive prices.* Indeed, the Court also refers to the goal of the availability to consumers of a choice of goods at competitive prices, which is antithetical to the "positive" effect, cited by the Respondents, of a price increase resulting from an anti-competitive merger and subsequent price coordination amongst propane suppliers to exploit that increase.
>
> (Commissioner's Reply Memorandum on Redetermination Proceedings, paragraph 76 at 29) [Emphasis (italics) added]

[303] In the Tribunal's view, the emphasized statement cannot be correct. If the purpose clause gave small and medium-sized business customers the absolute right to competitive prices, there would be an irreconcilable conflict between section 96 and the purpose clause because the former permits an anti-competitive merger when its requirements are met. In the Tribunal's view, the purpose clause does not

grant absolute entitlements; even the objective of efficiency and adaptability is not absolute but is, rather, based on the result of a tradeoff analysis. Section 96 accords the efficiency objective in merger review priority over the other objectives only when its requirements are met. Accordingly, small and medium-sized business customers do not lose an equitable opportunity to participate in economic activity when the anti-competitive merger and the higher price are permitted by section 96. Similarly, small business customers of a firm that is part of a registered specialization agreement may also pay supra-competitive prices, yet the Act allows such agreements when the requirements of section 86 are met. An equitable opportunity to participate is not an absolute right to competitive prices granted by the purpose clause of the Act.

[304] More generally, since, as in section 96, the statute explicitly permits an anti-competitive merger to proceed subject to certain conditions being met, it is illogical and contradictory to require that those conditions include the attainment of results that would be achieved under competition. Such an approach surely vitiates the statutory provision in section 96. Since this cannot be what the Court meant, it must be correct for the Tribunal to focus on the denial of an equitable opportunity of small and medium-sized businesses to participate in economic activity.

[305] To find the denial of an equitable opportunity of small and medium-sized enterprises to participate requires a demonstration that anti-competitive conduct offensive under the Act (i.e. section 79 or section 50) is taking place or will likely take place. On the evidence in this case, the Tribunal cannot conclude that small and medium-sized competitors and customers will lose an equitable opportunity to participate in economic activity.

VII. <u>REDISTRIBUTIVE EFFECTS (THE WEALTH TRANSFER)</u>

[306] The Tribunal recognized the redistributive effects of the instant merger, but treated them as offsetting because it concluded that the Total Surplus Standard was the applicable standard; hence, the redistributive effects were, on balance, socially neutral. The Court concluded that the Tribunal

> ...erred in law when it interpreted section 96 as mandating that, in all cases, the only effects of an anti-competitive merger that may be balanced against the efficiencies created by the merger are those identified by the total surplus standard...
>
> (Appeal Judgment, paragraph 139 at 54)

Accordingly, among the effects which the Tribunal must consider are the redistributive effects based on the evidence available in the record.

A. COMMISSIONER'S POSITION

[307] The Commissioner asserts that the higher price that will result from the merger will have the effect of transferring $40.5 million from propane consumers to shareholders of the merged firm annually. In the Commissioner's view, this is a "measured effect" of the merger that should be added to the other measured effects for the purpose of assessing all of the merger's effects. The Commissioner also submits that once the estimated size of the transfer has been quantified, the Commissioner's burden has been satisfied and that the respondents must demonstrate with appropriate evidence that

some other treatment for the transfer is appropriate (Commissioner's Memorandum on Redetermination Proceedings, paragraphs 92-93 at 38-39).

[308] The Commissioner submits that it is important to distinguish between producers (i.e. shareholders of the merged firm) and consumers of propane even if the former are also consumers thereof. Under the purpose clause of the Act, the concern for competitive prices to consumers requires that the entire redistributional effect be taken into account (Commissioner's Memorandum on Redetermination Proceedings, paragraphs 26-29 at 15-17).

[309] In taking this view, the Commissioner refers to decisions in criminal cases under the Act and its predecessor statutes pursuant to which the objective of competition law is free competition for the public at large and that injury to the public from supra-competitive prices cannot be justified. Accordingly, "...[a] wealth transfer which arises from the direct exercise of market power and the imposition of increased prices *prima facie* offends the purpose and objectives of the Act." (Commissioner's Reply Memorandum on Redetermination Proceedings, paragraph 92 at 34-35).

[310] The Commissioner notes that an alternate treatment of the transfer is provided in the opinion in dissent of Tribunal Member, Ms. Lloyd, who concluded that the wealth transfer should be considered from a qualitative perspective (Commissioner's Memorandum on Redetermination Proceedings, paragraph 102 at 42-43). However, the Commissioner does not advocate this view.

[311] A third approach to the wealth transfer was that offered by Professor Townley, who would consider whether the Balancing Weights Approach is reasonable based on the evidence regarding the distributional aspects of the merger (Commissioner's Memorandum on Redetermination Proceedings, paragraph 110 at 45). However, the Commissioner states that Professor Townley's approach has been superseded by the Court's Appeal Judgment which recognizes the significance of the transfer itself. While adopting the Townley approach would, in the Commissioner's submission, lead the Tribunal to disapprove the merger (Commissioner's Reply Memorandum on Redetermination Proceedings, paragraph 100 at 38), the Commissioner does not rely on that approach.

[312] In the Commissioner's further submission, Professor Townley's Balancing Weights Approach is "...simply a tool that is available to assist the Tribunal in performing the tradeoff..." and that it is the respondents' burden to satisfy the Tribunal on the ultimate issue with respect to section 96 (Commissioner's Memorandum on Redetermination Proceedings, paragraph 119 at 480) [Emphasis in original]. According to the Commissioner, it is not necessary to consider the disproportionate effect on relatively low-income families and small, rural businesses that Professor Townley described in his report (Commissioner's Memorandum on Redetermination Proceedings, paragraph 116 at 47).

[313] The Commissioner submits that as a result of the Appeal Judgment of the Court, the new approach adopted by his senior advisors in regard to assessing the transfer following the Commissioner's rejection of the Total Surplus Standard in the MEGs also reflected an incorrect and overly narrow interpretation of the Act (Commissioner's Reply Memorandum on Redetermination Proceedings, paragraph 99 at 37-38). Accordingly, the Commissioner no longer relies on that approach, which was emphasized at the first hearing.

B. RESPONDENTS' POSITION

[314] The respondents submit that in its Appeal Judgment, the Court did not prescribe the correct methodology for assessing the effects under subsection 96(1). Accordingly, and in light of that Judgment, the Tribunal must fully assess the particular fact situation before it and consider only that portion of the wealth transfer that the Commissioner has shown to have adverse distributional impact and is important in its magnitude (Respondents' Memorandum on Redetermination Proceedings, paragraphs 100-101 at 45-46).

[315] They further submit that the Commissioner's own position in law at the first hearing was that articulated by Mr. G. Allen, a senior advisor in the Bureau of Competition Policy, and that that approach seeks to determine the significant adverse redistributive effects of the transfer. That approach is consistent with Professor Townley's approach and, consistent with these experts, the entire income transfer cannot automatically count against the merger (Respondents' Memorandum on Redetermination Proceedings, paragraphs 106-108 at 48-49).

[316] They submit that the Commissioner has now adopted the Consumer Surplus Standard, and they point out that Professor Townley testified that that standard involves an a priori fixed weight and was inconsistent with traditional welfare economics (Respondents' Memorandum on Redetermination Proceedings, paragraph 122 at 54-55 and paragraph 125 at 56-57).

[317] The respondents cite witness testimony that propane expenditure is a small fraction of the buyer's total expenditures (Respondents' Memorandum on Redetermination Proceedings, paragraph 130 at 59) and that the effect of an eight percent price increase is a transfer of less than one percent of annual income of the buyer. While denying that there is evidence of an average eight percent price increase, they suggest that the income transfer therefrom would be inconsequential (Respondents' Memorandum on Redetermination Proceedings, paragraph 131 at 59).

[318] The respondents assert that the redistributional effect of the merger is not adverse. They argue that the transfer of income will, in part, be between shareholders of the merged company and the shareholders of large, publicly-owned enterprises that buy propane, and the shareholders may even be the same persons. Further, many of Superior's largest customers are controlled by substantial foreign investors whose interests are not protected by the Act, particularly under the purpose clause thereof (Respondents' Memorandum on Redetermination Proceedings, paragraphs 133-136 at 60-62).

[319] They also state that propane consumers are not generally poor or needy and that there is no evidence to the contrary. Many consumers are large industrial and agricultural concerns and wealthy individuals. They refer to Professor Townley's expert report (exhibit A-2081) that cited results of a survey of propane consumers by the Canadian Market Research Ltd. survey in 1997 ("CMR Study"), finding that 10 percent of residential customers studied used propane to heat their swimming pools. They also assert that the CMR Study is of limited scope, and they question why income transferred from people who use propane to heat second homes, cottages or ski chalets should be treated as a negative effect. They submit that the Commissioner has the burden of justifying that treatment (Respondents' Memorandum on Redetermination Proceedings, paragraphs 138-147 at 62-67).

