CT-2022-002

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER OF the proposed acquisition by Rogers Communications Inc. of Shaw Communications Inc.;

AND IN THE MATTER OF an application by the Commissioner of Competition for an Order pursuant to section 92 of the *Competition Act*.

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

and

ROGERS COMMUNICATIONS INC.
SHAW COMMUNICATIONS INC.

Respondents

and

ATTORNEY GENERAL OF ALBERTA
VIDEOTRON LTD.

Intervenors

BOOK OF AUTHORITIES

ATTORNEY GENERAL OF CANADA

Department Of Justice Canada
Competition Bureau Legal Services

Place du Portage, Phase I
50 Victoria Street, 22nd Floor
Gatineau, QC K1A 0C9
Fax: 819-953-9267

John Tyhurst
john.tyhurst@cb-bc.gc.ca

Jonathan Bitran
Tel: 416-605-1471
jonathan.bitran@cb-bc.gc.ca

Kevin Hong
Tel: 819-665-6381
kevin.hong@cb-bc.gc.ca

Counsel to the Commissioner of Competition

CT-2022-002

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER OF the proposed acquisition by Rogers Communications Inc. of Shaw Communications Inc.;

AND IN THE MATTER OF an application by the Commissioner of Competition for an order pursuant to section 92 of the *Competition Act*.

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

– and –

ROGERS COMMUNICATIONS INC.
SHAW COMMUNICATIONS INC.

Respondents

– and –

ATTORNEY GENERAL OF ALBERTA
VIDEOTRON LTD.

Intervenors

INDEX

LEGISLATION **TAB**

TAB 1

Date: 20110331

Docket: A-263-10

Citation: 2011 FCA 120

CORAM: **EVANS J.A.**
DAWSON J.A.
LAYDEN-STEVENSON J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

LEHIGH CEMENT LIMITED

Respondent

Heard at Vancouver, British Columbia, on March 3, 2011.

Judgment delivered at Ottawa, Ontario, on March 31, 2011.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: EVANS J.A.
LAYDEN-STEVENSON J.A.

Date: 20110331

Docket: A-263-10

Citation: 2011 FCA 120

CORAM: **EVANS J.A.**
DAWSON J.A.
LAYDEN-STEVENSON J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

LEHIGH CEMENT LIMITED

Respondent

REASONS FOR JUDGMENT

DAWSON J.A.

[1] This is an appeal from an interlocutory order of the Tax Court of Canada (Tax Court) rendered in respect of a motion brought by Lehigh Cement Limited (Lehigh). Lehigh moved for an order requiring Her Majesty the Queen (the Crown) to answer a question objected to on discovery and to produce certain documents. The issue raised on this appeal is whether the Judge of the Tax Court erred by ordering the Crown to:

1. Answer the following question: If the shares of CBR Cement Corp. had been owned by the appellant instead of a non-resident company related to the appellant, would the Crown have contested the arrangement (the disputed question).
2. Produce internal memoranda of the Canada Revenue Agency (CRA) from 2000 to July 2007 that specifically relate to the development of a general policy concerning paragraph 95(6)(*b*) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (Act), not including documents relating to a particular taxpayer (the disputed documents).

A subsidiary issue is raised with respect to the appropriate level of costs to be awarded on this appeal.

[2] The Judge's reasons in support of the order under appeal are cited as 2010 TCC 366, 2010 DTC 1239.

The Facts

[3] The relevant facts and the procedural context are set out succinctly in the following paragraphs from Lehigh's memorandum of fact and law:

> 1. In 1995 the Respondent, Lehigh Cement Limited ("Lehigh"), borrowed US$100,000,000 in Canada and contributed the US$100,000,000 as a capital investment in CBR Development NAM LLC ("CBR-LLC"), its wholly-owned U.S. subsidiary. Lehigh deducted the interest paid on the said loan pursuant to s. 20(1)(c) of the *Income Tax Act* (the "Act").
>
> 2. CBR-LLC in turn lent the US$100,000,000 to CBR Cement Corp. ("CBR-US"), a United States operating company, the shares of which were owned by CBR Investment Corporation of America ("CBR-ICA"), also a United States corporation.

3. In the years 1996 and 1997, CBR-US carried on an active business and paid interest to CBR-LLC of CDN$11,303,500 and CDN$11,305,800 respectively.

4. Lehigh, CBR-LLC and CBR-US were all treated as "related" corporations as that term is defined in the Act. Subparagraph 95(2)(a)(ii) of the Act, as it read at the time, provided that so long as the corporations were *related*, the interest so paid would retain its character as active business income to CBR-LLC, and as such become exempt surplus of CBR-LLC.

5. CBR-LLC paid dividends to Lehigh in 1996 and 1997 of CDN$8,294,940 and CDN$14,968,784 respectively. Paragraph 113(1)(a) of the Act provides that to the extent such dividends were paid out of exempt surplus of CBR-LLC, Lehigh was entitled to deduct such dividends in computing its taxable income, which it did.

[…]

7. Notices of Reassessment for each of the 1996 and 1997 taxation years were issued on November 30, 2004 and on May 3, 2005. The Minister's primary basis of reassessment was s. 95(6)(b), asserting that the effect of that provision was that the shares of CBR-LLC were deemed not to have been issued, with the result that the deduction under s. 113(1)(a) of the Act should be disallowed. The alternate basis was s. 245 of the Act, the general anti-avoidance rule (the "GAAR").

8. Lehigh objected to the reassessments. On February 27, 2009 the Minister confirmed the reassessments. Lehigh appealed to the Tax Court of Canada.

The Decision of the Judge

[4] After setting out the background facts, the Judge framed the dispute before her in the following terms:

9. The appellant's objective in bringing this motion is to have a better understanding of the respondent's position on the scope, and object and spirit, of s. 95(6)(*b*). The respondent resists largely on grounds that the information sought is not relevant.

[5] The Judge then noted that the principles applicable to the issues before her had recently been discussed by the Tax Court in *HSBC Bank Canada v. Canada*, 2010 TCC 228, 2010 DTC 1159 at paragraphs 13 to 16. The Judge particularly noted that the purpose of discovery is to provide a level of disclosure so as to allow each party to "proceed efficiently, effectively and expeditiously towards a fair hearing, knowing exactly the case each has to meet." The Judge indicated that while fishing expeditions are to be discouraged, "very little relevance need be shown to render a question answerable." No specific challenge is made to the Judge's statement of general principles.

[6] With respect to the disputed question, the Judge reasoned:

> 12. […] It is not in the interests of fairness or efficiency for the respondent to resist answering the question on grounds of principle. The answer will help the appellant know what case it has to meet and is within the broad purposes of examinations for discovery.
>
> 13. The purposes of discovery were summarised in *Motaharian v. Reid*, [1989] OJ No. 1947:
>
> (a) to enable the examining party to know the case he has to meet;
> (b) to procure admissions to enable one to dispense with formal proof;
> (c) to procure admissions which may destroy an opponent's case;
> (d) to facilitate settlement; pre-trial procedure and trial;
> (e) to eliminate or narrow issues;
> (f) to avoid surprise at trial.

[7] The Judge's conclusion with respect to the disputed documents was as follows:

> 15. As for the production of internal CRA memoranda, these documents are potentially relevant because it appears that they directly led to the respondent's position in this appeal. Effectively, these documents are the support for the assessments even though CRA's policy may have been in the formative stages when the assessments were issued. This type of disclosure is proper: *HSBC Bank*, para. 15.

16. It is also significant that the appellant's request is not broad. Mr. Mitchell indicated in argument that there are likely only a few documents at issue.

17. Disclosure will therefore be ordered, except that the formal order will clarify that production will apply only to memoranda that specifically relate to the development of a general policy. It will exclude documents that relate to a particular taxpayer.

The Asserted Errors

[8] The Crown asserts that in making the order under appeal the Judge erred by:

a. failing to observe principles of natural justice by accepting factual assertions made by counsel for Lehigh without providing the Crown with an opportunity to challenge them;

b. making findings of fact unsupported by the evidence and relying on such facts in support of her decision;

c. ordering the production of internal CRA memoranda; and

d. ordering the Crown to answer a hypothetical question aimed at eliciting the Crown's legal position.

Consideration of the Asserted Errors

a. Did the Judge fail to observe principles of natural justice?

[9] The Crown identifies three factual submissions made by counsel for Lehigh that it states were not supported by affidavit evidence. It states that it objected to these "bare assertions" being made because they were unsupported by evidence so that the Crown had no opportunity to challenge the assertions through the cross-examination of a deponent. The three impugned submissions are:

1. During oral discovery, counsel for Lehigh singled out two CRA officers, Wayne Adams and Sharon Gulliver, when questioning on the existence of internal memoranda.
2. Counsel for Lehigh stated at the hearing that the alleged change in CRA policy "was developed between 2000 and July 2007, when the CRA announced the new policy."
3. Counsel for Lehigh stated at the hearing that he did not think there would be many memoranda concerning the new policy. He only expected there to be three or four memoranda.

These assertions are said to have significantly influenced the Judge's decision.

[10] For the following reasons, I conclude that the Judge did not err as the Crown submits.

[11] To begin, the first impugned submission was not made to the Judge. What is complained of is a question asked by counsel for Lehigh on his discovery of the Crown when he sought production of the disputed documents. Counsel stated his request was "specifically but not exclusively" with respect to documents emanating to and from the two named employees. Such a question asked on discovery does not breach principles of natural justice.

[12] The remaining two impugned submissions were made to the Judge by counsel for Lehigh. However, counsel for Lehigh was explicit in his submissions to the Court that "[w]e don't know if there are any documents, to begin with. We are saying, if there are documents that give the context of this assessment we would like to see them." (Transcript of oral argument, Appeal Book page 81 lines 14-19). This makes clear that counsel was not improperly giving evidence about matters

within his knowledge. I read counsel's submissions as being in the nature of supposition as to when any memoranda would have been produced and the number of such memoranda. The Judge's reference to the number of documents reflected counsel's submissions.

[13] Further, counsel's submissions were informed by a memorandum prepared by Sharon Gulliver dated May 2, 2002 (Gulliver memorandum). The Gulliver memorandum was produced by the Crown following oral discovery, but before the hearing before the Judge, and was appended to the affidavit filed in support of Lehigh's motion. It will be described in more detail later in these reasons.

[14] The Crown has not established any breach of the principles of natural justice.

b. Did the Judge make and rely upon findings of fact which were unsupported by the evidence?

[15] The Crown asserts that the Judge based her decision to order the production of the disputed documents on the basis of two allegations which were not substantiated by evidence. The allegations were that:

1. The disputed documents led directly to the Crown's position in the underlying appeal.
2. The disputed documents provided the support for the assessments under appeal, even though the CRA's policy may have been in the formative stages when the assessments were issued.

The Crown points to paragraph 15 of the Judge's reasons, quoted above, to argue that the Judge made and relied upon these assumptions.

[16] In my view, the Judge's reasons, read fairly, fall well short of a finding of fact that the disputed documents either led directly to the Crown's position on the appeal or provided the support for the assessment. I reach this conclusion for the following reasons.

[17] First, as set out above, Lehigh was explicit that it did not know if the disputed documents existed. At paragraph 6 of her reasons, the Judge correctly stated that it was an assertion made by Lehigh, not an established fact, that the CRA's policy concerning the application of paragraph 95(6)(*b*) was developed between 2000 and July 2007 when the CRA announced the new policy.

[18] Second, the Judge noted in paragraph 15 of her reasons that the disputed documents were "potentially relevant because it appears that they directly led […]." No determination was made by the Judge that the documents existed, had led to the Crown's position on this appeal or had provided support for the assessment.

[19] Third, the Gulliver memorandum was in evidence before the Judge. This memorandum provided a basis for the Judge's conclusion by way of inference that any subsequent memoranda were potentially relevant. From the content of the Gulliver memorandum it was at least arguable that subsequent memoranda expressed the basis for the assessments at issue. As explained below,

the Crown's disclosure of the Gulliver memorandum evidenced the Crown's position that it was relevant to Lehigh's appeal.

[20] The Crown has not persuaded me that any of the impugned findings of fact were indeed made by the Judge.

[21] The Crown also argues that Lehigh had specific knowledge of documents relating to a change in policy "but chose not to adduce any evidence which might have shed light on the nature, volume and relevance of these documents." I agree with Lehigh's responsive submission that only the Crown possessed the knowledge of whether the disputed documents exist or if any existing documents are relevant. In such a circumstance it is difficult to see how Lehigh could have provided better affidavit evidence that shed light on these points.

c. Did the Judge err by ordering the production of internal CRA memoranda?

[22] I begin by noting that while the Judge ordered the production of internal CRA memoranda prepared from 2000 to July 2007, during oral argument counsel for Lehigh significantly narrowed the relevant timeframe to be from the date of the Gulliver memorandum (May 2, 2002) to the date of the assessments (November 30, 2004 and on May 3, 2005).

[23] The Crown argues that in ordering the production of internal memoranda the Judge erred because:

1. Opinions expressed by CRA officials outside of the context of a particular taxpayer's situation are irrelevant.
2. Official publications issued by the CRA are relevant only where a taxpayer seeks to establish that the CRA's interpretation of the Act, expressed in an official publication, is correct and contradicts the interpretation upon which the assessment in issue was made.

[24] The scope of permissible discovery depends upon the factual and procedural context of the case, informed by an appreciation of the applicable legal principles. See *Bristol-Myers Squibb Co. v. Apotex Inc.*, 2007 FCA 379, 162 A.C.W.S. (3d) 911 at paragraph 35. In the words of this Court in *Eurocopter v. Bell Helicopter Textron Canada Ltd.*, 2010 FCA 142, 407 N.R. 180 at paragraph 13, while "the general principles established in the case law are useful, they do not provide a magic formula that is applicable to all situations. In such matters, it is necessary to follow the case-by-case rule."

[25] It follows from this that the determination of whether a particular question is permissible is a fact based inquiry. On appeal a judge's determination will be reviewed as a question of mixed fact and law. Therefore, the Court will only intervene where a palpable and overriding error or an extricable error of law is established. See *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33; *Bristol-Myers Squibb Co. v. Apotex Inc.*, as cited above, at paragraph 35.

[26] In this case, consideration of whether a particular question is permissible begins with Rule 95 of the *Tax Court of Canada Rules (General Procedure)*, SOR/90-688a which governs the scope of oral discovery. Rule 95(1) states:

95. (1) A person examined for discovery shall answer, to the best of that person's knowledge, information and belief, any proper question relevant to any matter in issue in the proceeding or to any matter made discoverable by subsection (3) and no question may be objected to on the ground that	95. (1) La personne interrogée au préalable répond, soit au mieux de sa connaissance directe, soit des renseignements qu'elle tient pour véridiques, aux questions pertinentes à une question en litige ou aux questions qui peuvent, aux termes du paragraphe (3), faire l'objet de l'interrogatoire préalable. Elle ne peut refuser de répondre pour les motifs suivants :
(*a*) the information sought is evidence or hearsay,	*a*) le renseignement demandé est un élément de preuve ou du ouï-dire;
(*b*) the question constitutes cross-examination, unless the question is directed solely to the credibility of the witness, or	*b*) la question constitue un contre-interrogatoire, à moins qu'elle ne vise uniquement la crédibilité du témoin;
(*c*) the question constitutes cross-examination on the affidavit of documents of the party being examined. [emphasis added]	*c*) la question constitue un contre-interrogatoire sur la déclaration sous serment de documents déposée par la partie interrogée. [Non souligné dans l'original.]

[27] The Crown correctly observes that prior to its amendment in 2008, Rule 95(1) required a person examined for discovery to answer any proper question "relating to" ("qui se rapporte à") any matter in issue in the proceeding. A question was said to relate to any matter in issue if it was demonstrated that "the information in the document may advance his own case or damage his or her adversary's case". See *SmithKline Beecham Animal Health Inc. v. Canada*, 2002 FCA 229, 291 N.R. 113 at paragraphs 24 to 30. At paragraph 31 of its reasons this Court characterized this test to be substantially the same as the train of inquiry test.

[28] The Crown submits, however, that it "is doubtful that the 'train of inquiry' test, in its present form, will survive the amendment" of Rule 95(1) in 2008. The Crown argues that the jurisprudence relied upon by Lehigh does not address the impact of the narrower wording of Rule 95(1).

[29] In my view, the 2008 amendment to Rule 95(1) did not have a material impact upon the permissible scope of oral discovery. I reach this conclusion for the following reasons.

[30] First, I believe that the general purpose of oral discovery has not changed. Justice Hugessen described that purpose in the following terms in *Montana Band v. Canada*, [2000] 1 F.C. 267 (T.D.) at paragraph 5:

> The general purpose of examination for discovery is to render the trial process fairer and more efficient by allowing each party to inform itself fully prior to trial of the precise nature of all other parties' positions so as to define fully the issues between them. It is in the interest of justice that each party should be as well informed as possible about the positions of the other parties and should not be put at a disadvantage by being taken by surprise at trial. It is sound policy for the Court to adopt a liberal approach to the scope of questioning on discovery since any error on the side of allowing questions may always be corrected by the trial judge who retains the ultimate mastery over all matters relating to admissibility of evidence; on the other hand any error which unduly restricts the scope of discovery may lead to serious problems or even injustice at trial.
>
> [emphasis added]

[31] That the amendment of Rule 95(1) was not intended to effect a change in the scope of permissible questions is supported by the Regulatory Impact Analysis Statement (RIAS) accompanying the *Rules Amending the Tax Court of Canada Rules (General Procedure)*, SOR/2008-303, *Canada Gazette*, Part II, Vol. 142, No. 25 at pages 2330 to 2332. The RIAS

describes the amendment to Rule 95(1) to be a “technical amendment”. Courts are permitted to examine a RIAS to confirm the intention of the regulator. See *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 26, [2005] 1 S.C.R. 533 at paragraphs 45 to 47 and 155 to 157.

[32] Second, in *Owen Holdings Ltd. v. Canada* (1997), 216 N.R. 381 (F.C.A.) this Court considered and rejected the submission that the phrase “relating to” (as then found in Rule 82(1) of the *Tax Court of Canada Rules (General Procedure)*) encompassed the concept of a “semblance of relevance.” The Court indicated that “relating” and “relevance” encompassed similar meanings. At paragraphs 5 and 6 of its reasons the Court wrote:

> 5. With respect to the appeal, counsel for the appellant argues that the judge erred in holding that only documents which are relevant, that is to say which may advance the appellant’s case or damage that of the respondent, should be disclosed. Rule 82(1),[1] counsel says, uses the phrase “relating to” not “relevant to,” a basic distinction clearly confirmed and acted upon by this Court in *Canada (Attorney-General) v. Bassermann*.[2] At this stage, submits counsel, relevance should be of no concern; a “semblance of relevance,” if necessary, should suffice, an abuse of process being the only thing to be avoided.
>
> 6. We indicated at the hearing that we disagreed with counsel’s argument. Although obviously not synonyms, the words “relating” and “relevant” do not have entirely separate and distinct meanings. “Relating to” in Rule 82(1) necessarily imparts an element of relevance, otherwise, the parties would have licence to enter into extensive and futile fishing expeditions that would achieve no productive goal but would waste judicial resources. The well established principles that give rise to the relatively low relevance threshold at the stage of discovery, as opposed to the higher threshold that will be required at trial for the admission of evidence, are well known. We simply do not believe that the Tax Court ever had the intention of abandoning those principles any more than this Court could have had such an intention when, in 1990, it changed the word “related” to “relevant” in revising its corresponding provisions, namely subsections (1) and (2)(a) of Rule 448.[3] [emphasis added and footnotes omitted]

[33] Finally, there is an abundance of jurisprudence from this Court which has interpreted the permissible scope of examination under Rule 240 of the *Federal Courts Rules*, SOR/98-106. Like Rule 95(1), Rule 240 incorporates the test of whether a question is "relevant" to a matter which is in issue. Rule 240 states:

A person being examined for discovery shall answer, to the best of the person's knowledge, information and belief, any question that (*a*) is relevant to any unadmitted allegation of fact in a pleading filed by the party being examined or by the examining party; or (*b*) concerns the name or address of any person, other than an expert witness, who might reasonably be expected to have knowledge relating to a matter in question in the action. [emphasis added]	La personne soumise à un interrogatoire préalable répond, au mieux de sa connaissance et de sa croyance, à toute question qui : *a*) soit se rapporte à un fait allégué et non admis dans un acte de procédure déposé par la partie soumise à l'interrogatoire préalable ou par la partie qui interroge; *b*) soit concerne le nom ou l'adresse d'une personne, autre qu'un témoin expert, dont il est raisonnable de croire qu'elle a une connaissance d'une question en litige dans l'action. [Non souligné dans l'original.]

[34] The jurisprudence establishes that a question is relevant when there is a reasonable likelihood that it might elicit information which may directly or indirectly enable the party seeking the answer to advance its case or to damage the case of its adversary, or which fairly might lead to a train of inquiry that may either advance the questioning party's case or damage the case of its adversary. Whether this test is met will depend on the allegations the questioning party seeks to establish or refute. See *Eurocopter* at paragraph 10, *Eli Lilly Canada Inc. v. Novopharm Ltd.*, 2008 FCA 287, 381 N.R. 93 at paragraphs 61 to 64; *Bristol-Myers Squibb Co. v. Apotex Inc.* at paragraphs 30 to 33.

[35] Where relevance is established the Court retains discretion to disallow a question. The exercise of this discretion requires a weighing of the potential value of the answer against the risk that a party is abusing the discovery process. See *Bristol-Myers Squibb Co. v. Apotex Inc.* at paragraph 34. The Court might disallow a relevant question where responding to it would place undue hardship on the answering party, where there are other means of obtaining the information sought, or where "the question forms part of a 'fishing expedition' of vague and far-reaching scope": *Merck & Co. v. Apotex Inc.*, 2003 FCA 438, 312 N.R. 273 at paragraph 10; *Apotex Inc. v. Wellcome Foundation Ltd.*, 2008 FCA 131, 166 A.C.W.S. (3d) 850 at paragraph 3.

[36] This Court's comment at paragraph 64 of the *Eli Lilly* decision is of particular relevance to the Crown's submission that the 2008 amendment effected a material change. There, the Court wrote:

> 64. Furthermore, the Prothonotary's reference to a fishing expedition in paragraph 19 of her Reasons was one where a party was required to disclose a document that might lead to another document that might then lead to useful information which would tend to adversely affect the party's case or to support the other party's case. In my view, limiting the "train of inquiry" test in this manner is consistent with the test described in *Peruvian Guano, supra*, and applied by this Court in *SmithKline Beecham Animal Health Inc. v. Canada*, [2002] 4 C.T.C. 93 (F.C.A.), where, at para. 24 of her Reasons for the Court, Madam Justice Sharlow wrote:
>
> > [24] The scope and application of the rules quoted above depend upon the meaning of the phrases "relating to any matter in question between ... them in the appeal" and "relating to any matter in issue in the proceeding". In *Compagnie Financiere et Commerciale du Pacifique v. Peruvian Guano Company* (1882), 11 Q.B.D. 55 (C.A.), Brett, L.J. said this about the meaning of the phrase "a document relating to any matter in question in the action" (at page 63):
> >
> > > It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains

> information which may - not which must - either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words "either directly or indirectly," because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences. [emphasis in original]

[37] As can be seen, when interpreting relevance under the *Federal Courts Rules* the Court quoted with approval its prior articulation of the train of inquiry test in *SmithKline Beecham.* That decision concerned the proper interpretation of the pre-2008 version of Rule 95(1) of the *Tax Court of Canada Rules (General Procedure)*. Thus, the train of inquiry test has been found to be appropriate both under the pre-2008 *Tax Court of Canada Rules (General Procedure)* and the current *Federal Courts Rules* where the test is relevance.

[38] Turning to the application of these principles, in the present case the Crown had disclosed the Gulliver memorandum to Lehigh. The memorandum was produced in response to a request that the Crown provide "all correspondence and memoranda within head office, the district office, and between head office and the district office, giving instructions or dealing with their advisement on the GAAR issue."

[39] The Gulliver memorandum makes the following points:

1. The CRA was "pursuing cases coined 'indirect loans' whereby a Canadian company invests money into the equity of a newly created company in a tax haven and those funds are then lent to a related but non-affiliate non-resident company."

2. With respect to subsection 95(6) of the Act:

> While subsection 95(6) has been amended for taxation years after 1995, in nearly all of the "indirect loan" cases reviewed, the structure was in place prior to the amendments. We did consider whether paragraph 95(6)(*b*), as it then read, could apply to the "indirect loan" issue with respect to the incorporation of the tax haven company and its issuance of shares to CANCO. However, it was concluded from its wording that it was contemplated that the foreign affiliate or a non-resident corporation that issued the shares already existed before the series of transactions. In addition, without the use of the tax haven company, there was no certainty that CANCO would have otherwise transferred fund [*sic*] to the non-resident borrower so that there would be "tax otherwise payable". Therefore, subsection 95(6) was not proposed but in our view, this provision demonstrates that it is not acceptable to insert steps to misuse the foreign affiliate rules.[11] [emphasis added]

3. Footnote 11 to the above passage stated:

> [11] We have no written legal opinion on the matter at the present time. It is possible that Appeals or Litigation might see merit in arguing subsection 95(6). [emphasis added]

[40] In my view, the inference may be drawn from the Gulliver memorandum and the subsequent reassessment of Lehigh on the basis of subsection 95(6) that there may well be subsequent memoranda prepared within the CRA that considered whether subsection 95(6) of the Act could be argued to be a general anti-avoidance provision. Such documents, if they exist, would be reasonably likely to either directly or indirectly advance Lehigh's case or damage the Crown's case.

In my view, the Judge did not err in ordering their production. The trial judge will be the ultimate arbiter of their relevance.

[41] In so concluding, I have considered the Crown's arguments that the opinions of CRA officials outside the context of a particular taxpayer are irrelevant and that official publications of the CRA are of limited relevance. Those may well be valid objections in another case. However, in the factual and procedural context of this case, the Crown has already disclosed as relevant the Gulliver memorandum. For Lehigh to proceed expeditiously towards a fair hearing, knowing exactly the case it has to meet, it should receive any subsequent memoranda relating to the development of a general policy concerning paragraph 95(6)(*b*) of the Act.

d. Did the Judge err by ordering the Crown to answer a hypothetical question aimed at eliciting the Crown's legal position?

[42] The Crown argues that the Judge erred in ordering it to answer the disputed question because:

1. The question is hypothetical.
2. The purpose of the question is to elicit from the Crown details pertaining to its legal argument.
3. The question is a pure question of law.

[43] Lehigh responds that the purpose of the question is to determine if in reassessing Lehigh, paragraph 95(6)(*b*) of the Act was applied because the shares of CBR-US were owned by CBR-ICA, a non-resident corporation and not by Lehigh, a Canadian resident corporation.

[44] The Judge ordered the question to be answered in order to help Lehigh know the case it has to meet. In the context of this proceeding the question is not a pure question of law, nor does it elicit details of the Crown's legal argument. Lehigh is entitled to know the basis of the reassessment and what led the CRA to conclude it had acquired its shares in CBR-LLC for the principal purpose of avoiding the payment of taxes that would otherwise have been payable. In the factual and procedural context before the Court, the Crown has not demonstrated that the Judge erred in concluding that the disputed question should be answered.

[45] For all of the above reasons I would dismiss the appeal.

Costs and Conclusion

[46] Should this appeal be dismissed, Lehigh seeks an award of costs fully indemnifying its expenses in bringing the motion in the Tax Court and in opposing this appeal. Such an award is estimated to be in excess of $125,000.00.

[47] Lehigh concedes that such an award is commonly made where a party is found to have acted in a reprehensible, scandalous, or outrageous manner. Lehigh acknowledges that no such conduct has occurred in the present case. It submits, however, that such an award is justified in

this case because the discoveries were held on November 11, 2009 and Lehigh has been put to delay and considerable expense “all for no just cause.”

[48] Rule 400 of the *Federal Courts Rules* provides that the Court has full discretionary power over the award of costs. Rule 407 provides that unless the Court orders otherwise, party-and-party costs are to be assessed in accordance with column III of the table to Tariff B of the Rules. This reflects a policy decision that party-and-party costs are intended to be a contribution to, not an indemnification of, solicitor-client costs.

[49] Lehigh has not established exceptional circumstances that would warrant departure from the principle that solicitor-client fees are generally awarded only where there has been reprehensible, scandalous, or outrageous conduct on the part of one of the parties. See *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paragraph 77. The willingness of one party to incur significant expense on an issue cannot by itself transfer responsibility for that expense to the opposing party. The question then becomes, what is the appropriate contribution to be made to Lehigh’s costs if the appeal is dismissed?

[50] If successful, the Crown seeks, in lieu of assessed costs, costs here and in the Tax Court fixed in the amount of $5,000.00. Having particular regard to the complexity of the issues, I see nothing in the record to make this an unreasonable quantification of party-and-party costs. As Lehigh was awarded its costs in the Tax Court, on this appeal I would dismiss the appeal and

order the appellant to pay costs to Lehigh in the Tax Court and in this Court fixed in the amount of $5,000.00, all-inclusive, in any event of the cause.

"Eleanor R. Dawson"
J.A.

"I agree
John M. Evans J.A."

"I agree
Carolyn Layden-Stevenson J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-263-10
STYLE OF CAUSE:	HER MAJESTY THE QUEEN v. LEHIGH CEMENT LIMITED
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	March 3, 2011
REASONS FOR JUDGMENT BY:	DAWSON J.A.
CONCURRED IN BY:	EVANS J.A. LAYDEN-STEVENSON J.A.
DATED:	March 31, 2011

APPEARANCES:

Daniel Bourgeois Geneviève Léveillée	FOR THE APPELLANT
Warren J.A. Mitchell, Q.C. Mathew G. Williams Natasha Reid	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Myles J. Kirvan Deputy Attorney General of Canada	FOR THE APPELLANT
Thorsteinssons LLP Tax Lawyers Vancouver, British Columbia	FOR THE RESPONDENT

TAB 2

Competition Tribunal Tribunal de la concurrence

Reference: *The Commissioner of Competition v Live Nation Entertainment, Inc et al*, 2019 Comp Trib 3
File No: CT-2018-005
Registry Document No: 84

IN THE MATTER OF an application by the Commissioner of Competition for orders pursuant to section 74.1 of the *Competition Act*, RSC 1985, c C-34 regarding conduct allegedly reviewable pursuant to paragraph 74.01(1)(a) and section 74.05 of the Act;

AND IN THE MATTER OF a motion by the Respondents to compel answers to questions refused on discovery.

BETWEEN:

The Commissioner of Competition
(applicant)

and

Live Nation Entertainment, Inc, Live Nation Worldwide, Inc, Ticketmaster Canada Holdings ULC, Ticketmaster Canada LP, Ticketmaster L.L.C., The V.I.P. Tour Company, Ticketsnow.com, Inc, and TNOW Entertainment Group, Inc
(respondents)

Date of hearing: April 2, 2019
Before Judicial Member: D. Gascon J. (Chairperson)
Date of Order and Reasons for Order: April 5, 2019

ORDER AND REASONS FOR ORDER GRANTING IN PART THE RESPONDENTS' MOTION TO COMPEL ANSWERS TO QUESTIONS REFUSED ON DISCOVERY

I. INTRODUCTION

[1] On March 21, 2019, the Respondents filed a motion to compel the Commissioner of Competition ("**Commissioner**") to answer several questions that were refused during the examination for discovery of the Commissioner's representative, Ms. Lina Nikolova ("**Refusals Motion**"). Ms. Nikolova was examined for one day and a half on January 31 and February 1, 2019.

[2] In their Refusals Motion, the Respondents seek the following conclusions:

- An order compelling Ms. Nikolova to answer a list of questions that remained unanswered further to her examination for discovery and the expiry of the deadline provided for fulfilling answers to discovery undertakings ("**Refused Questions**");

- An order compelling Ms. Nikolova to attend for continued examination on discovery on behalf of the Commissioner or to provide follow-up answers in the form agreed upon by the parties, all in accordance with the scheduling order most recently amended on February 11, 2019;

- An order for the Respondents' costs of this motion; and

- Such further and other relief as the Tribunal deems just.

[3] At the hearing, the Respondents informed the Tribunal that they were no longer seeking an order compelling Ms. Nikolova to be further examined should the Tribunal order her to answer the Refused Questions, and that responses in writing would be satisfactory.

[4] In their Notice of Motion, the Respondents had initially identified a total of 34 Refused Questions grouped into four categories. However, in his response materials and in the days leading up to the hearing of this motion, the Commissioner provided answers to some of the questions that had been previously refused. In addition, the Respondents withdrew one of the Refused Questions for which they were seeking answers. The initial list of Refused Questions was thus narrowed down to 14 questions to be decided by the Tribunal, divided in two categories: (1) "Historical Conduct – Estoppel, Waiver and Remedy", which contained six outstanding questions relating to the Commissioner's review of the Respondents' conduct in 2009 ("**Category 1 Questions**"); and (2) "Individual Respondent Allegations – Liability", which referred to eight outstanding questions seeking details on which individual Respondents were specifically concerned by certain facts and allegations in the Commissioner's pleadings ("**Category 2 Questions**").

[5] The Respondents brought this Refusals Motion in the context of an application made against them by the Commissioner ("**Application**") under the deceptive marketing practices provisions of the *Competition Act*, RSC 1985, c C-34 ("**Act**"). In his Application, the Commissioner is seeking orders pursuant to section 74.1 of the Act regarding conduct allegedly reviewable under paragraph 74.01(1)(a) and section 74.05 of the Act. More specifically, the Commissioner alleges that one or more of the Respondents engaged in deceptive marketing practices by promoting the sale of tickets to the public on certain internet websites and mobile

applications ("**Ticketing Platforms**") at prices that are not in fact attainable, and then supplied tickets at prices above the advertised price on these platforms. The Commissioner's Notice of Application alleges that the reviewable conduct dates back to 2009, and continues until today. The relief sought by the Commissioner includes a prohibition order and administrative monetary penalties.

II. LEGAL PRINCIPLES

[6] I agree with the Respondents that, when dealing with refusals in the context of examinations for discovery, the Tribunal should not lose sight of the overarching objective of the discovery process, whether oral or by production of documents. The purpose of discovery is to render the trial process fairer and more efficient by allowing each side to gain an appreciation of the other side's case, and for the respondents to know the details of the case against them before trial (*Canada v Lehigh Cement Limited*, 2011 FCA 120 ("***Lehigh***") at para 30; *The Commissioner of Competition v Direct Energy Marketing Limited*, 2014 Comp Trib 17 at para 16). It is now well-recognized that a liberal approach to the scope of questioning on discovery should prevail (*Lehigh* at para 30). What the parties and the Tribunal are both trying to achieve with examinations for discovery is a level of disclosure sufficient to allow each side to proceed fairly, efficiently, effectively and expeditiously towards a hearing, with sufficient knowledge of the case each party has to meet (*The Commissioner of Competition v Vancouver Airport Authority*, 2017 Comp Trib 16 ("***VAA***") at para 46). If a party does not disclose relevant facts or information known to it until trial, the other side will be unfairly disadvantaged.

[7] The *Competition Tribunal Rules*, SOR/2008-141 ("**CT Rules**") do not deal specifically with refusals in examinations for discovery. However, subsection 34(1) of the CT Rules provides that, when a question arises as to the practice or procedure to be followed in cases not provided for by the rules, the *Federal Courts Rules*, SOR/98-106 ("**FC Rules**") may be followed. FC Rule 240 provides that a person being examined for discovery must answer, to the best of the person's knowledge, information and belief, any question that is relevant to the unadmitted facts in the pleadings. In addition, FC Rule 242 states that a party may object to questions asked in an examination for discovery on the ground that the answer is privileged, the question is not relevant, the question is unreasonable or unnecessary, or it would be unduly onerous to require the person to make the inquiries referred to in FC Rule 241.

[8] Relevance is the key element to determine whether a question is proper and should be answered. At the discovery stage, relevance is a generous and flexible standard (*Apotex Inc v Sanofi-Aventis*, 2011 FC 52 at para 19). Doubts on the issue of relevance are to be resolved in favour of disclosure, and questions will typically need to be answered unless they are clearly improper. In *Lehigh* at paragraph 34, the Federal Court of Appeal noted the broad scope of relevance on examinations for discovery:

> The jurisprudence establishes that a question is relevant when there is a reasonable likelihood that it might elicit information which may directly or indirectly enable the party seeking the answer to advance its case or to damage the case of its adversary, or which fairly might lead to a train of inquiry that may either advance the questioning party's case or damage the case of its adversary.

[9] And to determine the relevance of a question, one must look at the pleadings.

[10] That being said, even when questions do meet the standard of relevance, courts have nonetheless delineated some boundaries to the type of questions that may be asked on examinations for discovery. A party can properly ask for the factual basis of the allegations made by the opposing party and for the facts *known* by such party, but it cannot ask for the facts or evidence *relied on* by the party to support an allegation (*VAA* at paras 20, 27; *Montana Band v Canada*, [2000] 1 FC 267 (FCTD) ("***Montana Band***") at para 27; *Can-Air Services Ltd v British Aviation Insurance Company Limited*, 1988 ABCA 341 at para 19). In *Apotex Inc v Pharmascience Inc*, 2004 FC 1198, aff'd 2005 FCA 144 ("***Apotex***"), the Federal Court further established that witnesses are not to testify on pure questions of law: a fundamental rule is that an examination for discovery may seek only facts, not law. Accordingly, the following types of questions have generally been found not to be proper subject matters for discovery: (i) questions seeking expert opinion, (ii) questions seeking the witness to testify as to questions of law, (iii) questions seeking law or argument, as opposed to facts, and (iv) questions where the witness is being asked "upon what facts do you rely for paragraph x of your pleading" (*Bard Peripheral Vascular, Inc v W.L. Gore & Associates, Inc*, 2015 FC 1176 at para 19).

[11] It remains, however, that answers to questions on examination for discovery will always depend on the particular facts of the case and involve a considerable exercise of discretion by the judicial member seized of a refusals motion. There is no magic formula applicable to all situations, and a case-by-case approach must prevail to determine the appropriate level of disclosure required in examinations for discovery. The scope of permissible discovery will ultimately depend "upon the factual and procedural context of the case, informed by an appreciation of the applicable legal principles" (*Lehigh* at paras 24-25; see also *VAA* at paras 41-46).

III. CATEGORY 1 QUESTIONS

[12] The six Category 1 Questions deal with the Commissioner's knowledge of a prior investigation into the Respondents' price displays in 2009 and 2010. The Respondents submit that these Refused Questions are relevant as they relate to the Respondents' pleading of estoppel and waiver, and to the issue of remedy, since the duration of the alleged reviewable conduct and the manner and length of the investigation are factors to be taken into account when determining any administrative monetary penalties. The Respondents claim that the Commissioner reviewed the Respondents' Ticketing Platforms for deceptive marketing practices in 2009, but raised no issues about the displays of prices that he now alleges were deceptive. In fact, say the Respondents, the Commissioner did not raise his current complaints with the Respondents until 2017. They therefore contend that the Commissioner's 2009-2010 review, and his eight-year delay in proceeding, are relevant both to the Respondents' pleading of estoppel and waiver and to the determination of any remedy by the Tribunal. In this context, they argue that they should be permitted to ask the Category 1 Questions about the Commissioner's 2009-2010 investigation. The Commissioner replies that the Category 1 Questions are improper and not relevant, and that they are unreasonable, unnecessary and unduly onerous.

[13] I agree with the Respondents that, in the context of this Application, questions relating to the 2009-2010 investigation and to what the Commissioner had previously reviewed are

generally relevant in light of the Respondents' pleading on estoppel and waiver and on the issue of remedy. It cannot be said that these questions are totally unrelated to the issues in dispute. Moreover, I observe that facts surrounding the Competition Bureau's prior investigation of the Respondents' conduct have been referred to by the Commissioner in his own materials. The Commissioner has produced, as relevant documents in the Commissioner's documentary production in this Application, some customer complaints from the 2009 period, as well as records relating to the Competition Bureau's investigation of certain Ticketing Platforms in 2009 and 2010. Indeed, the questions in dispute in this first category relate to particular factual issues emanating from specific documents produced by the Commissioner, such as Exhibit 114.

[14] I further note that, in her examination for discovery, Ms. Nikolova has already provided answers to many questions asked about the 2009-2010 investigation. I am not persuaded – subject to the caveat explained below with respect to the two "why" questions – that the remaining outstanding questions have gone too far and should be treated any differently. The facts surrounding the 2009-2010 investigation are relevant to the Respondents' pleading, and the Commissioner cannot select what he wants to answer and what he prefers not to disclose. The Commissioner should instead provide all relevant facts relating to this prior investigation. In the same vein, I do not share the Commissioner's views that the Category 1 Questions constitute a fishing expedition into the Commissioner's previous investigation. Nor do I find that question 679 is overly broad as it focuses on the 2009 or 2010 fee display.

[15] The Commissioner further argues that, since the Category 1 Questions relate to the "conduct" of the 2009-2010 investigation, they need not be answered. I disagree. In light of the estoppel defence raised by the Respondents, the Commissioner's conduct in the investigation is clearly at play in this Application, as well as the timing and dates of the Competition Bureau's actions in that respect. Contrary to the situation in *Canada (Director of Investigation and Research) v Southam Inc*, [1991] CCTD No 16, 38 CPR (3d) 68, at paragraphs 10-11, the conduct of the Commissioner is one of the issues before the Tribunal, and it is directly relevant to the present proceedings on the basis of the pleadings.

[16] I pause to underline that the issue at this stage is not whether the estoppel argument raised by the Respondents in their pleading will ultimately be successful on the merits. It is whether the Category 1 Questions ask for relevant information. I am satisfied that the Respondents have established that they are relevant to their estoppel defence and to the issue of remedy.

[17] In light of the foregoing, questions 461, 462, 677 and 679 therefore need to be answered.

[18] However, with respect to questions 685 and 1199 respectively asking why it took eight years for the Commissioner to raise the complaint with the Respondents and why the Commissioner did not do anything about investigations that he might have carried on, I am not satisfied that they are proper questions on this examination for discovery. True, they relate to the Competition Bureau's 2009-2010 investigation, but they ask about the thought process of the Commissioner and essentially seek to obtain the opinion from the Commissioner on those two issues. What is relevant are the facts that the Commissioner apparently took eight years to raise the complaint with the Respondents and allegedly did not follow-up on complaints received in 2008, not the reasons or explanations behind those decisions of the Commissioner. Questions 685 and 1199 therefore need not be answered.

IV. CATEGORY 2 QUESTIONS

[19] Turning to the Category 2 Questions, they seek to obtain answers clarifying to which of the individual Respondents certain allegations made by the Commissioner relate. The Respondents argue that the Commissioner has named eight different Respondents, but that most of his allegations simply assert conduct by the "Respondents", without distinguishing among them. In his Notice of Application, at paragraphs 10 to 18, the Commissioner states generally that the Respondents "have acted separately, jointly and/or in concert with each other" or that they "work together and/or individually" in making the impugned representations or in permitting them to be made. The Respondents submit that which Respondent is actually alleged to have taken what steps, and with whom, is relevant information that should be provided. The Respondents have pleaded that some of the Respondents are not proper parties and do not have any responsibility for the representations that the Commissioner says are misleading or deceptive. The Commissioner does not object to the Category 2 Questions on the basis of relevance but on the ground that, as formulated, they ask for a legal interpretation and are improper.

[20] There is no doubt, in my view, that questions relating to individual Respondents and how the facts known by the Commissioner can be linked with each of them are relevant to this Application. The Commissioner's pleadings do not specify with great detail how each of the Respondents are specifically linked to the allegations. In light of the Respondents' pleading to the effect that several of the Respondents were not involved in the Ticketing Platforms and should not be targeted by this Application, I accept the general proposition that the Respondents are entitled to ask questions as to which of the Respondents the facts and allegations made by the Commissioner relate.

[21] Indeed, in the order issued by the Tribunal on October 17, 2018 with respect to the affidavits of documents to be produced in this Application, Justice Phelan addressed the problem of attribution of documents to each Respondent and noted that the Respondents insisted on being treated separately, on defending separately, and on pleading that some Respondents were not proper parties to the Application. Accordingly, Justice Phelan ordered that separate affidavits of documents were required for each Respondent, as requested by the Commissioner, thus recognizing the relevance and importance of information tailored to each individual Respondent.

[22] The problem raised by the Category 2 Questions lies in the way the questions have been formulated by the Respondents. It is useful to reproduce the eight questions in dispute. They read as follows:

- Q 285-286 -- [When you said that you are not aware of any facts linking VIP Tour Company to ticketmaster.ca at this time], does that include directly or indirectly by acting in concert or jointly with somebody else?

- Q 844-848 -- What facts are associated with Live Nation Entertainment Inc. [or any of the other seven respondents] acting jointly with another respondent in respect of the OneRepublic concert [referenced on page 12 of the Commissioner's pleadings]?

- Q 845-848 -- What facts does the Commissioner have in association with whether Live Nation Entertainment Inc. [or any of the other seven respondents] acted in concert in respect of the OneRepublic concert [referenced on page 12 of the Commissioner's pleadings]?

- Q 846-848 -- What facts or information is the Commissioner aware of with respect to whether Live Nation Entertainment Inc. [or any of the other seven respondents] acted separately, in any way, with respect to the OneRepublic concert [referenced on page 12 of the Commissioner's pleadings]?

- Q 847-848 -- What information does the Commissioner have, or is the Commissioner aware of, with respect to, or in connection with, whether Live Nation Entertainment Inc. [or any of the other seven respondents] permitted some other respondent to act in any particular way with respect to the OneRepublic concert [referenced on page 12 of the Commissioner's pleadings]?

- Q 1119 -- Which respondents are said to make the price representations in question and which respondents are said to permit others to make the price representations in question?

- Q 1120 -- I would like to have the Commissioner's information with respect to the manner in which each of the respondents permits another respondent to make price representations

- Q 1121 -- I would like to have the Commissioner's information as to the manner in which each respondent makes the price representations that are the subject of this application

[23] As stated above, it is not disputed that the Respondents can rightfully ask for the factual basis behind the allegations made by the Commissioner and for the facts *known* by Ms. Nikolova, but they cannot ask for the facts or evidence *relied on* by the Commissioner to support an allegation. Moreover, a witness cannot be asked pure questions of law, as opposed to facts. Indeed, the Commissioner acknowledged that it would have been fine to ask questions on the facts linking each Respondent to the representations at stake, as long as the questions did not seek the facts *relied on* for the Commissioner's legal arguments. For example, questions would have been proper and acceptable if they had asked about facts known to the Commissioner that relate to the involvement of the individual Respondents with respect to the representations in dispute.

[24] However, the Commissioner argues that, as formulated, the Category 2 Questions go one step too far and in fact ask for a "legal interpretation" to be made by the witness, as they would require Ms. Nikolova to assess whether the facts sought by the Respondents effectively qualify as "acting in concert", "acting jointly" or "acting separately", or as "making" or "permitting" to make the impugned representations. The Commissioner submits that questions asking a witness to testify on questions of law or to provide argument as to what is relevant in order to prove a given plea are improper as examinations for discovery may only seek facts, not law (*Apotex* at

para 19). The Commissioner pleads that the questions asked by the Respondents would in fact force Ms. Nikolova to think of the law applicable or relied upon for the Commissioner's allegations, and to select facts in accordance with her understanding of the law.

[25] I am ready to accept that this effectively happens when a party asks a discovery witness questions relating to the facts *relied on* in support of an allegation. However, I am not persuaded that this always happens when a witness is asked about facts in relation or in connection with allegations incorporating a legal test to be met, or simply because the questions contain language referencing provisions of the applicable legislation at stake or certain terms capable of having a legal connotation. Stated differently, I am not convinced that questions asking for facts or information known to the Commissioner's representative being discovered in connection with a particular allegation in the pleadings can be deemed to be automatically improper (and not subject to answer) because they import or refer to a legal concept or to a specific element of the conduct being challenged in the application.

[26] Depending on how they are actually formulated, questions seeking facts or information known to the Commissioner and underlying his allegations with respect to the various elements of an alleged conduct can be considered as appropriate questions on discovery, even if they contain a certain legal dimension. If I were to accept the Commissioner's position, it would mean that, as soon as a question would include wording repeating the language of the Act or the elements of an alleged conduct that is the subject of an application, it would run the risk of being refused on the ground that it is considered as requiring a legal interpretation. This would significantly restrain the scope of any discovery of the Commissioner's witness by the respondents, or risk transforming examinations for discovery into an exercise too focused on semantics, where counsel for the respondents would be expected to look for creative wording in order to avoid any reference to a term used in the Act or in the specific provisions at the source of the application.

[27] There is, of course, no question that examinations on discovery are designed to deal with matters of fact. However, the line of demarcation between seeking a disclosure of facts and asking for evidence relied upon for an allegation is often hazy. Likewise, there is always a fine line between questions asking for facts *relied on* by a party in support of an allegation (which are always improper) and questions seeking facts *known* to a party that underlie an allegation (which are proper even when they may contain certain elements of law in them). Similarly, it is also difficult to distinguish between facts and law, and the boundary between them is often not easy to draw (*Montana Band* at paras 20, 23).

[28] As such, determining when a question becomes a request for a legal interpretation that would be clearly improper on an examination for discovery is a highly case-specific exercise. Indeed, at the hearing, counsel for the parties have not referred to authorities providing guidance on this precise point. And I am not aware of decisions from the Tribunal or from the Federal Court addressing specifically whether, on examinations for discovery, a question about facts known to a witness that uses words with a legal connotation or legal language that is ultimately for the trier of fact to decide, such as language contained in an applicable legislation, would be improper. In my view, a distinction needs to be made between "pure" questions of law, and questions of fact that may imply a certain understanding of the law or that arise against a legal contextual background. It is well established that pure questions of law, such as questions asking

a witness to provide a legal definition of words or terms or to explain a party's position in law, are not permissible on examinations for discovery. However, the facts underlying questions of law can be discoverable. In the same vein, questions on discovery may mix fact and law. Questions relating to facts which may have legal consequences remain nonetheless questions of fact and may be put to a witness on discovery (*Montana Band* at para 23).

[29] In *Montana Band*, Justice Hugessen expressed the view that "it is proper on discovery (although it may not be so at trial) to ask a party as to the facts underlying a particular conclusion of law" (*Montana Band* at para 28). Questions can thus ask for facts behind a conclusion of law and for facts underlying a particular allegation or conclusion of law (*Montana Band* at para 27). While it is not proper to ask a witness what evidence he or she has to support an allegation, it is quite a different thing to ask what facts are known to the party being discovered which underlie a particular allegation in the pleadings. Even when the answer may contain a certain element of law, it remains in essence a question of fact (*Montana Band* at para 27). Similarly, the Federal Court wrote that "[q]uestions which seek to identify the factual underpinning of [a] position are proper questions even if they require an interpretation of the [legislation]" (*Sierra Club of Canada v Canada (Minister of Finance)*, 174 FTR 270, 1999 CanLII 8722 (FC) at para 9).

[30] To deny the possibility of asking about such facts would amount to refuse and frustrate the very purpose of discovery, which is to learn the facts, or often equally more important, the absence of facts, underlying each and every allegation in the pleadings. Moreover, bearing in mind the principled approach to examinations for discovery, whenever there is doubt as to whether a question relates sufficiently to facts as opposed to law, the resolution should be in favour of disclosure. This is especially true when the questions at issue are clearly relevant, as is the case here for the Category 2 Questions.

[31] In light of the foregoing, I am of the view that six of the eight Category 2 Questions disputed in this Refusals Motion need to be answered. They are questions 285-286; 844-848; 845-848; 846-848; 847-848 and 1119. As stated above, deciding on objections to questions on discovery is a fact-specific exercise and one needs to carefully look at what is being asked and how it is asked. As posed, these six questions require an answer of mixed fact and law which, in my opinion, do not require an improper "legal interpretation" to be conducted. They refer to terms which may be seen as having a legal connotation, but these terms are simply there as a contextual premise to answer what are factual questions.

[32] The first four questions relate to facts in association with whether individual Respondents acted "separately", "in concert" or "jointly" with other Respondents in respect of certain specific events. These words were used by the Commissioner in his pleadings; sometimes, the Commissioner also used the words "work together" and "jointly" as equivalents in referring to the Respondents. These are factual questions regarding which of the Respondents work together or in concert, and whether they act individually or separately.

[33] Question 847-848, on its part, seeks information in connection with individual Respondents "permitting" others to make the representations. As to question 1119, it specifically asks about the individual Respondents that are "said to make the price representations" or "said to permit others to make" them (emphasis added). I acknowledge that these two questions specifically refer to terms found in the deceptive marketing practices provisions at issue in this

Application: the term "make" is expressly used in paragraph 74.01(1)(a) of the Act and it includes "permitting a representation to be made" pursuant to subsection 52(1.2) of the Act.

[34] I do not agree with the Commissioner that these six questions improperly ask for a legal interpretation to be made by the witness. In my opinion, asking whether individual Respondents acted in concert, jointly or separately are questions of fact that are highly relevant in the context of this Application, and as formulated, the questions do not venture into the forbidden territory of asking "pure" questions of law or seeking facts or evidence *relied on* by the Commissioner. The references to the Respondents acting separately, jointly and/or in concert are part of the Commissioner's pleadings, and the Respondents are entitled to ask about the facts or information known to the Commissioner that underlie these allegations in connection with the various specific Respondents. I would add that terms like "acting in concert", "acting jointly" or "acting separately" are ordinary words which are not found in the provisions of the Act forming the basis of this Application. While these terms may have a legal connotation, they are also common words, as opposed to technical terms or terms requiring a technical interpretation. They are the kind of terms that any person can understand. In my view, no conclusion of law is required to answer the questions incorporating them. The same is true for the terms "permitting", "said to make" or "said to permit" used in Questions 847-848 and 1119 even though they echo wording used in the provisions of the Act at issue in the Application.

[35] In addition, I would point out that Ms. Nikolova has been involved in the Competition Bureau's investigation leading to the Application. It is reasonable to expect that she has a high level of knowledge of the context of the Application, and will be able to understand the terms used to frame these six Category 2 Questions and the specific factual questions being asked.

[36] I am therefore not persuaded that, as formulated, these six Category 2 Questions bear the attributes that would render them improper and inacceptable in the context of an examination for discovery of the Commissioner's representative. In my view, they do not require Ms. Nikolova to make a legal interpretation of the terms "make", "permit", "separately", "in concert" or "jointly", but instead ask for the facts allowing one to link the individual Respondents to the impugned deceptive marketing practices. The questions do not require her to assess whether the facts meet the precise legal test of paragraph 74.01(1)(a) and whether the facts indeed qualify as "making" or "permitting to make" the representations at issue.

[37] Questions 1120 and 1121 raise a more delicate issue. They broadly ask for the "Commissioner's information as to the manner in which each respondent makes the price representations" or "permits another respondent to make price representations". These questions not only specifically refer to the terms "make" and "permit" found in the deceptive marketing practices provisions at issue in this Application, but they also amount to asking about all the facts and evidence that the Commissioner has with respect to the reviewable conduct at issue. I acknowledge that the word "rely" is not used in these two questions but, broadly formulated as they are, I find that they are essentially to the same effect and lead to a similar result. They effectively ask for admissions of law and for the evidence in support of the Commissioner's allegations.

[38] As formulated, I find that they are problematic and improper, and they need not be answered.

[39] I make one last comment. Had the Respondents reformulated the Category 2 Questions and simply asked about facts or information known by the Commissioner in relation to the involvement of the various individual Respondents in the impugned representations on the Ticketing Platforms, those questions would have been allowed without hesitation, and without having to conduct the more detailed analysis described in these reasons. Determining whether questions are properly refused on examinations for discovery or cross the boundary into the territory of inappropriate questions is a fact-specific exercise, and it will ultimately depend on how the questions are formulated in the context of each given case. I agree that examinations for discovery should not be reduced to an exercise of semantics, but words used in questioning do matter. The parties will always be on safer grounds if the questions asked are carefully limited to the facts and do not import what may be perceived as legal language that the trier of fact will eventually have to interpret and assess.

FOR THE ABOVE REASONS, THE TRIBUNAL ORDERS THAT:

[40] The Respondents' motion is granted in part.

[41] The Respondents' questions 461; 462; 677; 679; 285-286; 844-848; 845-848; 846- 848; 847- 848; and 1119 need to be answered in writing by the Commissioner's representative, Ms. Nikolova.

[42] The Respondents' questions 685; 1199; 1120 and 1121 need not be answered.

[43] As success on this motion has been divided, and considering that 20 of 34 Refused Questions initially listed in the Notice of Motion have been answered by the Commissioner or resolved by the parties, costs shall be in the cause.

DATED at Ottawa, this 5th day of April 2019.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Denis Gascon

COUNSEL OF RECORD:

For the applicant:

The Commissioner of Competition

François Joyal
Paul Klippenstein
Ryan Caron
Derek Leschinsky
Katherine Rydel

For the respondents:

Live Nation Entertainment, Inc et al

Mark Opashinov
David W. Kent
Guy Pinsonnault
Adam D.H. Chisholm
Joshua Chad

TAB 3

Competition Tribunal Tribunal de la concurrence

Reference: *The Commissioner of Competition v Vancouver Airport Authority*, 2017 Comp Trib 16
File No.: CT-2016-015
Registry Document No.: 135

IN THE MATTER OF an application by the Commissioner of Competition for one or more orders pursuant to section 79 of the *Competition Act*, RSC 1985, c C-34 as amended;

AND IN THE MATTER OF a motion by Vancouver Airport Authority to compel answers to questions refused on discovery.

BETWEEN:

The Commissioner of Competition
(applicant)

and

Vancouver Airport Authority
(respondent)

Date of hearing: October 13, 2017
Before Judicial Member: D. Gascon J. (Chairperson)
Date of Order and Reasons for Order: October 26, 2017

ORDER AND REASONS FOR ORDER GRANTING IN PART RESPONDENT'S MOTION TO COMPEL ANSWERS TO QUESTIONS REFUSED ON DISCOVERY

I. OVERVIEW

[1] On September 29, 2017, the Vancouver Airport Authority ("**VAA**") filed a motion before the Tribunal to compel the Commissioner of Competition ("**Commissioner**") to answer several questions that were refused during the examination for discovery of the Commissioner's representative, Mr. Kevin Rushton ("**Refusals Motion**"). VAA brought this Refusals Motion in the context of an application made against VAA by the Commissioner ("**Application**") under the abuse of dominance provisions of the *Competition Act*, RSC 1985, c C-34 ("**Act**").

[2] In this Refusals Motion, VAA seeks the following conclusions:

(a) An order requiring the Commissioner to answer, within fifteen days, the refusals set out in Schedule "A" to VAA's Notice of Motion (specifically those refusals set out in VAA's Memorandum of Fact and Law under the following categories: Category A – Facts known to the Commissioner ("**Category A**"), Category B – Questions regarding the third-party summaries ("**Category B**") and Category C – Miscellaneous ("**Category C**"));

(b) An order for VAA's costs of this motion; and

(c) Such further and other relief as the Tribunal deems just.

[3] In its Notice of Motion, VAA identified a total of 55 questions that remained unanswered or insufficiently answered ("**Requests**"). This initial list of Requests was narrowed down at the hearing, as discussed below. The Category A Requests seek all the facts that the Commissioner knows in relation to various issues in dispute in this Application, including specific references to the Commissioner's summaries of third-party information and to records in the Commissioner's documentary productions. The Category B Requests seek third-party information that is subject to public interest privilege. The Category C Requests relate to miscellaneous questions.

[4] For the reasons that follow, VAA's Refusals Motion will be granted in part, but only with respect to the "reformulated" version of some Requests. Upon reviewing the materials filed by VAA and the Commissioner (including the transcripts of the examination for discovery of Mr. Rushton), and after hearing counsel for both parties, I am not persuaded that there are grounds to compel the Commissioner to provide answers to the Category B and C Requests listed by VAA, as well as to the Category A Requests as these were initially formulated at the examination for discovery of Mr. Rushton. However, I am of the view that, when read down and "reformulated" as counsel for VAA discussed at the hearing (at times, in response to questions from the Tribunal), some of VAA's Category A Requests will need to be answered by the Commissioner's representative along the lines developed in these Reasons. In essence, in order to properly and sufficiently answer these "reformulated" Category A Requests, the Commissioner will need to provide more than a generic statement solely referring to all materials already produced to VAA. Nevertheless, a subset of the "reformulated" Category A Requests will not have to be answered in any event, based on additional reasons raised by the Commissioner.

II. BACKGROUND

[5] The Commissioner filed his Notice of Application on September 29, 2016, seeking relief against VAA under section 79 of the Act.

[6] VAA is a not-for-profit corporation responsible for the operation of the Vancouver International Airport ("**VIA**"). The Commissioner claims that VAA abused its dominant position by only permitting two providers of in-flight catering services to operate on-site at VIA, and in excluding and denying the benefits of competition to the in-flight catering marketplace. The Commissioner's Application is based upon, among other things, allegations that VAA controls the market for galley handling at VIA, that it acted with an anti-competitive purpose, and that the effect of its decision to limit the number of in-flight catering services providers was a substantial prevention or lessening of competition, resulting in higher prices, dampened innovation and lower service quality.