[320] The respondents further submit that there is no evidence on the importance of the income effect on agricultural and auto-propane buyers. They conclude that there is no evidence that the redistributional impact of the merger is adverse, and that adopting the approaches of G. Allen and Professor Townley results in a neutral treatment of the wealth transfer (Respondents' Memorandum on Redetermination Proceedings, paragraphs 148-150 at 67-68).

C. DECISION OF THE COURT

[321] At paragraph 74 of its Appeal Judgment, the Court disagreed with the Tribunal's interpretation of the purpose clause of the Act and stated that it should not be read subject to the specific and contrary provisions of section 96. In paragraph 75, the Court describes the test to be applied under subsection 96(1) as a "balancing test". At paragraph 77, the Court states that

> In referring to "the effects of any prevention or lessening of competition", subsection 96(1) does not stipulate what effects must or may be considered. When used in non-statutory contexts, the word, "effects", is broad enough to encompass anything caused by an event. Indeed, even though it does not consider the redistribution of wealth itself to be an "effect" for the purpose of section 96, the Tribunal *recognizes*, as all commentators do, that one of the de *facto* effects of the merger is a redistribution of wealth...
>
> (Appeal Judgment, at 32)

[322] With reference to Reed J.'s comments *obiter dicta* in the Hillsdown decision at paragraph 131 of the Appeal Judgment, to the dissenting view of Ms. Lloyd at paragraph 132, to the treatment of the wealth transfer under the Horizontal Merger Guidelines, paragraphs 135-136, approvingly to certain American commentators on the interpretation of section 96 in the Commissioner's MEGs, paragraph 137, and in opposition to the views of "lawyer-economists" in the United States, paragraph 138, the Court concludes that

> ...the Tribunal erred in law when it interpreted section 96 as mandating that, in all cases, the only effects of an anti-competitive merger that may be balanced against the efficiencies created by the merger are those identified by the total surplus standard...
>
> (Appeal Judgment, paragraph 139 at 54)

[323] The Court further concluded that it should not prescribe the correct methodology, such task being beyond the limits of the Court's competence (Appeal Judgment, at paragraph 139). It also stated that:

> Whatever standard is selected (and, for all I know, the same standard may not be equally apposite for all mergers) must be more reflective than the total surplus standard of the different objectives of the *Competition Act*. It should also be sufficiently flexible in its application to enable the Tribunal to fully assess the particular fact situation before it.
>
> (Appeal Judgment, paragraph 140 at 54)

[324] The Court then suggested that the Balancing Weights Approach of Professor Townley was consistent with its broad requirements:

> It seems to me that the balancing weights approach proposed by Professor Townley, and adopted by the Commissioner, meets these broad requirements. Of course, this approach will no doubt require considerable elaboration and refinement when it comes to be applied to the facts of particular cases.
>
> (Appeal Judgment, paragraph 141 at 55)

D. TRIBUNAL'S ANALYSIS OF THE TRANSFER

[325] On the basis of the above, the Tribunal must now determine how to treat the redistributive effect (i.e. the transfer of wealth) based on the submissions of the parties, while taking instruction from the Court.

(1) General

[326] There is some confusion over terminology. The Tribunal does not consider the redistribution of income that results from an anti-competitive merger to be an "anti-competitive effect". Rather, having regard to the decision of the Court, and referring to the wording of subsection 96(1), the redistributional impacts are among the effects of lessening or prevention of competition that the merger brings about or is likely to bring about. Redistribution of income and/or wealth occurs in many different ways in society, and often has nothing to do with competition policy. For example, government may redistribute income through the tax system or through public expenditures without transferring income anti-competitively.

[327] The Tribunal notes the distinction for greater certainty because it is a distinction that is not made by the Court:

> Nonetheless, the *Horizontal Merger Guidelines, supra*, in the United States continue to treat the exercise of market power leading to an increase in price above the competitive level as the most important anti-competitive effect of a merger, and the resulting wealth transfer from the consumers to the producers, as a misallocation of resources: see P.T. Denis...
>
> (Appeal Judgment, paragraph 135 at 53)

At places in its Appeal Judgment the Court appears to refer to the redistributional effect as an anti-competitive effect, but such reference may reflect a convenient vocabulary rather than a statement of judicial understanding. In line with conventional economic analysis, the Tribunal does not regard the wealth transfer as anti-competitive or as a misallocation of resources. An anti-competitive effect is a misallocation of resources that reduces society's aggregate real income and wealth. A transfer redistributes income and wealth within society but does not reduce it.

[328] Whatever the practice or terminology may be in the United States, the Tribunal seeks to distinguish these two sets of effects. In its Reasons, the Tribunal distinguished between the resource-allocation effects of an anti-competitive merger and the redistributive effects (Reasons, at paragraphs 422-425). It stated that it did not regard the redistributive effects of a merger as anti-competitive (Reasons, at paragraph 446), which does not preclude giving consideration to those effects.

[329] In the simplest analysis, the redistribution of income that results from an anti-competitive merger of producers has a negative effect on consumers (through loss of consumer surplus) and a corresponding positive effect on shareholders (excess profit). Whether these two effects are completely or only partially offsetting is a social decision that, in Professor Townley's words, requires a value judgment and will depend on the characteristics of those consumers and shareholders. In some cases, society may be more concerned about one group than the other. In that case, the redistribution of income will not be neutral to society but rather will be seen as a social cost of, or social gain from, the merger.

Yet it is rarely so clear where or how the redistributive effects are experienced. As Williamson notes:

> For some products, however, the interests of users might warrant greater weight than those of sellers; for other products, such as products produced by disadvantaged minorities and sold to the very rich, a reversal might be indicated. But a general case that user interests greatly outweigh seller interests is not easy to make and possibly reflects a failure to appreciate that profits ramify through the system in ways–such as taxes, dividends, and retained earnings–that greatly attenuate the notion that monolithic producer interests exist and are favored...
>
> (O. Williamson, *Economies as an Antitrust Defense Revisited*, volume 125, No. 4, University of Pennsylvania Law Review, 1977, 699, at 711)

When viewed in this light, the redistributive effects are generally difficult to identify correctly, and will involve multiple social decisions. Given the informational requirements of such assessments, the assumption of neutrality could be appropriate in many circumstances.

[330] The Court notes favourably the views of Madame Justice Reed expressed in obiter dicta in the **Hillsdown** decision. In commenting on the Total Surplus Standard in *Hillsdown*, Madame Justice Reed questioned whether the redistributional effects were always offsetting and hence socially neutral. In her example of a life-saving drug, she questioned whether society was unaffected by the redistribution from ailing consumers to shareholders of the producer when it exercised its market power and raised the price of the drug. Accordingly, Madame Justice Reed appeared to articulate the view that the redistributional effects might not always be socially neutral; yet she did not state that this was always the case so that the assumption of neutrality could be appropriate, presumably in less dire circumstances.

[331] In criticizing the Consumer Surplus Standard, Professor Townley offered an example in which shareholders of a producer of a luxury good were less wealthy than the buyers (Townley Report, exhibit A-2081 at 32). In such cases, the exercise of market power would result in excess profits to the less wealthy group and would be seen as socially positive, rather than neutral. Such examples need not

be far-fetched; mergers among airlines may benefit travellers who, on average, may be better off than the shareholders thereof; similarly, mergers among taxi owners, or among owners of ski resorts.

[332] In its Appeal Judgment, the Court noted the following:

> ...Proponents of the total surplus standard argue that there is no economic reason for favouring a dollar in the hands of consumers of the products of the merged entity over a dollar in the hands of the producers or its shareholders, who are, after all, also consumers. Moreover, in the absence of complete data on the socio-economic profiles of the consumers and of the shareholders of the producers, it would be impossible to assess whether the redistributive effects of the wealth transferred as a result of the higher prices charged by the merged entity would be fair and equitable: paragraphs 423-425.
>
> (Appeal Judgment, paragraph 27 at 13-14)

The Tribunal can only agree that such information is required to determine the fairness and equity of the resulting distribution of income under a standard other than the Total Surplus Standard.

(2) Tribunal's Approach to the Redistributive Effects

[333] Having regard to the comments, in *obiter dicta*, of Madame Justice Reed in *Hillsdown* cited above, and to the favourable view thereof of the Court, the Tribunal must accept that the redistributional effects can legitimately be considered neutral in some instances, but not in others. Fairness and equity require complete data on socio-economic profiles on consumers and shareholders of producers to know whether the redistributive effects are socially neutral, positive or adverse. While complete data may never be attainable, the Tribunal must be able to establish on the evidence the socially adverse effects of the transfer.

[334] It is true, as the Commissioner submits, that the purpose clause of the Act does not discriminate against certain groups of consumers. However, the Tribunal cannot conclude that the redistribution of income is an effect that is necessarily always or entirely negative from society's viewpoint. To do so would be to adopt the "*a priori* fixed weight" to which Professor Townley objects based on his expertise in welfare economics. Moreover, that approach characterizes the Consumer Surplus Standard which, in the Tribunal's opinion, vitiates the statutory efficiency defence in section 96; accordingly, the Tribunal is not prepared to adopt that standard.