[7] In accordance with the scheduling order issued by the Tribunal in this matter, the Commissioner served VAA with his affidavit of documents on February 15, 2017 ("**AOD**"). The Commissioner's AOD lists all records relevant to matters in issue in this Application which were in the Commissioner's possession, power or control as of December 31, 2016. The AOD is divided into three schedules: (i) Schedule A for records that do not contain confidential information; (ii) Schedule B for records that, according to the Commissioner, contain confidential information and for which no privilege is claimed or the Commissioner has waived privilege for the purpose of the Application; and (iii) Schedule C for records that the Commissioner asserts contain confidential information and for which at least one privilege (i.e., solicitor-client, litigation or public interest) is being claimed. Since then, the original AOD has been amended and supplemented on a few occasions by the Commissioner (collectively, "**AODs**").

[8] The Commissioner states that, through the productions contained in his AODs, he has now provided to VAA all relevant, non-privileged documents in his possession, power or control ("**Documentary Productions**"). In total, the Commissioner says he has produced 14,398 records to VAA. Of these, 11,621 are in-flight catering pricing data records (i.e., invoices, pricing databases and price lists); 1,277 records were provided to the Commissioner by VAA itself and were simply reproduced by the Commissioner to VAA; and 342 records were email correspondence between VAA (or its counsel) and the Competition Bureau. Excluding these three groups of records, the Commissioner has thus produced 1,158 documents to VAA as part of his Documentary Productions.

[9] In March 2017, VAA challenged the Commissioner's claim of public interest privilege over documents contained in Schedule C of the AOD. This resulted in a Tribunal's decision dated April 24, 2017 (*The Commissioner of Competition v Vancouver Airport Authority*, 2017 Comp Trib 6 ("***VAA Privilege Decision***"). In the VAA Privilege Decision, currently under appeal before the Federal Court of Appeal, I upheld the Commissioner's claim of public interest privilege over approximately 1,200 documents.

[10] As part of the proceedings, the Commissioner produced to VAA summaries of the facts obtained by him from third-party sources during his investigation leading up to the Application

and contained in the records for which the Commissioner has claimed public interest privilege ("**Summaries**"). The first version of the Summaries was produced on April 13, 2017. As it was not satisfied with the level of detail provided in the Summaries, VAA brought a motion to challenge the adequacy and accuracy of the Summaries. Prior to the hearing of that motion, on June 6, 2017, the Commissioner delivered revised and reordered Summaries to VAA. The Summaries are divided into two documents on the basis of the level of confidentiality asserted and total some 200 pages.

[11] On July 4, 2017, the Tribunal released its decision on VAA's summaries motion (*The Commissioner of Competition v Vancouver Airport Authority*, 2017 Comp Trib 8 ("***VAA Summaries Decision***")). In his decision, Mr. Justice Phelan dismissed VAA's motion and concluded that VAA had not made the case for further and better disclosure of source identification in the Summaries, even in a limited form or under limited access.

[12] On August 23 and 24, 2014, the Commissioner's representative, Mr. Rushton, was examined for discovery by VAA for two full days.

[13] In its Notice of Motion, VAA had initially identified a total of 55 Requests for which it seeks an order from the Tribunal compelling the Commissioner to answer them. At the hearing of this Refusals Motion before the Tribunal, counsel for the parties indicated that Requests 126, 129 and 130 under Category B have been withdrawn and that Request 114 under Category C has been resolved. This leaves a total of 51 questions to be decided by the Tribunal: 39 in Category A, 11 in Category B and one in Category C.

III. ANALYSIS

[14] Each of the categories of disputed questions will be dealt with in turn.

A. Category A Requests

[15] The refusals found in Category A generally request the Commissioner to provide the factual basis of various allegations made in the Application. VAA also asks, in its Category A Requests, for specific references to the relevant bullets listed in the Summaries as well as to the relevant records in the Commissioner's Documentary Productions.

[16] While the exact wording of VAA's 39 Category A Requests has varied over the course of the two-day examination of Mr. Rushton, VAA described all these questions using identical language in its Memorandum of Fact and Law, save for the actual reference to the particular allegation or issue at stake in each question. For example, Request 21 reads as follows: "Provide all facts that the Commissioner knows that relate to the market definition that does not include catering as alleged in paragraph 11 of the Commissioner's Application, including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions" [emphasis added]. All Category A Requests reproduce these underlined introductory and closing words. This is what counsel for both parties referred to as the "stock undertaking" during the examination for discovery of Mr. Rushton, and at the hearing before the Tribunal.

[17] Through his counsel, the Commissioner had taken the 39 Category A Requests under advisement during the examination of Mr. Rushton. In his response provided to VAA after the examination, the Commissioner said that all Category A Requests have been answered, that he has already disclosed and provided to VAA all relevant facts in his possession at the time he produced his Documentary Productions and his Summaries, and that the answers to VAA's Category A Requests are found in the Summaries and Documentary Productions. Accordingly, the Commissioner submits that he has provided VAA, through the Summaries and Documentary Productions, with all relevant, non-privileged facts that he knows in relation to each of the issues referenced in the Category A Requests.

[18] The Commissioner repeated the same response for all Category A Requests. The Commissioner's exact response reads as follows:

> The Commissioner has produced to VAA all relevant, non-privileged information in the Commissioner's possession, power and control and has further produced to VAA summaries of relevant third party information learned by the Commissioner from third parties in the course of the Competition Bureau's review of this matter. Further, the Commissioner will comply with his obligations under the *Competition Tribunal Rules* as well as the safeguard mechanisms most recently discussed by Justice Gascon in *Commissioner of Competition v Vancouver Airport Authority*, 2017 Comp Trib 6 File No.: CT-2016-015. Accordingly, all relevant facts that the Commissioner knows regarding this issue have already been produced to VAA, subject to applicable privileges and safeguards described above. As previously advised, the Commissioner will provide VAA with a supplemental production and summary of third party information on 29 September 2017 pursuant to his ongoing disclosure obligations in order to make known information obtained since the Commissioner's last production.
>
> Further, and as described in a 30 August 2017 letter from counsel to the Commissioner to counsel to VAA, the Commissioner refuses to issue code the documents and information that the Commissioner has already produced to VAA. This question is improper and, in any event, disproportionally burdensome.

[19] Echoing the "stock undertaking" language used by counsel for the parties, this is what I refer to as the Commissioner's "stock answer" in these Reasons. In his Memorandum of Fact and Law, the Commissioner also identified additional reasons to justify his refusals with respect to 15 of the 39 Category A Requests.

[20] It is not disputed that VAA's Category A Requests relate to all facts *known by* the Commissioner, as opposed to facts *relied on by* the Commissioner. The distinction is important as it is well-recognized by the jurisprudence that, in an examination for discovery, a party can properly ask for the factual basis of the allegations made by the opposing party, but not for the facts or evidence relied on to support an allegation (*Montana Band v Canada*, [2000] 1 FCR 267 (FCTD) ("***Montana Band***") at para 27; *Can-Air Services Ltd v British Aviation Insurance*

Company Limited, 1988 ABCA 341 at para 19). I am also satisfied that the Category A Requests pose questions relating to topics and issues that are *relevant* to the litigation between the Commissioner and VAA in the context of the Application. Again, relevance is a primary factor in determining whether a question should be answered in an examination for discovery (*Apotex Inc v Wellcome Foundation Limited*, 2007 FC 236 at paras 16-17; *Federal Courts Rules*, SOR/98-106 ("**FCR**"), subsection 242(1)).

[21] The main concern raised by the Commissioner results from the scope of what is being sought by VAA in its Category A Requests. The Commissioner claims that, given the level of specificity requested by VAA, the Category A Requests in effect ask the Tribunal to compel the Commissioner to "issue code" (i.e., to organize by issue or topic) his Summaries and his Documentary Productions for VAA. The Commissioner argues that the relief sought is unreasonable, unsupported by jurisprudence and unprecedented in contested proceedings before the Tribunal and civil courts. The Commissioner further pleads that VAA's Category A Requests should be denied on the basis of proportionality, as they are disproportionately burdensome on the Commissioner and contrary to the expeditious conduct of the Application as the circumstances and considerations of fairness permit.

a. The questions effectively asked by VAA

[22] At the hearing before the Tribunal, a large part of the discussion revolved around the exact question effectively asked by VAA in its various Category A Requests, and the Commissioner's contention that VAA was in fact asking him to "issue code" his Summaries and his Documentary Productions. Counsel for VAA submitted that, in its early questions at the beginning of the examination, VAA was not truly looking for specific references to the Summaries and Documentary Productions, but ended up asking for these references further to the responses given by Mr. Rushton and indicating that the "facts known" by the Commissioner were in the materials already produced. He claimed that VAA wanted the Commissioner to provide all the facts in relation to specific allegations in the pleadings that are within the Commissioner's knowledge. He added that, if that could be achieved by the Commissioner without references to specific documents or summaries, this would be acceptable for VAA.

[23] In other words, counsel for VAA clarified that, in its Category A Requests, VAA's intention was to ask the Commissioner to answer the question regarding facts underlying an allegation or an issue in dispute, and that it was not necessarily seeking references to every specific bullet in the Summaries and to every specific document in the Documentary Productions.

[24] I admit that there was some confusion at the hearing before the Tribunal regarding the exact scope of what VAA was seeking in its Category A Requests. However, I understand that, in the end, counsel for VAA essentially retracted from the actual wording of the Category A Requests used in VAA's Memorandum of Fact and Law and now asks the Tribunal to read down its Requests and to ignore the language "including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions" contained in the Requests.

[25] The problem with VAA's modified position is that, on a motion to compel answers to questions refused on discovery, the Tribunal has to rule on the specific questions asked at the examination and which, according to the moving party, have been refused or improperly answered by the deponent. The questions asked are those formulated during the examination itself and which the deponent refused, was unable to answer or decided to answer in the way he or she did, at the examination itself or after having taken the questions under advisement. As rightly pointed out by counsel for the Commissioner, these are questions and answers arising from sworn testimony.

[26] Further to my review of the transcripts of the examination for discovery of Mr. Rushton, and of the actual questions asked under the various Category A Requests, I find that what was effectively asked by VAA at the examination was not only all the facts underlying an allegation or an issue in dispute, but also in the same breath all references to specific bullets in the Summaries and to specific documents in the Documentary Productions. These were the questions posed to Mr. Rushton, and these were the questions to which the Commissioner's representative responded. I understand that VAA's original question or intention might not have been to ask such broad and wide-ranging questions, but this is what was done for the Category A Requests. I note that the so-called "original question" is not before the Tribunal, and indeed does not form part of the 39 Category A Requests identified by VAA.

[27] I agree with VAA that questions asking for the factual basis of the allegations made by a party have been considered by the jurisprudence to be proper questions to ask on examinations for discovery. VAA was therefore entitled to ask for "all facts known to the party being discovered which underlie a particular allegation in the pleadings" (*Montana Band* at para 27). I am also ready to accept that, contrary to the Commissioner's contention, the vast majority of VAA's Category A Requests relate to specific and discrete topics and issues, as opposed to being generic, general or "catch-all" questions.

[28] However, the problem is the level of specificity asked by VAA in its Category A Requests, in terms of specific references to the Summaries and Documentary Productions. Pursuant to Rule 242 of the FCR, a person can object to questions asking for too much particularity on the ground that they are unreasonable or unnecessary. The Tribunal has previously established that the Commissioner does not generally have to identify every particular document upon which he relies to support an allegation (*Canada (Director of Investigation and Research) v Southam Inc*, [1991] CCTD No 16 ("***Southam***") at paras 17-18; *Canada (Director of Investigation and Research) v NutraSweet Co*, [1989] CCTD No 54 ("***NutraSweet***") at para 29). If it is unreasonable to expect a party to identify every document or part thereof which might be *relied upon* to support an allegation, I conclude that it is likewise unreasonable and improper, on an examination for discovery, to ask a party to identify every document *containing facts known* to that party and which underlie a specific allegation (*Southam* at para 18).

[29] I acknowledge that there could be situations where the volume and complexity of the documentation produced reach such a level that the specific identification of every document may become necessary (*NutraSweet* at para 29). Some courts have indeed held that, where documentary production is voluminous, a party may be required to identify which documents contained in its productions are related to or support particular allegations (*Rule-Bilt Ltd v Shenkman Corporation Ltd et al* (1977), 18 OR (2d) 276 (ONSC) ("***Rule-Bilt***") at paras 27-28;

International Minerals & Chemical Corp (Canada) Ltd v Commonwealth Insurance Co, 1991 CanLII 7792 (SKSB) ("***International Minerals***") at paras 6-10). However, I am not persuaded that, in this case, VAA has established or demonstrated the existence of such a voluminous or complex document production so as to require the Commissioner to identify every specific reference to documents or portions of summaries. I note that, when VAA's own productions and the catering pricing records are removed, the Commissioner's Documentary Productions amount to 1,158 records and that the Summaries add up to some 200 pages. In my opinion, and in the absence of any evidence demonstrating the contrary, this cannot be qualified as onerously voluminous or inherently complex, having particular regard to VAA's access to an electronic index and electronic data search function for these materials.

[30] I thus find that, as drafted in VAA's Memorandum of Fact and Law and as they were asked during the examination for discovery of Mr. Rushton, VAA's initial Category A Requests are overbroad and inappropriate and, for that reason, they need not be answered by the Commissioner. I agree with the Commissioner that answering them as they were expressed would in effect require the Commissioner to "issue code" its Summaries and Documentary Productions. This, in my opinion, cannot be imposed on the Commissioner.

[31] That being said, in the circumstances of this case, it would not be helpful nor efficient to end my analysis here. At the hearing, counsel for VAA indeed asked the Tribunal to also consider VAA's "reformulated" questions, namely a severed version of the Category A Requests asking for "all the facts known to the Commissioner" without necessarily referencing specific documents or specific bullets in the Summaries. He suggested that the Tribunal could read down and truncate the final portion of the Requests if it found VAA's initial Category A Requests too broad, and then assess whether those reformulated Requests were properly and sufficiently answered by the Commissioner.

[32] It is true that, in this Order, I could only consider VAA's Category A Requests as they were initially formulated, simply determine that they need not be answered because they are overbroad and unreasonable, and state that I decide so without prejudice to VAA returning in a further examination with read-down and reformulated questions addressing the same issues. However, in the context of this case and as the final steps for the preparation of the trial loom ahead, I am of the view that this option would not be a practical, expeditious and fair way to deal with the issues raised by VAA's Refusals Motion. The questions as framed in VAA's initial Category A Requests may be too broad but the subject matters of the questions are relevant. It is therefore much more preferable for me to deal with the "reformulated" Requests immediately, and this is what I will proceed to do.

b. The issue of proportionality

[33] I pause a moment to briefly address the subsidiary argument of the Commissioner based on the principle of proportionality, as it essentially applies in relation to the Commissioner's concern about VAA's request to "issue code" his productions and summaries. I know that, since I have just concluded that VAA's Category A Requests are overly broad and need not be answered, it is not necessary to consider this issue of proportionality for the purpose of this Order. However, in light of the representations made by counsel for the Commissioner at the hearing, I make the following remarks.

[34] The Commissioner claims that, in any event, the Tribunal should not order him to answer VAA's Category A Requests because it would be unduly burdensome and onerous for the Commissioner to issue code the Summaries and Documentary Productions to the level of specificity sought by VAA. The Commissioner has not filed an affidavit to support his claim regarding the disproportionate burden he would face to answer VAA's requests, but counsel for the Commissioner argues that, in this case, the Tribunal could determine this issue of proportionality in the Commissioner's favour despite the absence of affidavit evidence. I disagree with the Commissioner's position on this front.

[35] I do not dispute that the proportionality rule applies to Tribunal proceedings. More specifically, on questions such as those raised in this Refusals Motion, the Tribunal must always take into account issues of proportionality (*The Commissioner of Competition v Reliance Comfort Limited Partnership*, 2014 Comp Trib 9 ("***Reliance***") at paras 25-27). However, the case law is clear: claims invoking the principle of proportionality must be supported by evidence (*Wesley First Nation (Stoney Nakoda First Nation) v Alberta*, 2013 ABQB 344 at paras 93-94; *Montana Band* at para 33). It is not sufficient to merely raise the argument that it would be too onerous to comply with a request to provide answers to questions on discovery. Some evidence must be offered to support the claim and to establish how a request could be disproportionate to its value.

[36] Indeed, in the Tribunal's decision relied on by the Commissioner, Mr. Justice Rennie's finding that the request to compel answers would be too burdensome and disproportionate was predicated upon actual evidence coming from two affidavits detailing the costs, human resources and time needed to comply with the request made (*Reliance* at paras 32, 39 and 42). Similarly, in *The Commissioner of Competition v Air Canada*, 2012 Comp Trib 20 ("***Air Canada***"), affidavit evidence was filed to demonstrate how the questions asked would impose a massive and disproportionate burden (*Air Canada* at para 24).

[37] In the current case, the Commissioner has offered no evidence to support his plea of burdensomeness and disproportionality, and this alone would have been sufficient to reject his claim in this respect. I am not excluding the possibility that, in some circumstances, proportionality could dictate that disclosure requirements imposed on the Commissioner or a private litigant in an examination for discovery be more limited. These questions are highly fact-specific and will depend on the circumstances of each case. But, in each case, a claim of disproportionate burden will always require clear and convincing evidence meeting the balance of probability threshold (*FH v McDougall*, 2008 SCC 53 at para 46).

c. The "reformulated" questions asked by VAA

[38] I now consider VAA's "reformulated" Category A Requests, namely the questions asking for "all the facts that the Commissioner knows" with respect to a particular issue or allegation without necessarily referencing specific bullets in the Summaries or specific documents in the Documentary Productions. Of course, I understand that, as restated, these Requests were not actually put to Mr. Rushton during his examination for discovery and that neither Mr. Rushton nor the Commissioner has yet had an opportunity to consider them and to respond to them. In this regard, I accept that the responses already given by the Commissioner to VAA's initial Category A Requests, including his "stock answer", cannot simply be assumed to reflect what

Mr. Rushton and the Commissioner would effectively respond to the "reformulated" version of these Requests. In fact, I do not exclude the possibility that the overly broad nature of the Category A Requests formulated by VAA and of the "stock undertaking" used at Mr. Rushton's examination for discovery may have contributed to polarize the Commissioner's responses and to prompt him to reply with the "stock answer" he resorted to. In that context, Mr. Rushton and the Commissioner certainly deserve to be afforded the opportunity to effectively respond to the "reformulated" Category A Requests before the Tribunal can determine whether or not such questions have been properly and sufficiently answered.

[39] However, I believe that, in the circumstances of this case, it is also useful and practical for me to discuss what, in my view, would constitute a proper and sufficient answer by the Commissioner to such "reformulated" Category A Requests from VAA. As stated above, I am ready to accept that VAA was entitled to *ask* the Commissioner for "all facts known" with respect to a particular issue or allegation (*Montana Band* at para 27). What remains to be determined are the parameters that can assist the parties in defining what would constitute an acceptable *answer* by the Commissioner to questions seeking "all facts known" by him.

[40] In this regard, VAA's Refusals Motion raises some fundamental questions on the extent of the disclosure obligations of the Commissioner in the context of examinations for discovery, and it is worth taking a moment to look at this issue from the more global perspective of oral discovery in Tribunal proceedings.

i. Examinations for discovery

[41] It is well-accepted that the purpose of discovery, whether oral or by production of documents, is to obtain admissions to facilitate proof of all the matters which are at issue between the parties, and to allow the parties to inform themselves prior to trial of the nature of the other party's position, so as to define the issues in dispute (*Canada v Lehigh Cement Limited*, 2011 FCA 120 ("***Lehigh***") at para 30; *Southam* at para 3). The overall objective of examinations for discovery is to promote both fairness and the efficiency of the trial by allowing each party to know the case against it (*Bell Helicopter Textron Canada Limitée v Eurocopter*, 2010 FCA 142 at para 14; *Montana* at para 5).

[42] It is also generally recognized that courts have taken a liberal approach to questions seeking "all facts known" by a party and that, in examinations for discovery, the relevant facts should be provided with sufficient particularity so that the information is not being buried in a mass of documentation or information. A sufficient level of specificity contributes to render the trial process fairer and more efficient. As such, a party will typically be entitled to know not only which facts are referred to in the pleadings but also where such description of facts is to be found (*Dek-Block Ontario Ltd v Béton Bolduc (1982) Inc* (1998), 81 CPR (3d) 232 (FCTD) at paras 26-27). Providing adequate references to relevant facts and their description in the documentary productions may require work, time and resources from the party on whom the burden falls but, in large and complicated cases, the fact that "the marshalling of facts and documents may require a great deal of work is something with which the parties simply have to live" (*Montana Band* at para 33). It remains, however, that answers to questions on examination for discovery will always depend on the facts of the case and involve a considerable exercise of discretion by the judge.

[43] Other factors colour the examination for discovery process in Tribunal matters. First, the Commissioner is a unique litigant in proceedings before the Tribunal. The Commissioner is a non-market participant and his representatives have no independent knowledge of facts regarding the market and behaviour at issue. Rather, all of the facts or information in the Commissioner's possession, power or control arise from what he has gathered from market participants in the course of his investigation of the matter at stake. The Commissioner and his representatives do not have the direct and primary knowledge of the facts supporting the Application. This means that it may typically be more difficult and challenging for a representative of the Commissioner to exhaustively describe "all facts known" to the Commissioner.

[44] Second, expeditiousness and considerations of fairness are two fundamental elements of the Tribunal's approach and proceedings. Subsection 9(2) of the *Competition Tribunal Act*, RSC 1985, c 19 (2nd Supp) directs the Tribunal to conduct its proceedings "as informally and expeditiously as the circumstances and considerations of fairness permit". Ensuring both expeditious litigation and adequate protection of procedural fairness is thus a statutory exigency central to the Tribunal's functions. The Tribunal endeavours to make its processes quick and efficient and, at the same time, never takes lightly concerns raised with respect to the procedural fairness of its proceedings. Furthermore, as I have indicated in the VAA Privilege Decision, since proceedings before the Tribunal are highly "judicialized", they attract a high level of procedural fairness (*VAA Privilege Decision* at para 159). It is well-established that the nature and extent of the duty of procedural fairness will vary with the specific context and the different factual situations dealt with by the Tribunal, as well as the nature of the disputes it must resolve (*Baker v Canada (Minister of Citizenship and Immigration*), [1999] 2 SCR 817 at paras 25-26; *VAA Privilege Decision* at paras 165-170).

[45] Proceedings before the Tribunal move expeditiously and the Tribunal typically adopts schedules which are much tighter than those prevailing in usual commercial litigation, both for the discovery steps and the preparation of the hearing itself. These delays are generally measured in a limited number of months. This is the case for this Application, as the scheduling order provided for a timeframe of a few months to conduct documents and oral discovery. This entails certain obligations for all parties involved, and for the Tribunal. In determining what is proper and sufficient disclosure, concerns for expeditiousness always have to be balanced against fairness and efficiency of trial.

[46] In sum, what both the parties and the Tribunal are trying to achieve with examinations for discovery is a level of disclosure sufficient to allow each side to proceed fairly, efficiently, effectively and expeditiously towards a hearing, with sufficient knowledge of the case it has to meet. There is no magic formula applicable to all situations, and a case-by-case approach must always prevail to determine the appropriate level of disclosure required in examinations for discovery. The scope of permissible discovery will ultimately depend "upon the factual and procedural context of the cases, informed by an appreciation of the applicable legal principles" (*Lehigh* at para 24). In that context, determining whether a particular question is permissible on an examination for discovery is a "fact based inquiry" (*Lehigh* at para 25).

ii. The "stock answer" of the Commissioner

[47] In the case at hand, the first part of the Commissioner's response to VAA's initial Category A Requests summarily stated that he has produced to VAA all relevant, non-privileged information in the Commissioner's possession, power and control and has further produced to VAA summaries of relevant third-party information learned by the Commissioner from third parties in the course of the Competition Bureau's review of this matter. While he referred to his upcoming obligations under the *Competition Tribunal Rules* (SOR/2008-141) and in terms of issuance of witness statements, the Commissioner essentially said in this "stock answer" that the facts known to him in respect of the various questions raised by VAA could be found in the Summaries and Documentary Productions, with no further detail or direction.

[48] In my view, simply relying on this type of generic statement would not amount to a proper and sufficient answer by the Commissioner to the "reformulated" Category A Requests in the context of VAA's examination for discovery[1]. In the course of an examination for discovery of his representative, the Commissioner cannot just retreat behind his Summaries and his Documentary Productions and not take proper steps to provide more detailed answers and direction in response to specific questions and undertakings, beyond a reference to the mere existence of the materials he has produced. Stated differently, resorting to the "stock answer" that the Commissioner has used in this case would not be enough to meet the requirements of fairness, expeditiousness and efficiency of trial that should generally govern the examination for discovery process in Tribunal proceedings.

[49] Oral discovery has to mean something, including when the Commissioner is involved (*Commissioner of Competition v United Grain Growers Limited*, 2002 Comp Trib 35 ("***UGG***") at para 92). In my opinion, the Commissioner cannot cloak himself with the blanket of a generic statement that all documents and summaries have been produced, that there is nothing else, and that all relevant acts known to him are found somewhere in his documentary productions and summaries of third-party information, without any more detail or direction, and claim that this is sufficient to meet his disclosure obligations to relevant questions raised in an examination for discovery. Being an atypical litigant does not imply that the Commissioner can be insulated from the basic tenets of oral discovery or above the examination for discovery process (*NutraSweet* at para 35). In my view, if the Tribunal were to accept a generic statement like the "stock answer" used by the Commissioner in this case as constituting a proper and sufficient answer to VAA's Category A Requests, it could only serve to transform the oral discovery of the Commissioner's representative into a masquerade. It would reduce it to an empty, meaningless process. This is not an acceptable avenue for the Tribunal to follow, and it is certainly not a fair, efficient or even expeditious way to prepare for trial in this case.

[50] While I accept that requesting the Commissioner to "issue code" his documentary productions and summaries of third-party information and to identify every relevant document or piece of information in his materials is generally improper in the context of examinations for discovery in Tribunal proceedings, I find that simply responding that all relevant facts are

[1] As explained in more detail below, some of VAA's Category A Requests, even if "reformulated", need not be answered by the Commissioner for other reasons, and this discussion on the Commissioner's generic answer therefore does not apply to them.

contained somewhere in his documentary productions and summaries, without detail or direction, is equally an improper answer from the Commissioner. Neither of these two extremes is an acceptable option (*International Minerals* at para 7). I use the term "generally" as I am mindful that the disclosure requirements in an examination for discovery will vary with the circumstances of each case and that the decisions of the Tribunal on motions to compel answers always involve an exercise of discretion by the presiding judicial member seized of the refusals.

[51] I pause to make one observation regarding the examination for discovery of Mr. Rushton in this case. In making the above comments on the Commissioner's response to VAA's initial Category A Requests, I am by no means suggesting that resorting to the "stock answer" was reflective of the overall approach espoused by the Commissioner in the examination of Mr. Rushton, or of the testimony given by Mr. Rushton. On the contrary, throughout the two-day examination, most questions asked to Mr. Rushton did not lead to requests for undertakings by VAA as Mr. Rushton appears to have responded satisfactorily to the vast majority of them, notably by providing information, examples and sufficiently specific references to portions of the Summaries or of the Documentary Productions, and by referring to many facts that came to his mind. In fact, my reading of the examination tells me that Mr. Rushton was a cooperative and forthcoming witness over the two days of his examination. Unanswered questions were the exception rather than the rule and, at the end of two full days of examination, a total of only 39 Category A Requests emerged. For most questions raised during his examination, Mr. Rushton was far from simply retreating behind the Commissioner's Summaries and Documentary Productions and instead provided sufficient answers and direction in response to the questions asked by VAA.

[52] I observe that about three-quarters of the unanswered Category A Requests arose on the second day of Mr. Rushton's examination. A review of the transcripts leaves me with the impression that, as the examination progressed, counsel for both VAA and the Commissioner jumped somewhat hurriedly to simply flagging the "stock undertaking" and providing the "stock undertaking under advisement", without always giving an opportunity to Mr. Rushton to attempt to respond to some of the questions. This was followed by the "stock answer" eventually given by the Commissioner in response to the Category A Requests.

iii. Proper and sufficient answer to the "reformulated" questions

[53] Now, having said that about the "stock answer", how could the Commissioner properly and sufficiently respond to the "reformulated" Category A Requests in this case? Of course, I understand that determining whether a particular question is properly answered is a fact-based inquiry and will ultimately depend on the context of each question. Also, the Tribunal always retains the discretion to determine what amounts to a satisfactory and sufficient answer in each case. But, in light of the above discussion, I believe that some general parameters can be established to guide the Tribunal and the parties in making that determination.

[54] First, I accept that, like any other litigant, VAA has the responsibility to build and prepare its own case. It is not for the Commissioner to do the work for VAA. It is VAA's task to review and organize the materials produced by the other side, and the Commissioner does not have to give VAA a precise roadmap to find documents in the AODs or relevant extracts in the Summaries. To a certain extent, it is incumbent upon the recipient of a documentary disclosure to

comb through it and sort it out. The Commissioner has acknowledged that it has already produced all documents in its power, possession or control that could answer VAA's Requests, and both VAA and the Commissioner are in a position to perform the work of identifying the facts and sources underlying the various allegations made by the Commissioner. To some extent, the Commissioner is in no better position than VAA to do the work.

[55] At the same time, on discovery, VAA has the right to be provided with the relevant factual information underlying the Commissioner's Application and allegations therein (*NutraSweet* at paras 9, 35). It is entitled to know the case against it and to obtain sufficient information respecting the specific relevant facts (*The Commissioner of Competition v Direct Energy Marketing Limited*, 2014 Comp Trib 17 ("***Direct Energy***") at para 16; *NutraSweet* at paras 30, 42). Broadly speaking, the usual rules of discovery in civil proceedings apply.

[56] Another tempering element in this case, as is usually the situation for most respondents in proceedings initiated by the Commissioner before the Tribunal, is the fact that VAA is a market participant. VAA has considerable knowledge about the industry, its operations and the players and potential players. VAA already has a good sense of the information in the Commissioner's possession about the market in which it is alleged to have engaged into an abuse of dominant position. As observed earlier, 1,619 records produced by the Commissioner originate from VAA itself. Practicality dictates that I thus need to be mindful of VAA's own capability and knowledge.

[57] Indeed, I note that the number of documents other than VAA's records and in-flight catering pricing data records total less than 1,200 records and cannot be said to be voluminous, that the Summaries amount to just over 200 pages, and that these materials are fully searchable by both VAA and the Commissioner.

[58] I further observe that the Tribunal has previously recognized that it is "sufficient if a party on discovery indicates the significant sources on which it relies for its allegation" (*Southam* at para 18). Providing the main facts, significant sources, or categories of documents described in sufficient detail to enable to locate the facts has been found by the case law to be a proper and sufficient answer to questions raised in examinations for discovery (*Southam* at paras 18-19; *NutraSweet* at paras 30-35; *International Minerals* at paras 8-10). The degree of particularity needed will vary with the circumstances and complexity of the case, the volume of documents involved, and the familiarity of the parties with the documents (*Rule-Bilt* at para 25). While some of these precedents appear to have dealt with situations where the questions asked related to facts *relied on*, I am satisfied that these observations on the sufficiency of "significant sources" remain applicable to a certain extent for questions asking for relevant facts *known to* the Commissioner.

[59] Finally, and it is important to emphasize this, the Commissioner has clearly stated, and reiterated, that he has produced to VAA all relevant, non-privileged information in the Commissioner's possession, power and control, and that all relevant information learned by the Commissioner from third parties in the course of his investigation and subject to public interest privilege has been produced through the Summaries. Accordingly, it is not disputed that all relevant facts known to the Commissioner are already in the materials produced to VAA.

[60] In light of the foregoing, I consider that, for an answer to VAA's "reformulated" Category A Requests asking for "all facts known" to the Commissioner on a particular topic to be proper, it would be sufficient for the Commissioner to provide a description of the significant relevant facts known to him, with direction as to those sections, parts or range of pages of the Summaries and of the Documentary Productions where the significant sources of relevant facts are located. In other words, the Commissioner does not have to offer a complete roadmap to VAA, but he must at least provide signposts indicating what the significant facts known to the Commissioner are and offering direction as to where the information is located in the Commissioner's materials. In my view, answering the "reformulated" Category A Requests along these lines will result in a level of disclosure sufficient to allow both parties to proceed fairly, efficiently, effectively and expeditiously towards a hearing in this case.

[61] No magic formula exists to determine the precise level of description and direction needed, as it will evidently vary with the facts surrounding each particular case and question. If no agreement can be reached by the parties on a given question despite the above guidance, it will have to be assessed and determined by a presiding judicial member in the exercise of his or her discretion. However, I believe that the parties should generally be able to sort it out without the Tribunal's intervention if VAA and the Commissioner make good faith efforts to ask proper questions and provide proper answers.

[62] This means that the Commissioner will not have to go to the extreme advocated by VAA in this case, and precisely identify every single fact and document known by the Commissioner for each specific question asked by VAA in the "reformulated" Category A Requests. This, in my view, would be an unreasonable requirement in the context of an examination for discovery in this case. For greater clarity, describing the significant relevant facts, and providing direction to the significant sources containing the relevant facts will therefore not necessarily mean that these facts or sources identified by the Commissioner's representative constitute an exhaustive recount of "all" the facts known to the Commissioner. Again, requiring such an absolute level of disclosure would likewise not be fair or practical, nor would it promote expeditiousness and efficiency at trial.

[63] I should add that requiring the Commissioner to provide an indication of the significant relevant facts or sources known to him should not be interpreted or construed as being a disguised way of requiring the Commissioner to identify the facts "relied upon" for his allegations at this stage of the proceedings. As indicated above, it is trite law that this is not something that can be requested in examinations for discovery.

iv. Specific assessment of the "reformulated" questions

[64] Having examined and considered VAA's 39 "reformulated" Category A Requests under that lens, I conclude that 24 of these Requests will need to be answered by Mr. Rushton and the Commissioner, using the approach developed in these Reasons as guidance. The remaining 15 "reformulated" Category A Requests will not need to be answered because of other compelling reasons discussed below.

[65] I observe that this subset of 24 Requests embodies different situations in terms of the answers already provided by Mr. Rushton and the Commissioner. Indeed, VAA had referred to

two different categories of Category A Requests in its Memorandum of Fact and Law: one where no specific answer was given and another where some partial information was provided. Among these 24 Category A Requests, there are instances where the response already provided by Mr. Rushton contained no reference whatsoever to any particular facts, and no direction as to where the relevant information was located in the Summaries or the Documentary Productions, and where he only mentioned that "nothing immediately comes to mind". There are others where Mr. Rushton provided references to "some information", "some communications" or "some examples" in the Summaries or Documentary Productions, where he mentioned facts but did not recall where the information was, where he was uncertain as to whether other responsive facts existed, or where he indicated that there could be some facts or references but needed to verify where such information was. In the latter group of answers, there was therefore an onset of response provided by Mr. Rushton. However, for none of these 24 Category A Requests did Mr. Rushton refer to "significant" facts or direct VAA to "significant" sources.

[66] In light of the foregoing, the following 24 "reformulated" Category A Requests will need to be answered by the Commissioner along the lines developed in these Reasons (i.e., through a description of the significant relevant facts known to the Commissioner, with direction as to those sections, parts or range of pages of the Summaries and of the Documentary Productions where the significant sources of relevant facts are located):

> Request 24 (recent in-flight catering business changes)[2];
>
> Request 30 (West-Jet's switching to in-flight catering);
>
> Request 47 (double-catering);
>
> Request 49 (factors considered by airlines when deciding whether to operate at an airport);
>
> Request 50 (VAA's ability to dictate terms upon which it supplies access to the airside);
>
> Request 57 (whether VAA participates in the market for galley handling other than sharing in revenue);
>
> Request 58 (VAA's competitive interest in the market for galley handling);
>
> Request 61 (exchange between a supplier and VAA about the supplier's renting requirements);
>
> Request 62 (VAA having a competitive interest in the market for supply of galley handling);

[2] The actual description of the various VAA Requests has been slightly modified in this decision to remove any confidential information and specific references to confidential material.

Request 64 (whether in-flight caterers and galley handling firms operate on- or off-airport in North America);

Request 67 (innovation, quality, service levels and more efficient business models new entrants would have brought);

Request 74 (VAA's purposely excluding new entrants);

Request 77 (intended negative exclusionary effect of VAA's practice);

Request 78 (leasing land or having a kitchen located on the airport);

Request 82 (actual events of exclusion/refusal to new entrants);

Request 83 (reasons for not granting a particular licence);

Request 84 (whether reasons expressed in a particular letter for the denial of a licence by VAA were the actual ones);

Request 86 (airports in Canada and beyond Canada that limit the number of galley handlers and number of galley handlers in Canadian airports);

Request 89 (food as being of particular importance to Asian airlines);

Request 91 (importance of food to business/first class passengers);

Request 93 (flight delays' effect on an airline's willingness to launch or offer routes to that airport);

Request 96 (access issues raised by VAA);

Request 102 (ability of existing galley handlers at VIA to service demand); and

Request 103 (why a particular supplier left in 2003).

[67] I mention that, further to my review of the transcripts of Mr. Rushton's examination, I find that the Commissioner's responses to the two following requests offer examples of instances where Mr. Rushton provided answers echoing, at least in part, the guidance developed in these Reasons. Request 47 on double-catering has been answered through several references made by Mr. Rushton to important relevant information and direction to a range of pages and even specific bullets in the Summaries. Similarly, Request 64 on whether in-flight caterers and galley handling firms operate on- or off-airport in North America contained references by Mr. Rushton to facts and to information being generally contained at certain pages and sections in the Summaries. These responses to Requests 47 and 64 are examples of minimal benchmarks that the Commissioner should use for constructing proper and sufficient answers.

[68] Conversely, for the remaining 15 "reformulated" Category A Requests, I find that, even if the requirement for specific references to the Summaries and Documentary Productions were severed from the requests, and despite the limited, insufficient response offered so far through the "stock answer" given by the Commissioner, they still do not need to be answered by the Commissioner for other various compelling reasons.

[69] First, I agree with the Commissioner that several of these requests from VAA remain improper in any event, as they invite economic analysis, opinion or conclusions from the Commissioner on certain issues, or require comparative analyses between different price and non-price factors, as opposed to the facts themselves (*NutraSweet* at paras 23, 38; *Southam* at paras 12-13). Such requests essentially seek to reveal how the Commissioner assessed and interpreted facts, and therefore need not be answered. These are:

> Request 21 (market definition that does not include catering);
>
> Request 25 (geographic market definition being characterized solely as VIA);
>
> Request 48 (whether VIA competes with other airports);
>
> Request 53 (land rents charged to in-flight catering firms by VAA compared to other North American airports);
>
> Request 56 (VAA's latitude in determining prices and non-price dimensions for the supply of galley handling at VIA);
>
> Request 66 (whether concession fees charged by VAA are constrained by competition with other airports);
>
> Request 71 (whether the business of certain catering suppliers at VIA are profitable);
>
> Request 81 (market power of VAA in relation to galley handling affected by tying of airside access to leasing land at airport);
>
> Request 100 (impact at VIA of reduction from two caterers to one);
>
> Request 104 (scale and scope economies in catering and galley handling and how they would cross over from catering to galley handling);
>
> Request 105 (competition between certain suppliers for galley handling and catering at VIA); and
>
> Request 106 (how prices for catering/galley handling at VIA compare to prices at airports where new entry is not limited).

[70] Second, as counsel for VAA conceded at the hearing, Request 60 on pricing data has already been answered through the more than 11,000 in-flight caterer pricing data records provided by the Commissioner.

[71] Third, Requests 72 and 73 on certain meetings involving VAA need not be answered as VAA confirmed in its Memorandum of Fact and Law that it already has the facts. In addition, these requests are not asking for facts but, rather, for an interpretation or characterization of those facts by the Commissioner. Questions of this nature are improper and need not be answered.

B. Category B Requests

[72] VAA's 11 Category B Requests relate to questions that Mr. Rushton declined to answer on the basis of the Commissioner's public interest privilege. VAA claims that, to the extent the Commissioner asserts public interest privilege over information sought on oral discovery, he must establish that the information is in fact privileged and falls within that class of privilege. VAA contends that, in the challenged questions, the Commissioner simply made a bald assertion of public interest privilege, and that he has not addressed the scope of the public interest privilege or how such information falls within that scope.

[73] I disagree.

[74] As it was recently confirmed by the Tribunal in the VAA Privilege Decision, the Commissioner's public interest privilege has been approved as a class-based privilege. This privilege recognizes the existence of a class of documents and communications, created or obtained by the Commissioner during the course of a Competition Bureau investigation, as being protected, such that they need not be disclosed during the discovery phase of proceedings before the Tribunal. It guarantees to those persons having provided information to the Commissioner that their information will be kept in confidence and that their identities will not be exposed unless specifically waived by the Commissioner at some point in the proceedings.

[75] The assertion of the public interest privilege therefore allows, in the discovery process, the Commissioner to refuse to disclose facts that would reveal the source of the information protected by the privilege (*UGG* at para 93). I underline that this public interest privilege is limited, and extends only insofar as is necessary to avoid revealing the identity of the person or the source of the information gathered by the Commissioner. Needless to say, the privilege cannot be used by the Commissioner to avoid his normal disclosure obligations.

[76] In this case, the Commissioner (and also through Mr. Rushton in his examination for discovery) has refused to answer VAA's 11 Category B Requests in order to precisely avoid having to reveal the source of the information sought. In his sworn testimony, Mr. Rushton has indicated that answering those VAA questions would risk uncovering the identity of third-party sources. Accordingly, these questions are objectionable, as they encroach on the Commissioner's public interest privilege.

[77] VAA claims that, in the event the Commissioner asserts public interest privilege as the basis for refusing to respond to a question or undertaking, he is required to provide evidence as

to how responding to the question would reveal or risk revealing the source. I do not share that view. I am instead of the view that the burden lies on the party seeking disclosure to demonstrate why a communication or document subject to a class-based privilege should be disclosed. This is true for the public interest privilege of the Commissioner as it is for other class privileges such as the solicitor-client privilege. Once it is established that the relationship is one protected by the privilege, the information is *prima facie* privileged, and it is up to the opposing party to prove that the privilege does not apply. For instance, it belongs to the party seeking disclosure of a solicitor-client communication to demonstrate that the privileged communication should be disclosed, by proving, for example, that the privilege has been waived.

[78] In other words, it is incumbent upon VAA to demonstrate why the public interest privilege should be lifted in the case at hand. The burden does not suddenly shift back to the Commissioner to re-assert the class-based public interest privilege because VAA challenges it. The presumption of privilege is to be rebutted by the party challenging the privilege. VAA's proposed approach would in fact turn the class-based public interest privilege of the Commissioner into a case-by-case privilege. Privileges established on a case-by-case basis refer to documents and communications for which there is a *prima facie* presumption that they are <u>not</u> privileged and are instead admissible, but can be excluded in a particular case if they meet certain requirements. In those situations, there is no presumption of privilege, and it is then up to the party claiming a case-by-case privilege to demonstrate that the documents and communications at stake bear the necessary attributes to be protected from disclosure. The analysis to be conducted to establish a case-by-case privilege requires that the reasons for excluding otherwise relevant evidence be weighed in each particular case. This does not apply to class-based privileges.

[79] Furthermore, in the VAA Privilege Decision, I discussed the "unique way" in which the Commissioner's public interest privilege has developed, and I referred to two elements in that regard: "the safeguard mechanisms put in place by the Tribunal to temper the adverse impact of the limited disclosure and the high threshold (e.g., compelling circumstances or compelling competing interest) required to authorize lifting the privilege" (*VAA Privilege Decision* at para 81).

[80] The safeguard mechanisms have been mentioned by VAA in this Refusals Motion. They include: (1) the Commissioner's obligation to provide, prior to the examinations for discovery, detailed summaries of all information being withheld on the basis of public interest privilege, containing both favourable and unfavourable facts to the Commissioner's Application; (2) the option for the respondent to have a judicial member of the Tribunal, who would not be adjudicating the matter on the merits, to review the documents underlying the summaries to ensure they have been adequately summarized and are accurate; and (3) the fact that the Commissioner will have to waive privilege on relevant documents and communications and provide will-say statements ahead of the hearing, if he wants to rely upon information from certain witnesses in proceedings before the Tribunal (*VAA Privilege Decision* at paras 61, 82-87). I pause to note that, in the current case, the first two safeguard mechanisms have already been used, and the third one will likely kick in when the Commissioner files his witness statements.

[81] The second element I evoked in the VAA Privilege Decision was another mechanism available to VAA to challenge the public interest privilege of the Commissioner, namely by demonstrating the presence of "compelling" circumstances allowing one to circumscribe the reach of the Commissioner's public interest privilege (*VAA Privilege Decision* at paras 88-91). The public interest privilege of the Commissioner is not absolute and can be overridden by "compelling circumstances" or by a "compelling competing interest". But this requires clear and convincing evidence proving the existence of circumstances where the Commissioner's public interest privilege could be pierced, and it is a high threshold. As I had mentioned in the VAA Privilege Decision, Madam Justice Dawson notably expressed the test as follows: "public interest privilege will prevail unless over-ridden by a more compelling competing interest, and fairly compelling circumstances are required to outweigh the public interest element" (*Commissioner of Competition v Sears Canada Inc*, 2003 Comp Trib 19 at para 40).

[82] VAA had the option of bringing a motion to override the public interest privilege and to challenge the documents and information over which the Commissioner asserted a claim of public interest privilege, by demonstrating the presence of such compelling circumstances or compelling competing interests. It has not done so with respect to any of its 11 Category B Requests. Similarly, in the context of this Refusals Motion, VAA has offered no evidence sufficient for the Tribunal to even consider the potential exercise of its discretion to set aside the public interest privilege asserted by the Commissioner using that "compelling circumstances" mechanism. As admitted by counsel for VAA at the hearing, no evidence of compelling circumstances or compelling competing interests has been adduced or provided by VAA at this point, with respect to any of the Category B Requests. In the circumstances, I find that there are no grounds to compel the answers sought by VAA in its Category B Requests.

[83] I make one last comment on the issue of public interest privilege. I do not agree with the suggestion that, in the VAA Summaries Decision, Mr. Justice Phelan recognized or implied that questions requiring a circumvention of the public interest privilege would be automatically proper at the time of oral discovery of the Commissioner's representative. Mr. Justice Phelan instead stated that the identity of the sources "may be disclosed before trial if the Commissioner relies on the source for evidence", in fact alluding to the third safeguard mechanism referred above, namely the stage at which the Commissioner files his witness statements (*VAA Summaries Decision* at para 23). Contrary to VAA's position, I do not read Mr. Justice Phelan's comments as signalling that the public interest in not identifying third-party sources of information or not giving information from which sources may be identified could be quietly lifted at the oral discovery stage, without having to go through the demonstration of "compelling circumstances" or "compelling competing interests".

[84] For those reasons, VAA's Category B Requests 32, 39, 43, 117, 121, 122, 123, 124, 125, 127 and 128 need not be answered.

[85] I would further note that I agree with the Commissioner that Requests 39 and 43 need not be answered for an additional reason, as they relate to the conduct of the Commissioner's investigation and are thus not relevant to the Application (*Southam* at para 11).

[86] As to Request 117, I also find that it needs not be answered by the Commissioner for another reason: it is premature at this stage of the proceedings. The Commissioner does not have

to identify his witnesses prior to serving his documents relied upon and his witness statements (*Southam* at para 13). When the Commissioner does so on November 15, 2017 (as mandated by the scheduling order issued by the Tribunal), the third safeguard mechanism will require the Commissioner to waive his public interest privilege on relevant documents and communications from witnesses providing will-say statements, if he wants to rely on that information. The Commissioner does not have to identify his witnesses prior to that time and, if VAA believes that the Commissioner does not comply with his obligations when he serves his materials on November 15, 2017, it will be able to raise the issue with the Tribunal at that time.

[87] That being said, by finding that VAA's Request 117 is premature, I should not be taken to have determined that, in order to comply with his obligations at the witness statements stage, the Commissioner could simply waive his privilege claims over those documents and communications he will actually *rely on* in his materials, as opposed to all documents and communications related to the witness(es) for whom the privilege is waived. This is a fact based matter that the Tribunal will address as needed. I would however mention that, depending on the circumstances, considerations of fairness could well require that the privilege be waived on all relevant information provided by a witness appearing on behalf of the Commissioner, both helpful and unhelpful to the Commissioner, even if some of the information has not been relied on by the Commissioner (*Direct Energy* at para 16). As long as, of course, disclosing the information not specifically relied on by the Commissioner does not risk revealing the identity of other protected sources and imperil the public interest privilege claimed by the Commissioner over sources other than that particular witness.

C. Category C Requests

[88] I finally turn to VAA's Category C Requests, where Request 110 is the only item remaining. Request 110 asks the Commissioner to "[p]rovide a list of the customary requirements in each category – health, safety, security, and performance – that the Commissioner is asking the Tribunal to impose as part of its order". This Request need not be answered. I agree with the Commissioner that what makes any of these requirements "customary" will be determined through witnesses at the hearing of the Application on the merits, and that this is not a proper question to be asked from Mr. Rushton at this time.

IV. CONCLUSION

[89] For the reasons detailed above, VAA's Refusals Motion will be granted in part, but only with respect to the "reformulated" version of some Requests. I am not persuaded that there are grounds to compel the Commissioner to provide answers to the specific Category B and C Requests listed by VAA, as well as to the Category A Requests as these were initially formulated by VAA at the examination for discovery of Mr. Rushton. However, I am of the view that, when considered in their "reformulated" version, 24 of VAA's 39 Category A Requests will need to be answered by the Commissioner's representative along the lines developed in the Reasons for this Order. The remaining 15 "reformulated" Category A Requests will not have to be answered in any event, based on the additional reasons set out in this decision.

FOR THE ABOVE REASONS, THE TRIBUNAL ORDERS THAT:

[90] The motion is granted in part.

[91] VAA's Category B and C Requests as well as VAA's Category A Requests as these were formulated at the examination for discovery of Mr. Rushton need not be answered.

[92] The "reformulated" Category A Requests 24, 30, 47, 49, 50, 57, 58, 61, 62, 64, 67, 74, 77, 78, 82, 83, 84, 86, 89, 91, 93, 96, 102 and 103 need to be answered along the lines developed in the Reasons for this Order, by November 3, 2017.

[93] The "reformulated" Category A Requests 21, 25, 48, 53, 56, 60, 66, 71, 72, 73, 81, 100, 104, 105 and 106 need not be answered.

[94] As success on this motion has in fact been divided, costs shall be in the cause.

DATED at Ottawa, this 26th day of October 2017.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Denis Gascon

COUNSEL:

For the applicant:

The Commissioner of Competition

Antonio Di Domenico
Jonathan Hood
Katherine Rydel
Ryan Caron

For the respondent:

Vancouver Airport Authority

Calvin S. Goldman, QC
Michael Koch
Julie Rosenthal
Ryan Cookson
Rebecca Olscher

TAB 4

2001 FCA 104
Federal Court of Canada — Appeal Division

Canada (Commissioner of Competition) v. Superior Propane Inc.

2001 CarswellNat 2092, 2001 CarswellNat 702, 2001 FCA 104, [2001] 3 F.C. 185,
104 A.C.W.S. (3d) 857, 11 C.P.R. (4th) 289, 199 D.L.R. (4th) 130, 269 N.R. 109

THE COMMISSIONER OF COMPETITION (Appellant) and SUPERIOR PROPANE INC. and ICG PROPANE INC. (Respondents)

Stone J.A., Létourneau J.A. and Evans J.A.

Heard: January 9-11, 2001
Judgment: April 4, 2001
Docket: A-533-00

Proceedings: reversing in part *Canada (Commissioner of Competition) v. Superior Propane Inc.* (2000), 7 C.P.R. (4th) 385, 2000 Comp. Trib. 15, 2000 CarswellNat 3449 (Federal Court of Canada — Appeal Division); refused leave to appeal *Canada (Commissioner of Competition) v. Superior Propane Inc.* (2001), 2001 CarswellNat 1905, 2001 CarswellNat 1906, 278 N.R. 196 (note) (Federal Court of Canada — Appeal Division); refused leave to appeal *Canada (Commissioner of Competition) v. Superior Propane Inc.* (September 13, 2001), 28593 (Federal Court of Canada — Appeal Division)

Subject: Intellectual Property; Property; Corporate and Commercial
Related Abridgment Classifications
Business associations
VI Changes to corporate status
VI.1 Amalgamations and takeovers
VI.1.a Amalgamations
VI.1.a.iii Miscellaneous
Commercial law
VI Trade and commerce
VI.5 Competition and combines legislation
VI.5.d Abuse of dominant position (monopolies) and mergers
Commercial law
VI Trade and commerce
VI.5 Competition and combines legislation
VI.5.g Investigation and prosecution
VI.5.g.x Appeals
Headnote
Trade and commerce --- Competition and combines legislation — Abuse of dominant position (monopolies) and mergers
Corporations --- Amalgamations and takeovers — Amalgamations — Miscellaneous issues
Trade and commerce --- Competition and combines legislation — Investigation and prosecution — Appeals — Standard of review
Table of Authorities
Cases considered by *Evans J.A.*:
C.A.I.M.A.W., Local 14 v. Canadian Kenworth Co., (sub nom. *C.A.I.M.A.W. v. Paccar of Canada Ltd.)* 62 D.L.R. (4th) 437, (sub nom. *C.A.I.M.A.W. v. Paccar of Canada Ltd.)* 40 B.C.L.R. (2d) 1, 40 Admin. L.R. 181, (sub nom. *Paccar of Canada Ltd. v. C.A.I.M.A.W., Local 14)* 89 C.L.L.C. 14,050, (sub nom. *Paccar of Canada Ltd. v. C.A.I.M.A.W., Local 14)*

102 N.R. 1, (sub nom. *C.A.I.M.A.W. v. Paccar of Canada Ltd.)* [1989] 2 S.C.R. 983, (sub nom. *C.A.I.M.A.W. v. Paccar of Canada Ltd.)* [1989] 6 W.W.R. 673 (S.C.C.) — applied

C.J.A., Local 579 v. Bradco Construction Ltd., 12 Admin. L.R. (2d) 165, [1993] 2 S.C.R. 316, 106 Nfld. & P.E.I.R. 140, 334 A.P.R. 140, 93 C.L.L.C. 14,033, 153 N.R. 81, 102 D.L.R. (4th) 402 (S.C.C.) — considered

Canada (Director of Investigation & Research) v. Hillsdown Holdings (Canada) Ltd. (1992), 41 C.P.R. (3d) 289 (Competition Trib.) — referred to

Canada (Director of Investigation & Research) v. Southam Inc., 127 D.L.R. (4th) 263, 21 B.L.R. (2d) 1, 63 C.P.R. (3d) 1, [1995] 3 F.C. 557, (sub nom. *Director of Investigation & Research, Competition Act v. Southam Inc. (No. 1))* 185 N.R. 321 (Fed. C.A.) — considered

Canada (Director of Investigation & Research) v. Southam Inc., 144 D.L.R. (4th) 1, 71 C.P.R. (3d) 417, [1997] 1 S.C.R. 748, 209 N.R. 20, 50 Admin. L.R. (2d) 199 (S.C.C.) — considered

Harvard College v. Canada (Commissioner of Patents), 189 D.L.R. (4th) 385, 7 C.P.R. (4th) 1, (sub nom. *President & Fellows of Harvard College v. Canada (Commissioner of Patents))* [2000] 4 F.C. 528 (Fed. C.A.) — considered

Pezim v. British Columbia (Superintendent of Brokers), 4 C.C.L.S. 117, [1994] 2 S.C.R. 557, 114 D.L.R. (4th) 385, (sub nom. *Pezim v. British Columbia (Securities Commission))* 168 N.R. 321, [1994] 7 W.W.R. 1, 92 B.C.L.R. (2d) 145, 22 Admin. L.R. (2d) 1, 14 B.L.R. (2d) 217, (sub nom. *Pezim v. British Columbia (Securities Commission))* 46 B.C.A.C. 1, (sub nom. *Pezim v. British Columbia (Securities Commission))* 75 W.A.C. 1 (S.C.C.) — applied

Pushpanathan v. Canada (Minister of Employment & Immigration), 226 N.R. 201, (sub nom. *Pushpanathan v. Canada (Minister of Citizenship & Immigration))* 160 D.L.R. (4th) 193, (sub nom. *Pushpanathan v. Canada (Minister of Citizenship & Immigration))* [1998] 1 S.C.R. 982, 43 Imm. L.R. (2d) 117, 11 Admin. L.R. (3d) 1 (S.C.C.) — applied

R. v. T. (V.), [1992] 3 W.W.R. 193, [1992] 1 S.C.R. 749, 7 B.C.A.C. 81, 15 W.A.C. 81, 67 B.C.L.R. (2d) 273, 12 C.R. (4th) 133, 134 N.R. 289, 71 C.C.C. (3d) 32 (S.C.C.) — applied

Cases considered by *Létourneau J.A.*:

A. E. Staley Manufacturing Co. v. Federal Trade Commission (1943), 135 F.2d 453 (U.S. C.A. 7th Cir.) — considered

Canada (Director of Investigation & Research) v. Southam Inc., 144 D.L.R. (4th) 1, 71 C.P.R. (3d) 417, [1997] 1 S.C.R. 748, 209 N.R. 20, 50 Admin. L.R. (2d) 199 (S.C.C.) — considered

Standard Oil Co. v. Federal Trade Commission (1951), 71 S. Ct. 240, 95 L. Ed. 239, 340 U.S. 231 (U.S.S.C.) — considered

Statutes considered by *Evans J.A.*:

Competition Act, R.S.C. 1985, c. C-34

Generally — considered

s. 1.1 [en. R.S.C. 1985, c. 19 (2nd Supp.), s. 19] — considered

s. 45 — referred to

s. 92 [en. R.S.C. 1985, c. 19 (2nd Supp.), s. 45] — considered

s. 92(1)(a) [en. R.S.C. 1985, c. 19 (2nd Supp.), s. 45] — considered

s. 92(1)(b) [en. R.S.C. 1985, c. 19 (2nd Supp.), s. 45] — considered

s. 92(1)(c) [en. R.S.C. 1985, c. 19 (2nd Supp.), s. 45] — considered

s. 92(1)(d) [en. R.S.C. 1985, c. 19 (2nd Supp.), s. 45] — considered

s. 92(1)(e)(i) [en. R.S.C. 1985, c. 19 (2nd Supp.), s. 45] — considered

s. 92(1)(e)(ii) [en. R.S.C. 1985, c. 19 (2nd Supp.), s. 45] — considered

s. 92(2) [en. R.S.C. 1985, c. 19 (2nd Supp.), s. 45] — considered

s. 96 [en. R.S.C. 1985, c. 19 (2nd Supp.), s. 45] — considered

s. 96(1) [en. R.S.C. 1985, c. 19 (2nd Supp.), s. 45] — considered

s. 96(3) [en. R.S.C. 1985, c. 19 (2nd Supp.), s. 45] — considered

Competition Tribunal Act, R.S.C. 1985, c. 19 (2nd Supp.)

s. 2 "judicial member" — considered

s. 3 — considered

s. 3(2)(a) — considered

s. 3(2)(b) — considered

s. 3(3) — considered

s. 10(1) — considered

s. 12(1) — considered

s. 12(1)(a) — considered

s. 12(1)(b) — considered

s. 13 — considered

s. 13(1) — considered

s. 13(2) — considered

Federal Court Act, R.S.C. 1985, c. F-7

s. 27 — considered

Statutes considered by *Létourneau J.A.*:

Competition Act, R.S.C. 1985, c. C-34

s. 1.1 [en. R.S.C. 1985, c. 19 (2nd Supp.), s. 19] — considered

s. 92 [en. R.S.C. 1985, c. 19 (2nd Supp.), s. 45] — considered

s. 96 [en. R.S.C. 1985, c. 19 (2nd Supp.), s. 45] — considered

North American Free Trade Agreement Implementation Act, S.C. 1993, c. 44

Generally — referred to

World Trade Organization Agreement Implementation Act, S.C. 1994, c. 47

Generally — referred to

APPEAL by Commissioner of Competition from judgment reported at(2000), 7 C.P.R. (4th) 385, 2000 Comp. Trib. 15, 2000 CarswellNat 3449 (Competition Trib.) dismissing application by Commissioner for order dissolving merger of two corporations engaged in selling and distributing propane.

***Evans J.A.*:**

A. INTRODUCTION

1 This is an appeal from a decision of the Competition Tribunal ("the Tribunal"), dated August 30, 2000, dismissing an application by the Commissioner of Competition ("the Commissioner") for an order to dissolve the merger of the respondents, Superior Propane Inc. and ICG Propane Inc., or otherwise to remedy the lessening of competition likely to occur in the propane delivery market in Canada as a result of the merger.