[335] Noting that the Court has reservations about certain standards for the treatment of efficiency gains but has indicated its general approval of the Balancing Weights Approach of Professor Townley, the Tribunal is of the view that it should, as Professor Townley stated in his report, consider whatever qualitative or quantitative information is available that allows it to assess the redistributional effects. It therefore rejects the Commissioner's submission that the transfer of income must necessarily be included in its entirety once the Commissioner has estimated the size thereof and quantified it as a measured effect to be added to the other measured effects when assessing all of the effects of the merger under subsection 96(1). In the Tribunal's view, this largely quantitative approach is opposite to the instruction of the Court.

[336] The Commissioner's alternatives to this approach are: (i) the qualitative approach advocated by Ms. Lloyd in dissent; (ii) the Balancing Weights Approach of Professor Townley, and (iii) at the first hearing, the evaluation of the adverse redistributional effects on a case-by-case basis described by the Commissioner's senior adviser G. Allen. It appears to the Tribunal that approach (i) is not now advocated by the Commissioner, and the Commissioner claims that the decision of the Court renders approach (iii) incorrect in law and that approach (ii) is incomplete and useful only as a tool to assist it in its broader inquiry.

[337] The Commissioner's revised view of the Balancing Weights Approach is surprising because the Court indicated its approval thereof, albeit with the comment that it requires further refinement and elaboration when applied to the facts of a particular case. The Commissioner's abandonment of the case-by-case assessment of adverse redistributive effects as propounded at the first hearing is also surprising, as it provides the elaboration and refinement in particular cases that supports the Balancing Weights Approach.

[338] Following the instruction of the Court, the Tribunal would adopt the Balancing Weights Approach if there were sufficient information in evidence to come to an assessment of whether the estimated balancing weight of 1.6 is reasonable given the socio-economic differences between and among consumers and shareholders. Moreover, no alternate weight has been submitted nor any other approach that the Tribunal could use to evaluate the reasonableness of the estimated balancing weight of 1.6 as a measure of redistributive effects. While not adopting the Balancing Weights Approach, the Commissioner submits that in view of the record in its entirety, there is no basis for concluding that a weight of 1.6 or less is reasonable. There is, however, some limited information in the record that the Tribunal can use to reach a conclusion on the redistributive effects.

(3) Pecuniary Gains

[339] Before reviewing that information, the Tribunal takes note of the Court's remarks concerning subsection 96(3) of the Act which, if correct, have very significant implications for the understanding of the merger provisions of the Act. Following the interpretation of the Commissioner's MEGs, the Tribunal regarded subsection 96(3) as denying that pecuniary savings could be included in "gains in efficiency". For example, if a merger of buyers enabled them to extract lower prices from sellers through the exercise of bargaining power, those savings would be a redistribution of pecuniary income from sellers to buyers, not an increase in societal real income as the result of the improved use of resources achieved through the merger. Accordingly, those savings should not be treated as gains in efficiency, even though buyers do achieve lower prices thereby. Another example of a pecuniary gain is tax-savings achieved by the merger, which represent a transfer from taxpayers generally to shareholders of the merged firm.

[340] Thus, the Tribunal has viewed subsection 96(3) as a statutory reminder that there must be a gain to society, as opposed to a gain to one party at the expense of another, in order for a gain in efficiency to exist, i.e. that only those savings that resulted from improved resource allocation could be considered. In the Tribunal's view, the provision has no implications for the treatment of effects, a view that appears to be shared by all commentators on this part of the Act.

[341] The Court's remarks concerning subsection 96(3) are as follows:

> [82] I attach some weight to subsection 96(3) of the *Competition Act*, which provides that the Tribunal shall not find that a merger or proposed merger "is likely to bring about gains in efficiency by reason only of a redistribution of income between two or more persons." Hence, subsection 96(3) expressly *limits* the weight accorded to redistribution in assessing the *efficiencies* generated by the merger.
>
> [83] No similar limitation is imposed by the Act on the effects side of the balance. If Parliament had intended redistribution of income to be *excluded altogether* from the "effects" of an anti-competitive merger, as the Tribunal held, the drafter might well have been expected to have made an express provision, similar to that contained in subsection 96(3) with respect the efficiencies side of the balance. The absence of such a provision suggests that, contrary to the Tribunal's conclusion, Parliament did not intend to impose such a limitation on the "effects" side.
>
> (Appeal Judgment, at 33-34)

[342] If the Court is correct, then the pecuniary gain that benefits consumers as exemplified above, although not a gain in efficiency, would be an effect of the merger because, apparently, no limitation has been imposed on "effects".

[343] In the Tribunal's view, it is very doubtful that Parliament intended that pecuniary gains be considered in merger review under section 96, whether the pecuniary gains benefitted either buyers or sellers. Certainly, there is nothing in the statutory history or legislative review that suggests this. Indeed, as the Court stated, efficiency is explicitly the paramount objective of section 96.

[344] While the Court affirmed the Tribunal's conclusion, it required a broader conception of "effects":

> [92] Thus, although section 96 requires the approval of an anti-competitive merger where the efficiencies generated are greater than, and offset, its anti-competitive effects, the ultimate preference for the objective of efficiency in no way restricts the countervailing "effects" to deadweight loss. Instead, the word, "effects", should be interpreted to include all the anti-competitive effects to which a merger found to fall within section 92 in fact gives rise, having regard to *all* of the statutory purposes set out in section 1.1.
>
> (Appeal Judgment, at 37)

[345] The Tribunal is of the view that the Court's instruction to it to consider all relevant effects including redistributive effects does not require it to consider pecuniary gain as an effect under subsection 96(1).

(4) Professor Townley's Statistical Evidence

[346] Table 2 of Professor Townley's expert report contains information from the Statistics Canada report entitled *Family Expenditure in Canada*, *1996,* and presents data on consumption of "bottled propane" by household income quintile. Table 2 states that household expenditure on bottled propane is 0.23 percent of total household expenditure. Accordingly, bottled propane expenditures are shown to constitute a very small share of total household spending (Townley report, exhibit A-2081, at 37).

[347] Professor Townley calls attention to the pattern in Table 2 that the expenditure share declines as household income and total expenditure rise. For example, propane expenditure constitutes 1.68 percent of the total expenditure of the 20 percent of households with the lowest income (i.e. the lowest-income quintile). For the 20 percent of households that have the highest income (the highest-income quintile), propane spending is only 0.07 percent thereof. Professor Townley notes that while absolute spending does not display this pattern, the fact that bottled propane expenditure decreases as a share of total expenditure as income rises indicates to him that a price increase would have a relatively larger impact the lower one's income (Townley report, exhibit A-2081, at 36).

[348] Professor Townley also points out that the average household expenditure on bottled propane nation-wide is only 0.23 percent of total household expenditure. However, he expresses concern that the Statistics Canada survey, because it does not distinguish among uses of propane (i.e. home heating versus running a barbeque), does not convey the impact of a price increase on households that use it for home heating (Townley report, exhibit A-2081 at 36). He regards the household expenditure data in the Statistics Canada survey as heavily skewed toward minor consumers (Townley report, exhibit A-2081, at 38).

[349] Professor Townley quotes from a 1998 report of the Propane Gas Association, that cites a Statistics Canada estimate that 102,000 Canadian households are "fuelled by propane" (Townley report, exhibit A-2081, at 38). It is not entirely clear what the phrase "fuelled by propane" refers to, and the Tribunal cannot conclude that it refers exclusively to home heating.

[350] Setting aside the household expenditure data that Professor Townley suggests may be skewed, the Tribunal observes that according to the Statistics Canada data shown in Table 2, 4.7 percent of the households in the lowest-income quintile and 29.1 percent of households in the highest-income quintile consume bottled propane. Accordingly, consumption of bottled propane is not limited to low-income groups.

[351] While the 4.7 percent of households in the lowest-income quintile number only 102,465 households out of all 10,900,500 households in Canada as stated in Table 2, they should not, in the Tribunal's view, be ignored. However, as Professor Townley points out, the Statistics Canada survey includes the non-essential uses of propane by households in that income quintile. There is no information on the record in this regard that would assist in determining the extent to which the redistribution of income from this group is adverse.

[352] The Court alluded to a possible distinction between essential and non-essential uses:

> Second, the demand for propane is fairly inelastic, that is, consumers are relatively insensitive to price increases. Although some consumers purchase propane for less than essential purposes, such as heating their swimming pools, most purchase it for

> home heating, automotive fuel and industrial purposes. Consequently, propane is not a discretionary item that most consumers can choose to forego.
>
> (Appeal Judgment, paragraph 11, at 8)

[353] It appears to the Tribunal that while many consumers (including business consumers) do, in fact, have choices available other than propane, these alternatives may, for various reasons, not be attractive and so would not likely be adopted. However, there is no doubt, given the available evidence, but that many consumers have no good alternatives. Yet, if the essentiality of the application is a relevant variable, it will be difficult to draw firm conclusions about the adverse effect of the re-distribution of income based on the available evidence.