[1]

2 The appeal raises a question of fundamental importance to the administration of the *Competition Act* that has been the subject of vigorous debate among economists and lawyers in Canada and elsewhere. Indeed, the issue is one on which the Commissioner, and his predecessor, the Director of Investigation and Research, Bureau of Competition Policy, have at different times propounded more than one view. However, the volume of the literature to which it has given rise far exceeds that of the jurisprudence and, prior to the decision under appeal, the question had been the subject of judicial comment in only one case.

3 The question concerns the scope of the so-called "efficiency defence". Under this statutory defence, a merger must be permitted, even though it is likely to prevent or substantially lessen competition in a particular market, if the efficiency gains flowing from the merger are greater than, and offset, the effects of the lessening of competition.

4 The precise issue raised by this appeal is whether, for the purpose of the efficiency defence, the "effects" of an anti-competitive merger are limited as a matter of law to the loss of resources to the economy as a whole (the deadweight loss), or whether they include a wider range of the effects of a substantial lessening of competition. The latter would include the wealth transfer from consumers to producers that occurs when the merged entity exercises its market power to increase prices above competitive levels, the elimination of smaller competitors from the market, and the creation of a monopoly.

5 The Tribunal held that the merger would substantially lessen or prevent competition in nearly all local propane markets in Canada, as well as in the market for national account coordination services associated with the delivery of propane. The total divestiture by Superior of all of ICG's shares and assets was found to be the only appropriate remedy to prevent this. However, by a majority the Tribunal also concluded that, since the merger was likely to result in efficiency gains of $29.2 million, and would result in only $3.0 million of quantitative deadweight loss and $3.0 million of qualitative deadweight loss, the merger was saved by the efficiency defence contained in the *Competition Act.*

6 Using the "total surplus standard", the Tribunal concluded that the deadweight loss was the sole "effect" of the lessening of competition that must be balanced against the efficiency gains. Accordingly, the Tribunal treated as irrelevant all other effects, including the size of the wealth transfer from consumers to Superior as a result of the higher than competitive market prices that Superior was likely to charge for propane as a result of the merger.

B. LEGISLATIVE FRAMEWORK

7 The statutory provisions relevant to this appeal are as follows:

Competition Act, R.S.C. 1985, c. C-34

1.1 The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in —order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.	1.1 La présente loi a pour objet de préserver et de favoriser la concurrence au Canada dans le but de stimuler l'adaptabilité et l'efficience de l'économie canadienne, d'améliorer les chances de participation canadienne aux marchés mondiaux tout en tenant simultanément compte du rôle de la—concurrence étrangère au Canada, d'assurer à la petite et à la moyenne entreprise une chance honnête de participer à l'économie canadienne, de même que dans le but d'assurer aux consommateurs des prix compétitifs et un choix dans les produits.
92. (1) Where, on application by the Commissioner, the Tribunal finds that a merger or proposed merger prevents	92. (1) Dans les cas où, à la suite d'une demande du commissaire, le Tribunal

or lessens, or is likely to prevent or lessen, competition substantially——(*a*) in a trade, industry or profession,—(*b*) among the sources from which a trade, industry or profession obtains a product,—(*c*) among the outlets through which a trade, industry or profession disposes of a product, or—(*d*) otherwise than as described in paragraphs (*a*) to (*c*),—the Tribunal may, subject to sections 94 to 96,—(*e*) in the case of a completed merger, order any party to the merger or any other person—(i) to dissolve the merger in such manner as the Tribunal directs,—(ii) to dispose of assets or shares designated by the Tribunal in such manner as the Tribunal directs, or—...————————(2) For the purpose of this section, the Tribunal shall not find that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially solely on the basis of evidence of concentration or market share.

conclut qu'un fusionnement réalisé ou proposé empêche ou diminue sensiblement la concurrence, ou aura vraisemblablement cet effet_:—*a*) dans un commerce, une industrie ou une profession;—*b*) entre les sources d'approvisionnement auprès desquelles un commerce, une industrie ou une profession se procure un produit;—*c*) entre les débouchés par l'intermédiaire desquels un commerce, une industrie ou une profession écoule un produit;—*d*) autrement que selon ce qui est prévu aux alinéas a) à c),—le Tribunal peut, sous réserve des articles 94 à 96_:—*e*) dans le cas d'un fusionnement réalisé, rendre une ordonnance enjoignant à toute personne, que celle-ci soit partie au fusionnement ou non_:—(i) de le dissoudre, conformément à ses directives,—(ii) de se départir, selon les modalités qu'il indique, des éléments d'actif et des actions qu'il indique,—...——(2) Pour l'application du présent article, le Tribunal ne conclut pas qu'un fusionnement, réalisé ou proposé, empêche ou diminue sensiblement la concurrence, ou qu'il aura vraisemblablement cet effet, en raison seulement de la concentration ou de la part du marché.

96. (1) The Tribunal shall not make an order under section 92 if it finds that the merger or proposed merger in respect of which the application is made has brought about or 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 merger or proposed merger and that the gains in efficiency would not likely be attained if the order were made.————(2) In considering whether a merger or proposed merger is likely to bring about gains in efficiency described in subsection (1), the Tribunal shall consider whether such gains will result in ——(*a*) a significant increase in the real value of exports; or—(*b*) a significant substitution of domestic products for imported products.———(3) For the purposes of this section, the Tribunal shall not find that a merger or proposed merger has brought about or is likely to bring about gains in efficiency by reason only of a redistribution of income between two or more persons.—

96. (1) Le Tribunal ne rend pas l'ordonnance prévue à l'article 92 dans les cas où il conclut que le fusionnement, réalisé ou proposé, qui fait l'objet de la demande a eu pour effet ou aura vraisemblablement pour effet d'entraîner des gains en efficience, que ces gains surpasseront et neutraliseront les effets de l'empêchement ou de la diminution de la concurrence qui résulteront ou résulteront vraisemblablement du fusionnement réalisé ou proposé et que ces gains ne seraient vraisemblablement pas réalisés si l'ordonnance était rendue.——(2) Dans l'étude de la question de savoir si un fusionnement, réalisé ou proposé, entraînera vraisemblablement les gains en efficience visés au paragraphe (1), le Tribunal évalue si ces gains se traduiront_:—*a*) soit en une augmentation relativement importante de la valeur réelle des exportations;—*b*) soit en une substitution relativement importante de produits nationaux à des produits étrangers.——(3) Pour l'application du présent article, le Tribunal ne conclut pas, en raison seulement d'une redistribution de revenu entre

plusieurs personnes, qu'un fusionnement réalisé ou proposé a entraîné ou entraînera vraisemblablement des gains en efficience.

Competition Tribunal Act, R.S.C. 1985, c. 19 (2nd Supp.)

2. "judicial member" means a member of the Tribunal appointed under paragraph 3(2)(a).

2. *juge+ Membre du Tribunal nommé en application de l'alinéa 3(2)a).

3. (1) There is hereby established a tribunal to be known as the Competition Tribunal.——(2) The Tribunal shall consist of—(*a*) not more than four members to be appointed from among the judges of the Federal CourtCTrial Division by the Governor in Council on the recommendation of the Minister of Justice; and(*b*) not more than eight other members to be appointed by the Governor in Council on the recommendation of the Minister.——(3) The Governor in Council may establish an advisory council to advise the Minister with respect to appointments of lay members, which council is to be composed of not more than ten members who are knowledgeable in economics, industry, commerce or public affairs and may include, without restricting the generality of the foregoing, individuals chosen from business communities, the legal community, consumer groups and labour.————(4) The Minister shall consult with any advisory council established under subsection (3) before making a recommendation with respect to the appointment of a lay member.

3. (1) Est constitué le Tribunal de la concurrence.———(2) Le Tribunal se compose_:—*a*) d'au plus quatre membres nommés par le gouverneur en conseil sur recommandation du ministre de la Justice et choisis parmi les juges de la Section de première instance de la Cour fédérale;—*b*) d'au plus huit autres membres nommés par le gouverneur en conseil sur recommandation du ministre.———(3) Le gouverneur en conseil peut constituer un conseil consultatif chargé de conseiller le ministre en ce qui concerne la nomination des autres membres et composé d'au plus dix personnes versées dans les affaires publiques, économiques, commerciales ou industrielles. Sans que soit limitée la portée générale de ce qui précède, ces personnes peuvent être des individus appartenant à la collectivité juridique, à des groupes de consommateurs, au monde des affaires et au monde du travail.——(4) Avant de recommander la nomination d'un autre membre, le ministre demande l'avis du conseil consultatif constitué en application du paragraphe (3).

10. (1) Subject to section 11, every application to the Tribunal shall be heard before not less than three or more than five members sitting together, at least one of whom is a judicial member and at least one of whom is a lay member.

10. (1) Sous réserve de l'article 11, toute demande présentée au Tribunal est entendue par au moins trois mais au plus cinq membres siégeant ensemble et, parmi lesquels il doit y avoir au moins un juge et un autre membre.

12. (1) In any proceedings before the Tribunal,—(*a*) questions of law shall be determined only by the judicial members sitting in those proceedings; and—(*b*) questions of fact or mixed law

12. (1) Dans toute procédure devant le Tribunal_:—*a*) seuls les juges qui siègent ont compétence pour trancher les questions de

and fact shall be determined by all the members sitting in those proceedings.——13. (1) Subject to subsection (2), an appeal lies to the Federal Court of Appeal from any decision or order, whether final, interlocutory or interim, of the Tribunal as if it were a judgment of the Federal CourtCTrial Division.——(2) An appeal on a question of fact lies under subsection (1) only with the leave of the Federal Court of Appeal.

droit;—*b*) tous les membres qui siègent ont compétence pour trancher les questions de fait ou de droit et de fait.———13. (1) Sous réserve du paragraphe (2), les décisions ou ordonnances du Tribunal, que celles-ci soient définitives, interlocutoires ou provisoires, sont susceptibles d'appel devant la Cour d'appel fédérale tout comme s'il s'agissait de jugements de la Section de première instance de cette Cour.—(2) Un appel sur une question de fait n'a lieu qu'avec l'autorisation de la Cour d'appel fédérale.

C. THE TRIBUNAL'S DECISION

8 The Tribunal heard this matter over 48 days; 39 days were devoted to hearing from 91 witnesses, including 17 experts, at least 10 of whom have a Ph.D. in economics, while submissions from counsel took another 9 days. The reasons for decision of the majority of the Tribunal (the presiding judicial member, Nadon J., and one of the lay members, Dr. Schwartz, an economist) run to some 469 paragraphs. There are also substantial dissenting reasons by the second lay member, Ms. Lloyd, covering, in part, issues that lie at the heart of this appeal.

9 The first 317 paragraphs of the majority's reasons, written by Nadon J., deal at length with whether the merger would prevent or substantially lessen competition within the meaning of section 92 of the *Competition Act*. The Tribunal was unanimous in concluding that it would and, since the Tribunal's conclusion on this is not the subject of appeal, I can deal with its findings relatively briefly.

10 First, the Tribunal found that the merger would not substantially lessen competition in only 8 of 74 local markets for the supply of propane: paragraph 307 of the Reasons. At the other extreme, in 16 markets the merged entity would have a monopoly or near monopoly, that is, a market share ranging from 97% to 100%: paragraph 306. And, in another 16 markets, where there was already substantial market concentration, the merger would remove healthy competition: paragraph 308. The remaining 33 markets were in an intermediate category in that, while Superior and ICG were the largest sellers of propane, and the merger was likely to lessen competition substantially, competition from other suppliers would continue after the merger: paragraph 309. Finally, the Tribunal found that the merger would lessen competition substantially in the coordination services offered to national account customers, leaving the merged entity as the only firm in Canada serving this market: paragraph 310.

11 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.

12 Moreover, the cost of switching from propane to an alternative form of fuel is relatively high. For example, consumers who purchase propane to heat their homes will normally be deterred from substituting oil as a heating fuel by the considerable expense of converting to an oil burning furnace unless, for instance, their furnace is at the end of its useful life: paragraphs 24-25.

13 Third, relatively high barriers to entry face potential competitors in the market and hence increase the ability of the merged entity to raise prices above the competitive level. For example, consumers are often required to sign exclusive supply contracts stipulating that for five years they will purchase propane exclusively from the supplier and that, in the case of Superior, when the contract expires, consumers will give the supplier the right of first refusal. These supply contracts often contain lengthy notice of termination clauses that, in the case of ICG, require consumers to give 180 days notice prior to the termination date of the contract. In the absence of such notice, the contract is automatically renewed: paragraphs 132-146.

14 Another factor that makes switching suppliers difficult and costly is that the supplier, rather than the consumer, typically owns the propane tank: paragraph 147. In addition, a reputation for reliable delivery is an important factor in this market and consumers are therefore reluctant to switch to a new supplier with no established reputation: paragraph 154. Finally, new entrants are also likely to be discouraged by the maturity of the market; that is, there is little potential for growth in the demand for propane: paragraph 158.

15 In support of these findings on market entry barriers, the Tribunal noted that, when Imperial Oil Limited, a very large corporation, entered the market for propane distribution in 1990, it withdrew after nine years because market barriers made the venture uneconomic. Since then, no other entrants of comparable size or stature have materialized: paragraph 153.

16 On the basis of considerations of the kind noted above, the Tribunal concluded that, as a result of the merger, the merged entity was likely to increase the price of propane by an average of 8%: paragraphs 252-253. Having found that the merger would lead to a substantial lessening of competition contrary to section 92, the Tribunal concluded that only a total divestiture by Superior of all ICG's assets and shares would restore competition to the pre-merger level: paragraphs 314 and 316.

17 The Tribunal then proceeded to a consideration of the efficiency defence under section 96. It held that the merging parties had the burden of proving the efficiencies that would not have been generated but for the merger, while the Commissioner bore the burden of proving the anti-competitive effects, since he was in the better position to do so by virtue of the investigative powers conferred on him by the Act: paragraph 403. The merging parties had the burden of establishing that the resulting efficiencies would be greater than and offset the anti-competitive effects of the merger.

18 The majority calculated the net efficiency savings that would result from the merger, and could not have been achieved by other means, to be $29.2 million in each of the next ten years: paragraph 383. Ms. Lloyd dissented from the majority's view on this issue and held that the evidence before the Tribunal was insufficient to support this figure: paragraph 470. However, there is no appeal from this aspect of the Tribunal's decision and it is unnecessary to say more about it here.

19 Having made its entry on the "efficiency" side of the ledger, the Tribunal then considered the "effects" that would result from the "lessening or prevention of competition" if the merger was approved. The submissions and evidence before the Tribunal on this question went to two issues: the definition of "effects" for the purpose of section 96 and their quantification. The principal question in this appeal concerns the Tribunal's conclusion on the first of these issues.

20 The Tribunal had before it evidence describing various methodologies developed by economists for determining the effects of an anti-competitive merger. I should make it clear that the various standards considered by the Tribunal are, for the most part, the work of economists in the United States, and have been used as a basis for competition policy prescriptions. However, antitrust law in the United States does not have an efficiency defence comparable to section 96, although efficiencies are taken into consideration by the Federal Trade Commission when scrutinising a merger, along with other factors, including the likely wealth transfer from consumers to producers likely to result from it.

21 Two of the methodologies for determining when efficiency gains offset the adverse effects of an anti-competitive merger are likely to give a narrow scope to the efficiency defence. For example, under the "price standard" efficiencies will only justify an anti-competitive merger if they result in price decreases or, at least, do not increase prices. This is the most difficult standard for the parties to a merger to satisfy, and is the standard normally applied by the Federal Trade Commission as the basis for approving an anti-competitive merger: *Horizontal Merger Guidelines* (Department of Justice and Federal Trade Commission; April 2, 1992, revised April 8, 1997), pages 148-50.

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.

23 On the basis of a report prepared for the Commissioner by an expert witness, Dr. Peter Townley, a professor of economics at Acadia University, counsel for the Commissioner submitted that the Tribunal should adopt a "balancing weights standard" as the basis for determining whether the efficiency gains from the merger of Superior and ICG were greater than, and offset, its anti-competitive effects.

24 Using this methodology, the Tribunal would determine the anti-competitive effects of a merger by taking into account a range of factors, but would not assign to each a fixed, *a priori* weight. The factors include: the deadweight loss; the wealth transfer from consumers resulting from the increase in prices through the exercise of market power; the loss of product choices and services currently associated with the product; and the prevention of competition and the creation of a monopoly or near monopoly in some or all of the relevant markets: paragraphs 386-387 and 431.

25 The Tribunal rejected this approach in favour of the "total surplus standard" which looks only at the overall loss to the economy as a result of the fall in demand for the merged entity's products following a post-merger increase in price, and the inefficient allocation of resources that occurs when, as prices rise, consumers purchase a less suitable substitute. The resulting loss of resources to the economy constitutes deadweight loss.

26 The Tribunal relied on the analyses of leading economists and of "law and economics" scholars, mainly from the United States, but also from Canada, in support of the "total surplus standard". Under this standard, an anti-competitive merger is allowed to proceed when efficiency gains exceed deadweight loss. Its rationale is that this standard measures the net increase or loss in general welfare as a result of the merger. In addition, it provides a predictable standard for merger review, and hence firms are not deterred from effecting mergers that will increase total economic resources by an inability to predict whether their merger will receive regulatory approval.

27 Under the total surplus standard, the wealth likely to be transferred from consumers to producers as a result of the merger is not considered to be an anti-competitive effect, because such a transfer is neutral: that is, it neither increases, nor decreases total societal wealth. 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.

28 The Tribunal concluded that, properly interpreted, section 96 of the *Competition Act* mandates a methodology for determining the effects to be balanced against efficiency gains that ignores wealth transfers, or distributive effects, and focusses exclusively on the extent to which the merger increases net wealth in the economy as a whole. The reasons that the Tribunal advanced for its conclusion can be summarized as follows.

29 First, even if the necessary data were available, an assessment of the merits, or otherwise, of the distributive effects of a merger is a political task best performed by elected politicians, not by members of the Tribunal, who are appointed for their expertise in economics or commerce: paragraphs 431-432 and 438.

30 Second, since section 96 allows an anti-competitive merger where the efficiencies gained thereby are greater than, and offset, the effects of the lessening of competition, efficiency "was Parliament's paramount objective in passing the merger provisions of the Act": paragraph 437. Therefore, "effects" in section 96 should be interpreted in a way that best attains that objective. This excludes an interpretation that requires, or permits, distributive or other effects of a merger to be considered that are unrelated to the maximization of total societal wealth: paragraphs 411-413, 426 and 432.

31 Third, if business people are unable to predict whether the Commissioner or the Tribunal is likely to conclude that the efficiencies to be gained from a proposed merger will exceed, and offset, the adverse effects of the merger as calculated by the balancing weights standard, they will be deterred from merging, to the detriment of the economy as a whole: paragraph 433.

32 Accordingly, in the Tribunal's view, the difficulty of applying the balancing weights standard advanced by the Commissioner militates against its adoption. Indeed, even though Professor Townley favoured this approach he conceded in his evidence that, as an economist, he could not advise the Tribunal what weights to assign to the various factors to be considered. Hence, he could not say whether the efficiency gains from the merger of Superior and ICG were greater than and offset its effects.

33 Fourth, the Tribunal noted that in the *Merger Enforcement Guidelines* ("*MEG*") (Director of Investigation and Research, Information Bulletin No. 5, March 1991 (Supply and Services Canada, 1991)), which had been in force since 1991, the Commissioner had indicated that the effects of an anti-competitive merger were to be assessed for the purpose of section 96 by the total surplus standard.

34 Indeed, even after the appropriateness of the total surplus standard had been questioned by Reed J. when sitting as the judicial member of the Tribunal in *Canada (Director of Investigation & Research) v. Hillsdown Holdings (Canada) Ltd.* (1992), 41 C.P.R. (3d) 289 (Competition Trib.), the predecessor of the current Commissioner publicly reaffirmed the position taken in the *MEG*. In *Hillsdown*, *supra*, Reed J. had doubted (at page 339) whether an interpretation of "effects", such as that contained in the MEG, that omitted from consideration the wealth transferred from consumers to producers was consistent with the purposes of the Act.

35 Fifth, the Tribunal stated that the purpose and objectives section of the *Competition Act*, section 1.1, should not be read as requiring each of the objectives listed in it to be considered in the context of identifying the effects of a merger for the purpose of section 96. Rather, the references in section 1.1 to the Act's objectives, such as promoting "the efficiency and adaptability of the Canadian economy", ensuring that "small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy", and providing "consumers with competitive prices and product choices" should be regarded as no more than statements of the beneficial results of attaining the stated purpose of the Act, namely "to promote and encourage competition in Canada". Further, to the extent that there was a conflict between the general provision, section 1.1, and the specific, section 96, the latter should prevail: paragraphs 408-410.

36 The dissenting member of the Tribunal took issue with much of the majority's reasoning on the meaning of "effects" in section 96. In Ms. Lloyd's view, any interpretation of section 96 that excluded from "effects" the wealth transfer from consumers to producers likely to result from an anti-competitive merger was inconsistent with the objectives of the Act: paragraph 506.

37 She concluded that a flexible approach that enabled the Tribunal to take into account, along with other factors, the wealth transfer, both quantitatively and qualitatively, was more compatible with the statutory scheme, particularly in so far as its objectives include "to provide consumers with competitive prices and product choices": paragraph 511. Ms. Lloyd summarized (at paragraph 506) her position as follows:

> While I recognize that efficiencies are given special consideration under section 96 and may constitute a defence to an otherwise anti-competitive merger, it appears to me that section 96 is an *exception to the application of section 92 of the Act and not an exception to the Act itself.* (Emphasis added)

D. THE ISSUES

[38] The appeal raises three issues for the Court to decide.

[1]

(1) What standard of review is applicable to the Tribunal's determination of the "effects" of a merger to be considered under section 96?

(2) Did the Tribunal err in law when it interpreted "effects" as limited to those identified by the total surplus standard?

(3) Did the Tribunal err in law when it imposed on the Director the legal burden of proving the effects of the merger?

E. ANALYSIS

Issue 1: The Standard of Review

39 It was common ground between counsel that, in view of the Supreme Court of Canada's decision in *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (S.C.C.), if the Tribunal's interpretation of the word, "effects", was entitled to any deference, the less deferential standard of reasonableness *simpliciter* would be appropriate.

40 The disputed question was, of course, whether any deference was due at all. In my view, the answer is to be found, for the most part, in the reasoning in *Southam, supra*, which also concerned the Tribunal, and in *Pushpanathan v. Canada (Minister of Employment & Immigration)*, [1998] 1 S.C.R. 982 (S.C.C.), which is an important, comprehensive and general elaboration of the pragmatic and functional analysis for determining the standard of judicial review of administrative action.

41 I turn, then, to an examination of the elements of the pragmatic and functional analysis as they apply to the case before us. A consensus seems to have emerged in the jurisprudence that the expertise of the tribunal under review, and the relevance of that expertise to resolving the issues in dispute, will normally be the most important of the pragmatic or functional factors considered in determining the standard of review: *Pushpanathan* , *supra*, at pages 1006-07, paragraph 32. I deal first with the nature of the issue decided by the Tribunal in this case.

(i) The nature of the issue decided by the Tribunal

42 In holding that the meaning of the word, "effects", in section 96 is limited to the deadweight loss resulting from an anti-competitive merger, the Tribunal was clearly interpreting the Act and was thereby deciding a question of law.

43 This is because the Tribunal's ruling purports to be of general application to all cases in which the efficiency defence is invoked. The Tribunal did not confine itself merely to identifying the factors to be considered or not considered in this case, nor to prescribing a methodology for determining only the "effects" of Superior's merger with ICG. Instead, the Tribunal makes it abundantly clear in its reasons that, as a matter of interpretation, the word, "effects", means *only* deadweight loss and that the efficiency defence is, *in all cases*, simply a codification of the total surplus standard.

44 For instance, based on its conclusion that section 96 encapsulates the total surplus standard, the Tribunal made the following findings with respect to the meaning of "the effects" of an anti-competitive merger:

> [423] The economic effects of an anti-competitive merger are the effects on real resources, that is, the changes in the way the economy deploys those resources as the result of the merger.
>
> [427] Assessing a merger's effects in this way is generally called the "total surplus standard". ...transfers from consumers to shareholders are not counted as losses under the total surplus standard. The anti-competitive effect of the merger is measured solely by the deadweight loss ... Under the total surplus standard, efficiencies need only exceed the deadweight loss to save an anti-competitive merger.
>
> [430] ... The only standard that addresses solely the effects of a merger on economic resources is the total surplus standard.
>
> [447] 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. Accordingly, the Tribunal believes that the total surplus standard is the correct approach for analysing the effects of a merger under subsection 96(1).

Since none of these statements was made with reference to the particular facts of the case, the Tribunal must have intended its view of the meaning of the word, "effects", to apply whenever the section 96 efficiency defence is raised.

45 Referring to the task of distinguishing the *interpretation* of a statutory standard (normally a question of law) from its *application* to the facts of a case (often a question of mixed fact and law), Iacobucci J. said in *Southam*, *supra* (at page 768, paragraph 37):

Of course, it is not easy to say precisely where the line should be drawn; though in most cases it should be sufficiently clear whether the dispute is over a general proposition that might qualify as a principle of law or over a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future.

In a similar vein (*supra*, at page 767, paragraph 36), he had characterised a question as one of law "because the point in controversy was one that might potentially arise in many cases in the future."

46 Applying these observations to this case, I am of the view that, since the Tribunal's determination of what can be considered as an "effect" of the merger of Superior and ICG was intended to be of general application, it would be of "much interest to judges and lawyers", because other panels of the Tribunal will regard it as a legal proposition having considerable persuasive authority whenever they have to consider the efficiency defence under section 96. To use another of Iacobucci J.'s felicitous phrases (*Southam*, *supra*, at page 771, paragraph 45), the Tribunal in this case clearly "forged new legal principle".

(ii) The expertise of the Tribunal

47 Since the ultimate issue in determining the standard of review is whether the legislature should be taken to have intended the specialist administrative tribunal or the courts to bear primary responsibility for determining the question in dispute, it must be understood that "expertise" is a relative, not an absolute concept: *C.J.A., Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316 (S.C.C.), at page 335. In assessing the relative expertise of the Tribunal and the Court, I have had regard to the following considerations.

48 First, the Tribunal is an adjudicative body. Just as it has done with the administration of human rights legislation, Parliament has divided responsibility for administering the *Competition Act* between the Competition Bureau, the policy-making, investigative and enforcement agency, headed now by the Commissioner, and the Tribunal, the adjudicative agency. In this respect, the Tribunal is different from multi-functional administrative agencies, such as securities commissions in many provinces, which typically have wide powers that match their regulatory mandate. The absence of broad policy development powers is a factor that limits the scope of the Tribunal's expertise: *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 (S.C.C.), at page 596.

49 Second, expertise may be assessed by reference to the composition of an administrative tribunal. Hearings of the Tribunal are conducted before three to five members, at least one of whom must be a judicial member and one a lay member: *Competition Tribunal Act ("CTA")*, subsection 10(1). This case was heard by three members: the presiding judicial member and two lay members.

50 The judicial member is one of the maximum of four judges of the Trial Division of the Federal Court whom the Governor in Council may appoint to the Tribunal on the recommendation of the Minister of Justice: *CTA,* paragraph 3(2)(*a*). In addition to presiding at hearings of the Tribunal, the judicial member alone decides any questions of law that arise before the Tribunal: *CTA*, paragraph 12(1)(*a*).

[1]

51 I note that in the *Hillsdown* case *(supra*, at page 337, note 21), Reed J. made it clear that the validity of the definition in the *MEG*of "effects" involved the interpretation of section 96, and was thus a question of law alone. Hence, the Tribunal's reasons on this issue expressed her view as the judicial member of the Tribunal.

52 In contrast, Nadon J. does not state that his determination of the meaning of "effects" is solely his decision. However, since the Act gives to the judicial member sole responsibility for deciding questions of law, the standard of review cannot depend on whether, in a particular case, the lay member's participation in the decision on the legal issue extended beyond consultation.

53 A maximum of eight lay members are also appointed to the Tribunal by the Governor in Council on the recommendation of the Minister of Industry: *CTA*, paragraph 3(2)(*b*). No qualifications are prescribed for lay members. However, before making a recommendation, the Minister must consult with an Advisory Council comprising not more than ten members, who, the *CTA*, subsection 3(3) provides, are appointed from those

[1]

...who are knowledgeable in economics, industry, commerce or public affairs and may include, without restricting the generality of the foregoing, individuals chosen from business communities, the legal community, consumer groups and labour.	... personnes versées dans les affaires publiques, économiques, commerciales ou industrielles. Sans que soit limitée la portée générale de ce qui précède, ces personnes peuvent être des individus appartenant à la collectivité juridique, à des groupes de consommateurs, au monde des affaires et au monde du travail.

54 It is reasonable to infer from this provision that the Council was expected to recommend the appointment of lay members with a breadth of experience similar to that of the Advisory Council members themselves. Thus, members' fields of expertise need not be limited to economics, but may extend more broadly to public affairs. Further, their perspectives may include not only those of the business communities, including small and medium-sized business, but also of consumer groups and labour.

55 Questions of fact, and of mixed fact and law, are decided by all of the members of the panel of the Tribunal hearing a matter: *CTA*, paragraph 12(1)(*b*). In addition, even though the judicial member alone decides questions of law, the judicial member may well make his or her rulings after discussing the issues with the lay members and benefiting from whatever contribution they are able to make to the resolution of the legal issue from their perspective and on the basis of their expertise. After all, questions of law are rarely decided in the abstract, and generally require that careful consideration be given to the likely practical consequences and implications of deciding them one way rather than another.

56 In short, the composition of the Tribunal indicates a considerable level of expertise. This Court does not defer to decisions of the Trial Division of this Court on questions of law: *Harvard College v. Canada (Commissioner of Patents)*, [2000] 4 F.C. 528 (Fed. C.A.), at paragraph 180 (F.C.A). However, the fact that no more than four members of the Court may be appointed as judicial members suggests that, when sitting as the judicial member of the Tribunal and having the assistance of the lay members, a judge of the Trial Division can be expected to have a level of expertise or experience in this area of the law over and above that acquired by a judge in the ordinary course of judicial work. Nor do I disregard the importance of the understanding of the issues in dispute in this case that the Tribunal would have obtained after conducting 48 days of hearings.

57 Indeed, on more than one occasion, the Supreme Court of Canada has recognized (*Southam, supra,* at pages 772-73, paragraph 49) that the Tribunal

> is especially well suited to the task of overseeing a complex statutory scheme whose objectives are peculiarly economic.
>
> Iacobucci J. also noted in that case that, since the aims of the *Competition Act* are "more 'economic' than 'legal' (*supra*, at page 772, paragraph 48), it was appropriate to conclude that "the Tribunal's expertise lies in economics and commerce" (*supra*, at page 773, paragraph 51).

(iii) A question of law within the Tribunal's expertise?

58 Counsel for the respondents submitted that characterising a question decided by an administrative tribunal as one of statutory interpretation, and therefore one of law, is not necessarily determinative of the standard of review: see *Pushpanathan*

, *supra*, at page 1008, paragraph 34. However, it seems to me an obvious inference from the reasons for judgment of Iacobucci J. in *Southam, supra,* that, when all the factors in the pragmatic or functional mix are weighed together, the fact that the Tribunal in the case before us was deciding a question of law with a high degree of generality tips the scale in the direction of correctness as the applicable standard of review.

59 Thus, speaking at the level of principle, Iacobucci J. said (*supra*, at page 769, paragraph 39) that, if a decision-maker fails to consider all the factors that the legislature required to be considered, "then the decision-maker has in effect applied the wrong law, and so has made an error of law." And, turning to the Tribunal in particular, he said (*supra*, at page 769, paragraph 41): "If the Tribunal did ignore evidence that the law requires it to consider, then the Tribunal erred in law."

60 In my view, there is nothing about the word, "effects", to exclude the general principle that, in the absence of indicators to the contrary, statutory interpretation is a question of law that is reviewable on a standard of correctness. As Bastarache J. said in *Pushpanathan* (*supra*, at page 1012, paragraph 38):

> Without an implied or express legislative intent to the contrary ... legislatures should be assumed to have left highly generalized propositions of law to courts.

61 Thus, as a linguistic matter, the word, effects, does not suggest an implicit delegation of authority to the Tribunal to determine what factors must, and must not, be considered in determining what they are. If, as seems to be the case on the basis of the reasoning in *Southam, supra*, Iacobucci J. would have regarded a general proposition advanced by the Tribunal about the meaning of the word, "market", as subject to review for correctness, the same would seem equally true of the phrase, "the effects of any prevention or lessening of competition". Nor am I persuaded by counsel for the respondents that in *Southam* (*supra*, at pages 789-90, paragraphs 83-85) Iacobucci J. applied a standard other than correctness to the Tribunal's determination that the test for the remedy was the restoration of the parties to the pre-merger competitive position.

62 Moreover, an important element of the Tribunal's reasoning was its view of the statutory objectives provision of the *Competition Act*, section 1.1, and the relationship of that section to section 96. This is an issue of statutory interpretation of a kind with which courts are accustomed to dealing in the course of their ordinary work.

63 In short, I am not satisfied that Nadon J.'s expertise in competition law in general, and in the complexities of the merger of Superior and ICG in particular, gave him such a significant interpretative advantage over members of this Court as clearly to indicate Parliament's intention that the standard of review on the issue in dispute here should be that of unreasonableness. At the end of the day, the question of what count as "the effects of any prevention or lessening of competition" must be decided within the parameters of the Act, including its stated objectives. While economic expertise undoubtedly elucidates the strengths, weaknesses and consequences of the various choices available, it cannot be determinative of which of them, if any, is compatible with the *Competition Act*.

(iv) The Tribunal's constitutive statute and the scope of judicial review

64 Finally, the provisions of an administrative tribunal's constitutive statute respecting the grounds of judicial review, or the existence and scope of any right of appeal, may give some indication of the legislature's intention on the standard of review to be applied by a court to the tribunal's decisions.

65 At the one extreme, a strong preclusive clause, such as the bundle of exclusive jurisdiction, finality and "no *certiorari*" clauses typically found in the statutory schemes administered by labour relations boards, is indicative of a legislative intent to keep judicial review to a minimum. Hence, patent unreasonableness is generally the standard of review applied to labour boards' interpretation of the legislation that they administer.

66 At the other end of the spectrum are statutory rights of appeal that empower the appellate court to exercise any of the powers of the tribunal, direct the tribunal to take any action that the court considers proper and, for this purpose, to substitute its opinion for that of the tribunal. Rights of appeal from decisions of discipline committees of professional regulatory bodies are often of this kind.

67 There is a right of appeal from any decision of the Tribunal to this Court "as if it were a judgment of the Federal Court B Trial Division", except that, when the appeal is on a question of fact, leave of the Federal Court of Appeal is required: *CTA*, subsections 13(1) and (2). Section 27 of the *Federal Court Act*, R.S.C. 1985, c. F-7, imposes no limitations on the scope of the right of appeal from final judgments of the Trial Division to the Court of Appeal.

68 In my opinion, although expeditious decision-making is undoubtedly important in the review of mergers, the existence of an unrestricted right of appeal on questions of law, and of a modified right of appeal on questions of fact, must be entered as a factor indicative of Parliament's intention that the Tribunal's determinations of questions of law should be reviewable on appeal on a correctness standard.

(v) Conclusion

69 After weighing the factors to be considered in the pragmatic or functional analysis, and carefully examining the reasons for judgment in *Southam*, *supra*, I have concluded that it is the Court's function to determine whether the Tribunal was correct to decide that the effects of an anti-competitive merger that may be considered under section 96 are limited to the loss of resources to the economy as a whole resulting from the merger, to the exclusion of effects that relate to other statutory objectives, such as the wealth transfer from consumers to producers as a result of price increases, and the impact on competing small and medium sized businesses. A proposition of such generality is, to my mind, clearly a question of law.

70 I am not persuaded that, on an appeal to this Court, either the expertise of the Tribunal, or the degree of indeterminacy inherent in the word, "effects", indicates that the Court should review the Tribunal's decision on this issue on a standard other than that of correctness.

71 As Iacobucci J. noted in *Southam*, (*supra*, at pages 774-75, paragraph 53) with respect to the statutory requirement for, and to the role of, a judicial member of the Tribunal:

> Clearly it was Parliament's view that questions of competition law are not altogether beyond the ken of judges.
>
> This comment seems applicable also to the judges of this Court.
>
> [72] The composition of the Tribunal, and the rights of appeal from its decisions, reflect a carefully constructed compromise between assigning competition law exclusively to the domain of the judiciary, and entrusting it to a "non-judicial" regulatory agency, such as the Federal Trade Commission of the United States, which would operate subject to minimal judicial supervision: *Canada (Director of Investigation & Research) v. Southam Inc.*, [1995] 3 F.C. 557 (Fed. C.A.), at page 604 (*per* Robertson J.A.).

Issue 2: The Meaning of Effects in Section 96

73 The issue here is whether the Tribunal was correct in its interpretation of the phrase, "the effects of the prevention or lessening of competition ...", when it limited the relevant effects of the anti-competitive merger to those determined by the application of the total surplus standard. In my view, by so limiting the factors to be considered as "effects", the Tribunal erred in law because it failed to ensure that all the objectives of the *Competition Act*, and the particular circumstances of each merger, could be considered in the balancing exercise mandated by section 96.

74 With respect, I do not agree with the Tribunal's view that the list of objectives in section 1.1 of the *Competition Act* is merely a legislative rationale for the statutory purpose of maintaining and encouraging competition or that, if it is more than that, it should be read subject to the specific and contrary provisions of section 96. My reasons for these conclusions are as follows.

(i) The statutory text

(a) subsection 96(1)

75 Subsection 96(1) directs the Tribunal to consider whether the efficiencies produced by an anti-competitive merger are greater than, and offset, its anti-competitive effects. This is, in substance, a balancing test that weighs efficiencies on one hand, against anti-competitive effects on the other.

76 Writing of another provision in the *Competition Act* that called for the balancing of various factors, namely the determination of the scope of the relevant market, Iacobucci J. said in *Southam* (*supra*, at page 770, paragraph 43):

A balancing test is a legal rule whose application should be subtle and flexible, but not mechanical. It would be dangerous in the extreme to accord certain kinds of evidence decisive weight. [...] A test would be stilted and impossible of application if it purported to assign fixed weights to certain factors.

Hence, since the efficiency defence requires the Tribunal to balance competing objectives, its operation should remain flexible and not stilted by an overarching and restrictive interpretation.

77 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: paragraph 446.

78 In addition, section 5.5 of the *MEG* explicitly recognises that a merger may have more than one effect:

Where a merger results in a price increase, it brings both a neutral redistribution effect and a negative resource allocation effect on the sum of producer and consumer surplus (total surplus) within Canada.

The *MEG* concluded, however, that:

The efficiency gains described above are balanced against the latter effect, i.e., the deadweight loss to the Canadian economy.

79 Thus, it is not doubted that the redistribution of resources is an effect of an anti-competitive merger, in the sense that it is caused by the exercise of market power created by the merger. Nevertheless, the Tribunal's interpretation of the word, "effects", as it is used in section 96, narrows it to a single effect, namely the loss or inefficient allocation of resources in the economy as a whole as measured by the deadweight loss.

80 Moreover, the statutory requirement that, for the section 96 defence to succeed, the efficiency gains must be greater than, *and offset*, the effects of a lessening of competition suggests a more judgmental assessment than is called for by the largely quantitative calculation of deadweight loss that the Tribunal held was statutorily mandated.

81 Of course, the precise meaning to be given to a word when it appears in a statute, especially if it is commonly used in everyday speech, must be determined by reference to its context. Hence, it was not necessarily an error of law for the Tribunal in this case to give to the word, "effects", a narrower meaning than would normally be ascribed to it in other contexts. The pertinent enquiry is whether, in the context of the *Competition Act*, the Tribunal was correct to narrow its meaning to the single effect of deadweight loss.

(b) subsection 96(3)

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 a 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 a merger.

[1]

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.

(ii) Statutory purposes and objectives

(a) section 1.1

84 I turn now to section 1.1 of the *Competition Act* which, for convenience's sake, I set out again.

[1]

The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.	La présente loi a pour objet de préserver et de favoriser la concurrence au Canada dans le but de stimuler l'adaptabilité et l'efficience de l'économie canadienne, d'améliorer les chances de participation canadienne aux marchés mondiaux tout en tenant simultanément compte du rôle de la concurrence étrangère au Canada, d'assurer à la petite et à la moyenne entreprise une chance honnête de participer à l'économie canadienne, de même que dans le but d'assurer aux consommateurs des prix compétitifs et un choix dans les produits. —

85 I see nothing in the wording of this provision to indicate that it is anything other than a typical statutory purposes clause, and should be construed accordingly. As is not uncommon in such clauses, not all of the stated purposes or objectives can be served at the same time, nor are all necessarily consistent.

86 For instance, the objective of expanding "opportunities for Canadian participation in world markets" may be irrelevant when the merged entity is unlikely to compete abroad. Further, as is the case here, there may be a conflict between the aim of promoting "the efficiency and adaptability of the Canadian economy" and providing consumers with "competitive prices and product choices." In addition, of course, the wording of a particular provision in a statute may be so clear and precise that it must be regarded as overriding an ambiguous purpose clause.

87 Nonetheless, despite the typically indeterminate quality and inherent inconsistencies of purpose or objectives clauses, including section 1.1, statutory provisions containing general statements of legislative purpose are integral to the statute and can carry as much weight as its other sections: Ruth Sullivan, *Driedger on the Construction of Statutes*, 3rd edition (Butterworths Canada Ltd. 1994), pages 263-68.

Thus, a purpose clause serves as a guide to the court or tribunal in its interpretation of other statutory provisions: *R. v. T. (V.)*, [1992] 1 S.C.R. 749 (S.C.C.), at page 765, and may establish the parameters within which it must interpret the provisions of the statute: *C.A.I.M.A.W., Local 14 v. Canadian Kenworth Co.*, [1989] 2 S.C.R. 983 (S.C.C.), at page 1028.

88 In my view, section 1.1 suggests that an interpretation of "effects" should not focus exclusively on *one* of the objectives of promoting competition, namely, promoting the efficiency and adaptability of the economy. Rather, the "effects" to be considered under section 96 should also 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, and the availability to consumers of a choice of goods at competitive prices.

89 Indeed, in moving the second reading of 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*, 1 st Session, 33 rd Parliament, 1984-85-86, which became the *Competition Act* and *Competition Tribunal Act*, the Minister of Consumer and Corporate Affairs and Canada Post noted *(House of Commons Debates* (April 7, 1986) at 11927):

> The fourth but not the least objective is to provide consumers with competitive prices and product choices. As such, this objective becomes the common denominator in what we are trying to achieve. *This is the ultimate objective of the Bill*. (Emphasis added)

90 In spite of the existence of the multiple and ultimately inconsistent objectives set out in section 1.1, in certain instances the Act clearly prefers one objective over 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.

91 However, it does not follow from this that the only effects to be weighed against efficiency gains are limited to potential losses to the economy as a whole. Indeed, in the same Parliamentary speech referred to above, the Minister indicated (*Debates*, *supra*, at 11928) that the question posed to the Tribunal is:

> Would a particular merger result in efficiency gains which would offset *any* negative effects on competition? (Emphasis added)

> [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.

(b) "economic"purposes

93 In support of the position that the only effects of a merger that can be considered under section 96 are the resources lost to the economy as a whole, the respondents argued that the Supreme Court of Canada in *Southam* (*supra*, at page 772, paragraphs 48 and 49) authoritatively characterized the aims and objectives of the *Competition Act* as "more 'economic' than strictly 'legal' and as "peculiarly economic". In my opinion, however, these statements are not dispositive of the issue under consideration here, namely, whether the Tribunal's interpretation of "effects" was correct.

94 First, while these statements were clearly directed to the purposes of the *Competition Act* administered by the Tribunal, they were made in the context of the pragmatic or functional analysis conducted to determine the appropriate standard of review. When he used the words quoted above, Iacobucci J. was characterising the purpose of the Act in order to delineate the areas of expertise of the Court and the Tribunal respectively. Hence, they are not decisive in the context of the issue at stake here, namely, determining which effects of an anti-competitive merger may be considered as "effects" under section 96.

95 Second, a characterisation of the objectives of the *Competition Act* as economic does not necessarily lead to the conclusion that it is only permissible to consider as "effects" under section 96 the resources likely to be lost to the economy as a whole. I would have thought that the extent to which a merger is likely to result in the elimination of small and medium sized businesses from a market, or to cause consumers to pay more than competitive prices, are sufficiently "economic" to fall within Iacobucci J.'s characterisation of the aims and objectives of the Act.

96 Third, I have already noted the inclusion of persons with a wide range of backgrounds on the Advisory Council that the Minister of Industry must consult before making recommendations to the Governor in Council on the appointment of lay members to the Tribunal. The statutory inclusion of Council members from a wide range of backgrounds, including consumer groups and labour, suggests that the perspectives of those appointed are likely to extend beyond general welfare economics. This, in turn, is an indication that the Act itself is not concerned with "economics" so narrowly conceived as to exclude from consideration under section 96 the redistributive effects of higher prices that consumers will have to pay as a result of the merger, or its impact on small and medium sized businesses.

97 The Tribunal stated that taking into account a broader range of anti-competitive effects of a merger than the deadweight loss would license members of the Tribunal "to advance their views on the social merit of various groups in society" or "to achieve the proper distribution of income in society". These "political" tasks, the Tribunal stated, cannot be regarded as mandated by the Act, because they are not within the expertise of the members of the Tribunal, who "are selected for their expertise and experience in order to evaluate evidence that is economic and commercial in nature": paragraph 431.

98 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.

99 Of course, balancing competing objectives in order to determine where the public interest lies in a given case requires the exercise of discretion. However, the procedure and composition of the Tribunal equip it for this task no less well than those of other independent, specialized, administrative tribunals that are required to perform similar balancing exercises in the discharge of their regulatory functions.

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 B 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*.

103 Second, the result of applying the total surplus standard has some consequences that are so paradoxical in light of the consumer protection objectives of the Act that Parliament should not be regarded as having intended to limit the "effects" of the merger for the purpose of section 96 to deadweight loss. For example, use of the total surplus standard for calculating the anti-

competitive effects of a merger 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.

[1]

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. Therefore, a significant price increase will result in a smaller deadweight loss in a product where demand is inelastic than where it is elastic.

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*.

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 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.

109 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.

(iii) Predictability

110 It was strenuously argued by counsel for the respondents that, since one of the objectives of the *Competition Act* set out in section 1.1 is to "promote the efficiency and adaptability of the Canadian economy", it was important for business people to be able to predict whether or not a proposed merger was likely to receive regulatory approval. Otherwise, they might be deterred from entering into a merger that would violate section 92 by substantially lessening competition, but would increase wealth in the Canadian economy as a whole by producing substantial efficiency gains.

111 Hence, it was argued, it is consistent with the purpose of section 96 to interpret the efficiency defence as requiring the use of the total surplus standard to determine the anti-competitive effects of a merger, because the use of this standard makes the result of the section 96 balancing exercise much more predictable. While far from self-applying, the total surplus standard will generally make it much easier than the balancing weights approach favoured by the Commissioner to predict what will be the "effects" of a merger.

112 While not without some attraction, this argument when considered alone is far from dispositive in a regulatory context. And, when assessed with the stronger arguments pointing in the opposite direction, it does not in my view significantly buttress the Tribunal's interpretation of section 96.

113 First, discretionary decision-making in the regulation of economic activity is commonplace and predictability of outcome is a matter of degree. Indeed, since discretion is essential to the efficacy of most regulatory regimes, the interest of individuals in being able to arrange their affairs in the more or less certain knowledge of how they will be regarded by agencies of the state is not so highly valued as in other areas (such as taxation or criminal law) where the state impinges on individual conduct.

114 Hence, even if true, the submission that the total surplus standard may make the result of the balancing exercise more predictable than the balancing weights approach must be assessed in the context of the administration of a public programme of economic regulation.

115 Second, one should not exaggerate the differences in the degrees of predictability inherent in the total surplus and balancing weights standards for determining the "effects" of an anti-competitive merger. 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. Indeed, while section 5.5 of the *MEG* has adopted the total surplus standard, it also states that the "calculation of the anti-competitive effects of mergers is generally very difficult to make." See also Roy M. Davidson, "When Merger Guidelines Fail to Guide" (1991) 12 *Canadian Competition Policy Record* 44, at 46-47.

116 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.

117 Third, there are various tools available to administrative agencies that enable them to give more precision, and hence predictability of application, to the discretionary statutory standards that they must apply to particular fact situations: speeches by members of the administrative agency detailing agency thinking on an issue, and more formal published policy guidelines that can be elaborated and tailored from time to time to take account of agency experience with administering the regulatory scheme, for example. I discuss below the *MEG* issued by the Commissioner, in so far as they deal with the Competition Bureau's view of the interpretation of section 96.

118 In addition, parties contemplating a merger may submit details to the Commissioner at an early stage of the process in order to obtain an initial indication of whether approval is likely to be forthcoming and, if the Commissioner thinks that there may be problems, what they are and how they may be addressed. Administrative adjudication is only the rarely seen, though important, tip of the regulatory process iceberg.

119 Hence, even if the total surplus standard provides more predictability to prospective merging parties, when compared, for instance, to the balancing weights approach, the predictability argument is not sufficiently compelling to persuade me that it is the methodology mandated by section 96 for determining the "effects" of an anti-competitive merger in all cases.

(iv) ***Merger Enforcement Guidelines***

120 Both the Tribunal and, on appeal, counsel for the respondents, gave considerable weight to the *MEG*, issued in 1991 by the Director of Investigation and Research, Bureau of Competition Policy.

121 Section 5.5 of the *MEG* state that efficiency gains are to be balanced only against "a negative resource allocation effect on the sum of producer and consumer surplus (total surplus within Canada)"; in other words, "the deadweight loss to the Canadian

economy." It also states that the redistribution of wealth as a result of price increases stemming from the merger is "neutral", noting in footnote 37 that:

When a dollar is transferred from a buyer to a seller, it cannot be determined *a priori* who is more deserving or in whose hands it has a greater value.

122 In a speech given in Toronto on June 8, 1992 to the Canadian Institute, the then Director of Investigation and Research responded to the doubts expressed by Reed J., as the judicial member of the Tribunal that decided the *Hillsdown*case, *supra*, about whether the *MEG* were consistent with the *Competition Act* to the extent that they adopted total surplus standard as the basis for determining the "effects" of an anti-competitive merger. The Director saw no need to amend the *MEG* at that time, since economists advocated that wealth transfers to producers from consumers should be treated as a neutral effect of a merger, Reed J.'s expressions of doubt were only *obiter* and the Tribunal endorsed no other methodology for determining the "effects" to be taken into account under section 96.

123 In 1998, the approach to the determination of the anti-competitive effects of a merger adopted in the *MEG* was essentially endorsed in the Competition Bureau's publication, *The Merger Guidelines as Applied to a Bank Merger*.

124 The simple answer to the respondents' reliance on the *MEG* is that they are not law because they are not made under a grant of statutory authority, and cannot determine the meaning of the Act. Indeed, to the extent that they are inconsistent with the Act, they should be ignored. Further, the limited nature and intent of the *MEG* is clearly set out at the beginning of the document under the heading "Interpretation":

[1]

This document is intended solely to provide enforcement guidelines. As such, it sets forth the general approach that is taken to merger review, and is not a binding statement of how discretion will be exercised in a particular situation. Specific guidance regarding a specific merger may be requested from the Bureau through its program advisory opinions. The Guidelines are not intended to be a substitute for the advice of merger counsellors. They do not represent a significant change in enforcement policy or restate the law. *Final interpretation of the law is the responsibility of the Competition Tribunal and the courts.* (Emphasis added)

125 Of course, it may do little to inspire public confidence in the administration of the *Competition Act* that, in the context of the merger of Superior and ICG, the present Commissioner has apparently disavowed the interpretation of section 96 advanced in the *MEG*, which have still not been replaced. However, there was no allegation by the respondents that they had relied to their detriment on the *MEG*when they agreed to merge. While there was no evidence in the record about any discussions that may have taken place between the merging parties and the Bureau, it would not be surprising if such discussions had occurred and it had been indicated to the respondents that the Commissioner no longer thought that deadweight loss, measured both quantitatively and qualitatively, was the only "effect" that could ever be taken into account under section 96.

126 In addition, the possibility that a reviewing court may not agree with an agency's view of the law is an inevitable risk associated with the administrative practice of issuing non-binding guidelines and other policy documents to shed light on agency thinking and to assist those subject to the regulatory regime that it administers. This risk should deter neither the courts from deciding what the law is, nor agencies from engaging in the often useful exercise of administrative rule-making.

(v) The authorities

127 Finally, I consider whether existing authorities demonstrate the correctness of the Tribunal's interpretation of section 96. I turn, first, to the only other judicial pronouncement on the issue, namely, the decision of Reed J. in the *Hillsdown* case, *supra.* I agree with the respondents' position that what Reed J. said in that case is not dispositive of this case: not only is it, like the case before us, a decision of the Tribunal, but Reed J.'s statements did not form part of the *ratio* and, in some respects at least, she expressed herself more in the form of a doubt than of a definitive assertion that the interpretation in the *MEG* of "effects" was wrong in law.

128 Nonetheless, I find myself largely in agreement with the reasons given by Reed J. for querying whether the Tribunal was permitted to look only at deadweight loss when determining the effects to be balanced against any efficiency gains that, without the merger, were unlikely to be achieved.

129 In particular, I adopt her analysis of the legislative history of section 96: *Hillsdown*, *supra*, at pages 337-39. She observed that, unlike the present section 96, the previous, unenacted versions of the efficiency defence contained in both Bill C-42, *An Act to amend the Combines Investigation Act and to amend the Bank Act and other Acts in relation thereto or in consequence thereof*, 2nd Session, 30th Parliament, 1976-77, and in Bill C-29, *An Act to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof*, 2nd Session, 32nd Parliament, 1983-84, did not require that the efficiencies gained from an anti-competitive merger be balanced against its effects.

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 the earlier bills seem clearly to have encapsulated the total surplus standard in the efficiency defences, section 96 does not.

132 I note, too, that, even though she may not have been entitled as a lay member of the Tribunal to express a view on an issue that I have held to be a question of law alone, Ms. Lloyd did not agree that "effects" were confined to deadweight loss to the exclusion of effects relating to the other objectives of the Act: paragraph 506.

133 In a word, views expressed by Tribunal members who have considered the issue are about evenly split. I draw some comfort from the existence of this division of opinion both between the judicial members who have considered the issue (Reed J. and Nadon J.), and between the lay members of the Tribunal in this case, if, as I understand it, Dr. Schwartz agreed with Nadon J. Thus, in disagreeing with the Tribunal's interpretation of section 96, I cannot be said to have gone against the unanimous view of those more expert than I in this area of the law.

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 economics 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, 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, "Advances in the 1992 *Horizontal Merger Guidelines* in the Analysis of Competitive Effects" (Symposium on the New 1992 Merger Guidelines), *Antitrust Bulletin*, Fall 1993, pages 479-515.

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 B Did the Canadian Parliament Really Permit Mergers That Exploit Canadian Consumers So the World Can Be More Efficient?" (1997) 65 *Antitrust Law Journal* 641. Thus, Ross writes (*supra*, at 652, note 41):

[1]

As Professor Brodley has observed, the logical extension of competition policy based solely on societal wealth maximization would be to prefer a monopolist that was able to perfectly price discriminate (charge each consumer the maximum amount each consumer was willing to pay) to the typical Canadian industry with a relatively few number of firms, which would not produce at a single competitive price.

138 Hence, it is clear that there is more than one view among commentators on whether competition policy should disregard *a priori* transfers of wealth and other "effects" of anti-competitive mergers, and consider only whether the merger has the effect of increasing or decreasing the resources in the economy as a whole. Nonetheless, when the issue arises in the legal context of a section 92 proceeding instituted by the Commissioner, it must be answered by reference to the *Competition Act,* and Parliament's stated purpose and objectives in enacting it. In my view, the narrow reading that the Tribunal gave to the word, "effects", in section 96 cannot be justified by reference to the views of lawyer-economists in the United States, no matter how eminent.

(vi) Conclusions

139 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.

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 fully to 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 to 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.

Issue 3: The Burden of Proof

143 The Tribunal held (at paragraph 403) that, since section 96 constitutes a defence to an infringement of section 92, the merging parties bear the burden of proving each of its elements on the balance of probabilities, except the existence or scale of the effects that must be balanced against the efficiency gains.

144 The Commissioner submitted that the Tribunal had erred in law in holding that he had the legal onus of proving anything at all under section 96. While the evidential burden may shift as a case unfolds, the legal burden throughout, counsel for the Commissioner argued, remains with the respondents.

145 Apart from setting out the parties' contentions, the Tribunal gave little clue about the reasons for its conclusion on the burden of proof issue. One obvious possibility is that the Tribunal endorsed the submissions made by the party in whose favour it decided particular issues. Thus, the Tribunal stated that the respondents had submitted that the Commissioner bears

the burden of proving the scale of the "effects" of an anti-competitive merger (that is, on the Tribunal's interpretation of section 96, the deadweight loss), because the Commissioner's investigative powers put him in a better position than the respondents to obtain the necessary information from third parties.

146 On the hearing of the appeal, counsel for the respondents added that, if merging parties were to attempt to obtain the kind of information required to establish the effects of the merger for the purpose of section 96, including information on competitors' pricing and costs, they would run the risk of being accused of conspiring to restrain competition contrary to section 45 of the Act.

147 Counsel for the Commissioner, on the other hand, relied on statements made by officials of the Ministry of Consumer and Corporate Affairs, when appearing before the Legislative Committee on Bill-91. They advised the Committee that, once the Commissioner had proved a substantial lessening of competition under section 92, the burden of proving any defence was borne by the merging parties.

148 On the facts, the burden of proof did not have to be decided when the present case was before the Tribunal. However, since the effects that must be considered by the Tribunal include facts not taken into account when it first made the decision under appeal, it is necessary for the Court to determine the issue, which is largely one of first impression.

149 It seems clear that deciding which party bears the burden of proving what elements of the efficiency defence is a pure question of law that is not confined to the particularities of this case. For the reasons given earlier, I am of the view that the standard of review of the Tribunal's conclusion on this issue is correctness.

150 Two general principles would seem to support the Commissioner's position. First, the party who asserts, must prove the assertion. Since it is the respondents who assert that the efficiency gains of the merger are likely to exceed, and to offset, its anti-competitive effects, this principle indicates that the respondents should be required to prove each and every aspect of the assertion. The second general principle is that the burden of proving a defence generally rests with the defendant.

151 However, the principle that the party who asserts must prove is not absolute: Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*, 2 nd edition, (Butterworths Canada Ltd.; 1999), page 89. In addition, in the absence of authority, considerations of fairness, probability and policy would seem to be important determinants of the legal burden of proof: Sopinka, Lederman and Bryant, *supra,* at pages 86-90.

152 It would be somewhat odd, as counsel for the respondents argued, to place the legal onus of proving the anti-competitive effects of a merger on the party whose interest it is to deny that they exist or to minimise them. In addition, in the process of establishing a substantial lessening of competition, the Commissioner will often have gathered evidence on the effects of the merger that will also be relevant to the section 96 defence, including evidence on likely price increases following the merger and the impact of the merger on inter-related businesses.

153 These are matters on which the Commissioner is in a better position than the respondents to gather evidence by virtue of the investigative powers conferred on him by statute. Indeed, as Sopinka, Lederman and Bryant note (*supra*, at page 89), if "one party is peculiarly situated to prove a fact" a court may reverse the burden and place it on that party.

154 Accordingly, I have concluded that the Tribunal was correct to distribute the legal onus of proof as it did, so that the respondents bear the onus of proving every aspect of the section 96 defence, save for the anti-competitive effects of the merger.

F. CONCLUSIONS

155 In summary, I would allow the appeal, set aside the decision of the Tribunal with respect to the interpretation of section 96 of the *Competition Act* and remit the matter to the Tribunal for redetermination in a manner consistent with these reasons.

156 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.

157 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.

158 The appellant should have his costs, but because the respondents were successful on the burden of proof issue, I would reduce the costs awarded by 20% of those otherwise allowable.

***Létourneau J.A.*:**

159 I have had the benefit of reading the reasons for judgment issued by my colleague, Evans J.A.. I agree with him that the interpretation of the word "effects" in section 96 of the *Competition Act* (Act) R.S.C. 1985, c. C-34 involves a pure question of law that falls to be decided on a standard of correctness.

160 I also agree with my colleague that the word "effects" in section 96 of the Act ought not to be limited, as the Tribunal did, to the effects identified by the total surplus standard. As my colleague has pointed out, the interpretation of section 96 of the Act involves balancing market power and efficiency gains. The approach taken in this matter both in the United States and in Canada is by no means free from ambiguity and harsh criticism: see Robert H. Lande, The Rise and (Coming) Fall of Efficiency as the Ruler of Antitrust (1988) 33 *Antitrust* 429; David B. Andretsch, Divergent Views in antitrust Economics (1988) 33 *Antitrust Bull.* 135; Alan A. Fisher, Frederick I. Johnson and Robert H. Lande, Price Effects of Horizontal Mergers (1989) 77 *Calif. L.R.* 777; Lloyd Constantine, An Antitrust Enforcer Confronts the New Economics (1989) 58 *Antritrust L.J.* 661; Roy M. Davidson, When Merger Guidelines Fail to Guide (1992), *Canadian Competition Policy Record* 44, at page 46; Stephen 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, at pages 643-646; Tim Hazledine, Rationalism Rebuffed? Lessons from Modern Canadian and New Zealand Competition Policy (1998) *Review of Industrial Organization* 243; Jennifer Halliday, The Recognition, Status and Form of the Efficiency Defence to a Merger: Current Situation and Prospects for the Future (1999) *World Competition* 91. A review of these authorities reveals that the provision is at best confusing and puzzling. At worst, it can defeat the very purpose of the Act. I reproduce sections 96 and 1.1 for convenience:

96. (1) The Tribunal shall not make an order under section 92 if it finds that the merger or proposed merger in respect of which the application is made has brought about or 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 merger or proposed merger and that the gains in efficiency would not likely be attained if the order were made.

(2) In considering whether a merger or proposed merger is likely to bring about gains in efficiency described in subsection (1), the Tribunal shall consider whether such gains will result in

(*a*) a significant increase in the real value of exports; or

(*b*) a significant substitution of domestic products for imported products.

(3) For the purposes of this section, the Tribunal shall not find that a merger or proposed merger has brought about or is likely to bring about gains in efficiency by reason only of a redistribution of income between two or more persons.

96. (1) Le Tribunal ne rend pas l'ordonnance prévue à l'article 92 dans les cas où il conclut que le fusionnement, réalisé ou proposé, qui fait l'objet de la demande a eu pour effet ou aura vraisemblablement pour effet d'entraîner des gains en efficience, que ces gains surpasseront et neutraliseront les effets de l'empêchement ou de la diminution de la concurrence qui résulteront ou résulteront vraisemblablement du fusionnement réalisé ou proposé et que ces gains ne seraient vraisemblablement pas réalisés si l'ordonnance était rendue.

(2) Dans l'étude de la question de savoir si un fusionnement, réalisé ou proposé, entraînera vraisemblablement les gains en efficience visés au paragraphe (1), le Tribunal évalue si ces gains se traduiront:

a) soit en une augmentation relativement importante de la valeur réelle des exportations;

b) soit en une substitution relativement importante de produits nationaux à des produits étrangers.

(3) Pour l'application du présent article, le Tribunal ne conclut pas, en raison seulement d'une redistribution de revenu entre plusieurs personnes, qu'un fusionnement réalisé ou proposé a entraîné ou entraînera vraisemblablement des gains en efficience.

Purpose

1.1 The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

Objet

1.1 La présente loi a pour objet de préserver et de favoriser la concurrence au Canada dans le but de stimuler l'adaptabilité et l'efficience de l'économie canadienne, d'améliorer les chances de participation canadienne aux marchés mondiaux tout en tenant simultanément compte du rôle de la concurrence étrangère au Canada, d'assurer à la petite et à la moyenne entreprise une chance honnête de participer à l'économie canadienne, de même que dans le but d'assurer aux consommateurs des prix compétitifs et un choix dans les produits.

161 First, section 96 is broadly worded and provides no guidance as to the meaning of efficiency found in the section, the effects of the lessening of competition which are to be weighed against the efficiency gains, and the test, standard or trade-off to be applied in weighing the elements.

162 For example, what kind of economic efficiency does section 96 of the Act refer to? Allocative efficiency which is achieved when the existing products at the allocated prices satisfy the consumers' want? Or productive efficiency which is obtained when output is produced with the most cost-effective combination of productive resources available under present technology? Or technological or dynamic efficiency which is achieved through better industrial research development and a better rate of technological progress?

163 What are the anti-competitive effects of the merger that are to be weighed? Is it limited to deadweight loss which occurs when, because of higher prices, consumers choose an alternative and less appropriate substitute for the product that they would have other bought? Does the trade-off analysis include anti-competitive effects likely to arise in other related markets which would be affected by the merger? Does it include wealth transfers from consumers to producers that result from an exercise at market power? Are all the effects of the merger to 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?

164 What standard should be applied to the trade-off analysis required by the application of section 96? The total surplus standard chosen by the Tribunal in this case which considers only the deadweight loss and none of the redistributive effects involved in the wealth transfer from consumers to producers? Or the price standard under which efficiencies allow for mergers only if prices are to be maintained or reduced? Or the consumer surplus standard which disallows a merger where the loss of consumer surplus exceeds the efficiency gains?

165 Second, the relationship of section 96 with section 1.1, which states the purpose of the Act, is not defined and, in fact to many, section 96 contradicts section 1.1 and defeats the purposes contained in that purpose clause. When weighing the efficiency gains of a merger against the lessening of competition, what should be done of the stated objectives of ensuring that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy as well as providing consumers with competitive prices and product choices?

166 Third, section 96 poses no limits to the kind of mergers that can be effected and authorized as long as the efficiency gains will be greater than, and will offset, the effects of the lessening of competition and as long as these gains cannot be obtained by other means than the merger. This means that the creation of a monopoly or near monopoly through mergers could be authorized even though it would eliminate competition altogether, discourage competitive prices for consumers and would undermine, to the point of eradication, the development of small and medium-size enterprises, all these effects contrary to the purposes stated in section 1.1 of the Act.

167 Fourth, the problems created by section 96 are compounded by the fact that the provision is mandatory. The Tribunal shall not make an order preventing a merger where the undefined and elusive balancing test of section 96 is met.

168 Fifth, section 96 appears to have no geographical scope or limit so that efficiency gains made for the benefit of foreign corporations to the detriment of Canadian workers and consumers could be counted in the trade-off analysis that the provision requires. Or are mergers to be approved only if the efficiency gains in Canada exceed the losses in Canada? In the increasing context of globalization of trade and commerce, not to mention international trade treaties such as the *North American Free Trade Agreement Implementation Act*, S.C. 1993, c. 44 and the *World Trade Organization Agreement Implementation Act*, S.C. 1994, c. 47, Schedules I-IV, the issue of whether the balancing test applicable under section 96 is global or limited in its application to Canada becomes crucial. Yet, the provision still provides no guidance in this respect.

169 It is no wonder that conflicting views on the scope of section 96 have emerged and that the section, in search of predictability and workability, has been read down by eliminating some of the significant effects of the lessening of competition. It also comes as no surprise that many, influenced as they were by the Chicago school of thought in antitrust matters, concluded, as the Tribunal did in the present case, that efficiency of the economy overrides competition even with respect to an Act designed to maintain and promote competition.

170 It is true as Mr. Justice Iacobucci said in *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (S.C.C.), at page 772 that the focus of the Act is on economy rather than law or, if one prefers, that the "aims of the Act are more economic than they are strictly legal". But section 96 really begs the question: what kind of economy? Monopolistic, competitive or a proper balance between these two poles?

171 The Tribunal found that the merger was likely to prevent competition substantially in Atlantic Canada and to lessen competition substantially in coordination services offered to national account customers: see decision, paragraphs 310 and 313. There was also conclusive evidence that, in many large areas of the country, the merger would not merely lessen competition, but would in fact eliminate it and create monopolies. The following Chart illustrates the impact of the merger with respect to monopolies or near monopolies: see Compendium of the appellant, page 001327:

Table 4

Geographical Markets with Merger-to-Monopoly

	Pre-Merger	Post-Merger
Market	SPI	ICG SPI
	%	% %
Val d'Or	74	23 97
Sept Iles/Baie Comeau	55	45 100
Bancroft/Pembroke/Eganville	92	5 97
Dryden/Fort Frances/Kenora/Ignace	47	52 99

Echo Bay/Sault Ste Marie 55 44 99

Hearst/Wawa/Manitouwadge/Marathon 43 53 96

Little Current/Sudbury 51 48 99

North Bay 81 16 97

Thunder Bay 46 54 100

Fort McMurray 32 67 99

Whitecourt 55 45 100

Burns Lake/Terrace/Smithers/Prince Rupert 62 37 99

Fort Nelson 44 56 100

Valemont 43 57 100

Watson Lake 25 75 100

Whitehorse 33 67 100

172 The Tribunal, in view of its conclusion that efficiency is the paramount objective of the Act, ignored as an effect of the merger the fact that monopolies in certain product markets would ensue and failed to give any weight to that effect in its analysis under section 96. The Act maintains and promotes competition. It assumes that economic efficiency will generally and primarily develop through competition. It also accepts in section 96 that, in some cases, a reduction in competition can and will produce more efficiency than competition as it existed before merger.

173 In my respectful view, however, section 96 was not meant to authorize the creation of monopolies since it would defeat the purpose of section 1.1. The 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.

174 As the Supreme Court of the United States has asserted repeatedly with respect to the U.S. antitrust laws, "Congress was dealing with competition, which it sought to protect, and monopoly, which it sought to prevent: *Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 231 (U.S.S.C., 1951) , at pages 248-49 quoting *A. E. Staley Manufacturing Co. v. Federal Trade Commission*, 135 F.2d 453 (U.S. C.A. 7th Cir., 1943), at page 455". As my colleague pointed out, a similar expression of intent can be found in the Minister's (Minister of Consumer and Corporate Affairs and Canada Post) statement in the House of Commons where he reasserted in presenting the Bill that the ultimate objective of the Act was to provide consumers with competitive prices and product choices.

175 I agree with my colleague that the application of a balancing test requires a flexibility that the total surplus standard does not provide. It is true that a flexible approach may not yield the predictability that the assumptions and presumptions underlying the total surplus standard afford. However, if predictability is the preferred option, Parliament is at liberty to revisit section 96 and say so.

176 Finally, contrary to my colleague, I believe the Tribunal erred when it put on the Commissioner the legal burden (i.e., the burden of persuasion) of proving the effects of the lessening of competition. In practice, the merging parties will lead evidence of efficiency gains and of some of the effects of the lessening of competition. This is the evidential burden. They need to do that to establish that the gains offset the effects. Of course, the tendency for the merging parties might be to increase the amount of gains and downplay the effects of the lessening of competition. This is why, as we have seen in this case, the Commissioner also

bears in practice an evidential burden, that is the burden of leading evidence as to both components of the efficiency defence to alert the Tribunal to what the real, as opposed to the alleged, gains and effects are. In the end, however, the legal burden is on the merging parties to convince the Tribunal, first, that the efficiency gains are of the amount that they have contended, second, that the effects of the lessening of competition are those that they have identified and not those submitted by the Commissioner, and third, that the efficiency gains are greater than, and will offset, the effects.

177 I agree with the respondents that the Commissioner, with his statutory investigative powers, may be in a better position to gather information relevant to the effects and, indeed, that it would have done so in the context of the application of section 92 to which section 96 is a defence. The availability of statutory investigative powers will, indeed, enable the Commissioner to assume his evidentiary burden of gathering and filing relevant evidence to counter and rebut the allegations and evidence of the merging parties as to the effects of the lessening of competition. However, this is not sufficient to transfer the legal burden of proving these effects on the Commissioner. Indeed, there is no rationale and justification for putting on the Commissioner the burden of persuasion on one of the three components of the efficiency defence.

178 In conclusion, I would dispose of the matter as proposed by my colleague, except as to costs where I would make no apportionment in view of my conclusion that the Tribunal also erred on the issue of the legal burden of proof.

Appeal allowed in part.

End of Document

TAB 5

Canada (Commissioner of Competition) v. Superior Propane Inc.

Canada Competition Tribunal Decisions

Canada Competition Tribunal

Ottawa, Ontario

Before: Nadon J., presiding, L.P. Schwartz and C. Lloyd, Members

Heard: October 9-15, 2001.

Decision: April 4, 2002.

File no.: CT-1998-002

Registry document no.: 238a

[2002] C.C.T.D. No. 10 | 2002 Comp. Trib. 16 | Also reported at:18 C.P.R. (4th) 417

Reasons and Order Following the Reasons for Judgment of the Federal Court of Appeal Dated April 4, 2001 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. Between: The Commissioner of Competition, applicant, and Superior Propane Inc., ICG Propane Inc., respondents

(433 paras.)

Counsel 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

Counsel for the respondent:

Superior Propane Inc. ICG Propane Inc.

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

---

. . . . . .

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 On April 4, 2001, the Federal Court of Appeal (the "Court") set aside our decision of August 30, 2000. 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 Air Canada (Director of Investigation and Research v. Air Canada et al. *51 C.P.R. (3d) 131*, *[1993] C.C.T.D.*

No. 19), 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 reexamined. 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 judicata 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. THE ROLE OF THE TRIBUNAL

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 Southam case, certain procedural safeguards have to be met in order to satisfy the protections embodied in the Canadian Charter of Rights and Freedoms. 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 (Canada (Director of Investigation and Research) v. Hillsdown Holdings (Canada) Ltd. *(1992) 41 C.P.R. (3d) 289*) 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 offsetting public benefits. 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 tribunal, 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. 1*, (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 Act 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 Act 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, 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...
>
> [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:

> 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 Act" (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 welfare" 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. THE EFFECTS

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. REDISTRIBUTIVE EFFECTS (THE WEALTH TRANSFER)

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. CONCLUSIONS

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. CONCURRING OPINION (DR. L. SCHWARTZ)

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. Therefore, a significant price increase will result in a smaller deadweight loss where demand is inelastic than where it is elastic.
>
> [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

TAB 6

Most Negative Treatment: Check subsequent history and related treatments.

2012 Trib. conc. 14, 2012 Comp. Trib. 14
Competition Tribunal

Commissioner of Competition v. CCS Corp.

2012 CarswellNat 4409, 2012 CarswellNat 9015, 2012 Trib. conc. 14, 2012 Comp. Trib. 14, [2012] C.C.T.D. No. 14

In the Matter of the Competition Act, R.S.C. 1985, c. C-34, as amended

In the Matter of an Application by the Commissioner of Competition
for an Order pursuant to section 92 of the Competition Act

In the Matter of the acquisition by CCS Corporation of Complete Environmental Inc.

The Commissioner of Competition, (applicant) and CCS Corporation, Complete Environmental Inc., Babkirk Land Services Inc., Karen Louise Baker, Ronald John Baker, Kenneth Scott Watson, Randy John Wolsey, and Thomas Craig Wolsey, (respondents)

Sandra J. Simpson Chair, Paul Crampton Member, Wiktor Askanas Member

Heard: November 16, 2011; November 17, 2011; November 18, 2011; November 22, 2011; November 23, 2011; November 24, 2011; November 25, 2011; November 29, 2011; December 2, 2011; December 13, 2011; December 14, 2011
Judgment: May 29, 2012
Docket: CT-2011-002

Counsel: Nikiforos Iatrou, Jonathan Hood, for Applicant, Commissioner of Competition
Linda Plumpton, Crawford Smith, Dany Assaf, Justin Necpal, for Respondents, CCS Corporation, Complete Environmental Inc. and Babkirk Land Services Inc.
J. Kevin Wright, Morgan Burris, Brent Meckling, for Respondents, Karen Louise Baker, Ronald John Baker, Kenneth Scott Watson, Randy John Wolsey, and Thomas Craig Wolsey

Subject: Corporate and Commercial; Intellectual Property
Related Abridgment Classifications
Commercial law
VI Trade and commerce
VI.5 Competition and combines legislation
VI.5.d Abuse of dominant position (monopolies) and mergers
Headnote
Commercial law --- Trade and commerce — Competition and combines legislation — Abuse of dominant position (monopolies) and mergers
Table of Authorities
Cases considered by *Paul Crampton Member*:
Canada (Commissioner of Competition) v. Canada Pipe Co. (2006), 2006 FCA 233, 268 D.L.R. (4th) 193, 49 C.P.R. (4th) 241, 2006 CarswellNat 4554, 2006 CAF 233, 2006 CarswellNat 1763, 350 N.R. 291, [2007] 2 F.C.R. 3 (F.C.A.) — considered
Canada (Commissioner of Competition) v. Canadian Waste Services Holdings Inc. (2001), 2001 CarswellNat 3987, 11 C.P.R. (4th) 425, 2001 Comp. Trib. 3 (Competition Trib.) — considered
Canada (Commissioner of Competition) v. Canadian Waste Services Holdings Inc. (2003), 24 C.P.R. (4th) 178, 2003 CAF 131, 2003 CarswellNat 2986, 2003 FCA 131, 2003 CarswellNat 643 (Fed. C.A.) — referred to

Canada (Commissioner of Competition) v. Superior Propane Inc. (2000), 7 C.P.R. (4th) 385, 2000 Comp. Trib. 15, 2000 CarswellNat 3449 (Competition Trib.) — considered

Canada (Commissioner of Competition) v. Superior Propane Inc. (2001), 2001 FCA 104, 2001 CarswellNat 702, 269 N.R. 109, 199 D.L.R. (4th) 130, [2001] 3 F.C. 185, 2001 CarswellNat 2092, 11 C.P.R. (4th) 289 (Fed. C.A.) — considered

Canada (Commissioner of Competition) v. Superior Propane Inc. (2001), 2001 CarswellNat 1905, 2001 CarswellNat 1906, [2001] 2 S.C.R. xiii, 278 N.R. 196 (note), 14 C.P.R. (4th) vii (S.C.C.) — referred to

Canada (Commissioner of Competition) v. Superior Propane Inc. (2002), 18 C.P.R. (4th) 417, 2002 Comp. Trib. 16, 2002 CarswellNat 4016 (Competition Trib.) — considered

Canada (Commissioner of Competition) v. Superior Propane Inc. (2003), 223 D.L.R. (4th) 55, 300 N.R. 104, 2003 CAF 53, 2003 CarswellNat 1241, 2003 FCA 53, 23 C.P.R. (4th) 316, 2003 CarswellNat 217, [2003] 3 F.C. 529 (Fed. C.A.) — referred to

Canada (Director of Investigation & Research) v. Hillsdown Holdings (Canada) Ltd. (1992), 41 C.P.R. (3d) 289, 1992 CarswellNat 1630 (Competition Trib.) — referred to

Canada (Director of Investigation & Research) v. Southam Inc. (1992), 43 C.P.R. (3d) 161, 1992 CarswellNat 637 (Competition Trib.) — referred to

Canada (Director of Investigation & Research) v. Southam Inc. (1995), 21 B.L.R. (2d) 1, 63 C.P.R. (3d) 1, [1995] 3 F.C. 557, *(*sub nom. *Director of Investigation & Research, Competition Act v. Southam Inc. (No. 1))* 185 N.R. 321, 1995 CarswellNat 708, 1995 CarswellNat 1312, 127 D.L.R. (4th) 263 (Fed. C.A.) — referred to

Canada (Director of Investigation & Research) v. Southam Inc. (1997), 50 Admin. L.R. (2d) 199, 144 D.L.R. (4th) 1, 71 C.P.R. (3d) 417, [1997] 1 S.C.R. 748, 209 N.R. 20, 1997 CarswellNat 368, 1997 CarswellNat 369 (S.C.C.) — referred to

Canada (Director of Investigation & Research) v. Tele-Direct (Publications) Inc. (1997), 73 C.P.R. (3d) 1, 1997 CarswellNat 3120 (Competition Trib.) — considered

Cases considered by *Paul Crampton Member*:

Canada (Attorney General) v. Mowat (2011), 93 C.C.E.L. (3d) 1, D.T.E. 2011T-708, 337 D.L.R. (4th) 385, 26 Admin. L.R. (5th) 1, 2011 CarswellNat 4190, 2011 CarswellNat 4191, 2011 SCC 53, 422 N.R. 248, *(*sub nom. *C.H.R.C. v. Canada (A.G.))* 2011 C.L.L.C. 230-043, *(*sub nom. *Canada (Canadian Human Rights Commission) v. Canada (Attorney General))* [2011] 3 S.C.R. 471 (S.C.C.) — referred to

Rizzo & Rizzo Shoes Ltd., Re (1998), 1998 CarswellOnt 1, 1998 CarswellOnt 2, 50 C.B.R. (3d) 163, [1998] 1 S.C.R. 27, 33 C.C.E.L. (2d) 173, 154 D.L.R. (4th) 193, 36 O.R. (3d) 418 (headnote only), *(*sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re)* 221 N.R. 241, *(*sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re)* 106 O.A.C. 1, *(*sub nom. *Adrien v. Ontario Ministry of Labour)* 98 C.L.L.C. 210-006 (S.C.C.) — referred to

Statutes considered:

Competition Act, R.S.C. 1985, c. C-34

Generally — referred to

s. 1.1 [en. R.S.C. 1985, c. 19 (2nd Supp.), s. 19] — considered

s. 2(1) "business" — considered

s. 45 — referred to

s. 45.1 [en. R.S.C. 1985, c. 19 (2nd Supp.), s. 31] — referred to

s. 79 — considered

s. 79(1)(c) — referred to

s. 79(7) — referred to

s. 90.1 [en. 2009, c. 2, s. 429] — referred to

s. 90.1(10) [en. 2009, c. 2, s. 429] — referred to

s. 91 "merger" — considered

s. 92 — considered

s. 93 — considered

s. 96 — considered

s. 96(1) — considered

s. 96(3) — considered

s. 98 — referred to

Environmental Management Act, S.B.C. 2003, c. 53

Generally — referred to

Interpretation Act, R.S.C. 1985, c. I-21

s. 12 — referred to

Investment Canada Act, R.S.C. 1985, c. 28 (1st Supp.)

Generally — referred to

Regulations considered:

Environmental Management Act, S.B.C. 2003, c. 53

Hazardous Waste Regulation, B.C. Reg. 63/88

Generally — referred to

s. 1(1) "hazardous waste" — referred to

***Paul Crampton Member*:**

A. Executive Summary

1 The Tribunal has decided on a balance of probabilities that the Merger is likely to prevent competition substantially in the market for the supply of secure landfill services for solid hazardous waste from oil and gas producers in a geographic market which, at a minimum, is the area identified by CCS' expert, Dr. Kahwaty, as the "Potentially Contestable Area".

2 The Tribunal has concluded that CCS is a monopolist in the geographic market and that it exercises significant market power which is being maintained as a result of the Merger.

3 Although Dr. Baye, the Commissioner's expert, suggested a wide range of likely price decreases in the absence of the Merger, the Tribunal has found that a decrease in average tipping fees of at least 10% was prevented by the Merger.

4 There is significant time and uncertainty associated with entry. The Tribunal has concluded that effective entry would likely take a minimum of 30 months from site selection to the completed construction and operation of a secure landfill in the relevant market.

5 The Tribunal has also decided that, in the absence of the Merger, the Vendors would likely not have sold the Babkirk Facility in the summer of 2010 but would have operated it themselves and would have constructed a new secure landfill with a capacity of 125,000 tonnes by October of 2011. This landfill would likely have operated as a complement to the Vendors' bioremediation business until no later than October 2012.

6 The Tribunal has also concluded that the Vendors' bioremediation business would likely have been unprofitable and that by October 2012, the Vendors would likely have changed their business plan to significantly focus on the secure landfill part of their business or would have sold the Babkirk Facility to a secure landfill operator. In either case, no later than the spring

of 2013, the Babkirk Facility would have operated in meaningful competition with CCS' Silverberry secure landfill. It is the prevention of this competition by the Merger which constitutes a likely substantial prevention of competition.

7 The efficiencies claimed by CCS do not meet the requirements of section 96 of the Act.

8 Divestiture is an effective remedy and is the least intrusive option.

9 The application has been allowed. The Tribunal has ordered CCS to divest the shares or assets of BLS.

10 In dealing with the facts of this case, the Tribunal's conclusions were all based on an analysis of whether the events at issue were likely to occur.

B. Introduction

11 The Commissioner of Competition (the "Commissioner") has applied for an order under section 92 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the "Act"), dissolving a transaction in which CCS Corporation ("CCS") acquired the shares of Complete Environmental Inc. ("Complete") and ownership of its wholly-owned subsidiary Babkirk Land Services Inc. ("BLS") on January 7, 2011 (the "Merger"). In the alternative, the Commissioner requests a divestiture order requiring CCS to dispose of the shares or assets of BLS in a manner to be directed by the Tribunal.

12 In her application (the "Application"), the Commissioner alleges that the Merger is likely to prevent competition substantially in the market for hazardous waste disposal services in North-Eastern British Columbia ("NEBC") because, at the date of the Merger, Complete was a poised entrant by reason of having obtained the regulatory approvals needed to operate a secure landfill for hazardous solid waste on a site at Mile 115, Alaska Highway, Wonowon, B.C. (the "Babkirk Site").

13 Pending the Tribunal's decision on this application, CCS undertook to maintain all approvals, registrations, consents, licenses, permits, certificates and other authorizations necessary for the operation of a hazardous waste disposal facility (the "Babkirk Facility" or "Babkirk") on the Babkirk Site. Complete's other assets and businesses were not subject to this undertaking.

C. The Parties

14 The Commissioner is the public official who is responsible for the enforcement of the Act.

15 CCS is a private energy and environmental waste management company. Its customers are mainly oil and gas producers in Western Canada. CCS owns the only two operating secure landfills in NEBC that are permitted to accept solid hazardous waste. One is the Silverberry secure landfill ("Silverberry"). It opened in 2002. It is located approximately 50 km north-west of Fort St. John. The other is called Northern Rockies secure landfill ("Northern Rockies"). It opened in 2009 and is situated about 340 km northwest of Silverberry, about 260 km from the Babkirk Site and approximately 20 km south of Ft. Nelson. CCS also operates a variety of different types of secure landfills in Alberta and Saskatchewan and owns a separate waste management business called Hazco Waste Management ("Hazco"). Schedule "A" hereto is a map showing the locations of the landfills which are relevant to this Application.

16 BLS was founded in 1996 by Murray and Kathy Babkirk (the "Babkirks"). BLS operated a facility which was not a secure landfill. It had a permit for the treatment and short-term storage of hazardous waste on the 150 acre (approx.) Babkirk Site. It is located approximately 81 km or 1 $^{1}/_{2}$ hours by car, northwest of Silverberry. The Babkirks operated their facility for approximately six years under a permit from the British Columbia Ministry of the Environment ("MOE") which was issued in 1998. However, in 2004, they stopped accepting waste. Two years later, the Babkirks retained SNC Lavalin ("SNCL") to prepare the documents BLS needed to apply for permits for the construction of a secure landfill capable of accepting solid, hazardous waste at the Babkirk Site.

17 The individual Respondents are the former shareholders of Complete who sold their shares to CCS in the Merger. Karen and Ron Baker are married and Ken Watson is their son-in-law. Tom Wolsey is Randy Wolsey's father. The former shareholders will be referred collectively as the "Vendors". All the Vendors, except Tom Wolsey, gave evidence in this proceeding.

18 In November of 2006, Randy Wolsey, acting on his own behalf and on behalf of other individual Respondents, negotiated a "handshake agreement" with the Babkirks to purchase the shares of BLS. The deal was conditional on BLS obtaining approval for the secure landfill from the Environmental Assessment Office ("EAO"). In April 2007, the Vendors incorporated Complete (initially called Newco) to be the company that would eventually purchase the shares of BLS. After an extensive process of consultation and review, the EAO issued a certificate (the "EA Certificate") to BLS on December 3, 2008. Four months later, in April 2009, Complete acquired all the outstanding shares of BLS and it became a wholly-owned subsidiary of Complete. Thereafter, on February 26, 2010, BLS received a permit from the MOE authorizing the construction of a secure landfill, with a maximum storage capacity of 750,000 tonnes, and a storage and treatment facility with a maximum capacity of 90,000 tonnes (the "MOE Permit").

19 At the time of the Merger, Complete had other business interests. It operated municipal solid waste landfills for the Peace River Regional District as well as a solid waste transfer station. In addition, it owned a roll-off container rental business (the "Roll-off Bin Business"). Since the Merger, those businesses have been operated by Hazco.

20 CCS, Complete and BLS will be described collectively as the "Corporate Respondents".

D. The Parties' Positions

The Commissioner

21 The Commissioner alleges that because CCS owns the only two operational secure landfills for solid hazardous waste in NEBC, it has a monopoly and associated market power which allows it to price discriminate between different customers and set the prices for hazardous waste disposal above a competitive level. These prices are known as "Tipping Fees".

22 The Commissioner alleges that Complete was ready to enter the market for secure landfill services in NEBC and that it was likely that competition between Complete and CCS would have caused a decline in average Tipping Fees in NEBC of at least 10%. Alternatively, the Commissioner alleges that the Vendors would have sold Complete to a purchaser which would have operated a secure landfill in competition with CCS. Finally, the Commissioner maintains that any efficiencies associated with the Merger are likely to be *de minimis*.

The Respondents

23 The Vendors submit that their sale of Complete was not a Merger under the Act because there was no business in operation at the Babkirk Site. They also deny (i) that Complete was poised to enter the market for the direct disposal of hazardous waste into a secure landfill and (ii) that, in the absence of the Merger, an alternative buyer would have purchased Complete and operated a secure landfill. The Respondents maintain that if the Vendors had not sold Complete to CCS, they would likely have processed hazardous waste at the Babkirk Facility using a treatment technique called bioremediation. This type of treatment would have been complemented by a half cell (125,000 tonnes) of secure landfill. The secure landfill would only have been used to store the small amount of hazardous waste that could not be successfully treated, and would not have been used to engage in meaningful competition with CCS in respect of the supply of secure landfill services.

24 The Corporate Respondents challenge both the Commissioner's interpretation of CCS' pricing behaviour and her prediction of the anti-competitive effects she has alleged would likely result from the Merger. Among other things, they allege that the Commissioner's approach to market definition is fundamentally flawed and that the area in which there is scope for competition between the Babkirk and Silverberry facilities is, at best, limited to the very small "Potentially Contestable Area" identified by CCS' expert, Dr. Kahwaty (the "Contestable Area").

25 The Corporate Respondents also submit that the efficiencies resulting from the Merger are likely to be greater than, and will offset, the effects of any prevention of competition brought about by the Merger. They further argue that the Commissioner failed to meet her burden of quantifying the deadweight loss as part of her case in chief. As a result, they say that the Tribunal should conclude that the Merger is not likely to result in any quantifiable effects.

26 Finally, all the Respondents submit that if there is to be remedy, it should be divestiture, rather than dissolution.

E. The Evidence

27 Attached as Schedule "B" is a list of the witnesses who testified for each party and a description of the documentary evidence.

F. Industry Background

28 The management of solid hazardous waste generated by oil and gas operators is regulated in British Columbia by the *Environmental Management Act*, SBC 2003, c 53 (the "EMA") and regulations. If the waste produced meets the definition of "hazardous waste" found in the *Hazardous Waste Regulation*, (B.C. Reg. 63/88) (the "HW Regulation"), oil and gas operators wishing to dispose of hazardous waste must do so within the confines of the legislative framework. The MOE is responsible for administering the EMA and HW Regulation. Hereinafter, hazardous waste as defined in the HW Regulation which is solid will be described as "Hazardous Waste".

29 Under the HW Regulation, a person must receive a permit from the MOE to operate a facility called a secure landfill that can accept Hazardous Waste for disposal. A "secure landfill" is defined in the HW Regulation as a disposal facility where Hazardous Waste is placed in or on land that is designed, constructed and operated to prevent any pollution from being caused by the facility outside of the area of the facility ("Secure Landfill").

Disposal at Secure Landfills

30 Oil and gas drilling operators (also called waste generators) produce two major types of Hazardous Waste that can be disposed of at a Secure Landfill: contaminated soil and drill cuttings. The contaminants are typically hydrocarbons, salts, and metals.

31 Hydrocarbons are categorized as light-end hydrocarbons and heavy-end hydrocarbons. The evidence shows that Hazardous Waste often includes hydrocarbons of both types.

32 Oil and gas generators can contaminate soil with salt when, among other things, they inadvertently spill produced water or brine. Produced water is water that has been trapped in underground formations and is brought to the surface along with the oil or gas. Metals can be found in Hazardous Waste because they occur naturally or because they have been included in additives used in drilling.

33 The HW Regulation states that a Secure Landfill cannot be used to dispose of liquid hazardous waste.

34 Hazardous Waste from "legacy sites" can also be disposed of at Secure Landfills. Dr. Baye defined legacy waste as "accumulated waste from decades of drilling activity that has been left at the drilling site" ("Legacy Waste").

35 Operators pay third-party trucking companies to transport Hazardous Waste to Secure Landfills. Transportation costs are typically a substantial portion of waste generators' overall costs of disposal. Dr. Baye estimated that a generator would pay $4 to $6 per tonne for every hour spent transporting waste from, and returning to a generator's site.

36 At the hearing, Mr. *[CONFIDENTIAL]* and Mr. *[CONFIDENTIAL]*, indicated that no ongoing liability is shown on their books once Hazardous Waste is sent to Secure Landfills, even though generators could be liable if a Secure Landfill operator goes bankrupt or if the landfill fails and Hazardous Waste leaches out of the facility.

37 The MOE has issued five permits for Secure Landfills. Four of them are in NEBC and are currently valid: Silverberry, Northern Rockies, Babkirk and Peejay.

38 Silverberry has a permitted capacity which allows it to accept 6,000,000 tonnes of waste. At 1.52 tonnes per cubic meter, which is the same figure used to calculate tonnes at Silverberry, Northern Rockies' permitted capacity is 3,344,000 tonnes. In 2010, *[CONFIDENTIAL]* tonnes of Hazardous Waste was tipped at Silverberry and, in that year, Northern Rockies accepted *[CONFIDENTIAL]* tonnes.

39 Tipping Fees vary depending on the type of waste. According to the evidence given by Dr. Baye, the average Tipping Fee for all substances at Silverberry was *[CONFIDENTIAL]* per tonne in 2010 and the average Tipping Fee for all waste tipped at Northern Rockies in the same year was *[CONFIDENTIAL]* per tonne.

40 Peejay is located in a relatively inaccessible area near the Alberta border. It was developed by a First Nations community to serve nearby drilling operators such as Canadian Natural Resources Limited ("CNRL"). Construction specifications and an operational plan for Peejay were approved by the MOE on March 11, 2009. However, the Secure Landfill has not yet been constructed and there may be financial difficulties at the project.

41 There are presently no Secure Landfills in operation in NEBC which are owned by oil and gas generators.

Bioremediation - Methodology

42 Bioremediation is a method of treating soil by using micro-organisms to reduce contamination. The microbes can be naturally occurring or they can be deliberately added to facilitate bioremediation. In NEBC, bioremediation usually takes place on an oil and gas producing site where the waste is generated. Bioremediation can also be undertaken offsite but the evidence indicates that there are no offsite bioremediation facilities currently operating in NEBC.

43 A common bioremediation technique is landfarming. In landfarming, contaminated waste is placed on impermeable liners and is periodically aerated by being turned over or tilled. The landfarming technique the Vendors planned to use involves turning soil to create windrows which are *[CONFIDENTIAL]* triangular-shaped piles of soil *[CONFIDENTIAL]*.

44 The preponderance of the evidence showed that, given sufficient time, light-end hydrocarbons can be successfully bioremediated in NEBC despite the cold if the clay soil is broken up. However, the Tribunal has concluded that soil contaminated with heavy-end hydrocarbons is not amenable to cost effective bioremediation because it is difficult, unpredictable, and very time consuming. Further, waste contaminated with metals and salts cannot be effectively bioremediated with technologies currently approved for use in Canada.

45 Once bioremediation is complete, an operator will normally hire a consultant to determine whether the Hazardous Waste can be certified as "delisted" in accordance with a delisting protocol. If so, there is no further liability associated with that particular waste.

46 Mr. Watson testified that his company, Integrated Resource Technologies Ltd. ("IRTL"), had successfully bioremediated hydrocarbon-contaminated soil throughout the winter in NEBC and Northern Alberta. Since about 2002, he has been using a specially designed machine from Finland, the "ALLU AS-38H". This machine *[CONFIDENTIAL]* is capable of breaking up heavy clay so that bacteria can enter the windrow and consume the hydrocarbon contaminants.

G. The Issues

47 The following broad issues are raised in this proceeding:

1. Is CCS' acquisition of Complete a "merger"?

2. What is the product dimension of the relevant market?

3. What is the geographic dimension of the relevant market?

4. Is the Merger Pro-Competitive?

5. What is the analytical framework in a "prevent" case?

6. Is the Merger likely to prevent competition substantially?

7. What is the burden of proof on the Commissioner and on a Respondent when the efficiencies defence is pleaded pursuant to section 96 of the Act?

8. Has CCS successfully established an efficiencies defence?

9. Is the appropriate remedy dissolution or divestiture?

Issue 1 Is CCS' Acquisition of Complete a Merger?

48 As a threshold matter, the Vendors submit that the Application should be dismissed because, at the date of the Merger, Complete was not a "business" within the meaning of section 91 of the Act, given that it was not actively accepting and treating Hazardous Waste, and was not otherwise operational in relation to the supply of Secure Landfill services. Instead, they maintain that Complete was simply an entity which held the assets of BLS, i.e. permits and property. Accordingly, the Vendors' position is that, because CCS acquired assets which had not yet been deployed, it did not acquire a "business", as contemplated by section 91 of the Act. The Vendors also submit that the other businesses owned by Complete and acquired in the Merger are not relevant for the purposes of this Application because the Commissioner does not allege that they caused or contributed to a substantial prevention of competition.

49 A merger is defined in section 91 as the acquisition of a "business". The section reads as follows:

In sections 92 to 100, "merger" means the acquisition or establishment, direct or indirect, by one or more persons, whether by purchase or lease of shares or assets, by amalgamation or by combination or otherwise, of control over or significant interest in the whole or a part of a business of a competitor, supplier, customer or other person.

Pour l'application des articles 92 à 100, « fusionnement » désigne l'acquisition ou l'établissement, par une ou plusieurs personnes, directement ou indirectement, soit par achat ou location d'actions ou d'éléments d'actif, soit par fusion, association d'intérêts ou autrement, du contrôle sur la totalité ou quelque partie d'une entreprise d'un concurrent, d'un fournisseur, d'un client, ou d'une autre personne, ou encore d'un intérêt relativement important dans la totalité ou quelque partie d'une telle entreprise.

50 Business is defined as follows in subsection 2(1) of the Act (the "Definition"):

"business" includes the business of

(a) manufacturing, producing, transporting, acquiring, supplying, storing and otherwise dealing in articles, and

(b) acquiring, supplying and otherwise dealing in services.

It also includes the raising of funds for charitable or other non-profit purposes.

« entreprise » Sont comprises parmi les entreprises les entreprises:

a) de fabrication, de production, de transport, d'acquisition, de fourniture, d'emmagasinage et de tout autre commerce portant sur des articles;

b) d'acquisition, de prestation de services et de tout autre commerce portant sur des services.

Est également comprise parmi les entreprises la collecte de fonds à des fins de charité ou à d'autres fins non lucratives.

51 The Tribunal notes two features of the Definition. First, it uses the word "includes", which means that it is not exhaustive. Second, unlike the definitions of the term "business" found in statutes such as the *Investment Canada Act*, R.S.C. 1985, c. 28 (1st Supp.), the Definition makes no reference to generating profits or revenues.

52 Turning to the facts, it is the Tribunal's view that, for the reasons described below, Complete was actively engaged in the development of the Babkirk Site as a hazardous waste treatment facility.

53 Before the Merger, Complete had taken the following steps:

- It had purchased the shares of BLS, thereby acquiring the EA Certificate and the Babkirk Site;
- It had continued the application process and had secured the MOE Permit;
- It had held numerous shareholders' meetings to plan how the Babkirk Site would be developed as a bioremediation facility and how that facility would operate in conjunction with other businesses owned by the Vendors;
- Its shareholders had discussed bioremediation with Petro-Canada and had solicited its interest in becoming a customer for both bioremediation and Secure Landfill services;
- It had hired IRTL and had paid it *[CONFIDENTIAL]* to bioremediate the soil in cell #1 at the Babkirk Facility. This work was undertaken because it was a condition precedent to the construction of the half cell of Secure Landfill;
- It was developing an operations plan for the Babkirk Facility.

54 In the Tribunal's view, these activities demonstrate that Complete was engaged in the business of developing the Babkirk Site as a Hazardous Waste treatment service that included a Secure Landfill. Since the Definition is not exhaustive, the Tribunal has concluded that it encompasses the activities in which Complete and its shareholders had been engaged at the time of its purchase by CCS. Further, the absence of a requirement for revenue in the Definition suggests to the Tribunal that it covers a business in its developmental stage.

55 For all these reasons, the Tribunal has concluded that Complete was a business under section 91 of the Act at the date of the Merger.

56 In view of this conclusion, it is not necessary to decide whether Complete's Roll-off Bin Business or its management of municipal dumps could be businesses for the purposes of section 91 of the Act.

57 However, in the Chairperson's view, a business being acquired in a merger must have some relevance to a Commissioner's application. In other words, it must have the potential to impact competition in the markets at issue. This observation means that, in this case, Complete's Roll-off Bin Business and its management of municipal dumps would not have been caught by the definition in section 91 because they are not involved in any way in the disposal or treatment of Hazardous Waste. In his separate reasons, Crampton C.J. has taken a different position on this point.

Issue 2 What is the Product Dimension of the Relevant Market?

The Analysis

58 In defining relevant markets, the Tribunal generally follows the hypothetical monopolist approach. As noted in *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2000 Comp. Trib. 15, 7 C.P.R. (4th) 385 (Comp. Trib.) ("*Propane 1*"), at para. 57, the Tribunal embraces the description of that approach set forth at paragraph 4.3 in the Commissioner's Merger Enforcement Guidelines ("MEGs"), which state:

> Conceptually, a relevant market is defined as the smallest group of products, including at least one product of the merging parties, and the smallest geographic area, in which a sole profit-maximizing seller (a "hypothetical monopolist") would impose and sustain a small but significant and non-transitory increase in price ("SSNIP") above levels that would likely exist in the absence of the merger.

59 The price that would likely have existed in the absence of or "but for" the merger in a "prevent case" is the Base Price. The burden is on the Commissioner to demonstrate the "Base Price". In this case, Dr. Baye has predicted a decrease in Tipping Fees in the absence of the Merger of at least 10% and in some of his economic modelling the price decrease is as large as 21%. In *Canada (Commissioner of Competition) v. Canadian Waste Services Holdings Inc.*, 2001 Comp. Trib. 3, 11 C.P.R. (4th) 425 (Competition Trib.); aff'd 2003 FCA 131 (Fed. C.A.), at para. 92, the Tribunal observed that, when a price change can be predicted with confidence, it is appropriate to delineate markets based on the likely future price even if the future level of that price cannot be predicted precisely. In such cases, it may be sufficient for the Commissioner to demonstrate a range in which the likely future price would have fallen.

60 However, if a reasonable approximation of the likely future price cannot be demonstrated, it may be difficult for the Tribunal to clearly define the boundaries of the relevant market. In such cases, it will nevertheless be helpful for the Tribunal to be provided with sufficient evidence to demonstrate why substitutes that appear to be acceptable at the prevailing price level would or would not remain acceptable at price levels that would likely exist "but for" the merger or anti-competitive practice in question. In any event, evidence about various practical indicia is typically required to apply the hypothetical monopolist approach. The Tribunal recognizes that, like other approaches to market definition, the hypothetical monopolist approach is susceptible to being somewhat subjective in its practical application, in the absence of some indication of what constitutes a "small but significant and non-transitory increase in price" (SSNIP). For this reason, objective benchmarks such as a five percent price increase lasting one year, can be helpful in circumscribing and focusing the inquiry.

61 In the Application at paragraph 11, the Commissioner alleged that "[t]he anti-competitive effects of the Merger "primarily" affect oil and gas companies disposing of Hazardous Waste produced at oil and gas fields within NEBC." [our emphasis]. However, in his initial report Dr. Baye did not limit the product market to Hazardous Waste produced at oil and gas fields. Nevertheless, during the hearing, Dr. Baye and Dr. Kahwaty essentially agreed that the amount of solid hazardous waste generated by non-oil and gas sources and tipped at Secure Landfills in British Columbia is so small that it does not warrant consideration in these proceedings. Accordingly, in the Tribunal's view, the Commissioner's product market definition is "solid hazardous waste generated by oil and gas producers and tipped into secure landfills in NEBC".

62 However, the Respondents deny that the product market is as narrow as the Commissioner suggests. They say that it also includes bioremediation and the storage or risk management of waste on the sites where the waste was generated. They assert that these options constrain any market power that CCS may have. We will deal with these positions in turn.

Evidence about the Use of Bioremediation

63 Bioremediation has been described above and the evidence is clear that it is not an acceptable substitute for generators of Hazardous Waste if soil is contaminated with salts or metals. The Tribunal also accepts that, if heavy-end hydrocarbons are present, bioremediation is not cost effective or successful in a reasonable timeframe.

64 Mr. Andrews gave evidence about the use of bioremediation. He joined the MOE in January 2011. At that time, he was asked to review the E-Licensing Database, which keeps track of the progress made by operators who are bioremediating Hazardous Waste. He found that approximately 50% of the operators who had entries in the Database had reported no annual activity. He said that this indicated that many operators "had stopped actively treating H[azardous] W[aste] at these sites, or at least had stopped reporting any activities to the MOE."

65 He therefore contacted Conoco Philips Canada, Suncor Energy Inc. ("Suncor"), Progress, Devon Canada Corporation ("Devon") and Apache Canada Ltd. ("Apache"). They accounted for 80% of the registered sites with no reported activity. Among other things, he asked these operators to update their operations plans and submit annual reports.

66 According to Mr. Andrews' witness statement, three of the operators reported that they had dealt with the Hazardous Waste they were bioremediating by sending it to a Secure Landfill and he anticipated that the remaining operators would do the same because bioremediation had failed. Mr. Andrews also said that Suncor filed an operations plan for its registered bioremediation sites which stated that, in the future, it would be sending all its Hazardous Waste to a Secure Landfill.

67 Mr. Andrews also described his experience with onsite treatment before he joined the MOE. He stated the following in his witness statement [paragraphs 23-26]:

> I managed the HW at seven sites that CNRL had registered. These sites were allocated north of Fort St John and on existing oil and gas lease sites or on abandoned sites. There were approximately 50,000 tonnes of HW at these sites.
>
> Initially, we tried treating the HW onsite. At each of these sites we put the HW into windrows and used a turner to turn the HW three times per year at each site. Hazco Environmental Services was the contractor that provided the windrow turner. We also added fertilizers and nutrients in the soil to assist in the bioremediation process. The fertilizer is meant to add additional nutrients to aid the bacteria to process the hydrocarbons.
>
> CNRL pursued this treatment process for two years. While CNRL was able to reduce the contaminants in the HW at these sites, it failed to reduce the contaminants enough to "delist" the HW. Delisting HW means reducing the presence of contaminants low enough so that the soil is no longer considered to be HW. CNRL spent significant amounts of money on treatment because the sites required constant monitoring. The sites would get wet and require dewatering out to prevent berm overflow and enable equipment access.
>
> Ultimately, after two years of treatment, it was clear that bioremediation would not work to address the contamination issues. CNRL decided to send the remaining HW to a Secure Landfill, specifically Silverberry, which was the landfill closest to the sites. I was also responsible for this process. It took CNRL approximately 2-3 years and several million dollars to send all the waste to Silverberry.

68 *[CONFIDENTIAL]*, who works as a Contracting and Procurement Analysist for *[CONFIDENTIAL]*, testified that its current operations in NEBC are in two fields called *[CONFIDENTIAL]*. He indicated that *[CONFIDENTIAL]* uses Secure Landfills to dispose of its Hazardous Waste and that it does not bioremediate because of the associated costs, the time necessary to bioremediate, and the manpower required to undertake bioremediation. He stated that liability has the potential to remain if the Hazardous Waste is not effectively bioremediated and that additional costs might be incurred if the Hazardous Waste, which is not effectively treated, must be tipped into a Secure Landfill. He added that there is ongoing uncertainty about whether bioremediation is effective or not.

69 *[CONFIDENTIAL]*, the Vice-President of Operations at *[CONFIDENTIAL]*, testified that *[CONFIDENTIAL]* uses an oil-based mud system to reduce friction on horizontal wells and that the oil-based mud cuttings are typically tipped into Secure Landfills. He also stated that *[CONFIDENTIAL]* sees disposal at a Secure Landfill as the most economic alternative for dealing with the Hazardous Waste from drilling, as disposal eliminates the increased environmental risk and cost of long term storage and/or site remediation. He explained that "[c]ontainment, transport and disposal of hazardous waste generated from drilling operations is currently the only option used by *[CONFIDENTIAL]* for managing hazardous waste generated from drilling." Accordingly, it is clear that, at its current drilling sites, only Secure Landfills are used for disposal.

70 However, with respect to the Legacy Waste in NEBC on drilling sites which *[CONFIDENTIAL]*, Mr. *[CONFIDENTIAL]* testified that *[CONFIDENTIAL]* will bioremediate some of the waste on these sites. He explained that bioremediation of the Legacy Waste had already been started by *[CONFIDENTIAL]*. He stated that the decision to dispose of Hazardous Waste instead of treating it is taken on a case-by-case basis, and depends on the type and amount of Hazardous Waste present on the legacy site, the likelihood of successful remediation, and the cost of excavation, transport and disposal.

71 During a review of the HW Regulation undertaken by the MOE, the MOE retained Conestoga-Rovers & Associates to conduct a report on Secure Landfill disposal. The report is entitled "Secure Landfill Disposal Policy Review" and dated March 2011. It states:

> Based on equal weighting of cost, cost variability, timeline, and treatment certainty landfilling [Secure Landfill] is the preferred option under all scenarios. Landfarming [bioremediation] can be an appropriate method for treating hydrocarbon contaminated soils given appropriate concentrations and a multi-year timeline.

72 Devin Scheck, the Director of Waste Management and Reclamation at the British Columbia Oil and Gas Commission, testified that many operators still choose to dispose of their contaminated soils in Secure Landfills, even in situations where bioremediation is feasible, because of the associated costs and timeframe. He said the following in his witness statement [paragraphs 25-27]:

> In my experience, a significant number of the sites that Operators seek to remediate are remediated by the Operator disposing of the contaminated soils at a landfill. With sites that are only contaminated with light end hydrocarbons, Operators may seek to bioremediate the soil on site, but heavy end hydrocarbons tend to have a poor response to bioremediation. As well, tight clay (which is prevalent in North Eastern B.C. where the oil and gas activity is most prevalent) makes bioremediation difficult, as does the relatively cold weather in the region. The presence of other contaminants, such as salts or metals that exceed CSR standards, prevent bioremediation from being an appropriate option, as salts and metals cannot be bioremediated.
>
> Accordingly, when dealing with anything other than light end hydrocarbons, my experience is that Operators will usually dig up the soil, and dispose of it at a Secure Landfill like Silverberry in B.C. or a closer landfill across the Alberta border, such as the CCS Class II Alberta Landfill at LaGlace.
>
> In my experience, even where bioremediation may be feasible, many Operators will still choose to landfill their contaminated soils. With bioremediation there is much uncertainty about costs, and the timeframe required for treatment is also uncertain. Weather conditions, site access issues, amount/type of treatment, future equipment and labour costs, as well as the costs of ongoing access for treatment and sampling to determine if the soils are remediated contribute to this uncertainty.

73 Mark Polet, an expert environmental biologist with specialized knowledge in environmental assessment, remediation and reclamation, as well as waste facility management development, stated as follows in paragraph 17 of his expert report:

> Once an Operator in NEBC decides to clean up its waste, the two most practical options available are: 1) the disposal of the waste at an appropriate landfill; or 2) the treatment of the waste onsite through a process known as bioremediation. Operators do not have a uniform preference for either option but, in my experience, will choose an option based on cost, risk, efficacy and other reasons such as environmental stewardship.

74 At the hearing, Mr. Polet testified that the costs of bioremediation and secure landfilling can be comparable. He stated:

> Once you define the types [of contaminants], you can decide on the most prudent response. And so, for instance, if I found on a site just the light end hydrocarbons with no other types of contamination mixed with it, I would look at bioremediation as an alternative. If it had salts and metals associated with the contamination, as well, then I would lean very strongly to landfill. If it had heavier end hydrocarbons, I would lean strongly to landfill, as well.
>
> In terms of cost, there — can be quite comparable in price, but of course bioremediation is very limited in what it can be applied to. And the one thing that we've noticed in working in the field is that when bioremediation is not managed properly, then much material actually lands back up in the landfill, anyway. So it has to be well managed to work properly.

75 There is also evidence about bioremediation in the Statement of Agreed Facts (the "Agreed Facts"). However, at the hearing it became clear that, contrary to the way in which they are presented, some of the facts were not actually agreed. The

problematic evidence concerns bioremediation and was gathered in two ways. The evidence in paragraphs 63-67 of the Agreed Facts was given directly to the Commissioner's staff. This evidence will be called "Evidence A".

76 Evidence A has two significant characteristics. The sources are not named and the Agreed Facts state in paragraph 63 that "...the Bureau has not confirmed the truth of the facts communicated to it by the operators..." Evidence A is in the Agreed Facts because CCS insisted that it be included and CCS asks the Tribunal to give it weight and assume it is true.

77 Evidence A reflects that operator "F" bioremediates at least 70% of its waste in BC because it considers bioremediation to be better for the environment. Operators "H" and "J" bioremediate about 50% their waste. These operators appear to be bioremediating on their drilling sites to avoid the transportation charges and Tipping Fees associated with Secure Landfills.

78 Although the Commissioner cannot confirm its truth, the Tribunal is nevertheless prepared to give Evidence A some weight because it can see no reason why industry participants would lie to the Commissioner about their use of onsite bioremediation. However, without knowing the volume of waste produced by "F", "H" and "J", it is impossible to determine whether bioremediation is being undertaken on a significant scale. In any event, it is clear that, even for these waste generators, there is a substantial portion of Hazardous Waste in respect of which bioremediation is not used.

79 The second category of evidence is found in paragraphs 69-74 of the Agreed Facts. It was gathered in July 2011 by representatives of National Economic Research Associates ("NERA"). Dr. Baye works at NERA and it appears that NERA was retained by the Commissioner to interview industry participants. The Commissioner's staff attended these interviews and the six sources are named (*[CONFIDENTIAL]*). No concern is expressed about the reliability of this evidence. This evidence will be called "Evidence B".

80 The Commissioner only called witnesses from *[CONFIDENTIAL]* and *[CONFIDENTIAL]* who, as discussed above, indicated that they do not bioremediate as a matter of policy *[CONFIDENTIAL]*.

81 CCS states the evidence of the other four operators, described in Evidence B, shows that they are active bioremediators and CCS asks the Tribunal to draw an adverse inference from the fact that they were not called by the Commissioner. However, in the Tribunal's view, no such inference should be drawn because the Commissioner had no obligation to adduce the evidence and it was open to CCS to do so.

82 Evidence B shows that *[CONFIDENTIAL]* bioremediates 10-15% of its waste. *[CONFIDENTIAL]* engages in some bioremediation at about 70% of its sites and *[CONFIDENTIAL]* bioremediates about 75% of its treatable material onsite. (It also appears to treat the balance of treatable material offsite but this is not explained. Since there are no offsite bioremediation facilities in NEBC, the Tribunal has concluded that this statement must refer to offsite treatment elsewhere.) *[CONFIDENTIAL]* bioremediates onsite and sometimes moves waste between its sites for bioremediation. In the last 3-4 years, it has bioremediated 60-70% of its abandoned well waste.

83 It is noteworthy that this evidence gives no volumes for treatable and Legacy Hazardous Waste. In these circumstances, and given that the Respondent did not call witnesses from these four operators or other operators, the Tribunal is not persuaded that bioremediation is being undertaken on a significant scale in NEBC.

Evidence about Storage and Risk Management

84 Storage means that Hazardous Waste is left untreated on a drilling site which is still under lease. As long as the MOE does not order a cleanup, this option is available even though drilling has finished, as long as the operator continues to make the lease/tenure payments for the site. Since such payments are low compared to the cost of cleaning up the site, doing nothing may be an attractive option in some cases and the evidence from Trevor Mackay's examination for discovery is that "many" operators have waste stored on their sites. However, Mr. *[CONFIDENTIAL]* testified that *[CONFIDENTIAL]* does not store the Hazardous Waste generated from drilling operations for long periods of time, due to the cost and potential liability issues. He explained that the typical well site storage costs during drilling operations are *[CONFIDENTIAL]* per well.

85 Risk Management is a process undertaken when drilling is finished and an operator wishes to terminate a lease. The operator must restore the site's surface as nearly as possible to the condition it was in before drilling. Once this has been accomplished, a Certificate of Restoration (also referred to as a Certificate of Compliance) is issued and the operator's lease is terminated. However, the operator remains liable for any issues arising from the Hazardous Waste that is left behind and is obliged to comply with conditions such as monitoring even after the certificate is issued.

86 On this topic, Mark Polet said the following in his reply report:

> Based on my experience, Operators use risk management as a last resort if treatment or disposal are not practical. I rarely recommend it because even if approval is obtained, which in my experience is very difficult, the Operator retains liability and there is a recognition that the site may need to be revisited if issues arise.

87 Pete Marshal, an expert in Hazardous Waste management, testified that, although disposal in a Secure Landfill, bioremediation and risk management are each potentially available methods for dealing with Hazardous Waste, he did not know how many operators choose risk management.

88 This evidence leads the Tribunal to conclude that risk management is seldom used and is not considered to be an acceptable substitute for disposing of Hazardous Waste in a Secure Landfill.

Conclusions about the Product Market

89 Although some operators with Hazardous Waste which is contaminated with light-end hydrocarbons consider bioremediation to be an acceptable substitute for disposal in a Secure Landfill, there is no evidence about the volumes of waste which are successfully bioremediated. More importantly, there is no evidence that the availability of bioremediation has any constraining impact on Tipping Fees in NEBC. In addition, the Tribunal finds that bioremediation is not considered by at least some waste generators to be an acceptable substitute for disposal in a Secure Landfill, particularly in respect of soil that is contaminated with heavy-end hydro-carbons, salts or metals.

90 With regard to storage and risk management, there was no evidence about the volumes stored in NEBC and no evidence to suggest that the tenure payments or the cost to obtain a certificate of restoration have any impact on Tipping Fees at Silverberry.

91 Because bioremediation is not cost effective and is slow for a substantial volume of contaminated soil in NEBC and because it does not work at all on salts and metals, the Tribunal is satisfied that a substantial number of generators do not consider bioremediation to be a good substitute for the disposal of such Hazardous Waste in a Secure Landfill and would not likely switch to bioremediation in response to a SSNIP. Accordingly, the Tribunal is satisfied that the relevant product is "solid hazardous waste generated by oil and gas producers and tipped into secure landfills in NEBC".

Issue 3 What is the Geographic Dimension of the Relevant Market?

92 The Tribunal and the courts have traditionally considered it necessary to define a relevant market before proceeding to assess the competitive effects of mergers under the Act. (See, for example, *Canada (Director of Investigation & Research) v. Hillsdown Holdings (Canada) Ltd.* (1992), 41 C.P.R. (3d) 289 (Competition Trib.), at 297 ; *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (S.C.C.), at para. 79). However, they have cautioned against losing sight of the ultimate inquiry, which is whether the merger being assessed prevents or lessens, or is likely to prevent or lessen, competition substantially. (*Southam*, above; "*Propane*", above, at para. 48). With this admonition in mind, it is the Tribunal's view that, in this case, the Tribunal may evaluate the competitive effects of the Merger without precisely defining the relevant geographic market.

93 This conclusion is important because, as will be discussed below, the evidence that has been adduced does not permit the Tribunal to delineate the exact boundaries of the geographic market.

94 The Tribunal agrees with the approach taken in the MEGs. The process begins with a small area around one of the merging parties' locations (in this case, a Secure Landfill site) and then asks whether all rivals operating at locations in that

area, if acting as a hypothetical monopolist, would have the ability and incentive to impose a small but significant price increase (typically 5%) and sustain that increase for a non-transitory period of time (typically one year). If the postulated price increase would likely cause purchasers of the relevant product in that area to switch sufficient quantities of their purchases to suppliers located outside that area to render the price increase unprofitable, then the geographic dimension of the relevant market would be progressively expanded until the point at which a seller of the relevant product, if acting as a hypothetical monopolist, would have the ability and incentive to impose a SSNIP.

95 In the case at bar, the evidence dealt with three geographic regions:

I. *The Contestable Area* - this was identified by Dr. Kahwaty on behalf of CCS.

II. *All of NEBC* - the Commissioner, supported by her expert Dr. Baye, submitted this definition of the geographic market.

III. *The Babkirk Polygon* - this area was identified in internal CCS documents dealing with the potential impact of the Babkirk Facility on CCS.

I. The Contestable Area

96 In broad terms, the Contestable Area identified by Dr. Kahwaty encompasses an hourglass shaped area of 11,000 square kilometres which lies between the Babkirk Site and Silverberry. In his analysis, the road network in this area is such that there are some areas in which both Silverberry and a potential landfill at the Babkirk Site may be viable disposal options for customers with well sites in those areas. Dr. Kahwaty acknowledges that the transportation costs required to reach Silverberry or the Babkirk Site are such that both may be economic alternatives for these customers. In Dr. Kahwaty's view, the geographic scope of the relevant market should be limited to this area.