[354] The CMR study, as described by Professor Townley, is a 1997 survey of commercial and residential customers of Superior in Atlantic Canada, Ontario and Quebec. The survey finds that Superior's commercial customers tend to be small businesses in rural areas, and its residential customers tend to be low-income, older-than-average and located in rural areas. Among Superior's residential customers in eastern Canada,

> ...15% of Superior customers earned less than $25,000 per year, 11% earned between $25,000 and $35,000 annually, 12% earned between $35,000 and $45,000, 11% between $55,000 and $75,000, and 9% earned more than $75,000 annually. (32% of those surveyed did not state their annual income.)
>
> (Townley report, exhibit A-2081, at 39)

[355] The CMR study of eastern Canada consumers tends to support the impressions gained from the Statistics Canada material concerning residential consumers of propane. There is discussion of consumption by residential end-use or essentiality; for example, 53 percent of Superior's residential customers use propane for heating and 10 percent to heat a swimming pool (Townley report, exhibit A-2081, at 39).

[356] The Tribunal cannot avoid the conclusion that the redistributive effect of the merger on low-income households that purchase propane will be socially adverse. As suggested above, however, the number of such households is quite small and some undetermined number of them may not be using propane for essential purposes.

[357] The Tribunal places less weight on the redistributive effect on households which, as the respondents observe, use propane for swimming pools, barbeques, heating second homes, cottages and ski chalets. Many, although not necessarily all, of those households will presumably be in the higher income groups. The record is silent in this regard.

(5) Interrelated Markets: Redistributive Effects

[358] The Tribunal noted above the Commissioner's observation that slightly more than 10 percent of propane sales by the merged company will be made directly to consuming households. The remaining 90 percent of sales will be made to businesses that use propane as an intermediate input in their

production processes. Having regard to the Court's concern for interrelated markets and to the witness testimony at the first hearing, the Tribunal can only conclude that such propane will be acquired by large and successful, and in some cases widely-owned, companies that are well-known, as well as by small and medium-sized businesses about which little information is available.

[359] The Tribunal heard the testimony of some small and medium-sized business owners, and it infers therefrom and from the CMR study regarding Superior's commercial customers in eastern Canada, that propane is used by some businesses whose owners will be negatively affected by the reduction in their profits that will result from their higher costs of propane to the extent that they cannot pass the price increase on in the form of higher prices for their products. For example, local restaurant owners that appeared as witnesses for the Commissioner may be able to raise their prices to offset their increased costs. On the other hand, it appears that some unstated number of family-owned agricultural operations use propane in crop-drying and those businesses may have no alternative or perhaps only unattractive alternatives to that use, and no ability to increase their prices.

[360] The Commissioner refers to witness evidence that propane is "...a significant input for farmers for grain drying..." (Commissioner's Memorandum on Redetermination Proceedings, paragraph 32, at 18). Relying on the witness evidence, the respondents point out that the gross retail cost of propane accounts for two to three percent of the cost of drying crops and that the projected increase therein due to the merger would represent an effect that would be regarded by the Commissioner's recently-adopted methodology for assessing redistributive effects as unimportant (Respondents' Memorandum on Redetermination Proceedings, paragraphs 129-130, at 58-59).

[361] More importantly, in the Tribunal's view, there is nothing on the record that allows us to conclude that owners of agricultural enterprises are needy; indeed, according to the testimony of some owners of agricultural operations concerning the size of their businesses, they may be relatively well-off. Absent better evidence in this regard, it is impossible to determine whether and to what extent the redistribution of profits from agricultural businesses to the merged company's shareholders is socially adverse. Similar lack of information applies to the other small and medium-sized businesses to which the Commissioner refers.

[362] The Tribunal notes further that since 90 percent of the merged firm's sales will be to other businesses, the impact of the price increase will fall on the products of those firms and will, through interrelated markets, ultimately be borne by business owners and household purchasers throughout the economy, to the extent that they are not borne by the lower profits of owners of those businesses that purchase the propane directly from the merged company. How the burden of the price increase is ultimately shared across business owners in interrelated markets and by households is an important question that is difficult to answer. Certainly, however, shareholders of the merged firm will not escape the price increases.

[363] Yet, having regard to the evidence of regressivity of the price increase on consumers of "bottled propane" discussed above, there is no basis for assuming that outcome generally. The price increase may hit higher income groups disproportionately depending on their consumption patterns and on the extent to which propane is involved in the production of those goods and services. There is no evidence according to which such incidence of the price increase on 90 percent of initial propane sales might be inferred.

[364] There may well be some small and medium-sized businesses that are only marginally profitable and also unable to pass on the price increase. However, there is no information on the record that would allow the Tribunal to assess the number of such enterprises or to distinguish between them and those that are perhaps quite successful. In the former, the redistribution of profit to the shareholders of the merged firm might not be socially neutral; in the latter, perhaps, it would be.

(6) Tribunal's Decision on Redistributive Effects

[365] Based on its review of the evidence, the Tribunal cannot agree with the respondents' position that the redistributive effects are completely neutral. It is our view that the gains and losses are not completely offsetting and that there is a social loss that requires consideration.

[366] However, on the basis of the evidence, the Tribunal cannot find that such loss is measured by the Commissioner's measured transfer of $40.5 million per annum, because the Commissioner has not demonstrated that that amount is the socially adverse effect. There is considerable reason to think that portions, perhaps significant portions, of the measured transfer are redistributions of profit among shareholders that society would regard neutrally.

[367] The evidence tends to support the socially adverse redistributive effects regarding low-income households that use propane for essential purposes and have no good alternatives, but the number of such households appears to be small. In the Balancing Weights Approach of Professor Townley, the interests of those households should be weighted more heavily than the interests of the shareholders of the merged firm, but the higher weight is not determinable given the information on the record. In the Tribunal's view, the interests of other households and business owners should be weighted equally with shareholders of the merged firm in this case, particularly since, as the Commissioner has noted, all producers are, in a sense, consumers as well.

[368] The Tribunal notes that it is possible to quantify the adverse redistributive effects of the transfer on household consumers of bottled propane in the lowest-income quintile based on the evidence of Professor Townley and Professor Ward. As there are approximately 102,465 consuming households in that group, and as the average expenditure per consuming household in that group is $277 per year (Townley report, exhibit A-2081, Table 2), total sales to that group are approximately $28.4 million per annum. Since the Commissioner's measured deadweight loss assumes a demand elasticity of -1.5 and a price increase to residential consumers in general of 11 percent (Commissioner's Memorandum on Redetermination Proceedings, Appendix A), the transfer is 9.2 percent of sales (Ward report, exhibit A-2059, Table 8). Accordingly, on the Commissioner's evidence, the measured adverse redistributive effect on that group is
approximately $2.6 million. This estimate assumes that all propane consumed by households in this group is for essential purposes.

VIII. <u>CONCLUSIONS</u>

[369] It is clear, in our view, that the Court did not direct us to consider the entire amount of the wealth transfer as an "effect" of the lessening or prevention of competition. Rather, the Court has directed us to consider all of the "effects" in light of the statutory purposes of the purpose clause of the Act. Had the Court been of the view that the full amount of the wealth transfer constituted an "effect" under

subsection 96(1), it would, no doubt, have said so in clear terms. The Court did not make a determination nor did it purport to make one with respect to the "effects" that will result from the prevention or lessening of competition in the merger under review. The Court did not attempt to make such a determination because the findings to be made are clearly within the Tribunal's expertise. The Court recognized this when it stated at paragraph 139 of the Appeal Judgment:

> Having concluded for the above reasons that the Tribunal erred in law when it interpreted section 96 as mandating that, in all cases, the only effects of an anti-competitive merger that may be balanced against the efficiencies created by the merger are those identified by the total surplus standard, this Court should not prescribe the "correct" methodology for determining the extent of the anti-competitive effects of a merger. Such a task is beyond the limits of the Court's competence.

[370] Having assessed the measured adverse redistributive effect based on the evidence, it remains for the Tribunal to decide how to combine it with the measured deadweight loss of $3 million and the maximum deadweight loss attributable to changes in the merged company's product line of $3 million. Weighting redistributive effects equally with efficiency losses, the three effects would be added together to produce a maximum total effect of approximately $8.6 million.

[371] However, there is no statutory basis under the Act (or in U.S. antitrust law) for assuming such equal weighting: perhaps the adverse redistributive effects should weigh twice as heavily as efficiency losses, in which case the three weighted effects would not exceed $11.2 million. Alternatively, since efficiency concerns are paramount in merger review, perhaps adverse redistributive effects should be weighted half as much as deadweight losses. In the instant case, it is clear that the adverse redistributive effects are, on the evidence, quite small. Accordingly, the Tribunal is of the view that any under any reasonable weighting scheme, the gains in efficiency of $29.2 million are greater than and offset all of the effects of lessening and prevention of competition attributable to the merger under review.