97 Dr. Kahwaty used Dr. Baye's 10% predicted decline in Tipping Fees as his benchmark for defining the geographic scope of the relevant market. In short, he assessed every well site and calculated whether, if given a 10% reduction off the Tipping Fees paid at Silverberry, the customer would be indifferent as between tipping at Babkirk and Silverberry, having regard for the fact that their total disposal cost (transportation plus Tipping Fee) would be the same for each Secure Landfill. Twelve such customers were identified, accounting for approximately 41,900 tonnes in the Contestable Area. Dr. Kahwaty acknowledged that a larger critical price discount would produce a larger contestable area.

98 The Tribunal is satisfied that a hypothetical monopolist supplying Secure Landfill services to these twelve customers in respect of the Hazardous Waste generated in the Contestable Area would have the ability and incentive to impose and sustain a SSNIP above levels that would likely exist in the absence of the Merger.

99 Indeed, the Tribunal considers that the Contestable Area is likely understated and, in fact, smaller than the minimum area in which a hypothetical monopolist would have the ability and incentive to impose and sustain a SSNIP. The Tribunal has reached this view for several reasons. First, the Tribunal accepts Dr. Baye's position that "Babkirk need not have a location advantage for a customer — and the customer need not switch from Silverberry to Babkirk — for that customer to significantly benefit from the lower Tipping Fees stemming from competition". Second, the evidence suggests that new wells are likely to be drilled in the area between Babkirk and Northern Rockies, and that there is Legacy Waste sitting on abandoned well-sites in that region. Meaningful price and non-price competition between Babkirk and Northern Rockies for at least some of that waste likely would have developed in the absence of the Merger. Third, the geographic extent of the Contestable Area is necessarily limited by Dr. Kahwaty's assumption of a base price that is only 10% below prevailing levels. If that figure is too low Dr. Kahwaty admitted that the geographic market would be larger than the Contestable Area.

100 In addition, the Tribunal notes that the volume of Hazardous Waste generated in the Contestable Area likely is greater than reported by Dr. Kahwaty because he only used data for 2010. Moreover, Dr. Kahwaty excluded CCS' national customers from his analysis and this may also have resulted in an understated geographic market.

101 With respect to the possibility that Secure Landfills in Alberta might be economically accessible for generators of waste in the Contested Area, Dr. Kahwaty stated that "transportation costs are too great for [customers located to the south and east of Silverberry, who currently tip their waste in Alberta] to opt to dispose at a potential landfill at the Babkirk site (even with a significant discount) as compared to disposing at Silverberry at current prices." The Tribunal extrapolates from this and concludes that customers generating Hazardous Waste in the Contestable Area are unlikely to transport their waste to secure landfill sites in Alberta due to the significant transportation costs and potential liability that would be associated with hauling waste over such a long distance.

102 For all these reasons, the Tribunal concludes that the geographic market is at least as large as the Contestable Area. We now turn to whether it could be as large as all of NEBC.

II. All of NEBC

103 NEBC covers approximately 118,800 square kilometres and is vast in comparison to Dr. Kahwaty's Contestable Area. NEBC and the much smaller Contestable Area are compared on the map attached hereto as Schedule "C", which is taken from Tab 29 of Dr. Kahwaty's report of October 21, 2011.

104 Dr. Baye concludes that the relevant geographic market is NEBC on the basis that this is the region where targeted customers are located, including current customers at both Silverberry and Northern Rockies Secure Landfills.

105 In reaching this conclusion, Dr. Baye relies on an economic theory of market equilibrium which predicts that CCS would have an incentive to compete with an independently operated Babkirk Facility for customers located outside of Dr. Kahwaty's Contested Area. This theory is based on his understanding that CCS' average 2010 Tipping Fees at Silverberry were approximately *[CONFIDENTIAL]* per tonne and its average landfill costs were approximately *[CONFIDENTIAL]* per tonne, yielding a margin in excess of 60%. Using these figures, Dr. Baye assumes that CCS would be prepared to reduce its Tipping Fees by 25% or greater in some areas to retain business in the face of competition from an independent Babkirk Facility.

106 However, among other problems, Dr. Baye's theory fails to take into account the opportunity cost to CCS that would be associated with substantially reducing its Tipping Fees to sell landfill capacity today, which could be sold in the future at higher Tipping Fees to customers located closer to Silverberry. In the absence of any analysis of how this opportunity cost would factor into CCS' current decision-making process, the Tribunal finds that the economic theory relied on by Dr. Baye is not particularly helpful in defining the geographic scope of the relevant market.

107 In his initial report, Dr. Baye also provides estimates based on econometric regression models which he asserts are consistent with this theory and his definition of the geographic market as extending throughout all of NEBC. The first set of models, found at Exhibits 19 and 20 of Dr. Baye's initial report, test his hypothesis that the distance between a Secure Landfill and its closest competitor is a significant predictor of the average Tipping Fees at that landfill.

108 Exhibit 20 predicts that the opening of an independent landfill at the Babkirk Site will result in a large decline in average Tipping Fees at Northern Rockies, because it would reduce the distance to Northern Rockies' nearest competitor to three hours and 49 minutes. However, this ignores (i) the substantial transportation costs that the vast majority of customers who tip at Northern Rockies would have to incur to transport their waste to Babkirk, (ii) the very small number of well-sites located between those two facilities, and (iii) the apparent absence of any incentive for CCS to alter its Tipping Fees at Northern Rockies in response to entry at Babkirk.

109 The second set of regression models are estimates offered by Dr. Baye which relate to a "natural experiment" involving SES' entry at Willesden Green, Alberta, in December 2008. That facility became the closest competitor to CCS' Rocky Mountain House landfill ("Rocky"), located approximately one hour away. In his analysis of CCS' 2010 transactions data, Dr. Baye discovered that CCS substantially reduced the Tipping Fees it charged to several customers subsequent to the opening of SES' facility at Willesden Green.

110 To address the possibility that these substantial price reductions were purely coincidental, Dr. Baye developed "difference in difference" ("DiD") regression models, reported at Exhibit 26 of his initial report. The DiD approach controls for unobserved events, other than SES' entry at Willesden Green, which might have led to the observed decline in Tipping Fees at Rocky. In short, the DiD models include a "treatment" setting in which the event (in this case, entry) occurred and a "control" setting in which the event did not occur. Dr. Baye took the change in Tipping Fees that occurred in the treatment setting and subtracted any change that occurred in the control setting. He interpreted the difference in the change (or the "difference in difference") as the effect of entry at Willesden Green on Tipping Fees at Rocky.

111 It is significant that, in selecting a control landfill, Dr. Baye considered it important to pick a site that "is unlikely to be affected by the treatment event — in this case entry at Willesden Green." One of the principal criteria that he employed in making that selection was that the control landfill had to be "at least 300 km away" from Willesden Green. The same logic would imply that entry at Babkirk would not likely affect Tipping Fees at Northern Rockies, which is situated 260 km away from the Babkirk Site. A key assumption underlying Dr. Baye's DiD models is therefore inconsistent with his definition of the geographic market as all of NEBC. This, together with the fact that Northern Rockies is almost four times further away from Babkirk than SES' Willesden Green facility is away from CCS' Rocky facility, lead the Tribunal to conclude that Dr. Baye's DiD analysis is not particularly helpful in defining the geographic scope of the relevant market. That said, as discussed in detail below, the transactions data which reveals substantial price reductions by CCS to seven of its customers following SES' entry at Willesden Green is relevant to the Tribunal's assessment of the likely competitive effects of the Merger.

112 Finally, the Tribunal notes that Dr. Baye also points to internal documents of CCS which he says are consistent with his definition of the relevant geographic market. However, those documents simply: (i) make projections of the overall annual operating margin (*[CONFIDENTIAL]*) that CCS stood to lose at Silverberry and Northern Rockies were an independent landfill to open at the Babkirk Site; (ii) predict a pricing war if the Babkirk Facility was operated independently or acquired by a third party; (iii) discuss the likelihood of having to compete through "value propositions"; and (iv) reflect that CCS likely takes into account its customers' transportation costs to the next closest competing landfill in setting its Tipping Fees. While these types of statements assist in assessing whether the Merger is likely to prevent competition substantially, they are not particularly helpful to the Tribunal in defining the geographic scope of the relevant market.

III. The Babkirk Polygon

113 The Babkirk Polygon is the third area that was discussed at the hearing. That area was identified by a member of CCS' business development team who was asked to project Babkirk's market capture area. The Tribunal has added a rough depiction of that area on Schedule "C" hereto.

114 The Babkirk Polygon was apparently intended to identify the locations of existing Silverberry customers who would be likely to tip at Babkirk rather than at Silverberry, if Babkirk was operated as a Secure Landfill. In other words, the Babkirk Polygon was CCS' representation of the geographic locations of business it risked losing if Babkirk opened as a Secure Landfill. It includes territory north and west of Babkirk and is a larger area than Dr. Kahwaty's Contestable Area.

115 The Tribunal is satisfied that the locational advantage that the Babkirk Facility would enjoy for customers with drilling operations situated to its north and west is such that those customers would not likely tip at Silverberry in the absence of a very substantial reduction in its Tipping Fees. Given the opportunity cost that CCS would incur by offering such a substantial reduction in its Tipping Fees, and given the absence of any analysis by the Commissioner or Dr. Baye of the impact of that opportunity cost on CCS's decision-making, the Tribunal is not persuaded that CCS would have an incentive to compete for those customers in the absence of the Merger.

116 Likewise, the Tribunal has not been persuaded on a balance of probabilities that such customers who operate to the north and west of the Babkirk Facility would tip at Silverberry, in response to a SSNIP above the maximum average tipping fee level that it believes is likely to exist in the absence of the Merger. For the reasons discussed below, the Tribunal has concluded that such price level will be at least 10% below existing levels. However, transportation costs and the liability associated with

transporting Hazardous Waste over the long distance to Silverberry are such that it would require more than a SSNIP to induce waste generators located in those regions to tip their Hazardous Waste at Silverberry.

117 The Tribunal has concluded that the geographic scope of the relevant market is at least as large as the Contestable Area identified by Dr. Kahwaty, and likely falls between the limits of that area and the bounds of the Babkirk Polygon, which includes some of the Contestable Area, but adds significant territory north and west of Babkirk.

118 The Tribunal is satisfied that it would not matter if the geographic scope of the relevant market actually includes additional customer locations in the Babkirk Polygon, beyond the Contestable Area, because CCS would remain the sole supplier of Secure Landfill services to any reasonably defined broader group of customers.

Issue 4 Is the Merger Pro-Competitive?

119 CCS has suggested that the Merger is pro-competitive because it brings to the market a new Secure Landfill at the Babkirk Site. CCS further asserts that the Merger will most quickly transform the Babkirk Site into a Secure Landfill to complement CCS' existing business and serve the growing oil and gas industry in NEBC. CCS says that these facts explain its customers' failure to complain about the Merger.

120 The Tribunal disagrees. In its view, a merger which prevents all actual or likely rivalry in a relevant market cannot be "pro-competitive," even if it expands market demand more quickly than might otherwise be the case. Such a merger might be efficiency-enhancing, as contemplated by the efficiency defence in section 96 of the Act. However, it has adverse consequences for the dynamic process of competition and the benefits that such process typically yields. In the absence of actual rivalry, or a very real and credible threat of future rivalry, meaningful competition does not exist.

Issue 5 What is the Analytical Framework in a "Prevent Case?

121 The "prevention" branch of section 92 was raised in three previous Tribunal cases: *Canada (Director of Investigation & Research) v. Southam Inc.* (1992), 43 C.P.R. (3d) 161 (Competition Trib.), rev'd on other grounds (1995), 63 C.P.R. (3d) 1 (Fed. C.A.), rev'd, [1997] 1 S.C.R. 748 (S.C.C.), *Propane* and *Canadian Waste Services*. However, since those cases were primarily concerned with allegations involving a substantial lessening of competition, the Tribunal did not address in any detail the analytical framework applicable to the assessment of an alleged substantial prevention of competition.

122 In determining whether competition is likely to be prevented, the Tribunal will assess whether a merger is more likely than not to maintain the ability of the merged entity to exercise greater market power than in the absence of the merger, acting alone or interdependently with one or more rivals. For the purposes of this case, this requires comparing a world in which CCS owns the relevant Secure Landfills in NEBC (i.e. Northern Rockies, Silverberry and Babkirk) with a world in which Babkirk is independently operated as a Secure Landfill.

123 In assessing cases under the "prevent" branch of section 92, the Tribunal focuses on the new entry, or the increased competition from within the relevant market, that the Commissioner alleges was, or would be, prevented by the merger in question. In the case of a proposed merger, the Tribunal assesses whether it is likely that new entry or expansion would be sufficiently timely, and occur on a sufficient scale, to result in: (i) a material reduction of prices, or in a material increase in non-price competition, relative to prevailing price and non-price levels of competition, (ii) in a significant (i.e., non-trivial) part of the relevant market, and (iii) for a period of approximately two years. If so and if the entry or expansion likely would occur within a reasonable period of time, the Tribunal will conclude that the prevention of competition is likely to be substantial.

124 The Tribunal also considers whether other firms would be likely to enter or expand on a scale similar to that which was prevented or forestalled by the merger, and in a similar timeframe. Where the Tribunal finds that such entry or expansion would probably occur, it is unlikely to conclude that the merger is likely to prevent competition substantially.

125 As noted earlier and as recognized by all parties, the price against which the prevailing prices will be compared will be the price that would likely have existed in the absence of the merger. The burden will be on the Commissioner to demonstrate that price level, or the range of prices, that likely would have existed "but for" the merger.

126 In final argument, the Commissioner and CCS suggested that helpful guidance on the approach that should be taken to prevention of competition cases can be provided by the U.S. jurisprudence pertaining to mergers that have been alleged to reduce potential competition. In the Tribunal's view, that jurisprudence is not particularly helpful to merger assessment under the Act, because it was developed in respect of a different statutory test and, for the most part, many years ago. (It appears that the US Supreme Court and the federal appellate courts have not had an opportunity to revisit that jurisprudence since the 1980s. See M. Sean Royall and Adam J. Di Vincenzo, "Evaluating Mergers between Potential Competitors under the New Horizontal Merger Guidelines", *Antitrust* (Fall 2010) 33, at 35.)

Issue 6 is there a Substantial Prevention of Competition?

A. The "But For" analysis

Introduction

127 In *Canada (Commissioner of Competition) v. Canada Pipe Co.*, 2006 FCA 233 (F.C.A.), the Federal Court of Appeal decided that a "but for" analysis was the appropriate approach to take when considering whether, under paragraph 79(1)(c) of the Act, "...the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially." The specific question to be asked is stated, as follows, at paragraph 38 of the decision "...would the relevant markets — in the past, present or future — be substantially more competitive but for the impugned practice of anti-competitive acts?"

128 Language similar to that found in section 79 appears in section 92 of the Act. Section 92 says that an order may be made where "...the Tribunal finds that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen competition substantially." For this reason, the parties and the Tribunal have determined that the "but for" approach is also appropriate for use in cases under section 92 of the Act. The parties recognize that the findings will be forward looking in nature and CCS has cautioned the Tribunal against unfounded speculation. With this background, we turn to the "but for" analysis.

129 The discussion below will address the threshold issue of whether effective competition in the supply of Secure Landfill services in the Contestable Area identified by Dr. Kahwaty likely would have materialized in the absence of the Merger. Stated alternatively, would effective competition in the relevant market likely have emerged "but for" the Merger? After addressing this issue, the Tribunal will turn to the section 93 factors that are relevant in this case, as well as the issue of countervailing power.

130 In undertaking the "but for" analysis, the Tribunal will consider the following questions:

(i) If the Merger had not occurred, what new competition, if any, would likely have emerged in the Contestable Area?

(ii) If the Merger had not occurred, what would have been the likely scale of that new competition?

(iii) If the Merger had not occurred, when would the new competition likely have entered the market?

131 The Commissioner suggested that either June or July, 2010 be used as the timeframe for considering the "but for" world. CCS, on the other hand, was more precise and suggested that the relevant time for this purpose should be the end of July 2010, when CCS and Complete signed the letter of intent which led to the Merger. Since the parties have essentially agreed, the Tribunal will focus on the end of July.

132 The Tribunal's view is that, as of the end of July 2010, there were only two realistic scenarios for the Babkirk Site absent the Merger. They were:

1. The Vendors would have sold to a waste company called Secure Energy Services Inc. ("SES"), which would have operated a Secure Landfill; or

2. The Vendors would have operated a bioremediation facility together with a half cell of Secure Landfill.

133 Extensive evidence was adduced on these topics. The discussion below summarizes the most important aspects of that evidence.

Scenario #1 — A sale of Complete to SES

134 In February of 2007 when the Vendors first met to organize Complete, they decided that their exit strategy would be to sell the company to Newalta Corporation or to CCS. Newalta is a waste company which operates Secure Landfills in Alberta. However, it was always the Vendors' intention to sell only when they could achieve an acceptable return on their investment.

135 In November 2007, Canaccord Capital sent a four-person investment team to Fort St. John to investigate the purchase of a number of the Vendors' companies, including Complete. At that time, the Vendors' intentions about a sale of Complete were recorded in the company's minutes, which, among other things, stated:

> ...consensus at Complete's meeting was to carry on the way we are going unless we are presented with a very attractive proposal from outside. We don't want to do all the work for the benefit of others — better to take a longer time, but to have higher rewards for ourselves...

136 Subsequently, a Vision Statement, dated June 22, 2008, was prepared by Karen Baker. That document stated that they wanted to make a "good return on sale of company". The Statement also observed:

> The VISION of Complete Environmental Inc. is to become a diversified, highly efficient, environmental corporation in NEBC generating a high profit margin thus, presenting itself as an attractive acquisition to multiple potential purchasers.

137 After Complete received its MOE Permit on February 26, 2010, Ken Watson's company, IRTL, offered to purchase Complete for *[CONFIDENTIAL]*. Before that offer was made, the Vendors had not been actively considering a sale. However, IRTL's offer spurred them to seriously consider the matter and, before they responded to IRTL's, they authorized Randy Wolsey to contact CCS and SES for expressions of interest.

138 On March 23, 2010, Randy Wolsey spoke to SES but was told that it had no interest in making an offer because it was busy with its initial public share offering. However, SES did indicate a possible future interest and stated that it valued BLS at approximately *[CONFIDENTIAL]* in either mixed cash and shares or *[CONFIDENTIAL]* plus a share offering. In contrast, CCS expressed immediate interest and Dan Wallace of CCS verbally offered *[CONFIDENTIAL]* for BLS.

139 The Vendors eventually decided to sell Complete to IRTL. However, IRTL's offer was withdrawn in early June 2010 after Ken Watson learned that, contrary to his expectations, Canaccord Capital would not finance IRTL's acquisition of Complete. After Cannacord declined, he did not have time to arrange alternative financing.

140 According to Karen Baker, after IRTL's offer was withdrawn, the Vendors decided to try to sell Complete one last time. They concluded that, if they did not receive an interesting offer, they would operate the Babkirk Facility themselves. This would involve moving forward with an operating plan and constructing a half cell of Secure Landfill. To ascertain if a sale was possible, Randy Wolsey was again asked to contact CCS and SES. In addition, he was asked to contact Newalta. He did so, but Newalta did not respond to his email.

141 At about that time, Dan Wallace of CCS apparently heard that IRTL's offer had fallen through and sent Randy Wolsey an email asking if CCS could renew its earlier offer. Mr. Wolsey responded by offering to sell BLS for *[CONFIDENTIAL]*. On June 22, 2010, CCS agreed to purchase the shares of BLS for that amount.

142 Inexplicably, Randy Wolsey did not tell the other Vendors about his deal with CCS. Instead, he arranged a meeting with SES (the "Meeting"). It was held on June 29, 2010 and was attended by Rene Amirault, President and CEO of SES, Dan Steinke, SES' Vice-President of Business Development, and Corey Higham, SES' Business Development Representative (the "SES Group").

143 According to the Vendors, the SES Group spent much of the Meeting giving a presentation to show that SES was an attractive investment. An SES brochure prepared for potential investors was used for this purpose. However, the Vendors were not interested in acquiring shares of SES and they testified that no price for BLS or Complete was ever suggested and no offer was discussed.

144 According to Mr. Amirault, he indicated during the Meeting that an all cash offer could be made. The Vendors denied this. Since this evidence is significant and was not included in Mr. Amirault's witness statement, the Tribunal has concluded an all cash offer was not mentioned and that the Vendors understood that SES would only purchase Complete if it could use its shares to finance part of the purchase price.

145 During the Meeting, the SES Group had questions about how to secure the necessary regulatory approvals to allow SES to expand the permitted capacity of the Babkirk Facility and to upgrade the design of the Secure Landfill cells (the "Questions"). The Vendors could not answer the Questions and Mr. Amirault testified that he asked for and was refused permission to speak to Del Reinheimer about the Questions. However, some Vendors could not remember anyone from the SES Group asking for permission to speak to Del Reinheimer about the Questions and other Vendors denied that anyone asked for such permission at that time. Mr. Reinheimer was the Section Head, Environmental Management in the Environmental Protection Division of the MOE.

146 Mr. Amirault stated that following the Meeting, SES was actively interested in purchasing Complete and gave the following reasons to explain its failure to make an offer or submit a letter of intent in July 2010:

- The Questions had to be answered before a price could be established.

- There was no particular urgency about making an offer because there were no other buyers. Mr. Amirault testified that the Vendors had indicated at the Meeting that Complete had promised a First Nation that it would not sell to CCS and the SES Group knew that Newalta was not interested.

147 Mr. Amirault acknowledged that the Questions were about process i.e. "how to" go about getting approvals for increased permitted capacity and enhanced cell design. He also stated that he had no doubt that the approvals would be forthcoming. In these circumstances and because, as described below, SES was actively engaged in the development of another Secure Landfill, it is the Tribunal's view that SES would have known what it needed to spend to increase the permitted capacity and upgrade the landfill cells at the Babkirk Site. Accordingly, the Tribunal does not accept Mr. Amirault's evidence that SES could not establish a purchase price without the answers to the Questions.

148 There is a dispute about whether, on July 6, 2010, Corey Higham sent Ron Baker an email setting out the Questions which had been discussed at the Meeting. Mr. Amirault stated in hearsay evidence in his witness statement that Corey Higham had told him that the email had been sent. A photocopy of that alleged email was appended to Mr. Amirault's witness statement. However, after Ron Baker made a witness statement stating that he did not recall having received the email, no reply evidence was filed by Corey Higham to say that it had, in fact, been sent. The email is an important document to the extent that it evidences an ongoing interest by SES in receiving answers to the Questions. However, given that it was not properly adduced, the Tribunal gives it no weight.

149 As mentioned above, Mr. Amirault testified that Ron Baker told the SES Group during the Meeting that he had promised a First Nation that the Vendors would not sell the Babkirk Facility to CCS. This meant that SES understood that the Vendors were not likely to receive a competing offer. However, this apparently significant detail did not appear in Mr. Amirault's witness statement and was not referred to in his examination-in-chief. It was mentioned for the first time in answer to a question posed

by the Tribunal. For this reason, this evidence is not accepted as an explanation for SES' failure to show a more active interest in purchasing Complete.

150 Mr. Amirault acknowledged that the window for undertaking construction in 2010 "...was closing, closing fast" and that SES wanted to begin construction at Babkirk at the end of August or by mid-September at the latest. This meant that, if SES had been actively interested in acquiring Complete, it would have moved quickly to present the Vendors with a letter of intent. Mr. Amirault also testified that, apart from updating its earlier market study of the Babkirk Facility, no further due diligence was required. In addition, he testified that he did not need the approval of his Board of Directors to deliver a letter of intent. In these circumstances, the Tribunal has concluded that SES' failure to follow up more quickly on its meeting with the Vendors and its failure to demonstrate any interest in making an offer at that time are attributable to a lack of active interest in acquiring BLS in July 2010.

151 Ron Baker recalls that he was called by Corey Higham on July 28, 2010. However, Mr. Baker does not remember what Mr. Higham said during that telephone call. Since Corey Higham did not give evidence, the Tribunal considers it fair to assume that he did not make an offer to purchase Complete or propose a letter of intent. Although Mr. Baker does not recall much of his own side of the conversation, he does remember telling Mr. Higham that Complete had just signed a letter of intent with CCS.

152 The Tribunal considers it noteworthy that, since 2007, SES had been developing a new Secure Landfill called Heritage. It was located approximately 153 km south of the Babkirk Site. However, it was not favourably received during public consultations because it was to be located near a populated area and on a site where a landslide had occurred. Corey Higham of SES was told on July 26, 2010 that the EA's review of the Heritage Project had been "suspended" pending further evidence from SES about the suitability of the site. SES eventually abandoned the project in December of 2010.

153 Based on this evidence, the Tribunal has concluded that SES had an ongoing general interest in the Babkirk Facility. It had spoken to Murray Babkirk when he owned BLS and it had indicated possible future interest when Randy Wolsey contacted it in March of 2010. SES also sent its most senior executive to the Meeting in June 2010. However, the Tribunal has also concluded that SES was not actively interested in a purchase in July 2010. It never discussed a potential price, and, although it asked the Questions, the answers were not crucial to setting the price and SES already knew that it would be granted the additional approvals it sought. Finally, although Mr. Amirault testified that there was no due diligence of any consequence to be undertaken, SES did not send a letter of intent and there are no internal SES documents showing that it was preparing to make an offer. The Tribunal has concluded that SES' failure to take a more active interest in purchasing Babkirk is explained by the fact that it was still giving priority to its project at the Heritage site. This is understandable, since it had already invested three years and approximately $1.3 million in developing the project.

154 In all these circumstances, the Tribunal has concluded, on a balance of probabilities, that SES likely would not have made an acceptable offer for Complete by the end of July 2010 or at any time in the summer of 2010 and that the Vendors would have moved forward with their own plans to develop the Babkirk Facility.

Scenario #2 — The Vendors Operate Babkirk

155 The Vendors' position is that Complete was created to purchase BLS and to operate a bioremediation facility on the Babkirk Site. They assert that their plan was to accept only Hazardous Waste contaminated with light-end hydrocarbons which could be treated using bioremediation.

156 However, the Vendors recognized that bioremediation might sometimes fail and that they might be left with clumps of contaminated soil ("Hot Spots") after the surrounding waste had been successfully treated. The Vendors understood that the contaminated soil would have to be placed in a Secure Landfill before the remaining soil could be tested and de-listed as non-hazardous waste.

157 To enable BLS to permanently dispose of the contaminated soil from the Hot Spots and to attract customers to the Babkirk Facility, the Vendors proposed to construct a Secure Landfill on the Babkirk Site, which they described as "incidental" to their treatment operation. This meant that only soil that was not successfully treated using bioremediation would be moved

into the Secure Landfill. The Tribunal will give this meaning to the term "Incidental" in the context of the Vendors' Secure Landfill in the balance of this decision.

158 The Commissioner denies that the Vendors' Secure Landfill was only to be used on an Incidental basis. She maintains that the Vendors always intended to accept and directly and permanently dispose of all types of Hazardous Waste in their Secure Landfill. We will refer to this business model as a "Full Service" Secure Landfill. To support her position, the Commissioner relies, in part, on the documents used to obtain the EA Certificate and the MOE Permit. These documents will be described collectively as the Regulatory Approval Documents ("RADs"). As discussed below, the RADs clearly indicate that a Secure Landfill was to be opened on the Babkirk Site. The Commissioner also relies on the Draft Operations Plans (the "Operations Plan") for the Babkirk Site, which show that a Full Service Secure Landfill was planned.

159 Finally, the Commissioner relies on statements in a variety of documents which she asserts reflect that the Vendors intended to compete with CCS. She submits that references in those documents to competing with CCS meant operating the Babkirk Facility as a Full Service Secure Landfill.

The Vendors' Documents

160 The Vendors explained that they needed an EA Certificate and an MOE Permit for a Secure Landfill in order to accept Hazardous Waste of any kind for any type of treatment at the Babkirk Facility. However, they also stated that neither document required them to operate on a Full Service basis. In other words, although they were entitled to do so, they were not required to accept all types of Hazardous Waste for direct disposal. Instead, they were free to operate an "Incidental" Secure Landfill.

161 The Vendors ask the Tribunal to focus on the documents which were prepared when Complete was being incorporated and when the MOE Permit was finally granted, as the best evidence of their intention, which they say was to use the Secure Landfill on the Babkirk Site only as Incidental to their bioremediation. The five documents in this category will be described as the "Vendors' Documents". We will deal with them in turn below.

162 *Minutes of a meeting that Randy Wolsey and Ken Watson attended with Del Reinheimer and other MOE and EAO officials on January 24, 2007.* The minutes state:

> Ken [Watson] discussed the remediation side of the facility's operations, which will continue even after (if) the landfill is constructed. He stated that he has had interest expressed from companies who wish to pursue remediation as well as landfilling. Ken outlined some of the practices and equipment currently used in other operations with which he is involved, and showed some pictures and videos of the equipment (e.g. ALLU AS 38 composting machine) in action.
>
> Ken and Randy stated that their intention would be to have an ALLU AS 38 kept at the facility full-time. They cited that it would be capable of processing up to about 25,000m per day of Peace River region clay.
>
> [our emphasis]

163 In his testimony, Mr. Reinheimer agreed that his understanding was that the Vendors were going to operate a bioremediation facility and that it was an open question whether or not the Secure Landfill, for which application had been made, would ever be built. In the Tribunal's view, this evidence supports the Incidental nature of the Secure Landfill.

164 *Minutes of a Newco meeting dated in February 2007*. These minutes record the Vendors' vision for their new business, which was to become Complete. The minutes make no mention of a Secure Landfill at the Babkirk Site. They speak only of processing waste. The document also describes CNRL and Petro-Canada as customers for treatment and indicates that Petro-Canada has been interested for years. In context, it is clear that Petro-Canada's interest was in bioremediation. The fact that a Secure Landfill is not mentioned even though the application for its approval was already underway, strongly suggests that it was to play an Incidental role in Complete's business at the Babkirk Site.

165 The minutes read as follows:

> **Newco name** should be "**Environmental Services Co**." not "Waste Management (Facility) Co." **Services** to be offered by Newco were suggested to include drilling for sites in the 115 area, remediation on clients' sites, excavation at client sites, and processing at 115 landfill. We could also coordinate the trucking to haul clients' contaminated dirt that we would excavate at client sites to Mile 115 for processing, although we would not own such trucks.
>
> The **Target Market** would be environmental engineering companies and end-user oil and gas companies such as PetroCanada and CNRL. It would be good if we could get a letter from PetroCan/Matrix regarding the potential amount of work. Our services are needed — PetroCan has been interested for years now. This should be a "Market Pull" rather than "Product Push" situation.
>
> There would considerable **landfill preparation** at Mile 115 [the Babkirk Site]. Randy suggested Tom would probably like to be involved here with heavy equipment operation. We expect to have the permit by Nov 1/07. It would probably take 1 year for money to come in from sales for the landfill itself since we have to build the cells.
>
> [the emphasis is in the original]

166 The Tribunal has studied the final passage quoted above and has concluded that, although the term "landfill" is used, the topic under discussion was actually bioremediation and the Vendors' plan to sell the successfully treated soil.

167 *A diagram outlining Newco's operation*. This document shows how Complete's treatment facility on the Babkirk Site would complement other businesses operated by the Vendors. The diagram does not refer to the existence of a Secure Landfill. This omission also suggests that a Secure Landfill was not a significant part of Complete's business or of the Vendors' plan to integrate a number of their businesses.

168 *Minutes of January 20, 2010*. This document describes a meeting that Ken Watson and Ron Baker attended with Del Reinheimer and other officials from the MOE to discuss the Vendors' plans for the Babkirk Site. By this time, Complete owned Babkirk and had received the EA Certificate. The issuance of the MOE Permit for the Secure Landfill was the next step. The relevant portions of the minutes read as follows:

> Ken [Watson] and Ron [Baker] both stressed that although they would rather not use Babkirk as a Landfill but as a treatment facility, industry demands that Babkirk is Permitted as a Secure Landfill prior to transporting materials to or using Babkirk in any way. The term "Secure" appears to be of utmost importance to all major oil and gas companies.
>
> • Although Del [Reinheimer of the MOE] didn't understand why industry perceives as such, he realized the concern.
>
> • He stated that even though the Permit may be approved, operation of a Secure Landfill may not begin until the Operating Plan is also approved and the landfill has been constructed.
>
> • Ken and Ron agreed it is rather the perception of the word "Secure" that is required at this time to entice clients, than the use of an actual operating landfill.
>
> • Ken suggested that prior to approved Secure Landfill operations, unacceptable material could be sent to CCS (small amount around contamination source) and the remainder could be accepted at Babkirk.
>
> All agreed construction of the landfill is to commence within 2 years of Permit issuance; and that the Landfill Operating Plan must be completed prior to construction but the issuance of the Permit itself is not affected by the existence or not of the Operating Plan.
>
> Ron [Baker] suggested that the Permit read that the construction phase of the landfill be completed in small segments of a $^{1}/_{2}$ cell over a period of time rather than the construction of a full $^{1}/_{2}$ cell at one time (as suggested by Reg).
>
> [our emphasis]

169 In the Tribunal's view, there are several reasons why this document indicates that the Secure Landfill at the Babkirk Site was to be Incidental. First, Ron Baker was suggesting that even a half cell was not needed and proposed that smaller segments be constructed. This approach makes sense only if the Secure Landfill was to be Incidental. No one intending to compete with CCS' Full Service Secure Landfill at Silverberry would contemplate the construction of a small segment of a half cell.

170 Second, the Incidental nature of the Secure Landfill is disclosed when Ken Watson suggested that, before the Secure Landfill was operational at Babkirk, unacceptable material could be moved to CCS. The interesting point is that the unacceptable material is not material delivered by waste generators for direct disposal into the Secure Landfill at the Babkirk Site. Rather, it is only the "small amount around [the] contamination source" or, in other words, the material around Hot Spots. Once again, this confirms that the Vendors' intention was that their Secure Landfill would only be used on an Incidental basis.

171 *Minutes dated March 20, 2010*. These minutes reflect the Vendors' thinking in response to the offer to purchase that they received from IRTL. The minutes indicate that, at that time, they believed they had the following three options:

1. Operate start first secure cell and bioremediate [inc salt];

2. Bioremediate without cell;

3. Sell???

The Minutes also stated:

> Need 12 month season to see how well bioremediation works.

172 The Vendors ask the Tribunal to note that this evidence all predates CCS' purchase of Complete and the Commissioner's interest in the Merger. The Vendors also submit that their evidence at the hearing was consistent with their intention to operate only an Incidental Secure Landfill. Both the proposed manager of the Babkirk Facility (Randy Wolsey) and the man who would be in charge of daily operations (Ken Watson) testified that the only waste they intended to accept at Babkirk was waste which could be bioremediated.

The RADs

173 There are numerous RADs, however, those which are particularly relevant are: the "Terms of Reference" dated August 29, 2007; the "Application for an Environmental Assessment Certificate" dated February 11, 2008; the "Babkirk Secure Landfill Project Assessment Report" dated November 12, 2008; and a "BC Information Bulletin" dated December 9, 2008.

174 The first significant RAD is the Terms of Reference for the Babkirk Secure Landfill Project. It was approved by the EAO on August 29, 2007.

175 Section 3.1 reads as follows:

> The Proponent [Murray Babkirk] has experienced a considerable decline in the amount of waste brought to the existing facility for storage and treatment since the approval of the Silverberry Secure Landfill Facility application (north of Fort St. John, B.C.) as understandably, direct disposal forms a more cost effective option for clients than treatment and disposal. The conversion of the existing facility from a purely Short-term Storage and Treatment Facility to a Secure Landfill and Short-term Storage and Treatment Facility will allow fair competition between the Proponent and Silverberry facilities in providing responsible waste management solutions for local industry.
>
> [...]
>
> This section will provide:
>
> [...]

> • a list of the materials to be accepted at the Project for disposal;
>
> • a general description of the criteria that will be used to determine whether contaminated soil will be disposed of directly into the secure landfill or treated by bioremediation;
>
> [...]
>
> [our emphasis]

176 This document suggests that the proposed facility on the Babkirk Site would accept Hazardous Waste for direct disposal into the Secure Landfill and that the Secure Landfill was being developed so that the Babkirk Site could compete with CCS at Silverberry. This document was first drafted by SNCL on the instructions of Murray Babkirk, who was effectively the proponent, since, with his wife, he owned BLS. However, as discussed below, some of the Vendors later reviewed it and they did not suggest changes to reflect their intention to operate only an Incidental Secure Landfill. Since the further RADs contain similar language, it is not necessary to describe them in detail. The Tribunal is satisfied that they all indicate that there would be a Full Service Secure Landfill on the Babkirk Site.

177 It is clear that some of the Vendors were, in Karen Baker's words, "integrally involved" during the regulatory process leading to the EA Certificate. Some attended and assisted with information sessions, consultation meetings, and presentations to First Nations; some were included in correspondence regarding the EA Certificate; some participated directly in drafting or reviewing some of the RADs; and some assisted the Babkirks with technical matters. The Vendors also advanced funds which the Babkirks were able to use to finance the environmental assessment process and pay the fees charged by SNCL. This financial support totalled approximately $300,000 and was deducted from the purchase price that Complete eventually paid the Babkirks for the BLS shares. In all these circumstances, the Commissioner submits that the RADs reflect the Vendors' true intentions.

178 However, the Vendors state that while the RADs authorized the construction of a Full Service Secure Landfill, they say nothing about the Vendors' intentions. Mr. Baker explained that, as far as the Vendors were concerned, as long as they had an approval for a Secure Landfill, no one would complain if they chose to operate it on an Incidental basis. He also stated that, if they had asked to amend the Terms of Reference, which is clearly the document on which the later RADs were based, it would have slowed down the approval process for changes that, in the Vendors' opinion, were unnecessary.

179 The Tribunal has concluded that this explanation is reasonable and that it underpins Mr. Baker's response when he was asked why the Vendors didn't correct the Terms of Reference to reflect their intention to operate an Incidental Secure Landfill. He testified:

> [...] There was nothing in it that was that onerous to us or important to us to warrant changing.

180 In view of this explanation and in view of the Vendors' Documents which, starting in January 2007, consistently show that their plan was to operate an Incidental Secure Landfill, the Tribunal concludes that, although the RADs accurately described what could be offered at the Babkirk Facility, they did not accurately reflect the Vendors' intentions.

The Operations Plan

181 The Vendors never completed an Operations Plan for the Secure Landfill on the Babkirk Site.

182 The first Operations Plan was prepared by SNCL. An early and incomplete draft of that document is dated January 9, 2008. The evidence showed that a revision was prepared in December 2008. The Tribunal is satisfied that both versions provided in several places that the Secure Landfill could be operated on a Full Service basis. For example:

> [...] The addition of secure landfill capabilities to this facility would allow for direct disposal in addition to treatment and remediation of contaminated soil. This addition would allow the Babkirk facility to compete with the nearby Silverberry Secure Landfill facilities. The proposed facilities would be contained entirely within the footprint of the former facilities.

[our emphasis]

183 Mr. Baker's evidence was that the Vendors worked directly with SNCL on the Operations Plan and that they had worked "quite a little bit" on revisions to the first draft. However, he testified that when the Vendors reviewed the revised version they were not satisfied and decided to prepare their own plan. He added that writing a new plan would have taken "months" of work.

184 However, other evidence makes it clear that the Vendors did not pursue the idea of rewriting the Operations Plan. Minutes of Complete's meeting, which Ron Baker attended in March 2010, show that the Vendors then thought that it was "mostly in order" and that only a couple of weeks were needed to put it in final form for the MOE. Minutes of a later meeting in May 2010 suggest that the Operations Plan needed "4-5 days work".

185 Mr. Baker acknowledged that he understood the Operations Plan to be saying that waste generators could directly and finally dispose of untreatable Hazardous Waste into the Secure Landfill at the Babkirk Site. In this regard, the transcript of his cross-examination at p. 1212 reads:

> Mr. Iatrou: So you would accept waste. Some of it might be highly contaminated, not really treatable. That would stay in [the secure landfill], but the stuff that could be treated would come out of that cell as capacity and the bioremediation cell was freed up?
>
> Mr. Baker: That's correct.

186 However, a review of Mr. Baker's entire cross-examination on the Operations Plan reveals, in the Tribunal's view, that when he gave that answer, he was not saying that the Vendors intended to operate a Full Service Secure Landfill. Rather, he was describing what was possible under the plan. This difference becomes clear in the following exchange:

> Mr. Iatrou: You would accept the same sort of material that you could take to Silverberry?
>
> Mr. Baker: Yes, correct. We could accept it. Our plan was not to accept the type of soil that can only go to Silverberry, if you get my drift here. I suppose I have to explain that slightly.

[our emphasis]

187 Towards the end of his cross-examination, Mr. Baker began to answer questions from the Vendors' perspective. For example, when asked about the section of the Operations Plan that spoke about closing secure cells once they were filled, he stated "This was the concept, that *if we ever got around to using the Secure Landfill section of our facility*..." [our emphasis].

188 And at the end of his examination, when asked whether or not all three secure cells had to be built at once, Mr. Baker said "No, no, no. This whole idea of graded construction was that we — our intention half of one cell and never have to do anything further. That was our intention. *We would store so little of this landfillable material in that portion of a cell that it would last us the lifetime of our interest in this operation*." [our emphasis].

189 In the Tribunal's view, it is clear that the Vendors' approach to the Operations Plan was the same as it had been to the RADs. A plan that permitted the direct disposal of Hazardous Waste did not oblige the Vendors to accept it. It is obvious to the Tribunal that, from the early days of Newco in 2007, the Vendors wanted to make the Babkirk Facility as attractive as possible for sale and this meant that it had to be capable of being operated as a Full Service Secure Landfill. However, this does not mean that the Vendors intended to operate the Babkirk Facility in that manner given their long expressed preference for a bioremediation facility with an Incidental Secure Landfill.

Was Babkirk Going to Compete with CCS?

190 The Commissioner also relies on what she describes as the Vendors' expressed intention to compete with CCS to support her allegation that Complete was poised to operate a Full Service Secure Landfill at the Babkirk Site. The statements on which she relies are found in the RADs, the Operations Plan and in Complete's minutes.

191 There is no doubt that, in 2006 when the Babkirks approached SNCL to work on documents for the EA Certificate, they intended to operate a Full Service Secure Landfill on the Babkirk Site once the approvals were in place. As noted earlier, the original project description prepared by SNCL makes this clear when it says:

> The Proponent [BLS owned by the Babkirks] has reportedly experienced a considerable decline in his soil storage and treatment business since the approval of the Silverberry Secure Landfill Facility application (north of Fort St. John, BC) as understandably, direct disposal forms a more cost effective option for clients than treatment and disposal. The conversion of the existing facility from a purely Short-term Storage and Treatment Facility to a Secure Landfill and Short-term Storage and Treatment Facility will allow fair competition between the Proponent and Silverberry facilities in providing responsible waste management solutions for local industry.
>
> [our emphasis]

192 This language is repeated in the Terms of Reference and the point is made even more clearly in the application for the EA Certificate. It states that the proposed facility would allow the proponent to provide "market competition for direct disposal of waste soil" and speaks of the Babkirk Facility being in "direct competition" with CCS at Silverberry.

193 The Vendors' Operations Plan also mentions that the Secure Landfill has been added to the Babkirk Site to allow it to compete with Silverberry and, in the Vision Statement she wrote for Newco, which is attached to minutes dated June 22, 2008, Karen Baker stated that the Vendors wanted Complete "...to become the Number One Competitor to the industry leader [CCS/Newalta]".

194 In his cross-examination at the hearing, Randy Wolsey acknowledged an intention to compete with CCS. However, he testified that while landfilling and competing with Silverberry was "going to happen", it would be on a "very different scale" because the Vendors were going to supply a "brand new service".

195 Mr. Baker also acknowledged in his testimony that the Vendors did intend to compete with CCS and others, but not on price. He stated that they were going to compete by offering a service that was different from anything offered by CCS or Newalta.

196 The Tribunal has concluded that Complete intended to "compete" with Silverberry by offering a new bioremediation service, and that its statements about competition were not intended to mean that the Vendors planned to operate a Full Service Secure Landfill on the Babkirk Site.

Conclusions

197 If the Merger had not occurred, it is the Tribunal's view that, at the end of July 2010, in the absence of a letter of intent from SES, the Vendors would have proceeded to develop the Babkirk Facility. This would have involved:

- Completing the Operations Plan;
- Securing the MOE's approval for the Operations Plan;
- Constructing a half cell of Secure Landfill capacity i.e. 125,000 tonnes; and
- Accepting Hazardous Waste for bioremediation and moving waste that could not be successfully bioremediated into the Incidental Secure Landfill.

198 Although there was evidence to suggest that the Vendors might have decided to start accepting waste for bioremediation without any Secure Landfill capacity, the Tribunal has concluded that the Vendors would likely have built their half cell of Secure Landfill as soon as possible for two reasons. First, the Vendors told Del Reinheimer of the MOE on January 20, 2010 about the importance customers placed on having Secure Landfill capacity available. Indeed, Petro-Canada had refused to deliver waste for bioremediation until the Vendors opened a Secure Landfill. Second, Ken Watson testified that the plan was to store in the Secure Landfill all waste that was awaiting treatment. Presumably, this storage capacity would have been needed as soon as the business started in earnest.

199 The Tribunal has also concluded that it is more likely than not that the Vendors would have had an approved operations plan by the end of October 2010 and that the three months of preparatory work, which Ken Watson testified was needed before the Babkirk Facility could accept waste, would have been substantially completed by the end of October 2010.

200 This means that in the spring of 2011, the Vendors would have been able to accept waste for bioremediation. However, since generators had advised that they would not tip until a Secure Landfill was available, it is unlikely that any meaningful quantity of waste would have been delivered. Construction of the half cell of Incidental Secure Landfill would have begun as soon as the construction season opened in June 2011. Accordingly, given that the evidence showed that the construction would take three or four months, the Tribunal has concluded that the Babkirk Facility would have been fully operational by October 2011.

201 The evidence establishes that the Vendors felt that a twelve month period was needed to see how well bioremediation would work. The Tribunal therefore considers it reasonable to project that the Vendors would have carried on with bioremediation as their principal focus through the fall of 2012. However, the Tribunal has also concluded that, notwithstanding Ken Watson's contacts and his experience with bioremediation, the Vendors' bioremediation business would have been unprofitable for the reasons discussed below.

202 There would have been few if any customers for two reasons. First, while the evidence showed that there is a significant amount of treatable soil on drilling sites in the area around the Babkirk Facility, the bioremediation that presently occurs is done by generators on their own sites. There was no evidence that any companies are paying to transport waste to offsite bioremediation facilities in NEBC. Although Ken Watson testified that he expected that CNRL, Encana, and Bonavista would be interested in disposing of their waste in this fashion and, although Petro-Canada had been interested, the Vendors did not call evidence from any prospective customers to say that they would be prepared to truck their waste to the Babkirk Facility for bioremediation. Further, the Vendors provided the Commissioner with a list of potential customers and *[CONFIDENTIAL]* was first on that list. However, Mr. *[CONFIDENTIAL]*, Vice-President, Operations at *[CONFIDENTIAL]*, testified for the Commissioner that *[CONFIDENTIAL]* philosophy is "going to landfill". In other words, his company was not a significant potential customer for the Vendors' bioremediation facility.

203 Second, the Vendors testified that the Tipping Fees they would charge for bioremediation would be significantly higher than Silverberry's Tipping Fees for Secure Landfill services. It is difficult to imagine that generators with waste that could be bioremediated on their own sites would pay large sums to transport their Hazardous Waste to Babkirk and tip there at rates higher than those at Silverberry, given that they could continue to bioremediate on their own sites or tip for less at Silverberry.

204 Further, there was no evidence from any potential purchasers who might have bought treated waste from Complete for use as cover for municipal dumps or as backfill for excavations. It does not appear that any such sales would have been available to generate revenue for Complete.

205 It is not clear how long the Vendors would have been prepared to operate on an unprofitable basis, without beginning to accept more waste at the Secure Landfill part of the Babkirk Facility. In their final written submissions, the Vendors ask the Tribunal to assume that they would have incurred losses for two years before they decided that their venture had failed.

206 However, the Tribunal has concluded that, because there was no evidence that the Vendors have deep pockets or significant borrowing power, it is unreasonable to suppose that they would have been prepared to operate unprofitably beyond the fall of 2012, when they could have generated additional revenues by accepting more waste into the Secure Landfill part of their facility.

207 Accordingly, it is the Tribunal's view that the Vendors would have started to operate a Full Service Secure Landfill at least by the spring of 2013. In other words, they would have begun to accept significant quantities of Hazardous Waste for direct disposal into Babkirk's Secure Landfill, in competition with CCS. In the alternative, they would have sold Complete or BLS to a purchaser which would have operated a Full Service Secure Landfill. Given that the Vendors had a valuable and scarce asset and given the evidence that demand for Secure Landfill services has, for some time, been projected to increase as new drilling is undertaken in the area north and west of Babkirk, the Tribunal is satisfied that such a sale would have been readily available to the Vendors. Finally, whether Babkirk was operated by the Vendors or a new owner, Babkirk and Silverberry would have become direct and serious competitors by no later than the spring of 2013.

208 We have reached this conclusion notwithstanding CCS' submission that the Vendors' lack of experience and the smaller capacity of the Babkirk Facility would have constrained it from functioning as a serious competitor. In our view, as they had done in the past when they retained IRTL, the Vendors would have hired experts, if needed, to redress their lack of expertise. Moreover, 750,000 tonnes of permitted capacity was sufficient to allow the Vendors or a purchaser to compete effectively with CCS at Silverberry.

209 To summarize, the Tribunal has decided that it is likely that the Vendors would have operated a bioremediation treatment facility with an Incidental Secure Landfill for approximately one year from October 2011 to October 2012 (the "Initial Operating Period"). Thereafter, in the spring of 2013, the Babkirk Facility would have become a Full Service Secure Landfill.

210 Turning to the impact of these developments, it is the Tribunal's view that, as soon as the half cell of the Secure Landfill capacity at the Babkirk Facility was operational in October of 2011, waste generators who tipped at Silverberry would have seen that there was a potential alternative to Silverberry at the Babkirk Facility. The Tribunal cannot predict what would actually have happened. However, we can reasonably expect that, during the Initial Operating Period, some generators of Hazardous Waste would have asked the Vendors to take their waste for direct disposal, if only to use the possibility of disposing at Babkirk as a basis for negotiating lower Tipping Fees at Silverberry. This would have been possible because many oil and gas producers have one year non-exclusive contracts with CCS.

211 As well, given that the Vendors would have needed revenue and given that it might have been convenient for some of their customers, it is reasonable to assume that the Vendors would have accepted at least some Hazardous Waste for direct disposal during the Initial Operating Period, in spite of their evidence that this was not their intention. This possibility was foreseen by Ron Baker when, in his cross-examination, he was asked about the decision matrix in the Operations Plan which reflected that soil which arrived and could not be bioremediated would be landfilled with other soil that could not be bioremediated. He said that, "if we had room", "chances are" such soil would be put in the Secure Landfill.

212 The question is whether this competition afforded by Babkirk in the Initial Operating Period can be considered substantial. In *Canada (Director of Investigation & Research) v. Tele-Direct (Publications) Inc.* (1997), 73 C.P.R. (3d) 1 (Competition Trib.), the Tribunal addressed the question of the potential importance of a small amount of competition, in the course of examining the impact on Yellow Pages consultants of Tele-Direct's discriminatory anti-competitive practices. In that case, the Tribunal was considering whether there had been a substantial lessening of competition.

213 The Tribunal heard evidence that consultants, who charged fees to place Yellow Pages advertisements, had lost time and money and that their ability to attract new customers had been damaged by Tele-Direct's conduct. The Tribunal also found that, although the consultants only occupied a small segment of the market and had a limited and fragile ability to compete with Tele-Direct, they had had a significant positive influence on the level of service Tele-Direct provided to customers who were purchasing yellow pages advertisements. In this context the Tribunal stated at paragraph 758:

> Where a firm with a high degree of market power [Tele-Direct] is found to have engaged in anti-competitive conduct, smaller impacts on competition resulting from that conduct will meet the test of being "substantial" than where the market situation was less uncompetitive to begin with. In these circumstances, particularly Tele-Direct's overwhelming market power, even a small impact on the volume of consultants' business, of which there is some evidence, by the anti-competitive acts must be considered substantial.

214 In contrast, in this case, the Tribunal has concluded that the competition offered by the Babkirk Facility in the Initial Operating Period would likely have had no material, let alone significant, impact on pricing at Silverberry, because any competition would have been offered on an extremely small scale. In our view, during the Initial Operating Period, Silverberry could have ignored any requests by customers for lower prices because the Babkirk Facility would not have been a viable alternative for the volumes of Hazardous Waste oil and gas producers tipped at Silverberry. This means that the prevention of any competition that would have developed in the Initial Operating Period would not have been "substantial".

215 Turning to the spring of 2013, the competition that would have been offered by Babkirk as a Full Service Secure Landfill would have been direct and substantial and, as discussed below, it is this competition that was substantially prevented by the Merger.

B. What are the Relevant Assessment Factors?

Conditions of Entry

216 The conditions of entry into a relevant market can be a decisive factor in the Tribunal's assessment of whether a merger is likely to prevent or lessen competition substantially. This is because, "[i]n the absence of significant entry barriers it is unlikely that a merged firm, regardless of market share or concentration, could maintain supra-competitive pricing for any length of time" (*Hillsdown*, above, at 324; see also *Propane*, above, at para. 127).

217 To be effective, entry must be timely, likely and sufficient to ensure that any prevention of future competition will not be substantial.

218 CCS maintains that the evidence in this case is that the Secure Landfill business is not characterized by significant entry barriers and that the conditions for entry are conducive for potential competitors. In this regard, CCS asserts that (i) the regulatory regime is permissive, as evidenced by the fact that a number of permits to operate a Secure Landfill have been granted in NEBC in recent years, (ii) there is a growing market in the NEBC region for oil and gas drilling and related services, coupled with a growing demand and pressure for socially responsible waste management alternatives, and (iii) the industry practice of engaging in short-term contracts is conducive to entry. CCS further asserts that the Commissioner's reliance on the fact that BLS took nearly four years to obtain its Secure Landfill permit is misplaced, most importantly because BLS did not pursue concurrent permitting. Concurrent permitting allows an applicant to pursue applications for EA Certificates and an MOE Permits (together the "Authorizations") in tandem. CCS also asserts that entry is much less time consuming if a remote area near Babkirk is selected. Thus, attempts to develop secure landfills in populated areas around Dawson Creek should not be accepted as precedents for the timing that entry might involve near Babkirk.

219 Among other things, prior to seeking the Authorizations, a new entrant must spend several months selecting a site from among various potential sites. This involves drilling test holes to determine whether the site's subsurface characteristics are appropriate for Secure Landfilling. If so, a further assessment is undertaken which involves drilling multiple test holes and installing monitoring equipment. There is no evidence about the time needed to complete only a site selection. However, *[CONFIDENTIAL]* spent 15 to 18 months on site selection and the preparation of an application for a potential landfill.

220 Once a potential entrant has completed the site selection described above, it must then obtain the required Authorizations. The evidence is that this process would likely take at least 18-24 months and that a further 3 to 4 months are needed for construction.

221 Notwithstanding the time and money ($1.3 million) it spent during the development process, as described earlier, SES abandoned its plans to open the Heritage landfill and, after spending $885,000.00, CCS abandoned its proposed Sunrise Landfill in NEBC, due to opposition from local residents. These two incidents of site abandonment by knowledgeable industry participants underscore the risk and uncertainty associated with new entry, as well as the "sunk" nature of the entry costs in the event that an entry initiative is unsuccessful.

222 Based on this evidence, the Tribunal has concluded that, even in a remote location and even with concurrent permitting, it would take a new entrant at least 30 months to complete the process of selecting a new site, obtaining the required Authorizations and constructing a new Secure Landfill. That said, the Tribunal notes that there is no evidence of any proposed entry in the Contestable Area.

Absence of Acceptable Substitutes/Effective Remaining Competition

223 For the reasons given earlier, the Tribunal is satisfied that, for some product and for some generators, bioremediation does not compete in the same market as the supply of Secure Landfill services and does not exercise any constraining influence on price or non-price competition within the latter market.

224 This conclusion is supported by the fact that CCS' Tipping Fees are significantly higher in areas where it does not face competition from other Secure Landfill operators, than they are in areas where CCS does face such competition. In addition, the "natural experiment" that occurred when SES opened its facility in Willesden Green Alberta, and CCS substantially reduced its Tipping Fees to seven of its significant customers, strongly suggests that CCS' pricing behaviour is primarily determined by reference to the location of competing suppliers of Secure Landfill services, rather than by competition with suppliers of bioremediation services.

225 Dr. Baye provided extensive evidence with respect to CCS' alleged ability to price discriminate in order to show that it had market power. However, given the foregoing and because CCS is a monopolist in the relevant market and is not constrained by any actual or potential competition from within or outside the market, it is clear that CCS has significant market power. This conclusion is further supported by the discussion of countervailing market power immediately below. For this reason, it is not necessary to consider the allegation of price discrimination.

Countervailing Power

226 CCS correctly notes that none of its customers have complained about the Merger. CCS encourages the Tribunal to infer from this that the Merger is not likely to prevent competition substantially. However, the Tribunal is not persuaded that this is a reasonable inference.

227 The Tribunal recognizes that CCS' largest customers pay lower Tipping Fees than its smaller customers. However, the Tribunal notes that Dr. Baye's report indicates that even CCS' largest customers are forced to pay higher Tipping Fees in areas where CCS faces no competition than in areas where such competition exists and this evidence was not contested. In 2010, the average Tipping Fees at Silverberry and Northern Rockies were *[CONFIDENTIAL]* and *[CONFIDENTIAL]* respectively. However, Tipping Fees at CCS' South Grande Prairie *[CONFIDENTIAL]* and Rocky *[CONFIDENTIAL]* in Alberta were significantly lower because they both face competition from SES. This no doubt explains why Mr. *[CONFIDENTIAL]*, who testified for the Commissioner, made it clear in his testimony that he would welcome competition for CCS in NEBC.

228 The attenuated or limited nature of any countervailing power that may be in the hands of CCS' largest customers is also reflected in the evidence that written requests by them for price relief were rejected by CCS during the industry downturn in late 2008 and early 2009.

C. Conclusions

229

(i) Based on all of the foregoing, the Tribunal has concluded that the Merger is likely to prevent competition substantially. The Merger prevented likely future competition between the Vendors and CCS in the supply of Secure Landfilling services in, at the very least, the Contestable Area. Although the competition that was prevented in 2012 is not likely to be substantial, the Tribunal is satisfied that by no later than the spring of 2013, either the Vendors or a party that purchased the Babkirk Facility would have operated in direct and serious competition with CCS in the supply of Secure Landfill services in the Contestable Area.

(ii) In estimating the magnitude of the likely adverse price effects of the Merger, the Commissioner relied on expert evidence adduced by Dr. Baye. That evidence included economic theory and regression models. However, for reasons discussed below the Tribunal has not given significant weight to that economic theory or to those regression models in assessing the magnitude of the likely adverse price effects of the Merger. In reaching this decision, the Tribunal took into account the fact that the models do not control for costs, and the fact that, although Dr. Baye acknowledged that his theory of spatial competition should only be used if other data were unavailable, he used his theory even though he had actual CCS data.

(iii) Nevertheless, as discussed below in connection with the "effects" element of section 96, the Tribunal is satisfied that prices likely would have been at least 10% lower in the Contestable Area in the absence of the Merger.

(iv) The Tribunal therefore finds that the Merger is more likely than not to maintain the ability of CCS to exercise materially greater market power than in the absence of the Merger, and that the Merger is likely to prevent competition substantially.

Issue 7 When the Efficiencies Defence Is PLEADED, What is the Burden of Proof on the Commissioner and on the Respondent?

230 CCS has alleged that the Commissioner failed to properly discharge her burden to prove the extent of the quantifiable effects of the Merger. CCS alleges that the Commissioner's failure to prove those effects in her case in chief has precluded CCS from being able to meet its overall burden to prove the elements of the efficiencies defence on a balance of probabilities. CCS asserts that the Commissioner's failure means that the effects should be zero and that the Application should therefore be dismissed.

231 In paragraph 48 of its response to the Commissioner's Application, CCS pleaded the efficiencies defence in the following terms:

The Acquisition has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention of competition that will result from the Acquisition, and the gains in efficiency will not likely be attained if the requested order or orders are made by the Tribunal.

232 The burdens of proof under section 96 were established and applied over the course of the four decisions in *Propane* (*Propane*, at para. 48, rev'd on other grounds 2001 FCA 104, [2001] 3 F.C. 185 (Fed. C.A.) ("*Propane 2*"), leave to appeal to SCC refused [2001 CarswellNat 1905 (S.C.C.)], 28593 (September 13, 2001), redetermination, *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2002 Comp. Trib. 16, 18 C.P.R. (4th) 417 (Competition Trib.) ("*Propane 3*"), aff'd 2003 FCA 53, [2003] 3 F.C. 529 (Fed. C.A.) ("*Propane 4*")). "The effects of any prevention or lessening of competition" must be demonstrated by the Commissioner on balance of probabilities (*Propane*, above, at para. 402; *Propane*, above, at para. 177, *Propane*, at para. 17). Her burden is to prove (i) the extent of the *anti-competitive* effects in question where they are quantifiable, even if only roughly so (*Propane*, at paras. 35-38), and (ii) any non-quantifiable or qualitative *anti-competitive* effects of the merger. It also includes the burden to demonstrate the extent of any *socially adverse* effects that are likely to result from the merger, i.e., the proportion of the otherwise neutral wealth transfer that should be included in the trade-off assessment contemplated by section 96, as well as the weighting that should be given to those effects (*Propane*, above, at paras. 35-38, and 61-64). In this case, there being no socially adverse effects, the term "Effects" will be used to described quantifiable and non-quantifiable anti-competitive effects.

233 That said, the respondents bear the burden on the ultimate issue, namely, that the efficiency gains are likely to be greater than, and to offset, the effects of any prevention or lessening of competition likely to result from the merger (*Propane*, above, at para. 154).

234 There is no dispute about the fact that, in his expert report in chief, Dr. Baye only calculated that an average price decrease of at least 10% would be prevented by the Merger. This meant that CCS did not have a figure for the Effects and was obliged to serve its expert report on efficiencies with no ability to take a position about whether the number it calculated for its total efficiencies was greater than the Effects. As a result, CCS maintains that, as a matter of substantive and procedural fairness, it was effectively denied a right of response and the ability to properly meet its own burden under section 96. It therefore asserts that the Tribunal should conclude that there are no quantified Effects as a result of the Merger.

235 Dr. Baye did eventually quantify the Effects but not until he wrote his reply report, which was only made available to CCS two weeks before the hearing. By then, the Tribunal's Scheduling Order did not permit CCS to bring a motion or file a further expert report. In addition, the Tribunal accepts that, in practical terms, there was insufficient time before the hearing to permit CCS to move to strike Dr. Baye's report or to seek leave to file a further report in response to the Commissioner's quantification of the Effects.

236 The Commissioner maintains that her substantive burden to quantify the Effects only arises once a respondent advances its affirmative defence by proving efficiencies. She submits that any other result would require her to respond to every bald assertion of efficiencies, regardless of whether a respondent actually relies on efficiencies at the hearing. She asserts in her final written argument that this "would be an incredible waste of resources, and one that is antithetical to the notion of responding to an affirmative defence".

237 In the Tribunal's view, the Commissioner's argument about resources does not justify her failure to meet her burden to prove the Effects as part of her case in chief. Once CCS pleaded section 96, the efficiencies defence became part of the fabric of the case and, if it had not been pursued by CCS, the Commissioner would have been entitled to costs fully compensating her for work done by her experts to calculate the Effects.

238 The Commissioner also defended her approach by stating that, until CCS served Dr. Kahwaty's report on efficiencies ("Efficiencies Report"), it was an open question whether it was going to pursue the efficiencies defence at all. In this regard, she noted that prior to serving that report, CCS advanced no facts or proof of efficiencies, and provided no guidance on the types of efficiencies that Dr. Kahwaty planned to identify and quantify. She also observed that the Tribunal's Revised Scheduling Order, dated August 19, 2011, indicated that CCS might not pursue the efficiencies defence.

239 The revised scheduling order required the "Corporate Respondents to serve expert reports*, if any*, on efficiencies and provide them to the Tribunal" on or before October 7, 2011 (our emphasis). However, since the phrase "if any" was proposed by the Commissioner and not by CCS, the Tribunal does not accept that it suggests that CCS had resiled from its pleading.

240 In addition, the Tribunal can find no basis in the record for concluding that CCS did not intend to mount the efficiencies defence. The Tribunal notes that the Commissioner asked questions about efficiencies during examination for discovery and asked, during a case management teleconference on August 15, 2011, that CCS be ordered to produce documents relevant to the issue. During that teleconference, the Presiding Judicial Member stated that efficiencies were at issue and that, if relevant documents existed, their production was required.

241 Given the pleading of section 96 and these developments, the Tribunal concludes that there was no reason to doubt that CCS would pursue an efficiencies defence.

242 The Commissioner further asserts that the legislation and the case law do not dictate how she must meet her burden to prove the extent of the Effects. She submits that she is not obliged in every case to lead evidence about demand elasticities and provide detailed calculations about the range of likely Effects. This is particularly so in a case such as this in which she

asserts that the efficiencies are "plainly so minimal that it was an open question whether [the efficiencies defence would even be pursued]".

243 The Tribunal acknowledges that the legislation and the jurisprudence do not dictate how the Commissioner must meet her burden. However, as noted above, where it is possible to quantify the Effects of a merger, even if only in "rough" terms, the Commissioner has the onus to provide an estimate of such Effects (*Propane*, above, at paras. 35 — 38).

244 Indeed, where the necessary data can be obtained, the Commissioner will be expected in future cases to provide estimates of market elasticity and the merged entity's own-price elasticity of demand in her case in chief. These estimates facilitate the calculation of the magnitude of the output reduction and price effects likely to result from the merger. They are also necessary in order to calculate the deadweight loss ("DWL") that will likely result from the output reduction and related price effects. DWL is the loss to the economy as a whole that results from the inefficient allocation of resources which occurs when (i) customers reduce their purchases of a product as its price rises, and shift their purchases to other products that they value less, and (ii) suppliers produce less of the product.

245 Given that there will often be shortcomings in the data used to estimate market elasticities and the merged entity's own-price elasticity of demand, prudence dictates that a range of plausible elasticities should be calculated, to assist the Tribunal to understand the sensitivity of the Commissioner's estimates to changes in those elasticities. The Tribunal will be open to making its assessment of the quantitative extent of the Effects on the basis of persuasively supported "rough estimates" of those Effects, but only if the data required to reliably estimate elasticities cannot reasonably be obtained. Such rough estimates may be derived from evidence with respect to the magnitude of the likely price effects of the merger, including statements or projections made in the internal documents of the respondent or its advisors (including its investment bankers); persuasive estimates by customers, other lay witnesses, or expert witnesses; and persuasive evidence from "natural experiments."

246 Although the Commissioner failed to meet her burden, in the unusual circumstances of this case, CCS was not prejudiced by that failure because, instead of doing the required independent analysis of elasticities, Dr. Baye relied on his assumed price decrease of at least 10% and on certain assumptions used by Dr. Kahwaty in calculating CCS' claimed market expansion efficiencies. In making that calculation, Dr. Kahwaty assumed that the opening of a Secure Landfill at Babkirk would lead waste generators to dispose of approximately *[CONFIDENTIAL]* additional tonnes of Hazardous Waste, as forecast in CCS' internal documents. Further, during the hearing. Dr. Kahwaty was able to effectively attack Dr. Baye's DWL calculations on various grounds, including his failure to base them on conventional calculations of elasticities when he could have obtained the data necessary to perform those calculations. In short, CCS was able to effectively assert the defence and argue that the efficiencies its expert presented were greater than the Effects (i.e. the DLW) calculated by Dr. Baye. For these reasons, the Tribunal declines to dismiss the Application.

247 There is a second reason why CCS' request is being denied. CCS was also required to show that the cognizable efficiencies would be likely to *offset* the Effects. This means that even if the Tribunal had accepted CCS' submission that a zero weighting should be given to the quantifiable Effects, it would not necessarily follow that the Tribunal would find that the *offset* element of section 96 has been established on a balance of probabilities.

248 This is so for two reasons. First, as noted in *Propane*, above, at para. 172, "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 necessarily offset those effects." This is because the loss of dynamic competition will always merit some non-trivial qualitative weighting in the trade-off assessment. Indeed, dynamic efficiencies and dynamic Effects can have a major impact on the trade-off assessment. Second, in this case, the Commissioner adduced evidence of *qualitative* Effects in Dr. Baye's expert report in chief. As well, CCS adduced evidence of qualitative efficiencies, such as improved service, reduced risk for customers and the environment, which put in play the issue of whether a substantial prevention of competition likely would adversely impact upon these matters.

249 Accordingly, the Commissioner's failure to meet her burden to quantify the Effects, even in rough terms, at the appropriate time is not a sufficient reason to conclude that CCS is relieved of its obligation to meet its burden to meet the "offset" element in section 96.

Issue 8 Has CCS Successfully Established an Efficiencies Defence?

What are the Claimed Efficiencies?

250 We now turn to summarizing the efficiencies claimed by CCS. In that regard, Dr. Kahwaty testified on behalf of CCS that the Merger would likely result in efficiencies that he grouped into the following five categories.

251 *Transportation efficiencies*: These were described as being productive efficiencies realized by those customers presently serviced at Silverberry, who have an aggregate of *[CONFIDENTIAL]* locations that are situated closer to the Babkirk Facility than to Silverberry. Once CCS opens the Babkirk as a Secure Landfill, those customers will realize significant transportation cost savings, thereby freeing up resources for other uses. Based on what he described as the "going rate" of approximately *[CONFIDENTIAL]* for trucking services, the number of loads shipped from each of the above-mentioned *[CONFIDENTIAL]* locations in 2010, and the time saved by tipping at Babkirk instead of Silverberry, Dr. Kahwaty estimated the annual aggregate transportation cost savings for the aforementioned customers to be *[CONFIDENTIAL]*. Using a lower trucking rate of *[CONFIDENTIAL]* per hour per load (or $5 per tonne per hour of transport), Dr. Kahwaty provided a second estimate of those annual transportation cost savings, which totaled *[CONFIDENTIAL]*. Dr. Kahwaty also calculated that his two estimates represented approximately *[CONFIDENTIAL]* and *[CONFIDENTIAL]* respectively of CCS' 2010 revenue derived from the *[CONFIDENTIAL]* customer locations in question.

252 *Market expansion efficiencies*: Dr. Kahwaty stated that, absent the opening of a Secure Landfill at Babkirk, a significant volume of existing Legacy Waste and newly generated Hazardous Waste, within the drawing area of the Babkirk Facility, would not have been transported to Silverberry due to the significant risk, and related financial liability, that would be associated with transporting such waste over the long distance to Silverberry. However, with the opening of a Secure Landfill at the Babkirk Site, CCS estimated that approximately *[CONFIDENTIAL]* tonnes per year of such waste ("Market Expansion Waste") likely would be transported for disposal at Babkirk. Dr. Kahwaty acknowledged that this estimate is "necessarily imprecise," and suggested that the incremental volume of Market Expansion Waste could substantially exceed CCS' estimate of *[CONFIDENTIAL]* tonnes per year. Based on the reported margin for Silverberry in 2009 of *[CONFIDENTIAL]* and a price of *[CONFIDENTIAL]* per tonne, Dr. Kahwaty estimated an increase in producer surplus from this incremental volume of *[CONFIDENTIAL]*. In addition, based on an estimated reduction in disposal costs of *[CONFIDENTIAL]* per tonne, Dr. Kahwaty estimated that customers would gain approximately *[CONFIDENTIAL]* per year in consumer surplus. This is only 50% of the product of multiplying *[CONFIDENTIAL]* by *[CONFIDENTIAL]*, because Dr. Kahwaty felt that customers do not gain the full reduction in the costs of disposal when they are induced to dispose of their waste by virtue of a lower overall cost of disposition. The sum of the estimated *[CONFIDENTIAL]* in producer surplus gains and the estimated *[CONFIDENTIAL]* in consumer gains, was a total of *[CONFIDENTIAL]* of annual market expansion efficiencies.

253 *Overhead Efficiencies*: Dr. Kahwaty estimated that the Merger would result in annual overhead savings of approximately *[CONFIDENTIAL]*. He stated that these savings likely would be achieved by virtue of the fact that CCS could draw upon its existing administrative staff (e.g., those persons who deal with legal, regulatory, marketing, engineering, financial and health & safety matters) in operating the Babkirk Facility. In the absence of the Merger, he stated that the Vendors likely would have had to incur expenses associated with these functions. In reaching his estimate of *[CONFIDENTIAL]*, Dr. Kahwaty used the cost reductions that CCS has achieved in operating Complete's Roll-off Bin Business as a proxy. In addition, he submitted that some "qualitative" credit should be given to this category of efficiencies, because Complete would otherwise need to expend resources developing administrative systems and to deal with some of the matters identified above.

254 *Roll-off Bin Business Efficiencies*: Dr. Kahwaty estimated that CCS's Merger of the Roll-off Bin Business has resulted in annual cost savings of approximately *[CONFIDENTIAL]*. These savings were described as having been achieved as a result

of (i) the upgrading of its trucks to meet higher safety standards, (ii) investments in business development efforts, and (iii) the absorption of administrative functions, such as billing, into CCS' pre-existing corporate systems.

255 *Qualitative efficiencies*: Dr. Kahwaty listed the following qualitative efficiencies as being likely to result from the Merger:

a. the landfill services to be offered by CCS at the Babkirk Site will be of higher (and known) quality and involve less risk for customers due to CCS's knowledge and experience in the operation and management of hazardous waste landfills;

b. customers will benefit from being able to purchase bundled packages of services that may include, for example, loading, trucking and tipping services;

c. the landfill services to be offered by CCS at the Babkirk Site will reduce risks for customers due to CCS's substantial financial resources, which provide assurance to customers regarding the long-term management of the Babkirk Facility and the potential continuing liability for wastes disposed in that landfill;

d. CCS will have the capability and resources necessary to expand the Babkirk Facility as necessary and to meet special customer needs (e.g., rapid responses to increased disposal needs);

e. since landfilling is CCS' business and since the Vendors were not planning to operate a Secure Landfill, CCS will promote landfilling services to a greater extent than the Vendors would have done, once the Babkirk Site is operational, making trucking cost efficiencies available to more customers;

f. the provision of Secure Landfill services by CCS at the Babkirk Site will reduce risks for generators, trucking firms, and other road users related to the transportation of Hazardous Waste on roads over long distances;

g. increased competition in the Roll-off Bin Business will benefit roll-off customers and may reduce the extent of any DWL in the roll-off industry, which will increase the total surplus generated in the roll-off marketplace; and

h. increased site remediation from reduced trucking costs will benefit area residents, wildlife, and the overall environment, and will also further the government's policy of expanding contaminated site remediations.

256 Dr. Kahwaty also stated that some or all of the efficiencies identified above would likely be achieved sooner by CCS than by Complete or by any third-party who might acquire the Babkirk Facility pursuant to an order of the Tribunal.

257 In addition, Dr. Kahwaty stated that CCS should be given credit for some of the efficiencies that it has already achieved in respect of the Roll-off Bin Business.

258 Finally, Dr. Kahwaty provided reasoned estimates about the extent to which the above-mentioned trucking and market expansion efficiencies would increase under market growth scenarios of 1%, 2% and 4% compounded annually over the next 10 years. Based on this work, he suggested that these increased efficiencies ought to be considered by the Tribunal.

259 After providing his annual estimates of the quantifiable efficiencies, Dr. Kahwaty calculated the net present value of those efficiencies as of January 1, 2012 using three different discount rates: (i) a risk-free interest rate of 1%, which he described as being the annual yield on one to three year government of Canada marketable bonds over the 10 week period preceding the date of his report (October 7, 2011); (ii) an interest rate of 10%, which he described as being "roughly equivalent to rates prevailing in the oil and gas industry"; and (iii) an intermediate rate of 5.5%.

260 The Tribunal accepts the evidence of Mr. Harrington, the Commissioner's expert, that, in broad terms, the discount rate used in calculating the net present value of efficiencies typically does not matter, so long as the same discount rate is used to calculate the net present value of the Effects. That said, the Tribunal also accepts Mr. Harrington's evidence that, (i) as a general principle, the appropriate discount rate to use in discounting a set of future cash flows is a function of the risk of those cash flows being wrong, (ii) there is some uncertainty associated with the efficiencies identified and estimated by Dr. Kahwaty and

CCS, and therefore (iii) the midpoint (5.5%) of the three discount rates identified by Dr. Kahwaty is the most defensible of the three rates to use in calculating efficiencies and Effects in this case.

The assessment of the claimed efficiencies

261 In the initial stage of assessing efficiencies claimed under section 96 of the Act, the Tribunal applies five screens to eliminate efficiencies that are not cognizable under that section.

262 The first screen eliminates claims that do not involve a type of productive or dynamic efficiency, or that are not otherwise likely to result in any increase in allocative efficiency. The second screen narrows the claimed efficiencies to those that the Tribunal is satisfied are *likely* to be brought about by the Merger. Efficiencies that cannot be demonstrated to be more likely than not to be attained in the Merger are filtered out at this stage. The third screen filters out claimed efficiency gains that would be brought about by reason only of a redistribution of income between two or more persons, as contemplated by subsection 96(3). These types of gains include savings that result solely from a reduction in output, service, quality or product choice, as well as from increases in bargaining leverage and reductions in taxes. The fourth screen filters out claimed efficiency gains that would be achieved outside Canada and would not flow back to shareholders in Canada as well as any savings from operations in Canada that would flow through to foreign shareholders.

263 In the case at bar, the application of the first four screens does not result in the elimination of any of the claimed efficiencies.

264 The fifth screen filters out claimed efficiencies that either (a) would likely be attained through alternative means if the Tribunal were to make the order that it determines would be necessary to ensure that the merger in question does not prevent or lessen competition substantially, or (b) would likely be attained through the Merger even if that order were made. This screen has a critical role to play in the case at bar.

265 In this case, the fifth screen eliminates most of the efficiencies claimed by CCS. With three exceptions, being the one year of transportation efficiencies and the one year of market expansion efficiencies discussed at paragraph 269 below, as well as the overhead efficiencies discussed above, virtually all of the efficiencies claimed by CCS would likely be achieved even if the order referred to in the preceding paragraph is made. That order is an order for the divestiture of the shares or assets of BLS (the "Order").

266 Although there is currently some uncertainty regarding the identity of a prospective purchaser, the Tribunal is satisfied that a divestiture will ultimately be made to a purchaser who will operate the Babkirk Facility and attract essentially the same volumes of Hazardous Waste as were assumed by Dr. Kahwaty in arriving at his estimates of transportation and market expansion efficiencies.

267 The Tribunal has decided that, absent exceptional circumstances, it will not be prepared to conclude that the claimed efficiencies that would be realized by any acceptable alternative purchaser should be included in the trade-off assessment, on the basis that it is not possible to identify any particular *likely* purchaser of the shares or assets contemplated by the divestiture order.

Transportation and Market Expansion Efficiencies

268 Based on the reasonable assumption that a purchaser under the Order will emerge and attract, in its first year of operation, the volume of Hazardous Waste that formed the basis for Dr. Kahwaty's estimates of CCS' claimed transportation and market expansion efficiencies, those efficiencies cannot be considered in the section 96 assessment because they are likely to be achieved even if the Order is made.

269 A noteworthy exception to this conclusion concerns the transportation and market expansion efficiencies that CCS claims would be achieved more quickly by CCS than by a purchaser. In this regard, CCS asserted that it would already have been operating at Babkirk but for the Commissioner's intervention and that, in any event, it is likely to be in a position to operate a Secure Landfill at the Babkirk Site by the summer of 2012. In contrast, CCS stated that a purchaser following a divestiture

is unlikely to be in a position to operate a Secure Landfill facility at the Babkirk Site before mid-2013, having regard to the time required (i) for the Tribunal to render a decision in this proceeding, (ii) to effect the actual sale of the shares or assets of BLS (which it estimates to will require "at least six months, or more," inclusive of due diligence), (iii) to modify or prepare an operations plan for the landfill, (iv) for the MOE to approve the operations plan, and (v) for the purchaser to construct the landfill, bearing in mind that construction can only be undertaken between June and September.

270 In the Tribunal's view, claimed efficiencies that would not likely be achieved by a purchaser under the Order, but that would likely be achieved by CCS solely because of the types of delays identified immediately above and associated with the implementation of the Order, are not cognizable efficiencies under section 96. These will be described as "Order Implementation Efficiencies". In the case at bar, CCS and the Vendors completed the Merger after being advised that the Commissioner intended to apply to the Tribunal. To give the Respondents the benefit of Order Implementation Efficiencies in such circumstances, and thereby potentially preclude the Tribunal from issuing the Order in respect of their anticompetitive Merger, would be contrary to the purposes of the Act.

271 In any event, even if CCS were given full credit for the Order Implementation Efficiencies, those efficiencies are only likely to be between *[CONFIDENTIAL]* and *[CONFIDENTIAL]* (which represents one year of transportation cost savings) plus *[CONFIDENTIAL]* (which represents one year of annual market expansion efficiencies). As discussed below in connection with the Tribunal's treatment of the "offset" element of section 96, these efficiencies are not sufficient to change the Tribunal's overall determination with respect to section 96.

The Roll-off Bin Business Efficiencies

272 The divestiture of the shares or assets of BLS will not have any impact on the Roll-off Bin Business efficiencies claimed by CCS. Stated alternatively, those efficiencies will likely be attained even if the Order is made. Accordingly, those efficiencies cannot be considered in the trade off assessment contemplated by section 96.

273 CCS has also submitted that certain productive efficiencies have already been achieved as a result of (i) its upgrading and sale of trucks to meet higher safety standards and to operate more efficiently, and (ii) CCS having absorbed certain administrative functions into its pre-existing corporate functions. However, as Mr. Harrington testified on behalf of the Commissioner, these efficiencies would only be lost if CCS were required to divest the Roll-off Bin Business. Given that the Order does not include the Roll-off Bin Business, those efficiencies will not be affected by the Order as contemplated by subsection 96(1) of the Act. Accordingly, they are not cognizable. In any event, given the value of these efficiencies, which Dr. Kahwaty estimated to be approximately *[CONFIDENTIAL]*, the Tribunal's overall conclusion with respect to section 96, set forth below, would not change even if these efficiencies were given full value in the trade-off assessment.

274 More generally, if certain efficiencies have already been achieved, they cannot be considered to be a potential "cost" of making the order contemplated by section 96. Therefore, they cannot be considered in the assessment under section 96. In other words, it cannot be said that those efficiencies "would not likely be attained if the order were made," as required by subsection 96(1).

The Overhead Efficiencies

275 As has been noted, Dr. Kahwaty estimated that these efficiencies would likely total approximately *[CONFIDENTIAL]* per year. He arrived at this assessment by, among other things, using as a proxy the cost reductions that CCS has achieved in operating the Roll-off Bin Business. Those cost reductions amounted to approximately 21% of the overhead expenses that previously were incurred by Complete in operating the Roll-off Bin Business. Dr. Kahwaty applied this 21% to the overhead expenses incurred at Silverberry, to reach his estimate of approximately *[CONFIDENTIAL]* in annual overhead savings. Mr. Harrington took issue with this methodology, in part because the Roll-off Bin Business is different from the landfill business. In addition, he opined that if there is a divestiture, some of these savings, which he described as being equivalent to one-half of the annual cost of a full time back-office employee, would likely be achieved by the purchaser. The Tribunal is persuaded

by this reasoning and therefore accepts Mr. Harrington's conclusion that the annual overhead efficiencies which are cognizable under section 96 are reasonable but are probably somewhat less than the *[CONFIDENTIAL]* that CCS has claimed.

276 As a practical matter, given the conclusion that the Tribunal has reached with respect to the "offset" element of section 96, discussed below, the fact that a more precise estimate of the cognizable overhead efficiencies is not available does not affect the Tribunal's overall determination with respect to the efficiencies defence in section 96.

The Qualitative Efficiencies

277 As discussed above, Dr. Kahwaty identified eight types of qualitative efficiencies that he claimed would likely result from the Merger. The Tribunal is not persuaded that any of these efficiencies "would not likely be attained if the Order were made," as provided in subsection 96(1). Ultimately, the answer to that question is dependent upon the expertise, financial resources, and reputation of the purchaser under the Order. Given that the purchaser may well have the same expertise, financial resources and reputation as CCS, the Tribunal cannot give significant weight to these claimed efficiencies. Indeed, given that the purchaser will have to be approved by the Commissioner, the Tribunal is of the view that all, or virtually all, of these claimed efficiencies are likely to be achieved by that purchaser.

278 Regardless of the identity of the purchaser, some of the types of qualitative efficiencies identified by Dr. Kahwaty will be achieved, including those related to the Roll-off Bin Business, the reduction of risks related to the transportation of Hazardous Waste over long distances and the increased site remediation that will benefit residents, wildlife, and the overall environment. In fact, to the extent that the Merger is likely to substantially prevent competition, as the Tribunal has found, we conclude that it is entirely appropriate to take into account, in the trade-off assessment, the likelihood that there will be less site clean-up and tipping of Hazardous Waste in Secure Landfills than otherwise would have occurred if an Order were made. This will be described below when non-quantifiable effects are considered.

279 The Tribunal concludes that the only efficiencies claimed by CCS that are cognizable under section 96 are a maximum of *[CONFIDENTIAL]* in annual overhead efficiencies, having a net present value of approximately *[CONFIDENTIAL]*, using a discount rate of 5.5%.

280 If, contrary to the Tribunal's conclusion, the Order Implementation Efficiencies are also cognizable under section 96, then it would be appropriate to include in the trade-off assessment further amounts of approximately *[CONFIDENTIAL]* to *[CONFIDENTIAL]* (i.e., one year of transportation cost savings) plus *[CONFIDENTIAL]* (i.e., one year of annual market expansion efficiencies).

What are the Effects for the Purposes of Section 96 of the Act?

281 As CCS noted in its Final Argument, the total surplus approach remains the starting point in assessing the effects contemplated by section 96. Under that approach, the cognizable quantifiable efficiencies will be balanced against the DWL that is likely to result from a merger. In addition, the Tribunal considers any cognizable dynamic or other non-quantifiable efficiencies and *anti-competitive* Effects. Where there is evidence of important dynamic or other non-quantifiable efficiencies and anti-competitive effects, such evidence may be given substantial weight in the Tribunal's trade-off assessment.

282 After the Tribunal has assessed the evidence with respect to the quantifiable (i.e., DWL) and non-quantifiable *anti-competitive* Effects of the merger, it will assess any evidence that has been tendered with respect to the other effects contemplated by section 96 and the purpose clause in section 1.1 of the Act. It is at this point that the Tribunal's assessment will proceed beyond the total surplus approach. In brief, at this stage of the Tribunal's assessment, it will determine whether there are likely to be any *socially adverse* effects associated with the merger. If so, it will be necessary to determine how to treat the wealth transfer that will be associated with any adverse price effects that are likely to result from the merger. In a merger among sellers of products, that wealth transfer will be from the merging parties' customers to the merged entity. Of course, to the extent that the merging parties' rivals may be likely to follow such price effects, the wealth transfer would need to be calculated across the sales or purchases of such rivals as well.

283 The Tribunal expects that in most cases, it will be readily apparent that the wealth transfer should be treated as neutral in its analysis, because the socio-economic profiles of consumers and the merged entity's shareholders will not be sufficiently different to warrant a conclusion that the wealth transfer is likely to lead to *socially adverse* Effects. For greater certainty, the cognizable social Effects under section 96 do not include broader social effects, such as those related to plant-closings and layoffs (*Superior Propane Inc.*, at para. 444).

284 In these proceedings, the Commissioner adduced no evidence with respect to *socially adverse* effects. Indeed, in her Final Argument (at para. 208) she conceded that the Merger is not likely to result in any such effects, and that the wealth transfer should be treated as being neutral in this case. Accordingly, the discussion below will be confined to *anti-competitive* effects. In other words, in making its determination under section 96 in the case at bar, the Tribunal will adopt the total surplus approach.

Quantifiable Effects

285 Quantifiable *anti-competitive* Effects are generally limited to the DWL that is likely to result from a merger.

286 In this case, the DWL is the future loss to the economy as a whole that will likely result from the fact that purchasers of Secure Landfill services in the Contestable Area will purchase less of those services than they would have purchased had the Tipping Fees for such services declined due to the competition that would likely have materialized between CCS and Babkirk operated as a Full Service Secure Landfill.

287 The DWL that is likely to result from a merger is likely to be significantly greater when there is significant pre-existing market power than when the pre-merger situation is highly competitive (*Propane*, above, at para. 165). In the case at bar, as in *Propane*, the Commissioner did not adduce specific evidence of pre-existing market power, for example, with respect to the extent to which prevailing Tipping Fees exceed competitive levels. Therefore, the Tribunal is not in a position to quantify the impact that any such pre-existing market power likely would have on the extent of the DWL. Where, as in this case, the pre-existing market situation is characterized by a monopoly and the Tribunal is not provided with sufficient persuasive evidence to enable it to quantify the Effects associated with such market power, it will be open to the Tribunal to give qualitative weight to those Effects. Given the very limited nature of the cognizable efficiencies in this case, it has not been necessary for the Tribunal to attribute such a qualitative weighing to those Effects in making its determination under section 96.

288 As discussed above, CCS submitted that the Tribunal should conclude that there are no quantifiable Effects as a result of the Merger, because the Commissioner did not lead any evidence with respect to such Effects until she served Dr. Baye's reply report, on November 4, 2011. The Tribunal has rejected that position because CCS was not ultimately prejudiced in this regard. The Tribunal will therefore proceed to address the evidence adduced in Dr. Baye's reply report. As will be noted below, the Tribunal is satisfied that CCS would not have met its burden under section 96, even if the quantifiable Effects had been deemed to be zero.

289 At the outset of his reply report, Dr. Baye summarized a number of the conclusions set forth in his initial report, dated September 30, 2011. These included the following:

a. the Merger likely prevents the prices for the disposal of Hazardous Waste generated in NEBC from falling significantly for many customers;

b. the effects of the Merger are unlikely to be uniform across all customers in the relevant market; and

c. the average reduction in the Tipping Fees throughout NEBC is likely to be at least 10%, but the effects are likely to be significantly higher for customers generating Hazardous Waste in the vicinity near Babkirk and Silverberry and lower for customers located near the southern and northern boundaries of NEBC.

290 The Tribunal is satisfied, on a balance of probabilities, that with the exception of the geographic extent of the Effects, the foregoing conclusions are supported by the weight of the evidence that it has found to be credible and persuasive. As to the geographic region over which the aforementioned Effects are likely to result from the Merger, the Tribunal finds that, at a

minimum, such Effects are likely to extend throughout the Contestable Area identified by Dr. Kahwaty. Given the conclusions that the Tribunal has reached regarding the minimal nature of the efficiencies claimed by CCS, it is unnecessary to define the scope of the anti-competitive Effects with greater precision.

291 As Dr. Baye explicitly noted, his conclusions were based on a range of different sources of information and economic analyses, rather than on any specific source of information or economic methodology. Those sources included CCS' internal documents and a "natural experiment." The Tribunal has not placed weight on the economic models that are set forth in Dr. Baye's reports, for example, the tipping fee and DiD regressions presented at exhibits 20 and 26 of his initial Report, which are also briefly discussed in his reply report. In the Tribunal's view, some of the assumptions underlying those models are questionable. The same is true of some of the outcomes of those models, such as the prediction of greater adverse price effects for customers located closer to Northern Rockies than to Babkirk. In the Tribunal's view, those predictions of Dr. Baye's models are counterintuitive and are not supported by the weight of the other evidence adduced in these proceedings.

292 More generally, as noted above, Dr. Baye's models do not account for the opportunity cost that CCS would incur if it were to lower Tipping Fees to the 20 - 25% range necessary to attract business from customers located farthest away from Silverberry and Babkirk, respectively, as discussed at paragraphs six and seven of his reply report. The Tribunal is not persuaded that it would be in CCS' interest to reduce prices to that extent in the near future, and to thereby deplete its finite Secure Landfill capacity at Silverberry, assuming that CCS would likely be able to attract business at higher Tipping Fees further in the future to fill that capacity.

293 Notwithstanding the fact that the Tribunal has found the models at exhibits 20 and 26 to be unreliable, we are satisfied, on a balance of probabilities, that competition from an independently owned and operated Full Service Secure Landfill at the Babkirk Site likely would result in CCS reducing its prices by an average of at least 10% for customers in the geographic market described above. This conclusion is based on evidence from CCS' own internal documents, evidence given by *[CONFIDENTIAL]* of *[CONFIDENTIAL]* and the transactions data pertaining to the "natural experiment" at Willesden Green modelled in Dr. Baye's DiD analysis.

294 The internal CCS documents referenced above include:

a. a slide presentation, dated August 26, 2010, which is attached at Exhibit K to Mr. D. Wallace's witness statement, *[CONFIDENTIAL]*

b. an e-mail, dated July 15, 2010, sent by Trevor Barclay to Ryan Hotston and Lance Kile, *[CONFIDENTIAL]*

c. a document, entitled *[CONFIDENTIAL]*, containing several slides dated "3/9/2009/ *[CONFIDENTIAL]*

d. a financial analysis prepared by Dan Wallace, attached to an e-mail dated March 31, 2010, and at Exhibit C to his witness statement, *[CONFIDENTIAL]*

e. a document dated March 31, 2010, entitled *[CONFIDENTIAL]*, attached at Exhibit D to Dan Wallace's witness statement, *[CONFIDENTIAL]*

f. a document, entitled *[CONFIDENTIAL]*, dated September 15, 2009 and included at Tab 32 of the Parties' Admissions Brief, *[CONFIDENTIAL]*.

295 Turning to evidence from customers, there was, as mentioned earlier, an unusual paucity of such evidence in this case. However, Mr. *[CONFIDENTIAL]*, Vice President, Operations, at *[CONFIDENTIAL]* testified that "competition, in our mind, provides a more competitive playing field in terms of your pricing setup" and that "in Northeast B.C. we currently don't have that same level of competition in this facet of our business."

296 Lastly, the transactions data from the "natural experiment" at Willesden Green, which is found in Dr. Baye's initial report, demonstrates that CCS reduced its prices significantly to seven customers after SES' entry at South Grande Prairie.

297 For all these reasons, we have concluded that, in the absence of the Merger, competition in the provision of Secure Landfill services at Silverberry and the Babkirk Site likely would have resulted in prices being, on average, at least 10% lower in the geographic market described above. This is a sufficient basis for concluding that the Merger likely will prevent competition substantially, particularly given that the Merger preserves a monopolistic market structure, and thereby prevents the emergence of potentially important competition.

298 In his reply report, Dr. Baye opined that even if competition is only likely to be substantially prevented in the Contestable Area identified by Dr. Kahwaty, the welfare loss is likely to be significant. Specifically, Dr. Baye estimated that loss to be approximately *[CONFIDENTIAL]* annually. That estimate was based on an assumed price decrease of 10%, from *[CONFIDENTIAL]* to *[CONFIDENTIAL]* per tonne, and certain assumptions and estimates used by Dr. Kahwaty in calculating the market expansion efficiencies, discussed above. In making that calculation, Dr. Kahwaty assumed that the opening of a Secure Landfill facility at Babkirk would likely lead customers to dispose of approximately *[CONFIDENTIAL]* additional tonnes of Hazardous Waste, as forecast in CCS' internal documents. As discussed earlier in these reasons, that forecast increase in demand concerned Legacy Waste and future waste that would not otherwise be transported to Silverberry, due to (i) the level of the current disposal cost (Tipping Fees plus transportation cost) and (ii) the risk that would be associated with transporting Hazardous Waste to Silverberry. Dr. Kahwaty estimated that the total disposal costs of customers located in the Contestable Area that he identified likely would decline by approximately *[CONFIDENTIAL]* per tonne, due to the closer proximity of the Babkirk Facility, relative to Silverberry.

299 Based on the foregoing numbers used by Dr. Kahwaty to estimate the market expansion efficiencies, and the linear demand that was assumed by Dr. Kahwaty, Dr. Baye estimated that a 10% price reduction (from *[CONFIDENTIAL]* to *[CONFIDENTIAL]*) for customers in the Contestable Area would increase the volume of waste disposed of by those customers from *[CONFIDENTIAL]* tonnes to *[CONFIDENTIAL]* tonnes, annually. He further estimated CCS' unit costs to be approximately *[CONFIDENTIAL]*, based on the average 2010 price at Silverberry of *[CONFIDENTIAL]* across all substances, and the *[CONFIDENTIAL]* landfill margin reported for Silverberry in 2009, which was used by Dr. Kahwaty in estimating the market expansion efficiencies.

300 Given the foregoing estimates, Dr. Baye calculated the area under the demand curve for the Contestable Area to be (i) a rectangle that is approximately *[CONFIDENTIAL]* tonnes multiplied by *[CONFIDENTIAL]*, for a total of *[CONFIDENTIAL]*, plus (ii) a right triangle that is *[CONFIDENTIAL]* high and *[CONFIDENTIAL]* wide, for an area of *[CONFIDENTIAL]*. Summing (i) plus (ii) yielded a figure of *[CONFIDENTIAL]*. From this latter amount, Dr. Baye deducted CCS' unit cost of *[CONFIDENTIAL]* multiplied by *[CONFIDENTIAL]*, to arrive at an estimated welfare loss of *[CONFIDENTIAL]*.

301 The Tribunal is persuaded that, on a balance of probabilities, the approach adopted by Dr. Baye, and the numbers he used in reaching his estimate of the likely DWL, are reasonable for the purposes of the Tribunal's assessment of Effects under section 96 of the Act. In the Tribunal's view, the manner in which Dr. Baye proceeded in this regard is sound, and the inputs that he used are reliable and conservative. The fact that Dr. Baye relied on certain assumptions made by Dr. Kahwaty is not particularly important for the purposes of the Tribunal's assessment under section 96. What is important is that there is reliable evidence before the Tribunal that permitted the DWL to be estimated.

302 The Tribunal acknowledges Dr. Kahwaty's testimony that, to calculate the DWL, it is necessary to know the shape of the demand curve, and that, when prices are likely to differ across customers, it is necessary to have customer-specific elasticity data. However, the Tribunal is persuaded that, in the absence of such information, a reliable "rough" estimate of the likely DWL can be obtained based on information such as that which was used by Dr. Baye in reaching his estimated annual welfare loss of approximately *[CONFIDENTIAL]*.

303 Accordingly, the Tribunal accepts Dr. Baye's estimate of *[CONFIDENTIAL]*, as being the minimum annual DWL.

304 Dr. Baye then speculated that, (i) if the average price decrease in that area was 21 percent, the annual DWL would be approximately *[CONFIDENTIAL]*, (ii) if prices across all Hazardous Waste tipped at Silverberry in 2010 decreased by 10%, the

DWL would be approximately *[CONFIDENTIAL]*, and (iii) if prices across all such waste decreased by 21%, the DWL would be approximately *[CONFIDENTIAL]*. However, the Tribunal is not persuaded that these speculations about prices are reasonable.

Non-quantifiable Effects

305 The Tribunal is satisfied that the Merger likely would result in certain important qualitative or other non-quantifiable Effects.

306 In his initial report, Dr. Baye identified at least two important qualitative anti-competitive Effects of the Merger. First, at paragraph 157, he stated that lower Tipping Fees would induce waste generators to more actively clean up legacy sites in NEBC. At paragraph 91 of his report, he described this in terms of lower Tipping Fees inducing waste generators to substitute away from "delay," or bioremediation, towards disposal at a Secure Landfill. As Dr. Kahwaty noted at paragraph 96 of his Efficiencies Report, increased site remediation from lower disposal costs benefits "area residents, wildlife, and the overall environment."

307 Second, at paragraph 137(c) of his initial report, Dr. Baye stated that, to retain its waste volumes in the face of competition from an independently owned and operated Babkirk Facility, CCS "would have had an incentive to compete through 'value propositions' that, among other things, link prices on various services to provide customers with a lower total cost for waste services." Although the services in question were not further discussed by Dr. Baye, they were addressed in "read-in" evidence adduced by the Commissioner and cited by Dr. Baye (at footnote 93 of his initial report). The Tribunal is satisfied, on a balance of probabilities, that competition between CCS and an independently owned and operated Babkirk Facility would have led to important non-price benefits to waste generators in the form of various "value propositions" that include either existing services being provided at lower prices, or new or enhanced services being provided that likely would not otherwise be provided if the Order is not made.

Are the Cognizable Efficiencies Greater than and do they Offset the Effects?

308 Section 96 requires the Tribunal to determine whether the cognizable efficiencies "will be greater than, and will offset" the cognizable effects of any prevention or lessening of competition that will result or is likely to result from a merger.

309 The Tribunal considers that the terms "greater than" and "offset" each contemplate both quantifiable and non-quantifiable (i.e., qualitative) efficiencies. In the Tribunal's view, "greater than" connotes that the efficiencies must be of larger magnitude, or more extensive than, the effects referred to in section 96. This contemplates a balancing of commensurables, even if some of the efficiencies being balanced are not capable of accurate or rough quantification. By contrast, the term "offset" is broad enough to connote a balancing of incommensurables (e.g., apples and oranges) that requires the exercise of subjective judgment to determine whether the efficiencies compensate for the likely effects referred to in section 96.

310 In the case at bar, the Tribunal has found that the cognizable, quantifiable, efficiencies likely to result from the Merger will be a maximum of *[CONFIDENTIAL]* annually. Those are the overhead efficiencies estimated by Dr. Kahwaty. In addition, the Tribunal has found that CCS has not demonstrated, on a balance of probabilities, that the qualitative efficiencies it has claimed are cognizable. In other words, it has not demonstrated that those efficiencies would not likely be attained if the Order were made.

311 On the other hand, the Tribunal has found that the quantifiable Effects are likely to be at least *[CONFIDENTIAL]* annually. That is the value of the minimum DWL associated with the Contestable Area.

312 Based on these findings, it is readily apparent that CCS has not demonstrated that the cognizable, *quantifiable*, efficiencies likely to be brought about by the Merger will likely be "greater than" the *quantifiable* Effects that are likely to result from the Merger. Using a 5.5% discount rate, CCS estimated that the present value of these (overhead) efficiencies to be approximately *[CONFIDENTIAL]*, in comparison with a present value of *[CONFIDENTIAL]* for the aforementioned Effects.

313 Given the Tribunal's conclusion that the Merger would result in a number of important qualitative or other non-quantifiable effects, and that it would not likely bring about significant qualitative, cognizable, efficiencies, it is also readily apparent that the

combined quantitative and qualitative efficiencies are not likely to be "greater than" the combined quantitative and qualitative Effects.

314 In addition, the Tribunal is persuaded, on a balance of probabilities, that even if a zero weighting is given to the *quantifiable* Effects, as CCS submitted should be done, CCS has not satisfied the "offset" element of section 96. In short, the Tribunal is satisfied that the very minor *quantitative* efficiencies, (*[CONFIDENTIAL]* annually) that are cognizable, together with any qualitative or other non-quantifiable efficiencies that may be cognizable, would not "offset" the significant qualitative Effects that it has found are likely to result from the Merger.

315 This conclusion would remain the same even if the Tribunal were to accept and give full weight to the Order Implementation Efficiencies, which only amount to a maximum of *[CONFIDENTIAL]* (which represents one year of transportation cost savings) plus *[CONFIDENTIAL]* (which represents one year of annual market expansion efficiencies).

316 This is because, in the Tribunal's view, the qualitative Effects, when taken together merit substantial weight. That weight is greater than the weight attributable to the aggregate of the cognizable quantitative and qualitative efficiencies under any reasonable approach. In brief, those qualitative Effects are (i) reduced site clean-up and the benefits that such remediation would confer upon "area residents, wildlife, and the overall environment"; and, more importantly, (ii) reduced "value propositions" than would likely otherwise emerge in the relevant market, linking prices to various new or enhanced services.

317 Most importantly, in the absence of the Order, the Merger will maintain a monopolistic structure in the relevant market. In other words, the Merger will not only give rise to the qualitative effects summarized immediately above, but it will also preclude benefits of competition that will arise in ways that will defy prediction.

318 In summary, the Tribunal is satisfied that CCS has not met its burden to establish, on a balance of probabilities, the "greater than" or "offset" elements set forth in section 96.

Issue 9 What is the Appropriate Remedy — Dissolution or Divestiture?

319 An important question under this heading is whether SES is currently a willing purchaser for the Babkirk Site. Surprisingly, when Mr. Amirault of SES testified for the Commissioner, neither her counsel during questioning in chief nor counsel for the Vendors during cross-examination asked Mr. Amirault if SES is still interested in acquiring BLS.

320 The Commissioner's position is that, once she showed that dissolution was an effective and available remedy, the burden of proof shifted to the Vendors to demonstrate that divestiture was an available, effective and less intrusive remedy. The Commissioner maintains that the Vendors were obliged to ask Mr. Amirault if SES is still interested and, because they failed to ask that question and because they failed to lead any evidence about other prospective purchasers, they have no basis to argue that divestiture will be an effective remedy.

321 The Tribunal does not accept the Commissioner's characterization of the onus. In the Tribunal's view, if the Commissioner proposes alternative remedies, as she did in this case, she bears the onus of showing that, although one may be preferable, each is available and effective. Accordingly, the Commissioner's counsel should have asked Mr. Amirault about SES' interest in purchasing the shares of BLS.

322 The Tribunal notes that, in her written final argument, the Commissioner asks the Tribunal not to infer that SES is an interested purchaser. However, in contrast, in final oral argument, counsel for the Commissioner suggested that SES is an interested buyer.

323 The Tribunal accepts the latter submission and has determined, for the following reasons, that SES is likely to make an offer to purchase the Babkirk Facility at some point during the divestiture process under the Order:

- SES has already decided to operate a Secure Landfill in NEBC. It tried unsuccessfully and at considerate expense to secure the Authorizations at its Heritage Site;

• Babkirk already has the necessary Authorizations and SES is confident that its plans to expand the permitted capacity at Babkirk and upgrade the cell design will be approved;

• SES has demonstrated an active and continuing interest in the Babkirk Facility since the Merger. Among other things, this is demonstrated by SES' lawyers' written submissions to the Commissioner and by the participation of its CEO, Mr. Amirault, as a witness in these proceedings.

324 We now turn to the proposed remedies.

325 The Commissioner wants the Babkirk Site operated as a competitive Full Service Secure Landfill and she believes that dissolution will produce this result more quickly than divestiture.

326 Her submission is that, once the Vendors again hold the shares of Complete and have repaid CCS the purchase price, they will be highly motivated to resell Complete or the shares of BLS because this will enable them to recover their funds as soon as possible. However, this submission assumes that the Vendors will immediately be offered a price they are prepared to accept. In the Tribunal's view, there is no basis for this assumption. The evidence is clear that the Vendors have never been willing to be pushed into a quick sale.

327 The Commissioner's submission also assumes that the Vendors will have an incentive to sell quickly because they will be short of funds as a result of having to repay CCS as soon as the shares of Complete are returned to them. This assumption is also questionable, in part because it appears that CCS has indemnified the Vendors against all claims arising from any investigation or actions by the Bureau with respect to the Merger. Given this background, it is possible that CCS may not insist on immediate payment.

328 Even if the Commissioner is correct and the Vendors are cash-strapped and anxious to resell BLS or Complete, the Tribunal still anticipates that they will want an attractive price. It is also important to remember that all five individual Vendors must agree to accept an offer and they will not necessarily be like-minded, in part because some are near retirement and others are in mid-career.

329 The Tribunal notes that two years will have passed since the Babkirk Facility was last for sale. This means that purchasers, other than SES, may show interest, especially given the increasing rate of gas production in the area northwest of Babkirk. Dr. Baye testified that he thought SES, Newalta and Clean Harbours were potential purchasers. As well, it is not unreasonable to think that an oil and gas producer may decide to own and operate a Secure Landfill. The Tribunal heard evidence that *[CONFIDENTIAL]* is considering becoming a part-owner of the Secure Landfill at Peejay. If the Vendors receive multiple offers, protracted negotiations may follow.

330 Finally, if they do not receive an offer they consider attractive, the Vendors are free to change their minds and resurrect their plan to operate a bioremediation facility with an Incidental Secure Landfill. This would not result in the competition the Commissioner seeks because it will only be realized if the Babkirk Facility operates as a Full Service Secure Landfill.

331 There is also the question of whether a purchaser after dissolution will be an effective competitor. In the proposed order for dissolution found at the conclusion of the Commissioner's final argument, she does not seek the right to approve a purchaser and she only asks for notice of a future merger if it is "among the Respondents". In our view, this makes dissolution a less effective remedy.

332 Given all these observations, the Tribunal is concerned that dissolution may not be effective in that it may not lead to a prompt sale and a timely opening of the Babkirk Facility as a Secure Landfill.

333 It is also the case that dissolution is the more intrusive remedy.

334 Three of the Vendors testified about the financial hardship they would face if dissolution were ordered by the Tribunal. Ken Watson's share of the proceeds of the transaction was *[CONFIDENTIAL]*. He testified that if ordered to return the proceeds to CCS, *[CONFIDENTIAL]*, he expects to face significant financial hardship.

335 Randy Wolsey's share of the proceeds was approximately *[CONFIDENTIAL]*. He testified that almost half of the proceeds have been used to develop a property on which he is constructing a new family home. The balance has been invested in the purchase of various investment products. According to Mr. Wolsey, he expects to lose approximately *[CONFIDENTIAL]* if he is forced to make a quick sale on the residential property before the house under construction has been completed.

336 Karen Baker testified that if required to return her share of the proceeds, approximately *[CONFIDENTIAL]*, then her ability to continue to provide financial support to certain small business will be compromised. She also indicated that if the transactions were to be dissolved, she expects that the "work required to reverse the sale and calculate the adjustments required to account for changes in Complete's assets, working capital and lost opportunity costs, as well as the opportunity costs in time away from the other businesses in which [she is] involved, and cost to some of those businesses for replacement personnel to do the work that [she] should be doing, would cause [her] significant stress and emotional hardship."

337 The Commissioner asserts that, in the particular circumstances of this case, hardship is irrelevant, because she warned the Vendors that she would seek dissolution before they sold Complete to CCS. However, in the Tribunal's view it is the right of private parties to disagree with the Commissioner and make their case before the Tribunal. Accordingly, they are not estopped from raising issues of hardship.

338 The Tribunal is also of the view that dissolution is overbroad, since it involves Complete's other businesses and not just BLS.

339 In the spring of 2007, Complete acquired the assets of a municipal waste management business based in Dawson Creek, British Columbia. As noted earlier, those assets included contracts for the management of the Fort St. John and Bessborough municipal landfills and the Dawson Creek Transfer Station, the supply and hauling of roll-off bins, and the provision of rural refuse collections and transfer services. At the time of the Merger, those contracts and related equipment were transferred to CCS. Hazco has been responsible for this business since then.

340 Mr. Garry Smith, the president of Hazco, testified that Hazco has upgraded Complete's trucks and has sold some older equipment which it considered surplus. The two municipal landfill contracts have been extended and are now held directly by Hazco. Complete's employees are now employed by Hazco and there have been personnel changes. At the hearing, Mrs. Baker testified about the impact of the sale of some of the assets. She stated:

> Now, that equipment was older equipment. It wouldn't have brought big money, but the point is it was sufficient for us to do the work that we wanted it to do. Well, now the oil and gas industry is hot, hot up there. Trying to get equipment back, we certainly wouldn't get that equipment back. Any decent used equipment, I have no idea. The prices would be through the roof. Would we buy new equipment? I don't know. So right now, we don't even have the equipment to go back to work

341 To conclude, the Tribunal has decided that dissolution is intrusive, overbroad and will not necessarily lead to a timely opening of the Babkirk Facility as a Full Service Secure Landfill.

342 Turning to divestiture, the Tribunal finds that it is an available and effective remedy. If reasonable but tight timelines are imposed, it will not matter if, as the Commissioner alleges, SES and CCS are reluctant to negotiate because of their outstanding litigation. In the end, if they cannot agree, a trustee will sell the shares or assets of BLS, either to SES or another purchaser approved by the Commissioner. In other words, divestiture will be effective.

343 A divestiture with tight timelines has other advantages. The Commissioner will have the right to pre-approve the purchaser, the person responsible for effecting the divestiture will ultimately be CCS or a professional trustee, rather than five

individuals, the timing will be certain, a sale will ultimately occur and the approved purchaser will compete with Silverberry on a Full Service basis.

344 For all these reasons, the Tribunal will order CCS to divest the shares or assets of BLS.

H. Costs

345 The Commissioner chose dissolution as her preferred remedy when she commenced the Application. She made this choice because she believed that at the time of the Merger, the Vendors were about to construct and operate a Full Service Secure Landfill. For this reason she concluded that the most timely way to introduce competition was to return Babkirk to the Vendors.

346 However, for the reasons given above, the Tribunal has concluded that the Vendors did not intend to operate a Full Service Secure Landfill. This means that the Commissioner has failed to prove the premise which caused her to name the individual Vendors as parties to the Application. In essence she failed to prove her case against them and for this reasons she is liable for their costs.

347 However, during the Vendors' motion for summary disposition which was heard two weeks before the hearing, they indicated that, if the motion was successful and they were removed as parties, four of them would nevertheless attend the hearing to give evidence. The Tribunal assumes that, had done so, they would have been represented by one counsel. Accordingly, the Commissioner is to pay their costs less the legal fees which would have been incurred had they appeared as witnesses.

I. For These Reasons the Tribunal Orders That:

348 CCS is to divest the shares or assets of BLS on or before December 28, 2012 failing which a trustee is to effect a sale on or before March 31, 2013. If possible, the terms for this process are to be agreed between the Commissioner and CCS and are to be submitted to the Tribunal on or before June 22, 2012. If the agreed terms are accepted by the Tribunal, they will be incorporated in a further order to be called the Divestiture Procedure Order. If the Commissioner and CCS cannot agree to terms, each party is to submit a proposed Divestiture Procedure Order on or before June 29, 2012. If necessary, the Tribunal will hear submissions about each party's proposal in early July and then make the Divestiture Procedure Order.

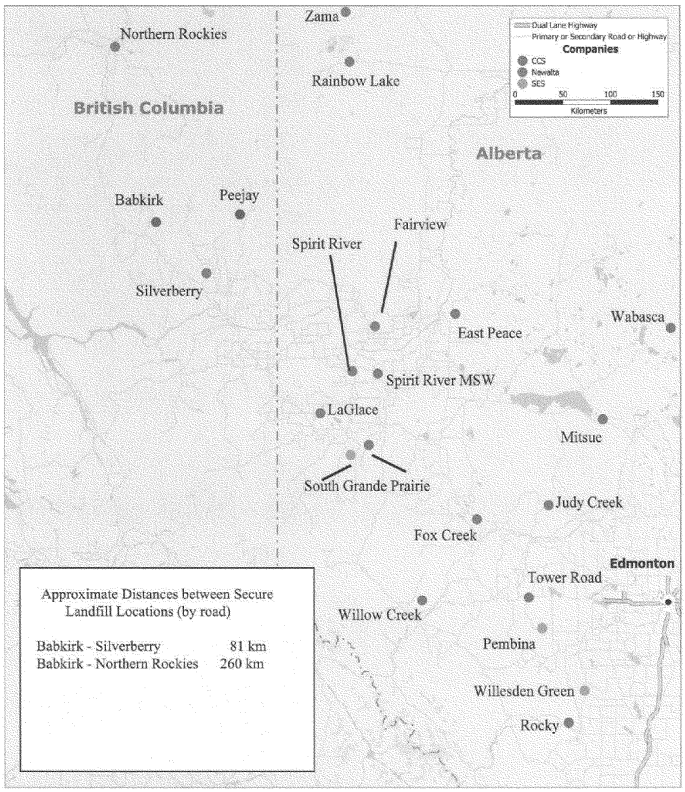
349 CCS is to pay the Commissioner's costs and, because dissolution was not ordered, the Commissioner is to pay the Vendors' costs less the fees they would have paid for legal representation if they had attended as non-parties to give their evidence. The Commissioner is to prepare a bill of costs to be submitted to CCS and the Vendors are to submit a bill of costs to the Commissioner both on or before August 31, 2012. Both are to be prepared in accordance with Federal Court Tariff B at the mid-point of column 3. If by September 14, 2011 no agreement is reached about lump sums to be paid, the Tribunal will hear submissions and fix the awards of costs.

***Paul Crampton Member*:**

J. The Schedules

350 The schedules appear on the following pages:

Schedule A: Map Showing Secure Landfills (based on Exhibit 4-A to Dr. Baye's Expert Report)



Graphic 1

Source: CCS, SES, and Newalta company websites.

This map may be printed in colour.

SCHEDULE "B"

THE EVIDENCE

Witnesses who gave oral testimony (in alphabetical order)

For the Commissioner of Competition

- **Rene Amirault**

President & CEO of Secure Energy Services Inc.

- **Robert Andrews**

Section Head- Environmental Management, Government Unit in the British Columbia Ministry of the Environment.

- **Michael Baye**

Expert Economist - Special Consultant at National Economic Research Associates, Inc. and the Bert Elwert Professor of Business Economics and Public Policy at the Indiana University Kelley School of Business.

- **Chris Hamilton**

Project Assessment Director at the British Columbia Environmental Assessment Office.

- **Andrew Harrington**

Expert on Efficiencies - Managing director of the Toronto office of Duff & Phelps.

• **[CONFIDENTIAL]**

Contracting and Procurement Analyst for the **[CONFIDENTIAL]**.

• **[CONFIDENTIAL]**

Vice-President, Operations at **[CONFIDENTIAL]**.

• **Mark Polet**

Associate at Klohn Crippen Berger Ltd. ("KCB"). KCB is a private, specialized engineering and environmental consulting firm with its head office in Vancouver.

• **Del Reinheimer**

Environmental Management Officer in the Environmental Protection Division at the British Columbia Ministry of the Environment.

• **Devin Scheck**

Director, Waste Management & Reclamation at the British Columbia Oil and Gas Commission.

For the Vendors

• **Karen Baker**

One of the founding shareholders of Complete Environmental Inc.

• **Ronald Baker**

One of the founding shareholders of Complete Environmental Inc.

• **Kenneth Watson**

One of the founding shareholders of Complete Environmental Inc.

• **Randy Wolsey**

One of the founding shareholders of Complete Environmental Inc.

For the Corporate Respondents

• **Trevor Barclay**

Landfill Manager of the Northern Rockies Secure Landfill.

• **James Coughlan**

Director of Sales and Marketing of CCS Corporation

• **Henry Kahwaty**

Expert economist - Director with Berkeley Research Group, LLC.

• **Richard Lane**

Vice-President of CCS Midstream Services, a division of CCS Corporation.

• **Pete Marshall**

Principal of Adelantar Consulting, an environmental consultancy based in Edmonton, Alberta.

• **Daniel Wallace**

Manager, Business Development of CCS Corporation's Midstream Services division

Other Evidence

• The witness statements from those who testified.

• Read-ins from Examinations for Discovery of Karen Baker and Kenneth Watson for the Vendors, Daniel Wallace for the Corporate Respondents and Trevor MacKay for the Commissioner of Competition

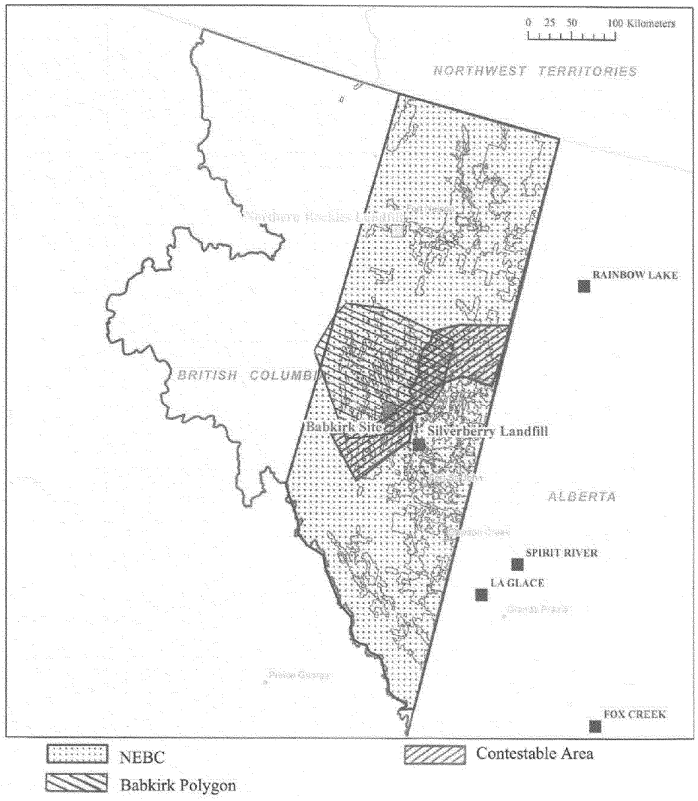
• The statement of agreed facts.

• The witness statements of **Robert Coutts**, President of SkyBase Geomatic Solutions Inc. and **Garry Smith**, President of Hazco Waste Management (owned by CCS). On consent these witnesses were not called to give oral testimony.

• A Joint list of agreed documents.

• The exhibits marked during the hearing.

Schedule C: Map of NEBC, the Contestable Area and the Babkirk Polygon



Graphic 2

K. Concurring Reasons by P. Crampton C.J.

351 Although I participated in the writing of, and signed, the Panel's decision in this case, I would like to comment on certain additional matters.