A. OBSERVATION

[372] In the Tribunal's view, demonstrating significant adverse redistributional effects in merger review will, in most instances, not be an easy task. This may be why the Commissioner has argued so strongly for the inclusion of the transfer in its entirety, no questions asked. As cited by the respondents in part, Mr. Howard Wetston, the former Director of Investigation and Research addressed the evidentiary issue in commenting on the *Hillsdown* decision. Speaking of section 96, he said:

> The section itself is broadly framed, and so, it may be argued, supports various interpretations. Economists have advocated treating the wealth transfer neutrally owing to the difficulty of assigning weights *a priori* on who is more deserving of a dollar. Even considering that some system of weighting could be articulated, the practical implications of this are likely insurmountable – for, who is losing and who is receiving the transfer? Shares are often widely held in companies. Are the shareholders of pension-fund investors in a firm more or less deserving than the customers of that firm? Moreover, who are the customers? In cases of

> intermediate products, is one looking to the shareholders of the consuming companies or to their customers?
>
> One solution to this dilemma is to adopt the U.S.-style approach to consideration of efficiencies; namely, that savings must be passed on to consumers. Yet, if Parliament's desire had been to deny the possibility of any price impact on customers by giving consideration to the wealth transfer effects of a merger, then this could have been specified in the language of the section.
>
> Under these circumstances, I am respectfully of the view that, from an enforcement perspective, it is preferable not to depart at this time from the approach adopted in the *Merger Enforcement Guidelines*. Moreover, it should be understood that, regardless of the interpretation, the number of cases falling into this category will not be large.
>
> (Remarks delivered by Howard I. Wetston, Q.C., Director of Investigation and Research, Bureau of Competition Policy, to the Canadian Institute, Toronto, June 8, 1992)

[373] In the Tribunal's view, the remarks of Mr. Wetston are very significant. First, he recognized that adequate measurement of the redistributive effects of a lessening or prevention of competition might well be impossible in light of the difficult questions that must be addressed. Second, Mr. Wetston recognized that no such effort was required under the American approach. However, there is no indication in the statute or elsewhere that Parliament intended this approach. The explicit efficiency defence in subsection 96(1) of the Act is clear evidence that Parliament intended not to follow the American approach to efficiencies.

[374] This decision has been a very difficult exercise. The difficulty results in great part from the wording of subsection 96(1) of the Act which requires the Tribunal to weigh efficiencies against the "effects" of a lessening or prevention of competition. In that regard, we believe that the view expressed by Professor W.T. Stanbury before the legislative committee on Bill C-91, is entirely apposite:

> Now I come to the matter of the efficiency defence. Proposed section 68 [now s.96] of Bill C-91 clearly contemplates a trade-off between gains in efficiency and the lessening of competition. This raises a number of difficult questions. The first and most important is the matter of incommensurability - namely, that the tribunal will be asked to deal and make a judgment between a lessening of competition, which will probably result in higher prices, and gains in efficiency, which are real savings to society. These are not comparable kinds of things because one involves a redistribution of income and the other involved real gains in terms of the savings of resources.
>
> *Second, there is an inherent and unavoidable value judgment that the tribunal must make in dealing with proposed section 68. The sad part is that Parliament has given no guidance to the tribunal as to its priorities, as to the weights to be applied to the lessening of competition [effects] and gains in efficiency.*
>
> ...

> With respect to the efficiency defence, there the clarification is not much of definition but of saying to the tribunal what priorities Parliament puts upon efficiency as opposed to the lessening of competition. *It is a judgment call; there is no technical way that can be handled by numbers or anything of that sort*. But Parliament could say...
>
> Let me just give you an historical example. In Bill C-256 the efficiency defence could be used only if the firms under review could show that at least part of the gains in efficiency were going to be passed on to consumers, you may recall. There is no such provision here. It seems to me that Parliament is indicating its priorities, that there is a difference in priorities there. I am not saying that we should adopt that; *I am saying that Parliament should decide and give instructions to the tribunal as to what values it wants the tribunals to adopt. The tribunal has to adopt a value - it cannot avoid it - in dealing with proposed section 68 of the Bill.*
>
> (Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-91, Monday, May 7, 1986, Issue 7, page 3:4) [Emphasis added]

It was the Tribunal's initial view, on its acceptance of the Total Surplus Standard, that the Act did not give rise to the difficulties to which Professor Stanbury referred. However, in light of the Court's Appeal Judgment, we feel that, as Professor Stanbury pointed out to the Legislative Committee, subsection 96(1) requires the Tribunal to compare matters that cannot be easily, if at all, compared. On the one hand, there are efficiencies, which are real savings to society, and on the other hand, there are the redistribution effects which arise by reason of a price increase. We have attempted to render the incomparable "comparable" by, whenever possible, quantifying the effects. We have not been totally successful in this endeavour but we have come to the conclusion that the $29.2 million of efficiencies brought about by the merger is greater than and outweighs the "effects" of the lessening of competition.

[375] Ms. Lloyd, in her dissenting opinion, which we have had the benefit of reading in draft form, has taken a different view of the matter. It is clear that, in her view, even if the merged company had been able to show efficiencies of, say, $100 million per year, that would not have sufficed to offset the effects of any prevention or lessening of competition.

[376] Ms. Lloyd has taken what we would characterize as the "qualitative approach". We are convinced that under that approach rarely will a merger succeed in passing the section 96 test. Our review of the legislative history of the merger provisions, and in particular, of section 96 of the Act, leads us to conclude that that could not have been Parliament's intention.

[377] The Tribunal therefore concludes that the Commissioner's application must be dismissed.

IX. <u>CONCURRING OPINION (DR. L. SCHWARTZ)</u>

[378] Agreeing as I do with the Tribunal's decision, I would like to comment on certain ancillary matters that have arisen. In my view, the Court and Létourneau, J.A., have raised economic issues that I feel require further discussion.

A. CHICAGO SCHOOL

[379] In the Appeal Judgment, Létourneau, J.A. suggests that advocates of the "Chicago School of thought in antitrust matters" agree with the earlier decision of the Tribunal in this merger case (Appeal Judgment, at paragraph 11, Létourneau, J.A.). I have difficulty in characterizing the attitude of the Chicago School regarding the proper treatment of efficiency in merger review. For example, Nadon, J. cited the views of Robert Bork with approval (Reasons, at paragraph 426). However, Judge Posner writes:

> ... The problem, as we shall see, is that it is very difficult to measure the efficiency consequences of a challenged practice; and thus throughout this book we shall be continually endeavoring to find ways of avoiding the prohibition of efficient, albeit anti-competitive, practices without having to compare directly the gains and losses from a challenged practice...
>
> (R.A. Posner, *Antitrust Law: An Economic Perspective*, Chicago: University of Chicago Press, 1976 at 22)

In Judge Posner's view, the measurement of efficiency gains and losses is so difficult that it ought to be avoided. In my view, there is no agreement among Chicago School advocates on the proper treatment of efficiencies in reviewing horizontal mergers under American antitrust law.

[380] In my understanding, the Chicago School of thought views all antitrust matters through the lens of applied price theory. On this view, I doubt that a separate product market for "national account coordination services" could be justified in light of the uncontradicted evidence proffered by the respondents. However, relying on the oral evidence of the Commissioner's witnesses, the Tribunal did not adopt applied price theory's conception of firms; it could be said, rather, that the Tribunal adopted a "transactions cost" perspective.

[381] If economic theory and analysis are relevant under the Act, then virtually every decision of the Tribunal will reflect the "applied price theory" perspective of the Chicago School to some extent. In my view, however, the present and earlier decisions of the Tribunal in the instant case cannot be described as wholly consistent with that school of antitrust thought.

[382] Létourneau, J.A. regards section 96 of the Act as vague.

> ...Are all the effects of the merger be weighed and what weight should be given to them? Are they all of the same significance and value? On what basis is one effect to be preferred over the other? On what basis should some effects, if any, be ignored or discarded?
>
> (Appeal Judgment, at paragraph 5)

[383] Up until the Court released its Appeal Judgment in the instant matter, I had not viewed section 96 of the Act as vague, having in mind the recommendation of the Economic Council of Canada in its 1969 Report, the exclusion of redistributive objectives from the 1986 amendments in contrast to earlier bills, the Parliamentary review, various Ministerial statements, and particularly, the paramountcy of the objective of economic efficiency in section 96 of the Act that the Court has confirmed. That said, if the

Act is vague, it is my view that the apparent preference in some quarters for following the American approach will be of limited assistance in achieving the objectives of the purpose clause of the Act.

[384] As noted by the Tribunal at paragraph 187 supra, Lande and Fisher acknowledged the lack of guidance in the American legislative history regarding the relative weighting of wealth transfers and efficiency effects. Fisher and Lande, who are generally critical of the Chicago School of antitrust, appeared to adopt the same position as Judge Posner. They concluded that case-by-case adjudication of efficiency gains versus effects was itself so "unworkable", even under the Consumer Surplus Standard, that merger review should avoid any such analysis (Fisher and Lande, at 1650). Their recommended approach was to evaluate all mergers based on rigid market-share criteria with few exceptions (Fisher and Lande, at 1691) and, of course, none for efficiency. However, the Act specifically calls for a case-by-case assessment of gains in efficiency and effects of lessening or prevention of competition, and it rules out sole reliance on market shares.

[385] In my view, the proclaimed supremacy of the consumer interest in the United States is frequently overstated. The recurring softwood lumber dispute between Canada and the United States amply illustrates how the interests of domestic lumber producers in the United States have prevailed at the expense of the American consumer (particularly homebuyers), and evidence of gains in efficiency is not even required of those producers in return for the market restrictions that they seek. When viewing the American antitrust regime, we ought to remember that it is often circumscribed by other policies in which the consumer interest is not paramount.