A. Is CCS's Acquisition of Complete a Merger?

352 At paragraph 56 of the Panel's reasons, it is noted that it was not necessary to decide whether Complete's Roll-off Bin Business or its management of municipal dumps could be a business for the purposes of section 91 of the Act. That said, the conclusion reached by the Chairperson on this point was articulated at paragraph 57. That conclusion was stated as follows:

> [A] business being acquired in a merger must have some relevance to a Commissioner's application. In other words, it must have the potential to impact competition in the markets at issue. This observation means that, in this case, Complete's Roll-off Bin Business and its management of municipal dumps would not have been caught by the definition in section 91 because they are not involved in any way in the disposal or treatment of Hazardous Waste.

353 I respectfully disagree. In my view, the term "business", as contemplated by section 91 of the Act, is not, as the Vendors maintained, confined to a business that competes with a business of an acquiring party. There is no such limitation in section 91 or in the definition of the term "business" that is set forth in subsection 2(1) of the Act.

354 The Vendors attempted to support their position by noting that section 92 of the Act requires that a "merger" prevent or lessen, or be likely to prevent or lessen, competition substantially. However, it is not necessary for a merger to involve two or more competing businesses to have the potential to prevent or lessen competition substantially. For example, the inclusion of the terms "supplier" and "customer" in section 91 reflects Parliament's implicit recognition that a vertical merger may have such an effect. The words "or other person" in section 91 reflect that Parliament also did not wish to exclude the possibility that other types of non-horizontal mergers may also have such an effect.

355 Considering the foregoing, I am not persuaded that the Vendors' position is assisted by reading the words of section 91 "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87, quoted in *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.), at 41; and *Canada (Attorney General) v. Mowat*, 2011 SCC 53 (S.C.C.), at para. 33 (".*Mowat*")). In the absence of any apparent ambiguity, one must adopt an interpretation of section 91 "which respects the words chosen by Parliament" (*Mowat*, above). The principle that the Act be given "such fair, large and liberal construction and interpretation as best ensures the attainment of its objects" also supports the view that section 91 ought not be read in the limited manner suggested by the Vendors (*Interpretation Act*, R.S.C. 1985, c. I-21, s. 12).

356 Indeed, if anything, a reading of section 91 in a manner that is harmonious with the scheme and object of the Act and the intention of Parliament arguably further supports interpreting section 91 in a way that does not require the type of assessment of competitive effects that is contemplated by the interpretation advanced by the Vendors. That is to say, when viewed in the context of the scheme and object of the Act as a whole, it is arguable that section 91 was intended by Parliament to be a gating provision, in respect of which an assessment ordinarily is to be made relatively early on in the evaluation contemplated by sections 92 and 93.

357 For example, all but one of the assessment factors in the non-exhaustive list that is set forth in section 93 refer to the "merger or proposed merger" in respect of which an application under section 92 has been made. In my view, this suggests that the merger or proposed merger in question should be identified before the assessment contemplated by sections 92 and 93 is conducted.

358 If an agreement, arrangement or practice cannot properly be characterized as a merger, it will fall to be investigated under another provision of the Act, such as section 45, section 79, or section 90.1, each of which has a substantive framework which

differs in important respects from the framework set forth in section 92. Indeed, in the case of agreements or arrangements that may be investigated under section 45, which is a criminal provision, there are important procedural implications associated with the decision to pursue a matter under that section, versus under section 90.1, 79 or 92. I recognize that there may be cases in which it may be appropriate to assess a matter under section 92 as well as under one or more of the other provisions mentioned immediately above, for a period of time before an election is made under section 98, 45.1, 79(7) or 90.1(10). However, the scheme of the Act and the interests of administrative efficiency arguably support the view that a determination as to whether a matter ought to be investigated as a merger, rather than a type of conduct addressed elsewhere in the Act, ordinarily should be made before the central substantive determinations under the applicable section of the Act are made. Among other things, such substantive determinations often take several months, and sometimes take much longer, to make.

359 In summary, for all of the foregoing reasons, I have concluded that the term "business" in section 91 is sufficiently broad to include any business in respect of which there is an acquisition or establishment of control or a significant interest, as contemplated therein. In the case at bar, this would include Complete's Roll-off Bin Business, which was fully operational at the time of Complete's acquisition by CCS. It would also include Complete's management of municipal dumps.

B. Market Definition

360 Market definition has traditionally been a central part of merger analysis in Canada and abroad for several reasons. These include (i) helping to focus the assessment on products and locations that are close substitutes for the products and locations of the merging parties, (ii) helping to focus the assessment on the central issue of market power, (iii) helping to identify the merging parties' competitors, (iv) helping to understand the basis for existing levels of price and non-price competition, and (v) facilitating the calculation of market shares and concentration levels. In turn, changes in market shares and concentration levels can be very helpful, albeit not determinative, in understanding the likely competitive effects of mergers and in assisting enforcement agencies to triage cases and to provide guidance to the public.

361 In recent years, developments in antitrust economics have reached the point that the United States Department of Justice and Federal Trade Commission have begun to embrace approaches that "need not rely on market definition" (*Horizontal Merger Guidelines* (August 19, 2010), at § 6.1). Likewise, the MEGs, at paragraph 3.1, have been amended to stipulate that market definition is not necessarily a required step in the Commissioner's assessment of a merger.

362 These developments can be accommodated within the existing framework of the Act and the Tribunal's jurisprudence.

363 In discussing market definition, the Panel noted, at paragraph 92 of its reasons, that the Tribunal has in the past cautioned against losing sight of the ultimate inquiry, which is whether the merger being assessed prevents or lessens, or is likely to prevent or lessen, competition substantially. The Tribunal has also previously noted that the Act does not require that a relevant market be defined in assessing whether competition is likely to be prevented or lessened substantially (*Superior Propane Inc.*, above, at para. 56). The logical implication is that defining a relevant market is not a necessary step in assessing whether a merger prevents or lessens, or is likely to prevent or lessen, competition substantially. Accordingly, it will be open to the Tribunal, in an appropriate case, to make this assessment without defining a relevant market.

364 That said, at this point in time, it is anticipated that such cases will be exceptional. Indeed, failing to define a relevant market may make it very difficult to calculate, or even to reasonably estimate, the actual or likely DWL associated with a merger, for the purposes of the efficiencies defence in section 96 of the Act.

C. The Analytical Framework in a "Prevent" Case

365 At the outset of the Commissioner's final oral argument, her counsel urged the Tribunal to clarify the analytical approach applicable to three areas, namely, (i) the assessment of whether a merger prevents, or is likely to prevent, competition substantially, (ii) the efficiencies defence, and (iii) the circumstances in which the Tribunal will entertain the remedy of dissolution, and what factors will be taken into account in determining the appropriate remedy in any particular case.

366 These topics are all addressed to some extent in the Panel's decision. I would simply like to add some additional comments, particularly with respect to the analytical framework applicable to the Tribunal's assessment of whether a merger prevents, or is likely to prevent, competition substantially.

367 The Tribunal's general focus in assessing cases brought under the "substantial prevention of competition" and "substantial lessening of competition" branches of section 92 is essentially the same. In brief, that focus is upon whether the merged entity is likely to be able to exercise materially greater market power than in the absence of the merger. The same is true with respect to other sections of the Act that contain these words.

368 In determining whether competition is likely to be *lessened*, the more particular focus of the assessment is upon whether the merger is likely to facilitate the exercise of new or increased market power by the merged entity, acting alone or interdependently with one or more rivals. In determining whether competition is likely to be *prevented*, that more particular focus is upon whether the merger is likely to preserve the existing market power of one or both of the merging parties, by preventing the erosion of such market power that otherwise likely would have taken place if the merger did not occur.

369 In making its assessment in the latter context, and with respect to a proposed merger, the Tribunal compares (i) the state of competition that would likely exist if the merger were to proceed, with (ii) the state of competition that would likely exist if the merger did not proceed. Scenario (ii) typically is referred to as the "but for", or "counterfactual", scenario. In the case of a completed merger, that "but for" scenario is the market situation that would have been most likely to emerge had the merger not occurred.

370 When the Tribunal determines that a merger is not likely to enable the merged entity to exercise greater market power than in the absence of the merger, the Tribunal generally will conclude that the merger is not likely to prevent or lessen competition at all, let alone substantially. With respect to allegations that competition is likely to be *lessened*, this conclusion generally will flow from a finding that the merger is not likely to enable the merged entity to *enhance existing, or to create new*, market power. With respect to allegations that competition is likely to be *prevented*, this conclusion generally will flow from a finding that the merger in question is not likely to enable the merged entity to *maintain* greater existing market power than in the absence of the merger. Once again, the foregoing also applies with respect to other sections of the Act that contain the "prevent or lessen competition substantially" test.

371 With respect to sellers, market power is the ability to profitably maintain prices above the competitive level, or to reduce levels of non-price competition (such as service, quality or innovation), for an economically meaningful period of time. With respect to purchasers, market power is the ability to profitably depress prices below the competitive level, or to reduce levels of non-price competition, for such a period of time.

372 In assessing whether market power is likely to be created, enhanced or maintained by a merger or a reviewable trade practice, the Tribunal assesses the intensity of competition, as reflected in its price and non-price dimensions. Competition is a dynamic, *rivalrous process* through which the exercise of market power is prevented or constrained as firms strive, among other things, to develop, produce, distribute, market and ultimately sell their products in rivalry with other firms. That rivalrous process generates the principal source of pressure on firms to innovate new or better products or business methods, and to deliver those products at competitive prices. In turn, those innovations and competitive prices serve to increase aggregate economic welfare in the economy, the economy's international competitiveness and the average standard of living of people in the economy.

373 In assessing the intensity of price competition, the Tribunal focuses upon whether prices are likely to be higher than in the absence of the merger. In assessing the intensity of non-price competition, the Tribunal focuses upon whether levels of service, quality, innovation, or other important non-price dimensions of competition are likely to be lower than in the absence of the merger. This focus ensures that the assessment of the intensity of price and non-price dimensions of competition is *relative*, rather than *absolute*, in nature (*Canada Pipe Co.*, above, at paras. 36 — 38). In short, the assessment of levels of price and non-price competition is made relative to the levels of price and non-price competition that likely would exist "but for" the merger.

The same approach is taken with respect to non-merger matters that require an assessment of whether competition is likely to be prevented or lessened substantially.

374 Competition may be said to be *prevented* when future competition is hindered or impeded from developing. Common examples of such prevention of competition in the merger context include (i) the acquisition of a potential or recent entrant that was likely to expand or to become a meaningful competitor in the relevant market, (ii) an acquisition of an incumbent firm by a potential entrant that otherwise likely would have entered the relevant market *de novo*, and (iii) an acquisition that prevents what otherwise would have been the likely emergence of an important source of competition from an existing or future rival.

375 In determining whether a prevention or lessening of competition is likely to be *substantial*, the Tribunal typically will assess the likely magnitude, scope and duration of any adverse effects on prices or on non-price levels of competition that it may find are likely to result from the creation, enhancement or maintenance of the merged entity's market power. That is to say, the Tribunal assesses the likely degree of such price and non-price effects, the extent of sales within the relevant market in respect of which such effects are likely to be manifested, and the period of time over which such effects are likely to be sustained.

376 With respect to magnitude or degree, the Tribunal has previously defined substantiality in terms of whether customers are "likely to be faced with *significantly* higher prices or *significantly* less choice over a *significant* period of time than they would be likely to experience in the absence of the acquisitions" (*Southam Inc.*, above, at 285, emphasis added). However, given that the Tribunal has now embraced the hypothetical monopolist framework and the SSNIP test for market definition, it is necessary to revisit this definition of substantiality. This is because if the degree of market power used to define relevant markets is the same as the degree of market power used to assess competitive effects, a merger would not be found to be likely to prevent or lessen competition substantially unless the degree of new, enhanced or maintained market power of the merged entity is the same degree of market power held by as the hypothetical monopolist that was conceptualized for the purposes of market definition.

377 Accordingly, the degree of market power used in assessing whether competition is likely to be prevented or lessened substantially must be recalibrated downwards. That recalibrated degree of market power is a level of market power required to maintain prices *materially* higher, or to depress one or more forms of non-price competition to a level that is *materially* lower, than they likely would be in the absence of the merger. As a practical matter, in the case at bar, this distinction between "material" and "significant" is of little significance, because the Panel has found that prices are likely to be significantly (i.e., at least 10%) higher than they would likely have been in the absence of the Merger.

378 Turning to the scope dimension of "substantiality", the Tribunal will assess whether the merged entity, acting alone or interdependently with other firms, likely would have the ability to impose the above-mentioned effects in a material part of the relevant market, or in a respect of a material volume of sales.

379 With respect to the duration dimension of "substantiality", the Tribunal typically will assess whether the merged entity, acting alone or interdependently with other firms, likely would have the ability to sustain the above-mentioned effects for approximately two years or more, relative to the "but for" scenario. This explains why the Tribunal typically assesses future entry and the expansion of potential rivals to the merged entity by reference to a benchmark of approximately two years.

380 When, as in this case, the merger has already occurred and the Commissioner alleges that the merger is likely to prevent competition substantially, the Tribunal's assessment of the duration dimension of "substantiality" will focus on two things. First, the Tribunal will assess whether the entry or expansion that was prevented or forestalled by the merger likely would have been sufficiently timely, and on a sufficient scale, to have resulted in a material reduction of prices, or a material increase in one or more non-price dimensions of competition, had the merger not occurred. If so, the Tribunal will assess whether the entry or expansion of third parties likely will achieve this result, notwithstanding the fact that the merger has occurred.

381 Before assessing whether a likely prevention of future competition would be "substantial," the Tribunal also will assess whether that future competition likely would have materialized "but for" the merger in question. In this regard, the Tribunal will assess whether such competition likely would have developed within a reasonable period of time.

382 What constitutes a reasonable period of time will vary from case to case and will depend on the business under consideration. In situations where steps towards entry or expansion were being taken by the firm whose entry or expansion was prevented or forestalled by the merger, a reasonable period of time would be somewhere in the range of time that typically is required to complete the remaining steps to enter or expand on the scale described above. Similarly, in situations where the entry or expansion was simply in the planning stage, a reasonable period of time would be somewhere in the range of time that typically is required to complete the plans in question and then to complete the steps required to enter or expand on the scale described above. In situations where entry on such a scale cannot occur for several years because, for example, a new blockbuster drug is still in clinical trials, a reasonable period of time would be approximately the period of time that it typically would take for such trials to be completed, relevant regulatory approvals obtained, and commercial quantities of the drug produced and sold. In situations where entry on the scale described above cannot occur for several years because of long term contracts between customers and suppliers, a reasonable period of time would be approximately one year after a volume of business that is sufficient to permit entry or expansion on that scale becomes available.

383 In all cases, the Tribunal must be satisfied that the future competition that is alleged to be prevented by the merger likely would have materialized within a reasonable period of time. If so, the Tribunal will assess whether the prevention of that competition likely would enable the merged entity to exercise materially greater market power than in the absence of the merger, for a period of approximately two years or more, subsequent to that time.

384 Notwithstanding the foregoing, it is important to underscore that the magnitude, scope and duration dimensions of "substantiality" are interrelated. This means that where the merged entity is likely to have the ability to prevent a particularly large price decrease that likely would occur "but for" the merger, the volume of sales in respect of which the price decrease would have had to be experienced before it will be found to be "material" may be less than would otherwise be the case. The same is true with respect to the period of time in respect of which the likely adverse price effects must be experienced — it may be less than the two year period that typically is used. Likewise, where the volume of sales in respect of which a price decrease is likely to occur is particularly large, (i) the degree of price decrease required to meet the "materiality" threshold may be less than would otherwise be the case, and (ii) the period of time required for a prevention of competition to be considered to be "substantial" may be less than two years.

385 In conducting its assessment of whether a merger is likely to prevent competition substantially, the Tribunal also assesses whether other firms likely would enter or expand on a scale similar to that which was prevented or forestalled by the merger, and in a similar timeframe. Where the Tribunal finds that such entry or expansion likely would occur even if the merger proceeds, it is unlikely to conclude that the merger is likely to prevent competition substantially.

386 In summary, to demonstrate that a merger is likely to prevent competition substantially, the Commissioner must establish, on a balance of probabilities, that "but for" the merger, one of the merging parties likely would have entered or expanded within the relevant market within a reasonable period of time, and on a sufficient scale, to effect either a material reduction of prices or a material increase in one or more levels of non-price competition, in a material part of the market, for approximately two years. Alternatively, the Commissioner must establish a similar likely effect on prices or on levels of non-price dimensions of competition as a result of the development of another type of future competition that likely would have occurred "but for" the merger.

D. When Efficiencies Can be Considered

387 The Tribunal's decision in *Propane*, above, has been interpreted as suggesting that cost reductions and other efficiencies can never be considered prior to the triggering of the defence set forth in section 96. This appears to be a misreading of *Propane*. The source of this misunderstanding appears to be found in paragraph 137 of that decision. The focus of the discussion in that paragraph was on the differences between the Canadian and American approaches to efficiencies, and, specifically, whether section 96 requires the efficiencies likely to result from a merger to be so great as to ensure that there are no adverse price effects of the merger.

388 There may well be situations in which any cost reductions or other efficiencies likely to be attained through a merger will increase rivalry, and thereby increase competition, in certain ways. These include: (i) by enabling the merged entity to better compete with its rivals, for example, by assisting two smaller rivals to achieve economies of scale or scope enjoyed by one or more larger rivals, (ii) by increasing the merged entity's incentive to expand production and to reduce prices, thereby reducing its incentive to coordinate with other firms in the market post-merger, and (iii) by leading to the introduction of new or better products or processes.

389 There is no "double counting" of such efficiencies when it is determined that the merger in question is likely to prevent or lessen competition substantially and a trade-off assessment is then conducted under section 96. This is because, in that assessment, such efficiencies would only be considered on the "efficiencies" side of the balancing process contemplated by section 96. They would not directly or indirectly be considered on the "effects" side of the balancing process, because they would not be part of any cognizable (i) quantitative effects (e.g., the DWL or any portion of the wealth transfer that may be established to represent socially adverse effects), or (ii) qualitative effects (e.g., a reduction in dynamic competition, service or quality). Moreover, at the section 92 stage of the analysis, they typically would not be found to be a source of any new, increased or maintained market power that must be identified in order to conclude that the merger is likely to prevent or lessen competition substantially.

E. The Efficiencies Defence

390 The analytical framework applicable to the assessment of the efficiencies defence has been set forth in significant detail in the Panel's decision. I simply wish to make a few additional observations.

(i) Conceptual framework

391 In broad terms, section 96 contemplates a balancing of (i) the "cost" to the economy that would be associated with making the order that the Tribunal has determined should otherwise be made under section 92 (the "Section 92 Order"), and (ii) the "cost" to the economy of not making the Section 92 Order. The former cost is the aggregate of the lost efficiencies that otherwise would likely be attained as a result of the merger. The latter cost is the aggregate of the effects of any prevention or lessening of competition likely to result from the merger, if the Section 92 Order is not made.

392 Section 96 achieves this balancing of "costs" by (i) confining efficiencies that are cognizable in the trade-off assessment to those that "would not likely be attained if the [Section 92 Order] were made", as contemplated by subsection 96(1), and (ii) confining the effects that may be considered in the trade-off assessment to "the effects of any prevention or lessening of competition that will result or is likely to result from the merger or proposed merger".

393 In short, the efficiencies that are eliminated by this language in subsection 96(1), which is referred to at paragraph 264 of the Panel's decision as the fifth "screen" established by section 96, are not considered in the trade-off assessment because they would not represent a "cost" to society associated with making the Section 92 Order. That is to say, the efficiencies excluded by this screen either would likely be achieved through alternative means in any event, or they would be unaffected by the Section 92 Order. This could occur, for example, because they would be attained in one or more markets or parts of the merged entity's operations that would be unaffected by the Section 92 Order. It is in this sense that the assessment contemplated by section 96 is heavily dependent on the nature of the Section 92 Order.

394 That said, to the extent that there are efficiencies in other markets that are so inextricably linked to the cognizable efficiencies in the relevant market(s) that they would not likely be attained if the Section 92 Order were made, they are cognizable under section 96 and will be included in the trade-off assessment.

395 In assessing whether efficiencies are likely to be achieved through alternative means, the Tribunal will assess the realities of the market(s) concerned, and will not exclude efficiencies from its analysis on the basis of speculation that the efficiencies could *possibly* be achieved through such alternative means.

396 It bears emphasizing that, under section 96, the relevant counterfactual is the scenario in which the Section 92 Order is made. This is not necessarily the scenario in which the merger does not occur.

(ii) Socially adverse effects

397 At paragraph 284 of the Panel's decision, it was observed that the Commissioner adduced no evidence with respect to what the Tribunal in the past has characterized as being *socially adverse* effects. The Panel also observed that the Commissioner conceded that the merger is not likely to result in any such effects. Accordingly, the Panel confined its assessment to the *anti-competitive* effects claimed by the Commissioner.

398 However, given that the Commissioner requested, in her final oral submissions, that the Panel clarify the analytical approach applicable to the efficiencies defence, the following observations will be provided with respect to the potential role of socially adverse effects in the trade-off analysis contemplated by section 96, in future cases.

399 At paragraph 205 of its final argument, CCS characterized the approach established by the Federal Court of Appeal in *Propane*, above, as being the "balancing weights approach." This is the same terminology that was used by Dr. Baye at footnote 14 of his reply report, where he referred to the approach established in *Propane*, above, and *Propane*, above. However, as the Tribunal noted in *Propane*, at para. 336, balancing weights "is incomplete [as an approach] and useful only as a tool to assist in its broader inquiry" under section 96. With this in mind, the Tribunal characterized that broader inquiry mandated by *Propane* in terms of the "socially adverse effects" approach. However, on reflection, the term "weighted surplus" approach would seem to be preferable.

400 As noted at paragraphs 281 — 283 of the Panel's decision, the total surplus approach remains the starting point for assessing the effects contemplated by the efficiencies defence set forth in section 96 of the Act. After the Tribunal has assessed the evidence with respect to the quantifiable (i.e., the DWL) and non-quantifiable anti-competitive effects of the merger in question, it will assess any evidence that has been tendered with respect to socially adverse effects. In other words, if the Commissioner alleges that the merger is likely to give rise to socially adverse effects, the Tribunal will determine how to treat the wealth transfer that is likely to be associated with any adverse price effects of the merger. The wealth transfer is briefly discussed at paragraph 282 of the Panel's decision.

401 As the Tribunal observed in *Propane*, above, at para. 372, "demonstrating significant adverse redistributional effects in merger review will, in most instances, not be an easy task." Among other things, determining how to treat the wealth transfer will require "a value judgment and will depend on the characteristics of [the affected] consumers and shareholders" (*Propane*, above, at para. 329). It will "rarely [be] so clear where or how the redistributive effects are experienced" (*Propane*, above, at para. 329). In general, the exercise "will involve multiple social decisions" and "[f]airness and equity [will] require complete data on socio-economic profiles on [*sic*] consumers and shareholders of producers to know whether the redistributive effects are socially neutral, positive or adverse" (*Propane*, above, at paras. 329 and 333).

402 Where it is determined that the merger likely will result in a socially adverse transfer of wealth from one or more identified lower income group(s) to higher income shareholders of the merged entity, a subjective decision must be made as to how to weigh the relevant part(s) of the wealth transfer. (If the entire wealth transfer will involve a socially adverse transfer, then it would be necessary to decide how to weigh the full transfer.) If the income effect on some purchaser groups would be more severe than on others, different weightings among the groups may be required.

403 It is at this point in the assessment that the balancing weights tool can be of some assistance. As proposed by Professor Peter Townley, one of the Commissioner's experts in *Propane*, above, this tool simply involves determining the weight that would have to be given to the aggregate reduction in consumer surplus (*i.e.*, the sum of the deadweight loss, including any deadweight loss attributable to pre-existing market power, plus the wealth transfer) in order for it to equal the increased producer surplus that would likely result from the merger (*i.e.*, the sum of the efficiency gains and the wealth transfer). (See the Affidavit of Peter G.C. Townley, submitted in *Propane*, above, (available at http://www.ct-tc.gc.ca/CMFiles/CT-1998-002_0115_38LES-1112005-8602.pdf).)

404 For example, in *Propane*, the aggregate reduction in consumer surplus was estimated to be $43.5 million, *i.e.*, the estimated $40.5 million wealth transfer plus the estimated $3 million DWL. By comparison, the aggregate increase in producer surplus was estimated to be $69.7 million, *i.e.*, the sum of the efficiency gains accepted by the Tribunal, namely $29.2 million, plus the wealth transfer of $40.5 million. The balancing weight was therefore represented by *w* in the following formula: 1(69.7) — *w* ($43.5) = 0. Solving for *w* yielded a value of 1.6, which was the weight at which the consumer losses and the producer gains just balanced. (See *Propane*, above, at paras. 102-104.) Accordingly, for consumer losses to outweigh producer gains, they would have had to be given a weight of greater than 1.6, assuming that producer gains were given a weight of 1.

405 Professor Townley's helpful insight was that members of the Tribunal often would be in a position to subjectively determine, even in the absence of substantial information, whether there was any reasonable basis for believing that a weighting greater than the balancing weight ought to be applied to the socially adverse portion(s) of the wealth transfer. If not, then notwithstanding an insufficiency of the information required to accurately calculate a full set of distributional weights, it could be concluded that the efficiencies likely to result from the merger would outweigh the adverse effects on consumer surplus. Unfortunately, there was not sufficient information adduced in *Propane* to permit the Tribunal to assess whether the estimated balancing weight of 1.6 was reasonable, given the socio-economic differences between and among consumers and shareholders (*Propane*, above, at para. 338).

406 Where the balancing weights tool does not facilitate a determination of the weights to be assigned to any identified socially adverse effects, other evidence may be relied upon to assist in this regard. For example, in *Propane*, the Tribunal relied upon Statistics Canada's report entitled *Family Expenditure in Canada, 1996*, which suggested that only 4.7% of purchasers of bottled propane were from the lowest-income quintile, while 29.1% were from the highest-income quintile. The Tribunal ultimately determined that the redistributive effects of the merger on customers in the lowest-income quintile would be socially adverse, and included in its trade-off analysis an estimate of $2.6 million to reflect those adverse effects. Although it found that it had no basis upon which to determine whether the DWL should be weighted equally with adverse redistribution effects, the Tribunal ultimately concluded that, even if the $2.6 million in adverse distribution effects were weighted twice as heavily as the $3 million reduction in DWL and a further $3 million to represent the adverse qualitative effects of the merger, the combined adverse impact on consumer surplus would not exceed $11.2 million (*Propane*, above, at para. 371). Since that estimate was still far below the recognized efficiency gains of $29.2 million, it concluded that the defence in section 96 had been met. This conclusion was upheld on appeal.

(iii) Non-quantifiable/qualitative effects

407 The Panel's assessment of the non-quantifiable effects that were considered in the section 96 trade-off assessment in this case is set forth at paragraphs 305-307 of its reasons.

408 I simply wish to add that where there is not sufficient evidence to quantify, even roughly, effects that ordinarily would be quantifiable, it will remain open to the Tribunal to accord *qualitative* weight to such effects. For example, in the case at bar, it would have been open to accord qualitative weight to the anti-competitive effects of the Merger expected to occur outside the Contestable Area, given that the evidence established that such effects were likely, but could not be calculated due to shortcomings in the evidence. As it turned out, it was unnecessary for the Panel to give those effects any weighting whatsoever.

409 Similarly, had the Panel not accepted the Commissioner's evidence with respect to the quantitative magnitude of the DWL, such that there was then no evidence on this specific matter, it would have been open to the Panel to accord qualitative weight to the fact that there would have been *some* significant DWL associated with the adverse price effects which it determined were likely to result from the Merger. The same will be true in other cases in which either it is not possible to reliably quantify the likely DWL, even in rough terms, or the Commissioner fails to adduce reliable evidence regarding the extent of the likely DWL, at the appropriate time.

TAB 7

Competition Tribunal Tribunal de la Concurrence

CT - 1991 / 001 – Doc # 155a

IN THE MATTER OF an application by the Director of Investigation and Research for orders pursuant to section 92 of the *Competition Act*, R.S.C., 1985, c. C-34, as amended;

AND IN THE MATTER OF the acquisition by Hillsdown Holdings (Canada) Limited of 56% of the common shares of Canada Packers Inc.

B E T W E E N:

The Director of Investigation and Research

Applicant

- and -

Hillsdown Holdings (Canada) Limited
Maple Leaf Foods Inc.
Nine-Five Investments Limited
Ontario Rendering Company Limited

Respondents

REASONS AND ORDER

Dates of Hearing:

November 25-28, December 2-5, 9-10 and 18-19, 1991

Presiding Member:

The Honourable Madame Justice Barbara J. Reed

Lay Members:

Madame Marie-Hélène Sarrazin
Mr. Victor L. Clarke

Counsel for the Applicant:

Director of Investigation and Research

Randal T. Hughes
Peter J. Cavanagh
Rory R. Edge
Andrea Safer

Counsel for the Respondents:

Hillsdown Holdings (Canada) Limited
Maple Leaf Foods Inc.
Nine-Five Investments Limited
Ontario Rendering Company Limited

Glenn F. Leslie
Neil R. Finkelstein
John J. Quinn
Jeffrey W. Galway
George Vegh

INDEX

COMPETITION TRIBUNAL

REASONS AND ORDER

The Director of Investigation and Research

v.

Hillsdown Holdings (Canada) Limited et al.

I. INTRODUCTION

An application is brought by the Director of Investigation and Research ("Director") pursuant to subparagraph 92(1)(e)(ii) of the *Competition Act*,[1] to require the respondent Hillsdown Holdings (Canada) Limited ("Hillsdown") to divest itself of the business operated by the respondent Ontario Rendering Company Limited ("Orenco") or to divest such assets as the Tribunal may designate.

The application was triggered by Hillsdown's acquisition on July 4, 1990 of Canada Packers Inc. As a result of that acquisition Hillsdown obtained control of Orenco, a rendering company previously controlled by Canada Packers Inc. Hillsdown already controlled, through its wholly-owned subsidiary, Maple Leaf Mills Limited, a rendering business carried on by its rendering division, Rothsay. It is alleged that the common control of these two

---

1 R.S.C., 1985, c. C-34, as amended.

businesses is likely to result in a substantial lessening of competition in the non-captive red meat rendering market in southern Ontario.

Subsequent to the acquisition, Canada Packers Inc. and Maple Leaf Mills Limited were amalgamated and continued under the name Canada Packers Inc. This name was subsequently changed to Maple Leaf Foods Inc. Orenco is presently operated as a wholly-owned subsidiary of Nine-Five Investments Limited which is in turn a wholly-owned subsidiary of Maple Leaf Foods Inc.

Orenco operates a rendering facility in Dundas, Ontario. Rothsay operates a facility in Moorefield, Ontario. The two sites are within approximately 60 miles of each other. Orenco and Rothsay (Moorefield) are approximately 40 miles west and 90 miles northwest of Toronto respectively. Rothsay also operated until recently a rendering facility at a lakeshore location in downtown Toronto ("Rothsay (Toronto)"). This property was expropriated by the City of Toronto on July 26, 1988. The facility was finally closed on November 30, 1990 after Rothsay had moved its Toronto business to the Orenco plant in Dundas and elsewhere.

The interaction of the expropriation and the merger is a major complicating factor in this case. The respondents argue that significant efficiencies occurred as a result of the merger. The applicant contends that the moving of the Rothsay (Toronto) business to Orenco and elsewhere was not a

rationalization arising as a result of the merger but a response to the expropriation notice which Rothsay (Toronto), at this time, was under. The transfer of the Rothsay (Toronto) business to Orenco occurred before the Director filed his application on February 15, 1991, seeking divestiture of the Orenco business. Thus, the interim order requiring that the two businesses be held separate and apart was obtained only after the integration of Rothsay (Toronto) and Orenco had been underway for some time. An additional important consideration in this case is the contracting nature of the red meat rendering business. The respondents say it is declining. The applicant says it is flat.

II. THE RENDERING BUSINESS

Rendering involves the processing of the left-over parts of livestock such as cattle, hogs and poultry which are either unfit or unsuitable for human consumption. The primary sources of supply for renderable materials are slaughterhouses, meat packing plants, poultry processing plants, abattoirs, grocery stores and butcher shops. The materials include: fresh packing house material (such as beef and pork heads, feet, offal, bones, fat and blood); material such as fat and bone discarded in preparing cuts for the retail consumer trade; and poultry material including offal and feathers. Renderable material is also obtained from deadstock, that is, from animals which have died or been killed outside the

slaughtering process.[2] Such animals may have died as a result of disease or accident on the farm or in transit to the slaughterhouse.

The quantity of renderable material available depends on the number of cattle, hogs and poultry which are killed in the market area served by the renderer. This in turn will vary with consumer demand for beef, pork and poultry products. Slaughterhouses are required to have all renderable materials produced as a result of a day's kill removed before they can commence operation the following day. The value of the renderable material compared to the value of a cattle beast or hog is insignificant.[3] Thus, the supply of renderable material does not depend on the price paid by the renderer for the material. The supply of renderable material is essentially inelastic in response to the price paid for it.

Two types of renderers exist. One is the "integrated renderer" which processes material produced in the slaughtering, packing or processing activities of affiliates in a vertically integrated operation (captive material). The other is the "non-integrated renderer" which collects and processes renderable material obtained from suppliers who are not affiliated with the renderer (non-captive material). Integrated renderers may or may not also process renderable material that is non-captive. Both Orenco and Rothsay are integrated renderers that also process non-captive material.

---

[2] Often referred to in the evidence as "fallen animals".

[3] The ratio of the value of the renderable material as a percentage of carcass cost, as of June 1991, was estimated as 1.15% for beef and 0.38% for hogs.

Non-captive material is picked up in specially equipped trucks. The renderer either pays the supplier for the renderable material or charges the supplier for its collection. Whether the material is purchased or a charge is levied depends upon a number of factors including the type of renderable material involved, the volume being acquired, and transportation and processing costs. Deadstock is often picked up from the farm by deadstock collectors rather than by the renderer directly. The collectors remove the hide for tanning and debone the carcass to provide meat for pet food. The rest of the carcass is then delivered to the rendering facility or picked up at the deadstock plant by the renderer.

At the rendering plant the material which has been collected is graded, sorted and dumped into receiving pits. It is then processed through either a continuous or batch rendering cooker. This involves cooking the material in a pressure cooker and feeding it through a press. Blood can either be rendered with other red meat by-products or separately. Poultry feathers are processed in specialized equipment (a hydrolyzer) and are processed separately.

Two products are produced from the rendering process: tallow and protein meal. Tallow is used in the production of soaps, animal feeds, cosmetics, paints, rubbers and in a variety of other consumer and industrial products. It is produced in a variety of grades (for example, top white, bleachable fancy, special, yellow grease, pet food grade). The grade or quality of the tallow depends upon

the type of renderable material from which it comes. Beef tallow is the highest quality, white in colour and has a comparatively high melting point (titre point). Tallow produced from poultry material is yellow in colour and has a lower melting point. Tallow produced from pork materials is of an intermediate quality.

The meal produced from the rendering process is used primarily in animal feed, fertilizers and pet food manufacturing. It also comes in a variety of grades depending upon its protein value. Blood meal is the highest quality. Meal rendered from poultry material is of a higher quality than meal rendered from red meat material.

Both the tallow and the meals compete with products such as coconut oil, palm oil, soya oil and soya meal which are sold on the commodities markets. The prices at which the products produced by the rendering process can be sold, then, are determined by the international market. A bulletin is published weekly in Ontario by a brokerage house called Eastern Packinghouse Brokers Ltd. It lists the current prices for at least some of the various grades of tallow and protein meal. The protein meal is listed as Unground Dried Rendered Tankage (U.D.R.T.) and its price varies with its protein content. The renderer thus is a "price-taker" with respect to these products.

III. EXPROPRIATION THEN MERGER

On July 26, 1988 an expropriation notice was issued by the City of Toronto transferring ownership of the land on which the Rothsay (Toronto) facility[4] was located to the Corporation of the City of Toronto. The City notified Rothsay that it required possession of this property by November 1, 1988.

Rothsay negotiated with the City for an extension of the time limit to enable it to find alternate premises from which to operate its business. Rothsay did not vacate the premises on November 1, 1988 and a lease with the City was eventually signed on December 19, 1989. That lease was stated to be for the period November 1, 1988 to June 30, 1990. A clause which would have required Rothsay to waive any right to apply, at the end of the lease period, for a postponement of the City's claim for possession was explicitly deleted from the lease.

Rothsay sought information concerning possible sites for the relocation of its Toronto business. The Hamilton harbour area was identified as the best. Rothsay commenced negotiations with the Hamilton Harbour Commission. Appropriate sites were identified and the Hamilton Harbour Commission was willing to accept Rothsay as a tenant. Unfortunately, the Harbour Commission was slow in acquiring the property required for the relocation. Rothsay also began exploring the possibility of expanding its Moorefield facility in order to accommodate the Toronto volumes.

---

[4] Maple Leaf Mills Limited was the legal entity that held title to the property which was expropriated.

By March 1990, Rothsay was still waiting for the Hamilton Harbour Commission to come forward with a proposal. As an alternative it decided to "fast track" expansion of its Moorefield facility. Any expansion of the Moorefield facility required approval from the provincial Ministry of the Environment which would entail at some point a public meeting to explain and discuss the proposal. Rothsay estimated that Ministry of the Environment approval might be obtained by December 31, 1990 and construction of the expanded facilities completed nine to twelve months thereafter. It therefore sought an extension of its lease with the City of Toronto until December 31, 1991.[5] The City granted an extension to August 31, 1990 with the indication that any further extension would be considered after discussion with its business consultants. A further extension to September 30, 1990 was granted because the City's business consultants were not available to consult during July and August.

On May 29, 1990 a representative of Rothsay met with Orenco for the purpose of seeing if that company could process the Rothsay (Toronto) volumes. It is clear that the possibility of a Hillsdown acquisition of Canada Packers Inc. was known. An attempt was made to characterize this meeting as having as its primary purpose the assessment of Pat Jones, who was general manager of Orenco, to see if he would fit into the Rothsay organization after a merger should such occur. That is not a credible characterization of the purpose of the meeting. The notes of Joseph F. Kosalle, Vice-President, Finance,

---

[5] Applicant's Selected Documents, vol. 1, tab 19 at 43 (Exhibit A-7); vol. 2, tab 185 at 2 (Exhibit A-8).

Agribusiness Group of Maple Leaf Foods Inc., regarding the meeting make it clear that the primary purpose was to seek a solution for rendering the Rothsay (Toronto) volumes. The assessment of Mr. Jones as a potential employee was an unexpected afterthought.

The documentary evidence makes it clear that Orenco contemplated during the second half of its 1990 fiscal year upgrading certain components of its rendering equipment. The equipment in place was old and the company was operating at or above capacity.[6] Adequate time for preventive maintenance was not available and when breakdowns occurred the company was vulnerable to losses arising therefrom. Part of the planned expansion involved installation of a hydrolyzer to enable Orenco to process poultry feathers.

Mr. Jones told Rothsay that Orenco was prepared to process the Rothsay (Toronto) volumes "with or without a merger". As of May 29, 1990, Orenco estimated that it would take six months for it to put certain equipment in place so that it could render the additional red meat material and if some of Rothsay's Toronto equipment was used for this purpose, the time frame would be even shorter. Thus, should Rothsay have been required by the City to leave the Toronto harbour area before either a new facility was built in Hamilton or Moorefield expanded, an available option was to have Orenco process the

---

[6] Joint Book of Documents, vol. 15B, tab 56 at 9, 11, 50 (Exhibit JB-15B).

Toronto volumes for the interim period. It is clear that tolling agreements between renderers are not uncommon in the industry.

In June 1990, Rothsay submitted reports concerning environmental concerns (water pollution and odour control) to the Ministry of the Environment regarding the proposed expansion of Moorefield. Ministry of the Environment concept approval for the expansion and an expression of support with respect thereto were eventually communicated to Rothsay sometime in or prior to November 1990. The public hearing necessary before final approval could be given was never held since sometime before November 30, 1990, Rothsay had moved a significant portion of its Toronto volumes to Orenco and relinquished what was by that time its month-by-month lease to the City.

A reorganization of the collection and processing of renderable material took place after the merger and the relinquishment of the Toronto premises. This resulted in renderable materials east of Oshawa, which had previously been collected by both Orenco and Rothsay (Toronto), being collected by Rothsay's rendering facility near Montreal, Laurenco, for processing at that plant. Prior to the merger, Rothsay (Laurenco) had been losing money due to low volumes.[7] Oshawa is approximately 270 miles from Montreal. Some materials which had previously been rendered at Rothsay (Moorefield) were sent to Orenco.

[7] The transfer of approximately 150,000 lbs (68 metric tonnes) per week to that location did not appreciably improve Laurenco's financial situation because volumes have continued to decline. (Transcript at 703 (3 December 1991)).

Rothsay (Moorefield) was able then to process one-third of the remaining Rothsay (Toronto) volumes and Orenco processed the other two-thirds.

IV. MARKET DEFINITION

In order to determine the likely effects of any merger or acquisition it is first necessary to determine the boundaries of the *relevant* market. A *relevant* market is that product or service with respect to which after a merger there is likely to be a substantial lessening of competition. Once the *relevant* market is defined, an assessment can be made as to the likely effect of the merger or acquisition on that market. Market boundaries, however, are not static. They expand and contract in response to price. One can conceptually think of a series of concentric areas whereby as the price rises the radii lengthen. The very definition of the market boundaries therefore carries with it an assessment as to whether the merged firm has or is likely to have market power. While the various elements relevant in considering the effect of a merger, first market boundaries and then whether a substantial lessening of competition is likely to occur, will be discussed in a linear fashion, the non-linear aspect of the analysis should be kept in mind.[8]

It is useful to refer to the explanation of the concept of a *relevant* market set out in the monograph *Horizontal Mergers: Law and Policy*:

---

[8] H. Hovenkamp, *Economics and Federal Antitrust Law* (St. Paul, Minn.: West, 1985) at 58:

The correlation between market share and market power can be rigorously expressed in a formula. However, the formula contains *three* relevant variables: market share, market demand elasticity, and the elasticity of supply of competing and fringe firms. If the two elasticity variables remain constant, then market power would be proportional to market share. In the real world, however, market elasticities vary greatly from one market to another. Thus in order to estimate a firm's market power we must gather some information not only about a firm's market share, but also about the demand and supply conditions that it faces.

For purposes of assessing the likelihood that a merger will create or enhance single-firm market power, market definition has been characterized as "an analytical construct enabling us to compensate for our inability to measure market power directly." Areeda and Turner explain:

> Market definition becomes crucial only when there are no other discoverable facts establishing the existence and degree of market power more directly and with tolerable accuracy. One would never need to define the market if he could accurately establish the firm's demand and cost curves - the quantities that could be sold at various prices, and the costs of producing those quantities. That information would directly establish both the presence of market power and the magnitude of potential monopoly profits. The firm's demand curve would reflect the availability of any substitutes, without further need for identifying them or their closeness.

Because direct measurement of a firm's market power is extraordinarily difficult, a two-step indirect measurement process has evolved: first define the relevant market, and then infer power within the market through the use of proxies such as market shares and other factors.[9] (footnotes omitted)

[9] ABA Antitrust Section, Monograph No. 12, (1986) at 62-63.

The identification of the relevant market in which it is alleged a substantial lessening of competition is likely to occur is normally assessed from two perspectives: the product or products with respect to which a merged firm acting alone or in concert with others is likely to be able to exercise market power and the geographic area within which such power is likely to be exercised.[10] The term "product" is used in the legal and economic literature relevant to competition law as meaning the output (product or service) which the producer (seller) provides to the consumer (purchaser). Thus, the use of that term should not be taken as excluding services.[11]

A. Product Dimension (Product Market)

Conceptually, the product in issue in this case can be thought of as the renderable material obtained by the renderers from the suppliers of that material or it can be thought of as rendering services provided by the renderers to slaughterhouses, meat processing plants, grocery stores, etc. If the first characterization is used then the analysis for competition purposes focuses on the possible monopsony power of the renderers as buyers of the raw materials. If the second characterization is used then the analysis focuses on the possible market power of the renderers as sellers of the rendering service. No significant difference results from the two characterizations. The Tribunal accepts that the

---

[10] *Ibid*. at 59-61 for a discussion of relevant markets.

[11] Subsection 2(1) of the *Competition Act* expressly provides that for the purposes of the Act "product" includes an article and a service.

more convenient way of describing the product is the latter, that is, as the sale of rendering services. This is more convenient because it avoids the conceptual awkwardness which arises from the fact that sometimes the renderer pays for the renderable materials and sometimes charges for its collection.

In determining the product dimensions of the market, the first step is to identify the product or products with respect to which, prior to the merger, the two firms were competitors. The second step is to ask whether there are any close substitutes to that product to which consumers could easily switch if prices were raised (an indication of demand elasticity). If two products appear to be close substitutes when both are sold at marginal cost, then the two should be included in the same product market.

At the time of the acquisition, Rothsay (Moorefield) rendered red meat by-products, blood, deadstock, poultry offal and feathers. Orenco rendered red meat by-products, blood, deadstock and grease but not poultry offal or feathers. Rothsay (Toronto) rendered the same kind of materials as Orenco.

The grease rendered by both Rothsay (Toronto) and Orenco is in general "restaurant grease" which has been used for deep frying certain foods. Although both Rothsay (Toronto) and Orenco processed grease it is processed differently from other renderable materials, usually in different equipment and it is collected independently of the other renderable materials. Rothsay (Moorefield)

has not and does not render grease. Little evidence was led with respect to grease or as to how the merger affected competition in this segment of the industry. Thus, it has not been established that it should be considered as part of the relevant product market.

The Director has not suggested that poultry offal and feathers should be included in the relevant market. Orenco did not process such material before the merger. It lacked the equipment required to process poultry feathers. Special equipment is not required to render poultry offal. While there is some documentation which indicates that prior to the merger Orenco was planning to acquire equipment to enable it to process poultry feathers, it has not been suggested by the Director that the merger would lead to any substantial lessening of competition with respect to rendering services for producers of that material.

Prior to the acquisition approximately 30% of the material rendered by Orenco came from affiliated Canada Packers Inc. operations. The remaining 70% was acquired from non-captive sources. Approximately 14% of Rothsay's material came from affiliated Maple Leaf Mills Limited operations. The remaining 86% was acquired from non-captive sources. There is no dispute that captive materials are not included in the product dimension of the relevant market.

It is clear that there are few "product substitutes", that is, alternatives available to the consumer of rendering services (demand elasticity is low). Some deadstock presumably might be buried but this is not a viable option for a significant amount of renderable material.[12] Landfill-site regulations often prohibit the disposal of renderable material at those locations and, as noted above, slaughterhouses require that renderable materials be removed on a daily basis.

While conceptually it would seem that supply elasticity with respect to the product dimensions of the market should also be included in defining the market, this factor is often considered when assessing whether the merger is likely to lessen competition substantially in the relevant market. Supply elasticity would be high and market power therefore would not likely be significant if other firms could immediately respond to a price rise by flooding the market with the relevant product either because they have excess capacity or because they can easily switch their production facilities to produce the relevant product. Those factors will be considered when the likelihood of substantial lessening of competition is assessed.[13]

---

[12] Ronald L. Dancey gave evidence that when Orenco started charging seven cents a pound for the collection of blood rather than picking it up at no charge, his company, Morrison's Meat Packers Limited, started routing the blood into a holding tank to be pumped out as sewage. (Transcript at 130, 158 (26 November 1991)).

[13] A discussion of three different ways of treating supply substitution, i.e., when defining the market, when determining market shares or when assessing the significance of market share figures, is found in G.J. Werden, "Market Delineation and the Justice Departments' Merger Guidelines" [1983] Duke L.J. 514 at 518-20.

The Tribunal accepts the Director's contention that the product dimension of the relevant market is the provision of rendering services for non-captive red meat renderable material which includes deadstock materials and blood.

B. Geographic Dimension (Geographic Market)

Determining the geographic dimensions of the relevant market is similar to determining the product dimensions; one asks whether there is a geographic area within which the merged firm either alone or in concert with others is likely to have market power. This requires identifying some area such that the merged firm has an advantage based on geographic considerations over firms not inside that area. Frequently this advantage results from transportation costs but often other factors may also be relevant, such as differing labour costs in the two areas or governmental restrictions and regulations.[14]

An assessment of geographic boundaries requires an assessment as to whether a significant number of consumers within the alleged area are willing to turn to suppliers outside of that area to obtain, in this case, rendering services and whether there are suppliers outside the proposed boundary who could supply consumers within that area with rendering services, as effective competitors to the

[14] The United States jurisprudence indicates that the definition of the geographic dimension of the relevant market has been determined by reference to tests such as: the area where "the effect of the merger on competition will be direct and immediate" or "the area in which the acquired firm is an actual direct competitor". (*United States v. Marine Bancorporation*, 418 U.S. 602, at 619, 622 (1973)).

merged firm (indicators of demand elasticity and supply elasticity respectively). It is clear that such switching or "substitutability" is more likely to occur on the edges of the defined geographic boundaries as the distance between the consumer of rendering services and the merged plant increases, provided there is another supplier of rendering services in the vicinity. Clearly, geographic boundaries of adjacent markets overlap and they are neither static nor precise. As in the case of the product market dimensions, a useful starting point for their definition is the existing pattern or patterns of competition which existed pre-merger.

The geographic dimensions of the market in issue in this case will be discussed by reference to three factors: distance, borders and consumer preference.

(1) Distance

The Director adopted submissions which were made to him on behalf of the respondents as accurately describing the distances applicable in defining the geographic dimensions of the relevant market:

> A good indicator of the relevant geographic market of a renderer is its current collection area. In general, the distance a renderer will travel to collect raw material is directly related to the value of the material available. There are three factors that affect the value of raw material and, thus, delineate the geographic area from which a renderer can effectively collect raw material: the type of raw material available, the perishable nature of the raw material and the cost of collection.
>
> ...

The interplay of these factors sets the distance from a rendering plant that a renderer will travel to get raw material. The need for product freshness sets a maximum collection distance. In general, waste is not [to] be shipped more than a few hundred miles because of the need for freshness. Because of transportation costs, a renderer will only travel that far for a large supply of high quality materials. For small amounts, the maximum distance might only be 75 to 100 miles.

...

The only possible overlap in the collecting areas between Rothsay Rendering and CP is in Southern Ontario based on a maximum collection distance of 300 miles from a plant. (In fact, the maximum collection distance may be much shorter for different types of by-products.) Consequently, in this submission we will only consider the effects of the merger in Ontario.

In Southern Ontario, Rothsay has two plants; one in Toronto and a larger one in Moorefield which is north of Kitchener-Waterloo. The Orenco plant is located in Dundas which is just west of Hamilton. The major collection area for both Rothsay and Orenco for most by-products is bounded by Windsor to the west, Kingston to the east, Owen Sound to the north and Northern New York State to the south. Orenco has a collection company called Liberty Reductions which collects raw material in the Buffalo area and delivers it to Orenco.

In the case of Orenco, from Dundas, Ontario it is about 193 miles to Windsor, 169 miles to Owen Sound and 204 miles to Kingston, so a 200 mile limit is a fairly accurate measure of the realistic collection distance of a Southern Ontario renderer. As for the Southern limit of Orenco's area, it is about 155 miles to Rochester, New York. Orenco will, however, go as far as Sault Ste Marie for a pick-up of high yielding waste (a distance of nearly 400 miles), but a service call of that distance is unusual.

Thus, we submit the relevant geographic market is the area within a 200-mile radius of the Rothsay and Orenco facilities. This area includes at least Southern Ontario, Northern New York State (the sector bounded by Rochester to the east and Jameston to the south) and South-Eastern Michigan (Port Huron, Detroit and their environs).[15]

...

Because of the low value-to-weight ratio of raw material for rendering, and its perishability, the cost of collection is relatively high in comparison with the value of the end product. A renderer will only pick up raw material where it is

---

[15] Applicant's Selected Documents, vol. 1, tab 6 at 5-7 (Exhibit A-7).

> economical to do so. Whether it is economical in a given case depends on several factors, namely the type of material available, the amount of material available, and the distance to be travelled. While no fixed maximum economical distance can be established, for the reasons set out in our Submission it is appropriate to consider as a bench-mark a range of 200 miles (about 320 kilometres).[16]

Despite these initial submissions, the respondents called evidence to demonstrate that some renderers can and do travel over 200 miles to collect renderable material. Reference was made to the fact that Baker Commodities Inc. ("Baker") has a plant in Lowell, Massachusetts[17] and collects red meat material at a distance of 500 miles from that location. Most of the plant's tonnage, however, is collected from within 350 miles of the plant. Transfer depots are used in collecting the materials. Transfer depots are large collection containers into which material collected locally is dumped so that only full trailer loads travel the long distances. Transportation costs are a significant factor in this Industry. [18]

---

[16] *Ibid.*, tab 13 at 4.

[17] More accurately, Tewksbury, Massachusetts.

[18] Fred D. Bisplinghoff, speaking of North American markets generally, states in his expert affidavit:

> Normally renderers can only economically pick up raw material within a seventy-five mile radius of the plant. There is a point of diminishing returns due to overtime hours, spoilage of raw material, and insufficient time to maintain trucks. The above conditions have led to building receiving stations, which can be constructed approximately 125-150 miles from the plants. Two to four straight trucks can operate from this facility, dump their loads onto an open top semi-trailer which can be pulled to plant by a tractor. This enables the renderer to service an area approximately 200 to 250 miles from the plant, but it significantly increases the hauling costs as it adds reload and station costs to the route cost. This appreciably increases the overall haul cost but is an economical alternative to operating several plants at less than one-half capacity. (Expert Affidavit of Fred D. Bisplinghoff at 7-8 (Exhibit R-8)).

Lomex Inc. ("Lomex"), also referred to as "Couture", has begun very recently to collect red meat material in Toronto for its plant in Montreal over 300 miles away. It is allegedly trying to establish a transfer depot outside Toronto but has not yet done so. Evidence was also given that Phil's Recycling,[19] a low overhead (mainly deadstock) collector with a non-unionized work force has transported materials for a distance of up to 600 miles and on a regular basis takes material 400 miles from Toronto to Montreal at a profit.

The Tribunal is reluctant to place much emphasis on the activity of Baker out of Lowell, Massachusetts, since it relates to another market area. The geographic dimensions of the relevant market have to be determined by reference to the economic factors existing in the relevant area. Thus, the evidence of Baker operating out of Massachusetts and into Quebec is of limited usefulness. Counsel states that the evidence is only being put forward to demonstrate that it is physically possible in some circumstances to collect from such distances and the Tribunal accepts it for that purpose.

Insofar as Lomex is concerned, it is collecting two full truck loads from two fairly large slaughtering operations and this activity is of very recent origin.[20] The Tribunal heard evidence that in the opinion of one industry participant Lomex was trying to "buy" its way into the Toronto market.

---

[19] Until recently named Phil's Rendering Service Inc.

[20] While it is not entirely clear when the activity commenced, the evidence indicates that it was probably during the summer of 1991.

Lomex's activity is more consistent with a market entry *initiative*[21] rather than being evidence of a viable competitor which is established in the relevant market.

Phil's Recycling which operates out of Peterborough, Ontario is a unique and somewhat specialized operation. The profitability of its collection and delivery operation is aided by carrying "haul backs" (e.g., firewood from Quebec for the Toronto market, white stone from Perth). More importantly, Phil's Recycling is not a renderer. It is not Phil's Recycling which must be assessed as an effective competitor to the merged firm but the renderers to whom it sells. Phil's Recycling sells to renderers located in southern Ontario as well as to renderers located in Quebec. It collects about 100 to 150 metric tonnes a week and sells about one-half of that to Quebec renderers. The activity of Phil's Recycling is peripheral in nature.

It is clear that there has not been and there is not now much vigorous and effective competition to Rothsay (Moorefield) and Orenco from renderers located more than 200 miles away. Particularly significant is the fact that when Rothsay (Toronto) was faced with expropriation it did not choose to send its Toronto volumes (i.e., those collected west of Oshawa) to Rothsay (Laurenco) near Montreal for rendering despite the fact that that plant had and continues to have low volumes.

---

[21] The concept "entry" is defined in *Director of Investigation and Research v. Laidlaw Waste Systems Ltd.*, (20 January 1992), CT-91/2, Reasons for Order (Competition Trib.) at 77.

(2) Borders

In addition to a 200 mile distance limitation, the Director argues that both provincial and international borders create boundaries to the geographic dimensions of the relevant market. This assertion will be considered from two perspectives: United States restrictions respecting the importation of renderable material and Canadian federal and provincial legislation respecting the handling and disposition of the renderable material.

Insofar as United States restrictions are concerned, the practice of the United States Department of Agriculture ("USDA") with regard to the importation of renderable material from Canada is allegedly set out in a letter from Robert Melland to counsel for the respondents. That letter states:

> Animal products originating from a Canadian-approved slaughterhouse that are accompanied by a sanitary certificate of origin issued by the Canadian Government are allowed unrestricted entry into the United States.
>
> Animal products that do not originate from a Canadian-approved slaughterhouse and for which the exporter is unable to obtain a Government certificate attesting to the origin of the materials must be consigned directly from the port of entry under USDA seal to an approved rendering plant in the United States.
>
> There are several USDA-approved rendering facilities authorized to receive animal products of Canadian origin.[22]

[22] Letter dated 25 November 1991 to Jay D. Kendry from Robert Melland, Administrator, United States Department of Agriculture (Exhibit R-6).

Counsel for the Director objected to this evidence being relied upon because it had not been adduced through a witness and therefore could not be subjected to cross-examination.[23] The Tribunal takes cognizance of that defect.

Canadian federal legislation is found in the *Meat Inspection Act*,[24] and in the regulations promulgated pursuant to that Act. Sections 7 and 8 of the Act provide:

> 7. No person shall export a meat product [includes the carcass of an animal or a product or by-product of a carcass] out of Canada unless
>
> *(a)* it was prepared or stored in a registered establishment that was operated in accordance with this Act and the regulations;
> *(b)* that person provides an inspector with evidence satisfactory to the Minister that the meat product meets the requirements of the country to which it is being exported; and
> *(c)* that person obtains a certificate from an inspector authorizing the export of that meat product.
>
> 8. No person shall send or convey a meat product from one province to another unless
>
> *(a)* it was prepared or stored in a registered establishment that was operated in accordance with this Act and the regulations; and ... (underlining added)[25]

---

[23] Especially since the respondents had refused to allow the Director to rely on pages from the relevant USDA manual without calling a witness to attest to the procedure set out therein.

[24] R.S.C. 1985 (1st Supp.), c. 25, as amended.

[25] Limitations also exist with respect to the importation of meat products. Section 9 provides:

9. (1) No person shall import a meat product into Canada unless
(a) at the time it was prepared for export, the country from which it originated and any country in which it was processed had meat inspection systems, those systems and the relevant establishments in those countries were approved in writing by the Minister before that time and the approvals were valid at that time;
(b) that person provides an inspector with evidence satisfactory to the Minister that it meets the prescribed standards for imported meat products;
(c) it meets the prescribed standards for imported meat products; and
(d) it is packaged and labelled in the manner prescribed.
(2) Every person who imports a meat product into Canada shall, as soon as possible, deliver it, in its imported condition, to a registered establishment for inspection by an inspector.
(3) No person shall have in his possession an imported meat product that the person knows
(a) has been imported into Canada in contravention of subsection (1); or
(b) has not been delivered to a registered establishment for inspection as required by subsection (2).

The *Meat Inspection Regulations, 1990*, however, provide:

> 3.(1) Sections 7 to 9 of the Act do not apply in respect of
>
> ...
>
> *(k)* a meat product that has not been condemned and is destined for inedible rendering.
>
> ...
>
> (3) Section 8 of the Act does not apply in respect of the following meat products:
>
> ...
>
> *(c)* a meat product that has been condemned and is destined for inedible rendering in accordance with paragraph 54(1)(b);[26]

Thus, there is no prohibition arising from federal legislation which prevents renderable material being taken across either provincial or international prevents renderable material being taken across either provincial or international borders unless it is condemned material. Also, condemned material is not prohibited from being moved interprovincially. However, since section 7 of the *Meat Inspection Act* applies to such material, it cannot be exported unless it originates in a federally licensed slaughterhouse or meat processing plant (a registered establishment).[27]

---

[26] SOR/90-288, as amended.

[27] There are also certain conditions which must be met in dealing with condemned materials. For example, paragraph 54(1)(b) of the *Meat Inspection Regulations, 1990* provides that federally registered slaughterers must identify condemned material, convey it to the inedible products area of their establishments, and then either render it themselves or denature it and convey it either to another registered establishment *or* to a rendering plant. Notably though, paragraph 54(1)(b) does not seem to place any interprovincial restrictions on the location of the rendering plant to which the condemned materials are shipped.