B. IMPLICATIONS OF SUBSECTION 96(2)

[386] There is a view that the efficiency defence in subsection 96(1) is available only when subsection 96(2) considerations are directly involved. This is not my understanding and, in response to a direct question from the Tribunal, the Commissioner did not take that position (Transcript, vol. 1, October 9, 2001, line 7, at 85). Subsection 96(2) requires special attention be given to exports and imports where they are involved, but subsection 96(1) applies to mergers generally, even if imported and exported goods and services are not involved.

[387] As I understand the legislative history, the 1986 amendments, including section 96, were motivated in large part by the pressures of growing international trade and investment on Canadian businesses and by the need to encourage them to restructure in order to be able to succeed in the more competitive environment that ultimately benefits Canadian consumers. However, this does not indicate to me that the efficiency defence in subsection 96(1) was limited to mergers where subsection 96(2) considerations were directly involved. Rather, Canadian firms that become more efficient through mergers that stimulate exports and reduce imports can be given special consideration.

C. SMALL BUSINESS

[388] The Court, relying on the purpose clause, has stated that the effects of an anti-competitive merger on small businesses must be considered when section 96 is invoked. Given the Court's emphasis on the purpose clause, it is puzzling that such consideration is only to be accorded under section 96. If the Court is correct in its view of the significance to be paid to small and medium-sized

enterprises under the Act, surely it would be expected that such concern would be as relevant, if not more so, under section 92.

[389] Section 93 of the Act lists certain factors that the Tribunal may consider when determining whether a merger prevents or lessens competition substantially under section 92. Neither efficiency nor small business are listed factors, and I infer therefrom that it was not Parliament's intent to allow the Tribunal to consider these factors in coming to a conclusion under section 92.

[390] It is true that paragraph (h) in section 93 of the Act enables the Tribunal to consider any non-listed factor. However, in light of the purpose of the Act as provided in the purpose clause, objectives relating to efficiency and small businesses were well-understood; bluntly, they were too big to miss. Hence, if Parliament wanted to allow the Tribunal to consider these factors in the section 92 inquiry, it would not have left them to the residual paragraph (h) in section 93. The Tribunal refused to consider the impact of efficiency gains on price in its analysis under section 92 (Reasons, at paragraph 258), and the Court did not disturb the Tribunal's conclusion that efficiency gains could not be considered under section 92 even if there were clear evidence that the price would decline as a result of those gains.

[391] Similarly, a merger may have profound implications for small businesses, yet that is not a factor in the Tribunal's assessment of whether the merger prevents or lessens competition substantially. Thus, if parties to a merger did not invoke section 96, there would be no basis for the Tribunal to consider the small-business implications at all.

[392] The purpose clause applies to the Act in its entirety. Accordingly, I think the better view is that since the impact of a merger on small business is, per statute, not a consideration under section 92 or section 93, then it may be inconsistent to give that impact greater weight under section 96.

D. DEADWEIGHT LOSS AND ELASTICITY OF DEMAND

[393] At paragraph 103 of the Appeal Judgment, the Court holds that applying the Total Surplus Standard leads to "paradoxical" consequences when viewed in light of the consumer protection objectives of the Act. In particular, that standard

> ... makes it easier to justify a merger between suppliers of goods for which demand is relatively inelastic than of goods for which demand is relatively elastic.

The Court continues:

> [104] This is because, where the demand for particular goods is inelastic, as it is for propane, the goods cannot be substituted as cost-effectively as where the demand is elastic. Hence, price increases that result from the exercise of market power are tolerated more by purchasers of goods for which the demand is inelastic than by purchasers of those where the demand is elastic. Thus, since purchasers of goods for which demand is inelastic are relatively insensitive to price, fewer will purchase substitute goods despite increases in price. <u>Therefore, a significant price increase will result in a smaller deadweight loss where demand is inelastic than where it is elastic.</u>

> [105] Thus, on the Tribunal's interpretation of section 96, the more inelastic the demand for the goods produced by the merged entity, the smaller will be the efficiencies required from the merger in order to offset its anti-competitive effects. It follows on this reasoning that, for the purpose of balancing efficiencies and effects, a potentially large wealth transfer from consumers of goods for which demand is inelastic to producers is to be ignored.
>
> [106] It is certainly not obvious how an interpretation of "effects" that creates a differential treatment of mergers by reference to the elasticity of demand for the goods produced by the merged entity is rationally related to any of the statutory aims of the *Competition Act*.
>
> (Appeal Judgment, at 42) [Underlined emphasis added]

[394] It appears to me that the Court has placed some weight on its findings in these matters. With respect, I believe that the Court's views rest on a misapprehension of the relationship between deadweight loss and elasticity of demand.

[395] What can be said is that, for a given demand elasticity and pre-merger sales, the calculated deadweight loss will be larger the larger is the price increase. This conclusion is reached by inspecting the formula for approximating the deadweight loss when competitive conditions prevail prior to the merger:

> deadweight loss ≈(percentage price increase)2 x demand elasticity x sales/2

Similarly, a larger demand elasticity results in a larger deadweight loss, holding the other variables, including the price increase, constant. Certain issues can be illuminated by using this formula and the *ceteris paribus* assumption (Reasons, at paragraphs 435-436).

In pricing decisions, however, the *ceteris paribus* assumption is not met because the price increase will depend on the demand elasticity. A firm with market power will impose a larger price increase when demand is inelastic than when demand is elastic, for in the latter case, customers will more readily shift to alternatives. Thus, where demand is elastic, the price increase will be relatively small; hence the deadweight loss will be relatively small. In contrast, where demand is inelastic, the price increase will be relatively large, hence the deadweight loss will be relatively large.

Thus, it is not reasonable to suppose that a firm with market power would impose the same "significant price increase" whether demand was inelastic or elastic. Therefore, it does not follow that the deadweight loss would necessarily be smaller in the former case than in the latter, yet this is the Court's view.

[396] The evidence of Professor Ward in this case illustrates the relationship between deadweight loss and demand elasticity. Using the average price increases of Superior and ICG when regional and discount firms are in the market, drawn from Table 7 of his expert report (exhibit A-2059) and, in parentheses, the associated deadweight losses as a percentage of sales in his Table 8 shows the following pattern:

Propane Demand Elasticity	-1.5	-2.0	-2.5
Residential price increase	8.0%	4.1%	2.1%
deadweight loss	(0.5%)	(0.2%)	(0.1%)
Industrial price increase	8.9%	5.4%	3.3%
deadweight loss	(0.6%)	(0.3%)	(0.1%)
Automotive price increase	7.7%	4.5%	2.7%
deadweight loss	(0.5%)	(0.3%)	(0.1%)

[397] For example, when demand is relatively elastic (-2.5), the deadweight loss in residential will be 0.1 percent of sales in that segment. However, if demand were relatively inelastic (-1.5), the deadweight loss would be larger, i.e. 0.5 percent of sales, because the price increase is much larger. The same pattern is observed in the industrial and automotive segments. Thus, contrary to the Court's view, it is apparent that the deadweight loss is larger when demand is inelastic than when it is elastic.

[398] These distinctions and the possibility for error were, I believe, first pointed out by W.M. Landes and R.A. Posner in their well-known 1981 paper (*Market Power in Antitrust Cases*, 94 Harvard Law Review, No. 5, March 1981, 937, at 991-996) wherein they criticize Professor Scherer, apparently for a similar mistake in his text. As quoted by the Tribunal at paragraph 188 supra, Fisher and Lande also noted in 1983 that the probable percentage price increase and the elasticity of demand are interrelated. The relationship between deadweight loss and elasticity of demand is, in my view, a sophisticated one and I criticize no one. However, the Tribunal did not err in its appreciation of this relationship or its implications, and I respectfully disagree with the findings of the Court and the conclusions that it reached thereon.

X. DISSENTING OPINION (MS. CHRISTINE LLOYD)

[399] The majority of the Tribunal redetermined the effects of the aforementioned anti-competitive merger for the purpose of the efficiency defence under section 96 of the Act, in light of the Appeal Judgment dated April 4, 2001. I recognize that efficiencies are given special consideration under section 96 of the Act and may constitute a defence in an otherwise anti-competitive merger. Section 96 involves a balancing process and as stated by the Court, must be assessed in accordance with the objective and goals of the Act. This objective is to maintain and encourage competition in Canada in order to achieve the goals of the Act. These goals are: the promotion of the efficiency and adaptability of the Canadian economy; the expansion of opportunities for Canadian participation in world markets; the equitable opportunity for small and medium-sized enterprises to participate in the Canadian economy and the provision of competitive prices and product choices to consumers.

[400] My dissent has regard to the majority's assessment and treatment of selected effects and their resultant conclusions. I am also concerned with the issue of the burden of proof as it relates to the complexity and extensiveness of the evidence that the majority claims should have been introduced by the Commissioner in order to prove certain effects of the merger. For instance, is it required that each

of the effects of the merger be *quantified* by the Commissioner in order to be considered in the analysis? Which of the effects should be considered on a qualitative basis when conducting the analysis prescribed by section 96 of the Act? Finally, and importantly, I disagree with the view of the majority that the Tribunal should only consider “the socially adverse” portion of the consumers’ surplus transfer in the section 96 analysis. Indeed, I cannot find any justification under the Act or elsewhere for treating the transfer of consumer wealth in this manner.

[401] The majority concludes that no consideration should be given to some of the effects presented by the Commissioner. These effects are: the reduction or elimination of customer programs; the prevention of competition in Atlantic Canada; the effects in interrelated markets; the loss of potential dynamic efficiency gains, and the effects on small and medium-sized enterprises. I believe that these effects should be given consideration. In relation to the consumers’ surplus transfer, the majority decided to consider only the part deemed “socially adverse”. I disagree with that conclusion. I am of the view that the transfer should be considered in its entirety when assessing the trade-off analysis.

[402] Consequently, when conducting the trade-off analysis in section 96, I considered certain effects that were dismissed by the majority and conclude that the efficiency gains are not greater than and do not “offset” the negative effects of this anti-competitive merger within the parameters of the Act.

A. REDUCTION OR ELIMINATION OF CUSTOMER PROGRAMS

[403] The majority, consistent with the earlier reasoning, only considered the impact on “resource allocation” when addressing the negative qualitative effects of the merger. The majority concluded that this effect was minimal and that the amount was unlikely to exceed the estimated deadweight loss. The Commissioner, in argument, points out that the majority did not, however, consider the transfer effects that would be associated with a reduction in real output and the creation of a deadweight loss. In these Reasons, the majority decided not to consider the redistributive effect associated with the removal/reduction of programs and services as the Commissioner did not adduce any evidence on this matter. Consequently, the majority decided not to revisit the original conclusion on this issue. While I agree with the majority that no evidence was adduced as to the amount of the transfer effects associated with a reduction in real output and the creation of a deadweight loss, I am nevertheless of the opinion that the effects associated with the elimination or the reduction of consumer choice should be considered on a qualitative basis.

[404] In my opinion, in the absence of ICG as a vigorous competitor, Superior, post-merger, will feel no competitive pressure or incentive to maintain the innovative programs established by ICG. One of the goals under the purpose clause of the Act is to provide consumers with competitive prices and product choices. Bundling propane with special service features is a means of differentiating an otherwise indistinguishable product. Providing a value-added feature sets the product apart from its competitors and this competitive advantage for the company then in turn, benefits consumers.

[405] It is clear that the merger will have a significant negative impact on customer programs, services and product choice because of the disappearance of ICG as a competitor. As a result, Superior no longer has to compete on the basis of those services. Nonetheless, as the value of these services is very difficult to assess and hence are not quantified, I am of the view that they should be considered from a qualitative perspective.

[406] In the case before us, consumers with a preference for a large national supplier of propane or with a need for "national account coordination services" will be deprived of all choice of suppliers. Indeed, Superior will lack incentive to provide national account customers with value added features beyond a central billing function. This potential loss of value-added features through the loss of ICG deprives the customer of product choices and while it cannot be quantified, this loss cannot be ignored and must be given weight qualitatively in the balancing process.

B. PREVENTION OF COMPETITION IN ATLANTIC CANADA

[407] The majority recognized at paragraph 244, supra, that the merger prevents ICG's plans to expand in Atlantic Canada from being implemented and as a result, the price of propane will likely be higher than it would be if the merger does not take place. Accordingly, they conclude that the effects of this prevention in Atlantic Canada should have been quantified in the form of efficiency gains and reduction in excess profits to the incumbents that would have resulted from additional competition that the merger precludes. The majority concludes that there is no evidence on the record about the extent of these effects resulting therefrom.

[408] It is a fact that Superior and Irving are the predominant operators in Atlantic Canada. ICG was looking to establish a branch office in Sydney, Nova Scotia, in partnership with the Petro-Canada agent. One of the expected results emerging from the additional competition in the region might have included more competitive prices and more product choices. Any potential benefits through the increased competition that ICG would have created are now thwarted by the merger.

[409] Therefore, I agree with the Commissioner's position that the loss of the benefits of competition that might otherwise have developed in Atlantic Canada due to ICG's activities in the absence of the merger is a relevant qualitative effect that should be taken into consideration. The fact that it is difficult to predict what would have occurred in the absence of the merger does not mean that the real effect of the merger preventing competition from developing in Atlantic Canada should be left out of the analysis.

C. THE EFFECTS IN INTERRELATED MARKETS

[410] The majority is of the view that an increase in the price of propane which has the potential to increase the costs of goods produced or the services provided by businesses (i.e. an increase in the price of a significant input), is not relevant. The majority states at paragraph 253, supra, that the issue here is whether an intermediate purchaser of propane will absorb the propane price increase or pass it on to customers in some way. Further, the majority states that whether the increase is large or small or whether propane is a significant input is not the issue.

[411] I strongly disagree with this view, especially in light of the Court, who acknowledged that one of the effects of a merger that may be relevant to the efficiency defence, is the "...impact of the merger on inter-related businesses." (Appeal Judgment, at paragraph 152).

[412] Regarding the effects on interrelated businesses, the evidence demonstrates that by far the majority of propane volume (89.3 percent) in 1998 was sold by Superior and ICG Propane Inc. to bulk agents and for commercial, agricultural, industrial and automotive end use applications. Only 10.7

percent was sold for residential use. Further, there is significant evidence on the record that shows that the cost of propane was a significant input for products or services. This evidence was reported at paragraphs 30 and 32 of the Commissioner's Memorandum on Redetermination Proceedings.

[413] This evidence indicates to me that the negative effects of a price increase would affect businesses as the cost of goods or services they produce would increase. Due to the fact that the relevant product in this case constitutes an input into a wide range of products and services in the Canadian economy, it is not feasible to quantify the additional resource allocation (deadweight loss) and transfer effects for each product or service affected by this "cost increase". This effect is important and must, in my view, be taken into account and be given appropriate weight in the balancing process.

D. THE LOSS OF POTENTIAL DYNAMIC EFFICIENCY GAINS

[414] The majority rejects the Commissioner's submissions that the merger will result in the loss of dynamic efficiency gains that would have been achieved by ICG's transformation process. The majority states at paragraph 258, supra, that there is no evidence on the gains therefrom, and note that no expert witness testified to the likelihood of these gains being achieved, their "..."dynamic" character, or their quantum, and accordingly the loss of such gains appears speculative..."

[415] Although more in the nature of an *obiter*, I feel compelled here to express my surprise with the comment made by the majority regarding the necessity to have evidence on the "likelihood of those efficiency gains being achieved". In my humble opinion, this evidence regarding "likelihood" was not adduced with respect to the $29.2 million of efficiency gains alleged to result from the merger. In that regard, I expressed my concerns with respect to the likelihood of the respondents' alleged efficiency gains being achieved. I discussed these concerns in detail in my previous dissenting opinion (Reasons, at paragraphs 486-493).

[416] The evidence demonstrates that ICG, in a competitive environment, had, prior to the merger, undergone a business re-engineering to enhance efficiency and improve productivity. ICG had embraced technology as one method by which to achieve that goal. They had established computer-based systems to better manage the business and had given themselves a competitive advantage in the propane market. The process was not fully implemented when Superior acquired ICG and these innovations will now be reversed. I am of the view that the merger results in the loss of a propane company prepared to re-engineer its approach to conduct its business and attempt through innovation to improve its efficiency and competitiveness.

E. EFFECTS ON SMALL AND MEDIUM-SIZED ENTERPRISES

[417] The majority expresses the views at paragraphs 286 to 305*, supra*, that the Commissioner has not shown that Superior behaved aggressively toward its small and medium-sized competitors. Further, the majority states that, although it takes the witnesses claims of predatory pricing seriously, the evidence is not sufficient to establish predation.

[418] The majority comes to the conclusion that in order to consider the effects of Superior's increased market power and its ability therefrom to resort to "unfair tactics" to deter entry, or expansion or to discipline small and medium-sized enterprises, a case of predatory pricing should have been

presented by the Commissioner. I recognize that pricing aggressively is an element of healthy competition and may not constitute violations under the provisions of the Act. However, I am of the view that evidence of a company's past conduct might constitute a relevant factor to be considered. The potential effect that this merged company might have on small and medium-sized enterprises in the future, and their equitable opportunity to compete becomes an issue.

[419] Indeed, the evidence demonstrates that Superior's practices are designed to either increase rivals' costs or decrease rivals' revenues. Superior's own records indicate that "retaliation" is a response to any competitive company who has taken or attempts to take business away from Superior. This evidence was referred to in the Commissioner's Memorandum on Redetermination Proceedings at paragraphs 56 to 66. It is apparent that Superior's increased market power gives it *the ability* to "discipline" its competitors. Superior's retaliatory behaviour goes beyond normal competitive practices. Some examples of Superior's retaliatory behaviour are drastic margin cuts, tying up customers with multi-year contracts, removal charges, free tanks (normally rented) and the "last look" on tenders. Imperial Oil's failure to enter propane retailing is an example of Superior's aggressive reaction and inclination to resort to measures that deter expansion, entry or discipline competitors. While I recognize that Imperial Oil does not fall into the category of "small and medium-sized enterprises", I believe that Imperial Oil's exit from the market is indicative of how Superior's behaviour could negatively impact small and medium-sized enterprises. Furthermore, I see no reason why Superior would act any differently towards a company considered small or medium-sized.

[420] Small and medium-sized enterprises are entitled under the Act to an equitable opportunity to compete. This increased ability to deter expansion, entry and discipline competitors is a real possibility that is supported by Superior's past behaviour. It is an effect that runs contrary to the goal of the Act to "provide an equitable opportunity for small and medium-sized enterprises to participate in the Canadian economy" and hence should be given weight in the balancing exercise.

F. THE CONSUMERS' SURPLUS TRANSFER

[421] A significant effect of this merger is the wealth transfer from consumers to Superior Propane Inc. (consumers' surplus transfer) which has been estimated by the Commissioner to be as high as $40.5 million per annum. This wealth transfer results from the supra-competitive market prices that Superior would likely charge as a consequence of its market power. In the view of the Court, the Act is not in itself concerned with "economics" so narrowly conceived as to exclude from consideration under section 96 these redistributive effects and hence these effects must be given weight in the balancing process.

[422] In its earlier Reasons, the majority recognized the redistributive effects of the instant merger, but treated them as offsetting because it concluded that the Total Surplus Standard was required in law; hence, that the redistributive effects were, on balance, socially neutral. In these Reasons, the majority asks what treatment should be given to the consumers' surplus transfer based on the submissions of the parties, while taking instruction from the Court. The majority concludes that the redistribution of income that results from an anti-competitive merger of producers has a negative effect on consumers (loss of consumers' surplus) and a correspondingly positive effect on shareholders (excess profit) and states that whether these two effects are completely or only partially offsetting is a *social decision*. Further, the majority recognizes at paragraph 333 of these Reasons that redistributional effects can

legitimately be considered neutral in some instances, but not in others. The majority then went on to say that "...[w]hile complete data may never be attainable, the Tribunal must be able to establish on the evidence the socially adverse effects of the transfer." The majority concludes that the redistributive effects are not completely neutral in the instant merger but refuse to consider the entirety of the Commissioner's measured transfer of $40.5 million per annum on the grounds that he has not demonstrated that *this amount is the socially adverse effect*. The majority is of the view that the interests of households and business owners should be given equal weights with shareholders of the merged entity in this case, particularly since, as the Commissioner has noted, all producers are, in a sense, consumers as well.

[423] The merger reduces the competitiveness of propane prices and this effect reduces the benefits of competitive propane prices to *all* Canadian propane consumers by at least the amount of the consumers' surplus transfer. While individual shareholders of Superior may well be consumers of propane, the principle issue at hand is the competitiveness of propane prices for *all Canadian consumers* regardless of consumer segment; that is their demographics or the product end-use. The important consideration is that competitive propane prices should be available to all propane consumers as they are all affected by a price increase. Hence, the consumers' surplus transfer is an immediate effect resulting from the anti-competitive merger. I am of the view that there should be no preference for one segment of consumers over another segment. Indeed, the purpose clause of the Act explicitly recognizes the goal of providing consumers with "competitive prices". Further, the majority's approach for treating the transfer would require complete data on the socio-economic profiles of the consumers and of the shareholders of the producers. With such an approach, it would be impossible to assess whether redistributive effects on the wealth transferred as a result of the higher prices charged by the merged entity would be fair and equitable.

[424] The fact that the merger will likely result in a transfer estimated at $40.5 million per annum due to Superior's ability to exercise its market power in the form of higher prices is a serious consideration given the Appeal Judgment and the language of the purpose clause of the Act. Therefore, I came to the conclusion that the entirety of the estimated income transfer of $40.5 million per year should be included in the section 96 trade-off analysis in light of the purpose clause.

G. REQUIREMENT TO QUANTIFY THE EFFECTS

[425] As stated above at paragraph 400, I am concerned with the position adopted by the majority which requires the Commissioner to present evidence of a quantitative nature with regards to the effects of the anti-competitive merger for the purpose of the section 96 analysis. In my view, such requirement makes the Commissioner's evidentiary burden formidable. Indeed, as the Commissioner points out, certain effects under consideration are more qualitative in nature and in many instances some are impossible to quantify. For instance, the majority discards the effects on interrelated markets as, in their view, the magnitude of that effect was not established by the Commissioner. The majority implies at paragraph 254 that this effect should have been measured by calculating the deadweight loss and transfer effects resulting from a price increase in each market affected by the merger. Propane being a commodity, the end-uses of which extends to a very large number of businesses in Canada, makes such measurement highly complex. With such a required approach, not only would the Commissioner have to prove the number of businesses affected but he would also have to present evidence of a deadweight

loss arising in each industry (interrelated market). That would be a daunting task to prove *even one* specific effect of the merger.

[426] Finally, although the majority recognized at paragraph 372, with respect to the transfer effect in particular, that demonstrating significant adverse redistributional effects in merger review will, in most instances, "not be an easy task", the majority nevertheless maintains the view that this would constitute the appropriate treatment for the transfer. As I stated above, I see no justification under the Act for reducing the transfer to the part that is "socially adverse". The purpose clause of the Act explicitly recognizes the goal of providing all Canadian consumers with "competitive prices". I am concerned that the approach adopted by the majority regarding the transfer might well be impossible to implement in light of the complex issues such an approach would entail.

[427] If the standard imposed on the Commissioner, as a result of this decision, were that he had to quantify each of the effects of an anti-competitive merger and demonstrate the *socially adverse* redistributional effect (part of the consumers' surplus transfer), it is my opinion that the merger provisions of the Act would be, at a minimum difficult, if not impossible to enforce.

H. CONCLUSION

[428] In light of my dissenting reasons, when conducting the trade-off analysis in section 96, I conclude that the efficiency gains of $29.2 million per year are not greater than the combined measured effects ($43.5 million per year) and serious qualitative effects that I discussed above. As a result, the merger fails the "greater than" aspect of the test.

[429] Further, I am of the view that the efficiency gains of $29.2 million per year do not "adequately compensate society", do not "offset" the negative effects of this anti-competitive merger within the parameters of the Act, for the combined measured $40.5 million of consumers' surplus transfer, the estimated deadweight loss of $3 million per year and the negative qualitative effects that I have identified. Finally, as I stated in my previous dissenting opinion, I still cannot find any meaningful consideration or real benefits in the nature of dynamic efficiencies that could have had an impact on the outcome of my analysis. Indeed, the respondents provided no evidence that the efficiencies claimed will *compensate for* the detrimental effects that will result from the merger. For example, the respondents could have claimed that the merger is likely to bring about dynamic efficiencies arising from innovation that will benefit the Canadian economy. Such qualitative efficiency gains could have been assessed in the trade-off analysis as ways to compensate for the detrimental effects caused to the economy as a whole. However, the respondents did not even attempt to present any such *beneficial* effect to the economy that will result from the merger.

[430] Finally, as I discussed above at paragraph 425, I am of the view that this case raises serious concerns with respect to the evidentiary burden that must be met by the Commissioner in order to enforce the merger provisions of the Act. As I stated earlier, I disagree with the majority that each effect of the anti-competitive merger should be quantified in order to be considered under section 96 of the Act. Such a task would amount to an extremely difficult exercise to carry out with any degree of reliability.

(1) Observation

[431] In this case, I was particularly concerned with the tremendous number of estimates that were provided as input into the calculations that formed part of the extensive economic evidence presented in relation to the efficiencies defence. For example, the input required to establish deadweight loss and transfer estimates included compounded estimates of volumes, prices per litre by end-use and projected price increases by end-use. This is not to say that using some arithmetic standard is not necessary; however, in my view such a standard should be used as a tool/guide in reaching a decision and should not be interpreted as having such precision so as to be concluded as being an end in itself. Qualitative input is, in my view, imperative in analysing the effects of an anti-competitive merger.

[432] Relying on estimates and calculations to arrive at what appears to be a precise number provides a false sense of security in that numbers interpretation. In addition it eliminates or at a minimum, reduces the discretion/judgment that the Court allowed the Tribunal in conducting the balancing exercise. The Court recognized "...given the difficulties of for example assessing both the relative elasticity of demand for the goods produced or supplied by a merged entity, and the qualitative aspect of deadweight loss, the application of the total surplus standard is far from mechanical..." In my view it is inherent in this statement that the Court accepts that the results derived from any merger analysis may be imprecise and subject to margins of error. A qualitative analysis and learned judgment is therefore essential.

XI. ORDER

[433] The Tribunal hereby orders that the Commissioner's application for an order under section 92 of the Act is denied.

Dated at Ottawa, this 4th day of April, 2002

SIGNED on behalf of the Tribunal by the presiding judicial member.

(s) M. Nadon

APPEARANCES:

For the applicant:

The Commissioner of Competition

John F. Rook, Q.C.
William J. Miller
Jo'Anne Strekaf
Steven T. Robertson
Christopher P. Naudie
Donna Blois

For the respondent:

Superior Propane Inc.
ICG Propane Inc.

Neil Finkelstein
Jeff Galway
Martha Cook
Brian Facey
Charlotte Kanya-Forstner