Insofar as provincially licensed slaughterhouses and meat processors are concerned, s. 108 of *Regulation 607,* promulgated pursuant to the *Meat Inspection Act (Ontario)*[28] provides:

> **108**. Where this Regulation prescribes that,
>
> *(a)* an animal be condemned and killed;
> *(b)* a carcass or a part or organ thereof be condemned; or
> *(c)* inedible offal and meat that is not food be disposed of,
>
> an inspector shall direct that such animal, carcass, part, organ, inedible offal or meat that is not food be disposed of by,
>
> *(d)* delivery to a rendering plant,
>
> (i) licensed under the *Dead Animal Disposal Act*, or
>
> (ii) approved under the *Meat Inspection Act* (Canada),
>
> in a vehicle constructed and equipped in accordance with the *Dead Animal Disposal Act*;
>
> *(e)* burying with a covering of at least sixty centimetres of earth;
> *(f)* incineration by a method approved by the Director [Director of Veterinary Service Branch of the Ministry of Agriculture and Food;
> *(g)* rendering in a plant that is equipped with high temperature rendering facilities approved by the Director; or
> *(h)* any other method approved by the Director.[29]

While subparagraph 108(d)(ii) seems to contemplate the licensing of renderers under the federal *Meat Inspection Act*, in fact no such licensing is done and all Ontario renderers are provincially licensed. Thus, under Ontario law provincially licensed slaughterhouses must deliver condemned materials, inedible offal and meat that is not food to provincially licensed renderers. There is no evidence suggesting that paragraph 108(g) or 108(h) has been used to broaden this restriction

---

[28] R.S.O. 1980, c. 260, as amended.

[29] R.R.O. 1980, Reg. 607, s. 108.

Provincial legislation also imposes restrictions on the disposition of deadstock by collectors of that material. Section 4 of the Ontario *Dead Animal Disposal Act*[30] requires that dead animals (horses, goats, sheep, swine, cattle) be collected by licensed collectors and provides:

> (2) No collector shall give, sell or deliver a dead animal to any person other than the holder of a licence as an operator of a receiving plant or a rendering plant under this Act.

And section 5 requires:

> **5.**(1) No person shall engage in the business of,
>
> *(a)* a broker;
> *(b)* a collector;
> *(c)* an operator of a receiving plant; or
> *(d)* an operator of a rendering plant,
>
> without a licence therefor from the Director.
>
> (2) No person shall collect a dead animal unless he is the holder of a licence as a collector.

Thus, Ontario law prevents deadstock being delivered to a renderer who is outside Ontario (i.e., who is not provincially licensed).

Federally inspected slaughterhouses account for 80% of the cattle slaughtered in the southern Ontario region and for 90% of the hogs slaughtered.[31] Deadstock and condemned material comprise from 5 to 10% of the total red meat renderable materials available for rendering.

---

[30] R.S.O. 1980, c. 112, as amended.

[31] Transcript at 173 (26 November 1991).

There is evidence that the regulatory constraints described above do not impose a significant impediment to the movement of most renderable materials across the Canada-United States border. In 1975-76, Rothsay (Moorefield) had a contract with a pork slaughterer in Detroit whereby renderable material was brought across the border for rendering. Mr. Kosalle gave evidence that the handling of deadstock and condemned material caused no problems. These were simply put in a separate container by the slaughterer and picked up under a side agreement which Rothsay had with a Detroit renderer. There is no reason to suppose that a similar arrangement would not work with respect to material flowing into the United States from Canada. The Detroit contract was lost when a renderer closer to the slaughterer obtained the account. Rothsay (Moorefield) had become uncompetitive when the exchange rate changed.

Orenco operated a collection service called Liberty Reduction Inc. in the Buffalo area for some time. The material collected was brought to Orenco in Dundas for rendering. This operation was eventually sold to Darling & Company, Ltd ("Darling") on January 7, 1991. The volumes were not high enough for it to make economic sense for Orenco to continue that operation. It was not discontinued as a result of difficulties arising because of regulatory constraints related to crossing the border. Darling closed its Buffalo plant a few months later because of low volumes.

When Darling had labour difficulties at its Toronto plant sometime during 1988-89, materials were taken to Darling's Detroit and Buffalo plants for rendering. Also, there is evidence that some material (grease) is now being taken from Sault Ste. Marie to Detroit. While it is clear that Darling has consistently brought materials from the London and Windsor areas to its Toronto plant rather than taking it to the Detroit facility, this is not necessarily evidence that difficulty exists in taking materials across the border.[32] That behaviour can result, for example, from factors related to the capacity utilization of the various Darling plants.

Baker has been importing renderable material from Quebec to the United States since June 1991 and is currently importing 227 metric tons of material a week including packinghouse material, bone and fat, and deadstock. (Quebec legislation respecting deadstock may be different from that in Ontario.) Baker has experienced delays at the border on two occasions. One problem was resolved when the letter referred to above[33] was given to border officials and they verified its contents with authorities in Washington. The other problem was clerical in nature and was quickly resolved.

It is clear that there has been some but not a great deal of cross-border transportation of renderable materials. In the Toronto-Hamilton area this

---

[32] James A. Ransweiler, Vice-President and Division Manager of the Great Lakes Division of Darling & Company, Ltd., gave evidence with respect to the past and present activities of Darling. That evidence was given in confidence. Where the facts found in these reasons do not coincide with that evidence this should not be taken as a reluctance to refer to Mr. Ransweiler's evidence because it was given in confidence but rather as a decision by the Tribunal that it does not wish to give that evidence much weight.

[33] *Supra*, note 22.

was probably largely due to the fact that until recently Darling had a rendering plant in Buffalo, New York. Thus, the lack of cross-border activity can be attributed to market configuration rather than to regulatory or other practical constraints arising from the existence of the Canada-United States border.

(3) Consumer Preferences

It is suggested that consumers are unwilling to turn to a supplier whose rendering plant is more than 200-250 miles distant or whose rendering plant is located in the United States. Since renderable materials must be removed on a daily basis, there is a need for reliable service. The Tribunal is not convinced that the alleged consumer preferences play much of a role in the market definition. To the extent that such preferences exist the Tribunal considers them as resulting more from lack of supplier recognition than from any innate reason related to distance or borders. In fact, Lomex has acquired two customers and it operates from a distance of over 250 miles away.

C. Conclusion

The purpose of determining the product and geographic dimensions of the relevant market is of course to allow for identification of the competitors to the merged firm and the calculation of the respective market shares of the market participants. It is important to emphasize, however, that market

boundaries cannot and will not in many instances be precise. They can only be approximations. As long as market share statistics are not taken as the only indicators of the existence of market power, the exact location of those boundaries becomes less important. Restraints on a merged firm's (alleged) market power can come from both inside and outside the market as defined.

It is useful to refer to some comments set out in the text entitled *Competition Law* by Whish. While that text is directed to the difficulties in defining the product dimensions of a market, they equally apply to geographic dimensions:

> The idea of interchangeability [substitutability] is simple enough. In practice of course one finds that identification of the relevant product [geographic] market can give rise to great difficulty. The reason for this is that the concept of the relevant market is just that - a concept; it is a useful theoretical device which facilitates an understanding of the problem of monopoly, but it is not to be supposed that it is reflective of the real commercial world.[34]

And further:

> The difficulties associated with the relevant product [geographic] market issue can be overcome provided that definition of the market is not thought to be of fundamental significance: in particular it is vital that having identified the relevant market, competitive pressures which come from outside that market should still be considered. The mistake is to suppose that in the commercial world there is a whole series of independent, discrete relevant product [geographic] markets which exert no influence on one another. In fact in business there exists a complex web of interlocking markets and sub-markets which may have an influence on one another in a more or less tangential way. Once that has been recognized, the danger of defining the market too narrowly ceases to be a problem, because the identification of the market is seen to be

---

[34] R. Whish, *Competition Law* (London: Butterworths, 1985) at 216.

> only a staging post on the way to the really important question which is whether a firm is in a position to behave independently of its competitors. For this purpose it is relevant to consider not only the position of firms within the defined product [geographic] market but also the competitive pressure that can be exerted from those in other markets. ... If this approach is [not] adopted, then immense strain is imposed on the meaning of the relevant product [geographic] market, greater than the concept can realistically bear.[35]

In the present case, as has been noted, the product dimensions of the relevant market are easy to define: the provision of rendering services for non-captive red meat renderable material which includes deadstock materials and blood. The geographic dimensions, however, are more uncertain. This uncertainty arises because of the inherent ambiguity with respect to where market boundaries begin and end and, more importantly in this case, because of changes which have been occurring in the market since the merger.[36]

With respect to the geographic dimensions the Tribunal considers that transportation and other costs related to operating at a distance are such that a renderer located over 200-250 miles from Rothsay-Orenco should not be included in the relevant market. While it is clear that the Canada-United States border will result in some additional costs for renderers who engage in the cross-border collection of the material as a result of required paper work and possible delays at the border, the Tribunal is of the view that renderers located within the United States but close to the border could provide effective competition to the

---

[35] *Ibid.* at 218-19.

[36] *Infra* at 59ff.

merged firm.

In the present case regardless of whether one defines the geographic market as the Ontario market (as the Director contends) or as the Ontario market plus parts of northern New York State and southeastern Michigan (as the respondents contend), the market is still highly concentrated.[37]

D. Identification of Competitors

The purpose of defining the relevant market is of course to facilitate identification of the merged firm's competitors and to assess the market share of the relevant market which each holds vis-à-vis the merged firm. A significant difficulty in identifying the merged firm's competitors in the present case arises because of the dramatic changes which have taken place and are taking place independent of the merger. It is relatively easy to identify Rothsay and Orenco's competitors at the time of the merger in July 1990. These were Darling (Toronto), F.W. Fearman Company Limited ("Fearman"), Banner Packing Limited ("Banner"), J.M. Schneider Inc. ("Schneider"), and Ray Bowering. In addition, it was anticipated that Central By-Products would soon become a competitor.[38]

---

[37] Expert Affidavit of David D. Smith at para. 32 (Exhibit A-4); Expert Affidavit of Thomas W. Ross at para. 38 (Exhibit A-1).

[38] A small amount of material was also being taken out of the market to Quebec by Phil's Recycling. As has been noted, the Tribunal does not consider Quebec renderers to be established in the relevant market.

As of the date of the merger, Darling had rendering plants in Buffalo, Toronto and Detroit. Darling is the largest independent renderer in North America and has thirty-four rendering plants throughout the United States and one in Canada. Darling has been experiencing financial difficulties. Darling closed its Buffalo plant some time during either the winter or spring of 1991. Darling's Toronto plant was situated on land leased from the Toronto Harbour Commission. On the most recent expiration of the lease (October 31, 1990) the Commission refused to renew. A court order for vacant possession by January 7, 1992 was obtained. Even without the cancellation of this lease, there was speculation that Darling intended to leave the harbour area because of the costs involved in meeting environmental requirements.[39] Whether that company will relocate in Canada is not clear. Thus, at present the only Darling plant whose existence can be relied upon to provide competition to the merged firm is in Detroit.

Fearman was a competitor prior to the merger but it was bought by Canada Packers Inc. (now Maple Leaf Foods Inc.) on February 18, 1991. That acquisition has not been challenged by the Director. Fearman is therefore no longer a competitor and must be treated as part of the Rothsay-Orenco group. Fearman was and is a pork slaughterer whose rendering operation was mainly devoted to processing captive materials although more recently some non-captive material is being processed.

---

[39] Applicant's Selected Documents, vol. 1, tab 14 at 11 (Exhibit A-7).

Banner remains a competitor to the merged firm. It is a fairly small renderer located in downtown Toronto. Much of its finished product material (tallow and meal) goes into its own pet food operation. It was a vigorous competitor to Orenco, Rothsay (Toronto) and Darling (Toronto). At the same time, its costs of operation have risen as a result of amounts which must be spent to meet environmental concerns and revenue is dropping because of the depressed state of prices for the finished products (tallow and meal).[40] Prices charged by Banner to its customers for rendering services have accordingly been rising. Banner has indicated an interest in selling its Toronto rendering facility since it moved its pet food operation to Trenton, Ontario.[41]

Schneider is located in Kitchener, Ontario and it remains a competitor in the market. Its rendering facility until recently were used to process only captive material. As a result of the closure of its beef slaughtering operations in Ontario, capacity became available to render non-captive materials and it entered the non-captive red meat material rendering market.

Ray Bowering, a deadstock collector located in Melbourne, Ontario, remains a competitor. He operates a small batch cooker and renders very small volumes.

---

[40] Transcript at 246 (26 November 1991).

[41] *Ibid.* at 500 (2 December 1991).

Central By-Products is not yet in operation but the evidence indicates that it soon will be. It is being constructed by David T. Smith and James W. Murray. Messrs. Smith and Murray operate deadstock businesses. They decided in February 1990 to construct their own rendering facility near Hickson, Ontario, on land owned by Mr. Murray. He operates Oxford Deadstock Limited and presently uses Darling as a renderer. Mr. Smith operates a deadstock collecting and processing operation as well as a pet food business, Atwood Pet Food Supplies Ltd and presently uses Orenco as a renderer.

There is no evidence that Baker's plant in Rochester, New York has historically been a competitor of Rothsay and Orenco in southern Ontario. That plant, like Darling, is also part of a large multi-plant firm. It is the second largest renderer on the North American continent. The Baker (Rochester) plant is within geographical reach of the relevant market, being located 135 miles from Orenco's plant in Dundas. It is clear that both Baker (Rochester) and Darling (Detroit) would become increasingly competitive in the southern Ontario market served by the merged firm (insofar as geographical location is concerned) in proportion to any supra-competitive price rise which might be exacted. Since Baker (Rochester) has not historically been in the market and since it is not immediately adjacent to the border, it may be that it should be considered a potential entrant rather than a competitor in the market. Its relationship to the merged firm will be considered from both points of view.

Lomex commenced operating in the Toronto market in the summer of 1991[42] and, as has been noted, is taking two full truck loads from two of the larger Toronto area producers of renderable materials to Lomex's plant outside Montreal. The Tribunal has not classified Lomex as a competitor within the market but recognizes that as a potential entrant Lomex will provide some discipline on the merged firm's ability to raise prices.

V. SUBSTANTIAL LESSENING OF COMPETITION

Market power in the economic sense is the ability to maintain prices above the competitive level for a considerable period of time without such action being unprofitable. In a competitive market, prices will tend towards marginal cost. Market power can be viewed as the ability of a firm to deviate profitably from marginal cost pricing. In assessing the likely effects of a merger, one considers whether the merged firm will be able to exercise market power additional to that which could have been exercised had the merger not occurred. A merger will lessen competition if it enhances the ability of the merging parties to exercise "market power" by either preserving, adding to or creating the power to raise prices above competitive levels for a significant period of time. One considers the degree of any such likely increase and whether by reference to the particular facts of the case it should be characterized as substantial.

---

[42] *Supra*, note 20.

Whether an enhancement of market power exists as a result of a merger and whether it is substantial is determined by reference to a number of factors. Market share data can give a *prima facie*[43] indication as to whether such is the case.

A. Market Concentration

The market concentration in the relevant market can be measured by reference to a number of different indicia. What measure will be chosen will depend upon the nature of the industry in question and the data available. In this case two measures have been used: the amount of renderable material actually processed in the recent past by the firms (historical output) and the plant capacity of the competitors (productive capacity). With respect to firms which have not previously been active in the market but which as a result of changes are now considered to be competitors, only the second method of measurement can be used.

A market share measurement based on pre-merger volumes of renderable material processed in southern Ontario indicates that Orenco and Rothsay were each servicing approximately 30% of that non-captive red meat rendering market. Darling's Toronto plant was processing 13%. Banner was processing 12% and Fearman 2%. An extrapolation from those data indicates

---

[43] *Prima facie* is being used in its ordinary dictionary meaning of "at first sight" or "on first impression". This does *not* signify that the Director has by merely proving market share thereby proved his case subject to whatever rebuttal evidence the respondents might adduce. A responsibility still remains with the Director despite the market share evidence to adduce some evidence regarding barriers to entry.

that after the merger the merged Rothsay-Orenco firm will hold approximately 62-63% of the southern Ontario market. The next largest firm, Darling, for the moment at least would hold approximately 12-13%. Banner would hold 11-12%. Schneider and Ray Bowering would continue to process small amounts of non-captive material.

While the increased market share concentration calculated on that basis can be seen at a glance, two tools which have been developed in the United States for measuring market concentration in a summary fashion were referred to in evidence: the four-firm concentration ratio[44] and the Herfindahl-Hirschman Index ("HHI"). The four-firm concentration ratio measures market concentration by adding together the market shares of the four largest firms in the market. If the post merger concentration is very high and the merged firm accounts for a significant proportion thereof, then the merger is one which if assessed solely by reference to market shares will be considered to lead to a substantial lessening of competition. The HHI is computed by adding together the squares of the market shares of all the firms in the market.[45] The HHI can theoretically range from near zero to 10,000 (100 x 100) for a monopoly. In the context of anti-trust enforcement in the United States, it is generally thought that if a market has an HHI over 1,800 it is highly concentrated. An HHI between 1,000 and 1,800 is of medium concentration and below 1,000 relatively

---

[44] Sometimes referred to in the evidence as "CR4".

[45] The HHI was derived from oligopoly theory; see G.J. Stigler, *The Organization of Industry* (Homewood, Ill.: R.D. Irwin, 1983) at 31; Expert Affidavit of David D. Smith at para. 43 (Exhibit A-4).

unconcentrated.[46] If the increase in HHI as a result of the merger exceeds 100 and the post merger HHI for the market exceeds 1,800, according to the Director's expert, one should assume (at least on a *prima facie* basis) that the merger will substantially lessen competition.[47]

Thomas W. Ross, who gave expert evidence on behalf of the Director, noted that the pre-merger four-firm concentration ratio for the total red meat renderable materials (captive and non-captive) in southern Ontario was 86.8% measured by reference to the volume of renderable materials processed each week by the firms.[48] The post-merger four-firm concentration ratio for these materials is 90.4%. The pre-merger ratio for non-captive materials only was 90.4% and post-merger is 91.6%.[49] While the application of this method of measurement clearly demonstrates how highly concentrated the markets are, it tells little about the effects of the merger. It demonstrates the inadequacies of the four-firm concentration ratio as a measure of increased concentration[50] in a case

---

[46] H. Hovenkamp, *supra*, note 8 at 304-305.

[47] Expert Affidavit of David D. Smith at para. 44 (Exhibit A-4). In the United States, if the HHI increases by more than 100 as a result of the merger and the post-merger HHI is between 1,000 and 1,800, then the merger is likely to be challenged. If the post-merger HHI is over 1,800 and the increase as a result of the merger is over 50, then the merger is likely to be challenged. (*1984 [U.S.] Justice Department Merger Guidelines*, 49 Fed.Reg. 26,823 (1984) at para. 3.11(b)). Thus, the Director's expert is applying a higher test than pertains in the United States, an approach which will likely be more appropriate for Canadian industries which will often already be highly concentrated.

[48] Expert Affidavit of Thomas W. Ross, table 1 at 15 (Exhibit A-1). Dr. Ross' analysis assumes market boundaries of 200-250 miles and one restricted by the Canada-United States border.

[49] Orenco, Rothsay and Fearman were treated as one entity post-merger for the purposes of this analysis and Fearman is added to the Rothsay volumes pre-merger because that acquisition has not been challenged.

[50] Transcript at 337 (27 November 1991).

such as the present where the changes resulting from the merger are primarily occurring among the top four firms.

David D. Smith, who also gave expert evidence on behalf of the Director, did an analysis applying the HHI to measure increased concentration and using as a measure of market share the volume of non-captive red meat renderable material being processed in July 1990 by Ontario renderers. This analysis led to a finding that the increase in the HHI as a result of the merger with respect to the rendering of red meat by-products and deadstock was 1,594 points to a total HHI for that market of 3,608. Insofar as non-captive material is concerned, it is estimated that the increase is 1,526 points to a market total of 3,791.

The second variable by reference to which the position of the various competitors was assessed is plant capacity. This allows some measurement to be made with respect to Baker (Rochester) and Darling (Detroit) as competitors even though they have not historically been such. The capacity of some of the plants is not greatly in dispute: Darling (Detroit) can process approximately 1,600 metric tonnes per week; Baker (Rochester) can process approximately 1,600 metric tonnes per week; Schneider can process approximately 800 metric tonnes per week; Banner can process approximately 510 metric tonnes per week; Central By-Products will be able to process approximately 363 metric tonnes and Ray Bowering has capacity for 23 metric

tonnes; Fearman's capacity is approximately 450 metric tonnes per week, which should now be added to that of the merged firm.[51]

The capacity of the Orenco and Rothsay (Moorefield) plants are subject to more dispute. The respondents say Orenco's capacity is approximately 2,500 metric tonnes per week; the Director argues that it is approximately 2,900 metric tonnes. It is not necessary to consider in detail the dispute with respect to Orenco's capacity because the difference is small. However, the positions of the two parties vary greatly with respect to the capacity which should be attributed to Rothsay (Moorefield). The respondents argue that insofar as the equipment at that plant is presently used for rendering poultry materials, it should not be considered to be capacity available to render red meat. Rothsay (Moorefield) has two cookers; one is used full- time to render poultry materials and the other part-time for poultry offal and part-time for red meat. Approximately 200 metric tonnes per week of poultry offal is processed on the second cooker. This occupies approximately 17 to 18 hours per week with an additional seven hours required for cooking and cleaning the equipment when it is switched over.

The Tribunal accepts the position that capacity for present purposes should be assessed by reference to the equipment that is able to render red meat materials rather than to the purpose for which it is presently being used. The Tribunal understands from the evidence that this is the basis on which the

[51] The Tribunal has selected what we consider to be reasonable approximations although we should point out that a range of numbers was given to us respecting plant capacities and utilization.

capacities of the other plants, at least Baker (Rochester) and Darling (Detroit), were assessed. The extent to which Rothsay (Moorefield) would actually switch from processing poultry materials to processing red meat is more appropriately considered in assessing the significance of market share and plant capacity estimates, particularly in the context of assessing the import of excess capacity. Accordingly, for present purposes the Rothsay (Moorefield) red meat rendering capacity is approximately 3,200 metric tonnes per week.

On this basis the merged firm including Fearman would hold approximately 56% of the total productive capacity of the market if both Baker (Rochester) and Darling (Detroit) are considered to be competitors and approximately 66% if only the latter is included. Dr. Smith did a number of HHI calculations based on plant capacity. These were based on a number of different possible scenarios with respect to who was in and who was out of the market. While such calculations could be done by reference to the capacities which the Tribunal has accepted, it is not obvious that they add much in the present case.

The various measurements indicate that the merger increases market share considerably in an already highly concentrated market and gives rise to at least an initial concern that the merger will likely substantially lessen competition in that market.

B. Excess Capacity - Increasing Available Capacity by Switching Rendering Equipment Presently Used for Poultry - Increasing Capacity by Easy Expansion of Existing Facilities

As has already been noted, market share is not necessarily a reliable determinant of market power. As an indicia of such it may either overstate or understate a firm's market power. If other firms in the market have excess capacity, they can respond to a supra-competitive price rise by flooding the market at a lower price level. As a result, the best question to ask when assessing market power, in some circumstances, is whether the respondents' current competitors have capacity available to serve what otherwise would be the merged firm's customers. One of the most significant sources of high supply elasticity is the excess capacity of competing firms. The respondents argue that Rothsay-Orenco competitors have extensive excess capacity in comparison to the merged firm and therefore the merged firm will not be able to exercise significant market power.

Insofar as the alleged excess capacity of Rothsay-Orenco's competitors is concerned, the situation of Darling is quite problematic. As has been noted, it has lost its Toronto lease and will have to move. Mr. Kosalle's view is that Darling will stay in the Toronto-Hamilton area and probably construct a new plant. He is also of the view that Darling will transport Toronto materials to its Detroit plant in the interim. Darling was processing approximately 850 metric

tonnes per week at its Toronto plant; 40% of this was collected west of Lambeth which is near London, Ontario. For the purpose of assessing excess capacity (existing or likely to exist in the near future) the Tribunal is not willing to place much reliance on Darling constructing a new plant in the Hamilton area. At the same time, since Darling is a large multi-plant firm with plants in Cleveland, Ohio, Detroit, Michigan, Coldwater, Michigan and Milwaukee, Wisconsin, the Tribunal accepts the argument that a considerable amount of capacity could be opened up at the Detroit location by shifting volumes between the Cleveland, Coldwater and Milwaukee facilities.

The Tribunal heard evidence that Banner was operating at capacity (approximately 500 metric tonnes per week) but could increase that capacity by approximately 390 metric tonnes per week if $400,000 was spent on additional equipment.

Schneider also has excess capacity as a result of closing its Ontario cattle slaughtering operations. Its capacity is estimated to be approximately 800 metric tonnes per week of which approximately 400 metric tonnes is presently being used. Central By-Products is installing a plant with the capacity to render approximately 360 metric tonnes. It will use only 113 metric tonnes per week for its captive materials. Baker (Rochester) could open up excess capacity of approximately 400 metric tonnes.[52] Lomex in Montreal is thought to have

[52] This assumes that there is an ability to shift material between Rochester, N.Y. and Lowell, Mass. (see Transcript at 1080-81 (10 December 1991)).

excess capacity and Rothsay (Laurenco) at that same location is known to have excess capacity of approximately 800 metric tonnes. Although, as has been noted, the Tribunal has not considered the Montreal plants to be in the relevant market.

Insofar as the merged firm's excess capacity is concerned, it is alleged that after the merger Orenco will have only 233 metric tonnes excess capacity per week and Rothsay (Moorefield) will have only 78. These figures appear to significantly understate the excess capacity of those establishments. In the first place, this estimate assumes that Fearman's rendering plant will be closed and the material previously rendered at that plant will be rendered in the future at Rothsay (Moorefield) and Orenco. The decision to close Fearman's rendering plant and thereby reduce Rothsay and Orenco's excess capacity is a matter which is within the control of the Agribusiness Group of Maple Leaf Foods Inc. It is a decision which apparently was only discussed two or three weeks prior to the Tribunal's hearing. This alleged decision, at the moment, is speculative.

In addition, the excess capacity of Rothsay (Moorefield) has been calculated on the assumption that priority will be given to the rendering of poultry materials at the expense of red meat materials. The excess capacity figures for Moorefield are calculated by excluding usage of the equipment which is presently dedicated to processing poultry materials. It is assumed that the equipment will continue to be used for that purpose. With respect to whether Rothsay

(Moorefield) would switch its equipment to rendering poultry material if rendering red meat material became more profitable, there is much reason to think that it would not. While poultry offal does not produce high quality tallow, poultry feathers do produce a high quality meal.[53] In addition, much of Rothsay's poultry volumes are captive materials for which disposal would have to be provided in any event.

It is known that Maple Lodge Farms Ltd, a poultry processing firm not related to Maple Leaf Foods Inc., has entered the poultry material rendering business and might expand this activity. Maple Lodge Farms Ltd produces 36-38% of Ontario's poultry.[54] It is estimated that Maple Lodge Farms Ltd was processing 23 metric tonnes per week in June 1990, and in October 1991 it was processing 218 metric tonnes per week. To the extent that that firm ceases to use Rothsay (Moorefield) to process its renderable materials, capacity would be freed up. Most important with respect to the respondents' estimates of their excess capacity is a letter written in December, 1990. It states:

> ... Rothsay (Moorefield) and Orenco have sufficient cooking capacity to handle all the raw material currently processed by Rothsay, Orenco and Darling & Co. in Ontario. This cooking capacity could be fully utilized if relatively inexpensive modifications were made to the Rothsay Moorefield and Orenco plants to de-bottleneck their production lines. For example, Orenco could increase its capacity by installing additional press equipment.[55]

---

[53] On average red meat material yields 22% tallow and 24% meal. Poultry offal yields 8% (low quality tallow) fat and 20% meal. Raw feathers yield about 26-30% feather meal. (Applicant's Selected Documents, vol. 1, tab 6 at 2 (Exhibit A-7)).

[54] Transcript at 523-24 (2 December 1991).

[55] Applicant's Selected Documents, vol. 1, tab 38 at 1 (Exhibit A-7).

It is clear that in general in this industry it is fairly easy for renderers to increase their capacity or when they are a multi-plant firm to shift the renderable material among different plants to open up capacity at a given plant when it is needed. Some of the larger firms, at least, plan their plants with a view to being able to respond quickly in this way. With respect to the ease with which the firms can increase or reallocate their capacity, this can be seen in the reallocation which took place among Rothsay (Laurenco), Rothsay (Moorefield) and Orenco after the merger in response to the expropriation of Rothsay (Toronto). With respect to the ability to move material between plants and thereby free up capacity, Joseph G. Huelsman, General Manager, Baker Commodities Inc., gave evidence as to how this could be done at the Baker (Rochester) plant if it was deemed advisable to do so in order to enable that firm to enter the southern Ontario market. There appears to be significant excess capacity in the industry generally and the merged firm is not capacity-constrained. The excess capacity of firms both within and outside the relevant market will provide a degree of competitive pressure on the merged firm and restrain to a considerable extent its ability to raise prices.

C. Market Environment

A significant factor in this case is the changes which are taking place in the red meat material rendering market. The Director describes the market as flat, the respondents describe it as declining. The Tribunal finds the

respondents' description persuasive, particularly the evidence of Erna H.K. van Duren.[56] She estimates that the supply of renderable red meat material resulting from cattle slaughter in Ontario is likely to decline by 4% per year until at least 1995. She estimates that the renderable red meat material from pork slaughter is expected to decline 0.3% per year over the same period. Poultry materials are expected to increase by approximately 3.2% per year. As has been noted, beef materials are sought-after because they produce high quality tallow. Poultry feathers, however, produce high quality protein meal.

Dr. van Duren's opinion is based on several factors. Firstly, consumer preference for red meat has been declining since 1970. This change in consumer taste from red meat to poultry and non-meat products results from concern that eating red meat is not as healthy as eating the other products. The relative price of red meat vis-à-vis other products is also referred to as a factor.

Secondly, insofar as Ontario is concerned, there has been a marked decline in cattle-rearing activity in the province. Such activity has been shifting westward to the provinces of Alberta and Saskatchewan. The trend westward is due to the increased size of herds needed to stay competitive. These can be raised much more economically in Alberta and Saskatchewan than in Ontario.

---

[56] Expert Affidavit of Erna H.K. van Duren (Exhibit R-11).

The shift of cattle-rearing operation westward has been accompanied by a movement to locate slaughter operations close to where the cattle are raised. Instead of transporting either live cattle or cattle carcasses east, the various cuts for the consumer trade are more likely to be prepared at a slaughterhouse located close to where the cattle have been reared. Transportation costs are less for what is known as boxed beef than for live animals or carcasses.

There was some discussion before the Tribunal about projections prepared by Agriculture Canada for Canada East and Canada West which projected a much smaller decline in cattle slaughter in Canada East than Dr. van Duren estimates. Dr. van Duren notes that the Canada East and Canada West models are merely mirrors of each other and thus the Agriculture Canada model is one that really pertains to Canada as a whole and says little about the Ontario situation.[57]

The Director argues that the market may have been declining but that there is no reason to assume that the past trend will continue. Dr. van Duren, on the other hand, argues that there is little indication that the

[57] Dr. van Duren noted that the amount of renderable material which would be available in the future depends upon: (i) the number of animals slaughtered; (ii) the carcass size; and (iii) the proportion of the carcasses which is renderable. She assumed a carcass size for her model that was equal to the 1990 levels. She noted that insofar as the proportion of renderable material to carcass size is concerned, over the years there have been significant reductions in this regard as leaner and leaner cattle have been bred. The most significant factor for present purposes, however, is the drop in cattle slaughter which has occurred and is occurring in Ontario as a result of both the decrease in consumer demand for red meat and the shift westward of cattle-rearing and slaughtering operations. She looked at the declines which have occurred between 1981 and 1990 and made estimates for the next five years on the assumption that such trends would continue.

restructuring of the North American red meat industry which has been occurring is likely to stop, especially in Canada. Thus, it is argued that it is likely that the Canadian industry will continue to consolidate and increase its geographic concentration westward with a consequent decline of beef slaughter in Ontario. The Tribunal accepts Dr. van Duren's opinion.

Reference was also made to the trends and restructuring which have been occurring in the industry generally, particularly in the United States markets since the 1970s. While the Tribunal is reluctant to put much weight on events which occur in other markets, in this instance it agrees that industry trends in general provide some relevant information concerning the context within which the industry as a whole is operating. Since 1970 there has been a decline in the number of independent renderers in the United States from over 600 to under 350. This decline has been particularly noticeable in large metropolitan areas. The New York Metropolitan Area has seen a reduction from seven to two rendering facilities since the early 1980s. In the Los Angeles Metropolitan Area, the amount of rendering has dropped from four plants operating 24 hours a day, six days a week, to two plants operating at two-thirds capacity. Finally, in the Chicago Metropolitan Area the amount of rendering has been reduced from nine large plants, including the largest in the world, plus several smaller plants in 1975 to only one small plant.[58] While it is true that a city or state boundary may tell one little about the geographical dimensions of the relevant markets, the reduction in

[58] Expert Affidavit of Fred D. Bisplinghoff at paras. 23, 39-41, 66 (Exhibit R-8).

the number of plants in the larger metropolitan areas does give some indication of the trends in this market.

Decline in the volumes of red meat material available for rendering in Ontario, of course, opens up additional excess capacity for renderers, thus providing an additional incentive for renderers to compete aggressively for material in their current collection areas and to increase the size of those collection areas. There is also incentive as volumes decline to purchase adjacent renderers in order to acquire the requisite volumes.

In addition to the decline in red meat materials, this industry faces increasing costs as a result of environmental concerns and as a result of changes in what is considered to be appropriate use for the land on which some rendering plants are located (or for the land proximate thereto). These factors force changes in market configurations. For example, both Rothsay (Toronto) and Darling have lost their Toronto harbourfront property and lease respectively. The Toronto harbourfront location afforded proximity to the major suppliers of renderable materials in the Toronto area and access to port facilities from which tallow could be shipped to the international market in which it is sold. It is argued that environmental concerns would lead to difficulties with respect to any proposed expansion of Rothsay (Moorefield). While the Tribunal is not convinced that this would necessarily be the case, it is clear that failure to meet environmental standards in the past has been the subject of much adverse publicity for that plant.

Banner also has experienced increased costs as a result of environmental considerations.[59]

Another factor which is having a negative impact on this industry is the relatively depressed prices at which tallow and meal are being sold. The respondents state that the protein meal which is produced from the rendering process is, in general, sold within Canada but that the tallow products are exported. It is noted that there is an abundant supply of alternative non-animal based products which compete with the tallows and which are being promoted as preferable to the animal-based products.

In general, then, the industry is one in which there has been and is a decreasing supply of quality renderable materials, costs have been rising and there is little ability to control the price at which the finished products (tallow and meal) are sold. Renderers have been increasing their prices to customers, for example, by charging for the pick-up of materials which previously had been collected without charge and by picking up but ceasing to pay for materials which previously had been purchased. While some of the witnesses see these changes as resulting from the merger, the evidence indicates that such is not the case. These changes are a result of the increasing costs and decreasing revenues which the renderers are experiencing. Rendering is a necessary service and thus

---

[59] Transcript at 246ff (26 November 1991).

renderers are not likely to disappear completely from an urban area. The pressures on the industry, however, have led to increasing consolidation.[60]

D. Barriers to Entry

In the absence of significant entry barriers it is unlikely that a merged firm, regardless of market share or concentration, could maintain supra-competitive pricing for any length of time. An attempt to do so would cause competitors to enter the market and the additional supplies created in that manner would drive prices back to the competitive level.

As has been noted above, whether one classifies a firm which has not previously been active as a competitor to the merged firm as a competitor in the relevant market or as a potential entrant whose existence restrains the merged firm from levying supra-competitive prices is not of great importance. The respondents argue that entry can be defined in a number of ways: to include new firms entering the market, firms expanding their activities into the relevant market from another geographic area, local firms beginning to offer the relevant product (which did not do so before), and firms already in the relevant market (sometimes

---

[60] See also Joint Book of Documents, vol. 17A, tab 74 at 36 (Exhibit JB-17A Confidential):

> We are in a mature market. The only way a renderer can significantly increase his supply of raw material is by obtaining an existing supply. Hence, we do expect to see further rationalizations of the industry. These changes will see packer renderers no longer rendering, and independent custom renderers being bought-out by larger competitors.

called "fringe firms") expanding their output.[61] The Tribunal has chosen not to classify the expansion of output by existing firms, be they "fringe firms" or major competitors, as entry decisions. The Tribunal considers entry to be either the establishment of a new firm in the market whether entirely new to the industry or new to the geographic area (e.g., the Tribunal has already indicated that it considered Lomex to be attempting entry) or local firms which previously did not offer the product in question commencing to do so (e.g., deadstock operators or slaughterhouses commencing to also operate a rendering facility).[62]

The Director has alleged that barriers to entry into the relevant market consist of: the environmental and regulatory requirements which must be met; the difficulty which exists with respect to acquiring sufficient supplies to become viable; the sunk costs involved in starting a rendering plant.

(1) Environmental and Regulatory Constraints

There is no doubt that provincial Ministry of the Environment, Ministry of Agriculture and Food and municipal approvals are needed to start a rendering plant and that some locations are simply not available for this use. Many sites in urban areas or sites close to urban areas are not likely to be

[61] *R. v. J.W. Mills & Son Ltd. et al.* (1968), 56 C.P.R. 1 (Ex. Ct.) at 37; *United States v. Baker Hughes, Inc.*, 908 F. 2d 981 (D.C. Cir. 1990); *United States v. Syufy Enterprises*, 903 F. 2d 659 at 666 (9th Cir. 1990); *United States v. Waste Management, Inc.*, 743 F. 2d 976 (2d Cir. 1984); *United States v. Calmar, Inc.*, 612 F. Supp. 1298 (D.C.N.J. 1985); *Re The Echlin Manufacturing Company*, 105 FTC 410 (1985).

[62] *Supra*, note 21.

available. Environmental and regulatory approvals can more easily be obtained, however, if an appropriate site is chosen, for example, a site in an industrially-zoned area of a large municipality. Mr. Kosalle testified that the Hamilton Harbour Commission has several sites suitable for rendering facilities and that the Hamilton Harbour Commission is amenable to leasing a site for such a facility. These sites are particularly attractive as they provide access to a wharf which allows for the economical transportation of finished products.[63]

Reference was made to the fact that Central By-Products had been delayed in opening its newly constructed facility as a result of the need to comply with environmental requirements. Central By-Products commenced construction of its facility in February 1990 without obtaining prior environmental approval. Professional engineers were not retained to design air and water treatment until after construction had been started. Ministry of the Environment approval for the new plant is expected shortly.[64]The experiences of that firm demonstrate the difficulties which an inexperienced entrant into the market can encounter.

The Tribunal does not put much weight on the length of time Rothsay took in trying to locate a new site when faced with the expropriation of its Toronto plant. There would be good reasons for Rothsay to try to retain its Toronto location for as long as possible. The Tribunal is of the view that *de novo*

---

[63] Transcript at 45-46 (4 December 1991) (confidential); 495 (2 December 1991).

[64] Transcript at 223-25 (26 November 1991).

entry would likely take approximately 18 months to accomplish. At the same time, entry by a supplier from an adjacent geographic market through expansion of its collection area would not entail this difficulty. Also, forward integration on a small scale by the larger slaughterhouses would likely be less difficult if land were available at the site and the slaughterhouse already located in an appropriately zoned area.

(2) Sufficient Supplies

Insofar as obtaining sufficient supplies are concerned, the amount of material needed will depend on the size of the plant in question. Central By-Products clearly is of the view that 113 metric tonnes is sufficient.[65] A slaughterer or deadstock operator who establishes a rendering plant at the same location as his slaughtering or deadstock operation, will incur less costs in rendering material produced therefrom than a non-integrated renderer since no collection costs will be involved. Fearman, for example, has been operating a rendering plant for its captive pork products having a capacity of 450 metric tonnes per week. Schneider has a capacity of approximately 800 metric tonnes per week. Banner which has no captive material operates a plant having a capacity of approximately 510 metric tonnes per week.

[65] This may not be entirely accurate as deadstock volumes have dropped considerably since Messrs. Murray and Smith decided to build their plant. The drop in deadstock coincided with the decision to start charging for the pick-up of deadstock. (Transcript at 220 (26 November 1991)).

Better Beef and Quality Meat Packers are examples of slaughterers with sufficient supply to establish at least a small scale rendering operation. They respectively produce approximately 900 and 1,000 metric tonnes of renderable material per week. Groups of smaller suppliers might also have the requisite minimum volume to justify construction of a rendering plant.[66]

Such enterprises, of course, would not be able to establish a rendering facility of the scale of Orenco or Rothsay. What is more, given the contracting nature of the industry one can question whether or not much entry is in fact likely to occur as a result of forward-integration by slaughterers such as Better Beef and Quality Meat Packers or by a group of smaller companies. But this is clearly more than just a mere possibility. Central By-Products has taken this initiative recently and insofar as poultry is concerned, Maple Lodge Farms Ltd appears to have done so. The test as to whether potential entry will discipline the market is whether such entry is likely to occur, not merely whether it could occur.

(3) Sunk Costs

Insofar as sunk costs are concerned, there is little evidence as to the proportion of the investment which is sunk in a rendering plant. There is evidence, however, that the total investment required can vary considerably depending on the size of the facility. Central By-Products has recently built a

[66] Transcript at 217-18 (26 November 1991); 1012 (9 December 1991); 568-69 (2 December 1991).

plant in Hickson, Ontario at a cost of $1.1 to $1.2 million. Ray Bowering is a small collector who originally sold material to Phil's Recycling. Ray Bowering built his own plant which can render 23 metric tonnes of material per week.[67] At the other end of the scale, however, Rothsay has estimated that $10 million would be reasonable as an estimate for the cost of a new plant.[68] While there is no direct evidence concerning the proportion of costs which would be sunk, it is clear that some must be involved, for example, the costs of obtaining regulatory approvals, the specialized equipment and building required which on resale would command a lower price than that for which they were bought.

(4) Conclusion

The extent of the barriers to entry depends upon the would-be-entrant. They are moderately high for a *de novo* entrant. The regulatory and environmental approvals which are required together with the construction time involved, as has been noted, would probably mean that approximately 18 months would be required to effect entry. In addition, the obtaining of sufficient volumes, unless one purchased such from an existing competitor in the market, as well as the fact that some sunk costs would be involved would discourage such entry. Indeed, given the state of this market one would not expect *de novo* entry.

---

[67] Transcript at 219 (26 November 1991); 1012 (9 December 1991); Tables Referred to in Testimony of Joseph Kosalle, tables XVIII and XX (Exhibit R-4).

[68] For a lower figure, see Joint Book of Documents, vol. 17A, tab 74 at 39 (Exhibit JB-17A Confidential).

As has been noted, entry on a small scale by forward integration of the larger slaughterhouses or groups thereof cannot be dismissed as a possible source of entry particularly if they are located in an area where such industry is accepted and where adjacent physical space is available. The experience of Messrs. Murray and Smith in constructing Central By-Products indicates that the investment required for a small operation can be relatively modest; sunk costs did not deter that initiative. While the Tribunal heard evidence that the small slaughterhouses would not contemplate attempting to render their own materials, there is no evidence that this is so for the larger ones. At the same time, the Tribunal does not rely on forward integration by the larger slaughterhouses as a significant source of probable entry. The most probable source of entry in response to a price rise is entry by existing suppliers already established in adjacent regions. Barriers to entry would not preclude entry by such renderers in response to a price rise. Also they might in any event attempt to do so in order to expand their collection area because of low volumes.

E. Renderable Materials Are Not Homogeneous

Renderable materials are not homogeneous. That is, they vary as to quality and in the distance at which they are located from the rendering plant. Some are picked up; some are delivered to the plant by the producer of the material or by others. The price paid for the material or the pick-up charge levied will differ depending on the quantity and the quality of the material. Quality will

differ, for example, as between beef and pork material, as among shop bones and fat (e.g., material from supermarkets), packing house materials, low grade deadstock materials, blood. The quality will also vary depending upon the freshness of the material. There are no published price lists relating to the collecting of renderable materials. While the main thrust of the Director's case has been that the merged firm will become a dominant firm, insofar as any increased market power might be alleged to lead to collusion or tacit price following rather than to dominant firm behaviour, the non-homogeneous nature of renderable materials (including differences in quality, quantity and distance from the rendering plant) would make such behaviour difficult.

F. Conclusion

It is clear that a lessening of competition will result from the merger. What will constitute a likely "substantial" lessening will depend on the circumstances of each case. It is difficult to articulate criteria which might be applicable apart from the obvious ones of degree and duration. The degree of lessening can in some circumstances be assessed by reference to factors such as the number of competitors left in the market, the amount of harm which can be done before the market is likely to again become competitive, for example, as a result of new entry. Various tests have been proposed: a likely 5% price rise sustainable for one year; a 5% price rise sustainable over two years; a small but significant and non-transitory price rise. The Tribunal does not find it useful to

apply rigid numerical criteria although these may be useful for enforcement purposes.

In addition to the lessening which will occur as a result of the merger, lessening is also occurring as a result of changes in the market independent of the merger. It seems clear that the Toronto area was the most competitive in North America. The competition was driven largely by the aggressiveness of Darling (Toronto) and Banner. A highly competitive situation existed between three firms all located within the City of Toronto (Darling, Rothsay and Banner) and one located 40 miles distant (Orenco). That competitive situation of course cannot be re-established.

The Tribunal is asked to assess the effects of the merger in the light of the new situation because it will be within that context that the merged firm will operate. The merger of the two largest firms and the closure of the Darling (Toronto) plant will substantially change the structure of the market. Even if Darling remains in the market and competes from Detroit it will not be as effective a competitor from that location as it was when it had a plant located in Toronto. Darling will take on the character of a fringe firm rather than a major competitor. While, as has been noted, the view has been expressed that Darling will build a plant in Hamilton, there is no verifiable evidence of such intention. One would have thought that if Darling intended to maintain a plant in that area it would have taken concrete steps with respect thereto before now.

Dr. Ross expressed the opinion that with the merger and the departure of the Darling plant from the Toronto-Hamilton area, the merged firm would likely assume the behaviour of a dominant firm with the remaining firms functioning as a competitive fringe. He expressed the view that the price increases which would follow could be very high because the elasticity of demand is so low (producers of renderable material must dispose of it). That conclusion depended upon a number of assumptions including high barriers to entry and limited excess capacity in the hands of the merged firm's competitors.

The respondents argue that the likely effects of the merger should be assessed by reference to a longer time frame than two years. Given the declining state of the market it is argued that in the not too far distant future (the respondents say five years) there will only be enough red meat renderable material to support one plant and some smaller specialty fringe firms. It is also argued that with or without the merger, given the projected increase in poultry materials together with the decline in red meat materials, Rothsay (Moorefield) will be dedicated to processing poultry materials and will be out of the red meat material rendering business.[69]

The decision in *United States v. General Dynamics Corp.*[70] is cited for the proposition that in assessing a merger one must consider changes that are

---

[69] Discussed further *infra* at 101-102.

[70] 485 U.S. 486 (1974).

occurring in the market and that are likely to occur in the future. That case concerned the coal industry. The United States government relied on statistical evidence to show that there was concentration in that industry, that the concentration was increasing and that the acquisition in question would increase the market share of General Dynamics Corp. and contribute to the concentration trend. The Supreme Court upheld a finding of a lower court that despite this statistical evidence there would be no lessening of competition because of the acquired firm's current production and its much more limited potential for future production as a result of its depleted reserves.

While market share statistics are high and barriers to *de novo* entry are moderately high, the Tribunal cannot ignore the fact that a significant source of competitive discipline will exist from those firms which border geographically on the relevant market and which would be prepared to expand their area of collection in the face of a price rise by the merged firm. Indeed, such firms may find it necessary to do so in any event in order to obtain sufficient volumes for themselves. The fact that there is excess capacity everywhere in the relevant market and in the rendering plants proximate thereto means that constraint will exist on the merged firm's ability to raise prices.

It is true that the merger was not caused by a need to rationalize the firms as a result of lower volumes. Nor did the merger happen for the purpose of limiting competition in the market. The merger "just happened" as part of the

larger acquisition of Canada Packers Inc. by Hillsdown. At the same time, the declining nature of the market is a significant factor to be taken into account since it will lead to increased excess capacity and increased expansion of existing collection areas.

In the light of these considerations, the Tribunal finds that it has not been convinced, on the balance of probabilities, that a substantial lessening of competition is likely to arise as a result of the merger of the two rendering businesses. This decision is very much a borderline one and the difficulty relates to the dynamic changes which are occurring in the market.

In addition, the effectiveness of any divestiture order which might be given is a relevant consideration. It will be discussed below after discussion of the evidence and arguments respecting efficiencies are considered.

VI. EFFICIENCIES

Section 96 of the *Competition Act* provides:

> 96. (1) The Tribunal shall not make an order under section 92 if it finds that the merger or proposed merger in respect of which the application is made has brought about or 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 merger or proposed merger and that the gains in efficiency would not likely be attained if the order were made.

> (2) In considering whether a merger or proposed merger is likely to bring about gains in efficiency described in subsection (1), the Tribunal shall consider whether such gains will result in
>
> *(a)* a significant increase in the real value of exports; or
>
> *(b)* a significant substitution of domestic products for imported products.
>
> (3) For the purposes of this section, the Tribunal shall not find that a merger or proposed merger has brought about or is likely to bring about gains in efficiency by reason only of a redistribution of income between two or more persons. (underlining added)

Section 96 recognizes the fact that mergers which result in or are likely to result in a substantial lessening of competition may have beneficial consequences as well as detrimental and anti-competitive ones. Mergers can increase the efficiency of firms, for example, by enabling them to benefit from economies of scale (the unit cost of production decreases as the amount of output product increases); economies of scope (when lower costs are included in producing two or more products together than in producing them separately); dynamic efficiencies which arise because of improvements to product quality or innovation.[71]

A. Assessment of Cost Savings Claimed as Efficiencies

Three types of efficiencies are claimed by the respondents as arising out of the merger: administrative cost savings; transportation savings; and manufacturing costs savings.

---

[71] P. Areeda & L. Kaplow, *Antitrust Analysis: Problems, Text, Cases*, 4th ed. (Boston, Toronto: Little, Brown, 1988), ¶120.

(1) Administrative Cost Savings

The total annual administrative cost savings alleged is $1,101,337. These arise from a reduction in the number of positions which are no longer required at Orenco allegedly as a result of the merger, positions such as a marketing manager, an accountant, a route service manager, three grease salesmen. The cost savings arise from the money which would have been spent on salaries and associated benefits as well as expenses (e.g., travel expenses). The numerical amount claimed as cost savings is not in dispute. What is disputed is whether these savings arose from the merger or from some other cause. Also, a consideration not raised in argument is why, if grease is not now considered to be in the relevant market, savings with respect to grease salesmen are included in the efficiency calculations.

The Director's experts challenge these administrative cost savings as efficiency gains arising out of the merger on the ground that: (i) information relating to them is entirely in the hands of the respondents and it is easy in the context of a merger to camouflage the dismissal of redundant employees; (ii) these kinds of savings are due to spreading fixed costs over larger output and thus they could have been obtained through means other than the merger, e.g., internal growth, joint venture, or as a result of another merger. The Director's position is that cost savings that do not arise *uniquely* out of the merger are not to be considered as efficiency gains. The respondents' position is that the test to be

applied is whether the efficiency gains would *likely* have been realized in the absence of the merger. The Tribunal accepts the respondents' position.

The most significant difficulty in assessing whether these cost savings arose as a result of the merger, however, arises because they are based on assumptions with respect to the likely structure of the market had the merger not occurred and those assumptions do not appear to be the appropriate ones. This same consideration arises with respect to at least some of the transportation cost savings and will be addressed in discussing them.

(2) Transportation Cost Savings

Three sources of savings on transportation costs are identified: the rationalization of truck routes in Western Ontario; the rationalization of routes in Toronto; and the savings arising from transporting material to Orenco in Dundas rather than to Rothsay (Moorefield). With respect to Western Ontario, since Rothsay (Moorefield) and Orenco covered much of the same territory in Western Ontario, it is possible after the merger to use fewer trucks to collect the same amount of material, resulting in savings of mileage, labour and capital. The total annual savings from these is calculated to be $241,433.46. There is no serious argument that these figures and savings are not accurate. Insofar as the savings respecting the Toronto routes are concerned, these routes were serviced prior to Rothsay (Toronto) volumes being moved to Dundas out of Rothsay

(Toronto) and Orenco. Combining these routes resulted in savings in mileage, labour and capital of $1,451,522.69.

The respondents claim only one-third of these (an annual cost saving of $483,841) as being attributable to the merger. This apportionment is based on the assumption that Rothsay would not have solved its expropriation problems by expanding Moorefield or by obtaining a location on the Hamilton Harbour, but would have had to relinquish two-thirds of its Toronto business. Since it could accommodate one-third of the business at Moorefield without expansion of its existing facility, it claimed only one-third of the savings arising under this heading. A similar one-third allocation was made with respect to the savings claimed as arising out of transporting material from Toronto to Orenco in Dundas rather than from Toronto to Moorefield. One-third of $519,905 was claimed ($173,302) as an annual cost savings.

There is little quarrel with the numbers which are claimed. The validity of the claims with respect to the last two categories of transportation savings, however, is based on the assumption that Rothsay would have responded to the expropriation notice it was under by moving as much material as it could to Moorefield (i.e., one-third of the Toronto volume) and abandoning the rest.[72] This is not a credible assumption. Mr. Kosalle's evidence was that the most likely solution to the expropriation notice would have been for Rothsay to have

[72] Supplemental Affidavit of Donald G. McFetridge at para. 11 (Exhibit R-20).

constructed a new plant in the Hamilton Harbour area. In addition, notices given to drivers who were terminated from the Rothsay (Toronto) plant on transfer of the Toronto volumes to Rothsay (Moorefield) and Orenco were told that their termination was the result of the expropriation of the Toronto plant. Mr. Kosalle admitted that it was impossible to distinguish cost savings which might have arisen as a result of the merger from those which arose as a result of the restructuring which occurred in response to the expropriation. Insofar as efficiency gains likely to arise from the merger are concerned, the burden of proof is on the respondents. The respondents have not met that burden with respect to the claimed efficiency gains insofar as such claims depend upon the assumption that Rothsay would have responded to the expropriation by moving one-third of its Toronto volumes to Moorefield and by abandoning the rest.

(3) Manufacturing Cost Savings

The savings in manufacturing costs which are alleged to result from the merger relate to Orenco's purchase before the merger of approximately 6 million pounds of bleachable fancy tallow to mix with its raw material in order to produce higher quality tallow. This tallow was purchased from Taylor By-Product in the United States. It cost Orenco $184,400 more annually than would have been the case had it purchased the tallow locally. In addition, the cost of heating, milling and refining the tallow was $33,600 annually. It is alleged that Orenco can now produce the same product using Rothsay raw materials.

The Tribunal is not convinced that this is a saving arising out of the merger. It is argued that Orenco could not buy the quantity of tallow required in Canada before the merger because it was not available in the amounts required and that it could not buy the raw material to itself produce this grade of tallow because at the time it was operating at full operational capacity. It seems clear that the savings in question arose because Orenco upgraded its machinery, thereby increasing its capacity, and not as a result of the merger. This should therefore not be considered to be an efficiency gain.[73]

---

[73] With respect to the admonition in subsection 96(3) of the Act that a gain in efficiency shall not be considered appropriate for a decision if it arises "by reason only of a redistribution of income between two or more persons", while this is not relevant given the conclusion that the Tribunal has reached with respect to the cause of the cost saving in question, it is useful to refer to the comments of the former Director of Investigation and Research in a speech on October 15, 1988. These provide content to the subsection 96(3) exception:

> ... gains in efficiency that are pecuniary in nature, that is arising as a result of a distribution of income between two or more persons, are unacceptable.
>
> By way of illustration, cost savings that result when a firm is able to use increased bargaining leverage to extract volume discounts from suppliers are not eligible per se for consideration. The fact that the purchaser is able to obtain products at a reduced cost in these circumstances is only a transfer of income from suppliers. However, cost savings resulting from
> larger volume orders, which enable the purchaser to attain economies of scale or incur lower transaction costs, may reflect real efficiency gains and consequently may be accepted for consideration. If the placement of larger volume orders also enables the supplier to reduce costs, part of which are transferred to the purchaser in the form of lower prices, then that part may also qualify as real efficiency gains. Other examples where such pecuniary gains in efficiency may arise, and are thus not allowable, might be found in labour procurement situations and tax savings matters. (C.S. Goldman, "Mergers, Efficiency and the Competition Act: Notes for an Address", Commercial and Consumer Workshop, Faculty of Law, McGill University, Montreal, Quebec, October 15, 1988).

And an explanation found in Areeda also sheds light on this concept:

> In addition to the "technological" economies of scale ..., many large firms enjoy "pecuniary" economies of scale to some degree, for example, higher discounts for volume advertising or lower rates for heavy utility use not related to resource savings. Unlike technological economies, these pecuniary economies do not represent long-run savings in the use of socially valued resources. And they may raise barriers to entry in some cases. Indeed, pecuniary economies may be a euphemism for the surplus profits made possible by monopoly on the buyer's side of the market. Monopsony, as buyer monopoly is called, spoils economic efficiency just as seller monopoly does. Consequently, restructuring of large firms can hardly be resisted on the ground that it would deprive them of pecuniary economies. (*Supra*, note 71 at 36.)

Donald G. McFetridge prepared expert evidence assessing the deadweight loss[74] which likely could arise from the merger and compared it to the efficiencies claimed by the respondents. He assumed for the purposes of this analysis a 20% (and alternatively a 30%) decrease in the price paid by the renderers to the suppliers of renderable material. He also did an analysis based on a 40% increase with an elasticity of 0.1. On the basis of that analysis he concluded that the claimed efficiency gains outweighed the deadweight loss. Dr. McFetridge chose the 20% figure as a starting point because on examination for discovery the Director's representative, Stephen Peters, had referred to this percentage. It is clear that the percentage decreases which were used may not be very realistic for this industry. The prices can vary from a fairly small amount (e.g., three cents per pound) to a charge being levied for pick-up. In any event, given the Tribunal's findings elsewhere it is not necessary to express any conclusions with respect to this analysis.

(4) Conclusion

It is first necessary to address the question of the burden of proof which must be met by respondents when alleging efficiency gains. Counsel for the respondents seemed to argue that once they had established the claimed efficiency gains on a *prima facie* basis, that was sufficient to transfer the onus of disproving them to the Director. He argued that if on the balance of probabilities

---

[74] Described *infra* at 88.

there was uncertainty, the doubt should be resolved in the respondents' favour. The Tribunal does not accept that argument. The respondents have the onus of proving the existence of the efficiencies claimed, or the likelihood of their existence when the merger has not been consummated, on the balance of probabilities in the normal way. Many of the claimed efficiency gains in this case, as has been noted, have not been proven to have arisen out of the merger as opposed to having arisen as a result of the restructuring caused by the expropriation. More importantly, however, the respondents based their trade-off analysis on a legal interpretation of section 96 which the Tribunal does not think is correct. That interpretation will be discussed below.

B. Legal Interpretation of Subsection 96(1)

In order to understand the arguments which were presented to the Tribunal respecting the proper interpretation of section 96, it is necessary to refer to a distinction which is made by economists between two different types of detrimental effects which may result from a firm having a monopoly or a dominant position in a market. If the merger results in the merged entity being able to raise prices above what would exist in a competitive market, then a transfer of funds (the wealth transfer) from the consumer to the producers is likely to occur. While this will be detrimental to individual consumers personally, it is not necessarily classified by economists as detrimental to society as a whole. This thesis postulates that there is no reason to suppose that the wealth transfer in

the hands of the purchaser (consumer) would be used for any more socially beneficial purpose than would be the case if it were in the hands of the producer (seller). What is important under this economic value judgment, is the detrimental effects which arise from the merger which lead to losses for society as a whole.[75]

Detriment to society as a whole is said to arise, for example, when consumers because of the higher prices choose an alternate and less appropriate substitute product for the use they have in mind. They substitute a product which would have been their second choice in a competitive market. This inefficient substitution is seen as a misallocation of resources; it is seen as a loss to society as a whole. It is referred to as allocative inefficiency or the deadweight loss.

Both the Director and the respondents argue that subsection 96(1) directs the Tribunal to balance "the gains in efficiency" which will arise from the merger against this allocative inefficiency or deadweight loss.[76] The Director's *Merger Enforcement Guidelines* states:

> Section 96(1) requires efficiency gains to be balanced against "the effects of any prevention or lessening of competition that will result or is likely to result from the merger or proposed merger". Where a merger results in a price increase, it brings about both a neutral redistribution effect and a negative resource allocation effect on the sum of producer and consumer surplus (total surplus) within

---

[75] O. Williamson, "Economics as an Antitrust Defence: The Welfare Tradeoffs" (1968) 58 Am. Econ. Rev. 18 at 21-23; "Economics as an Antitrust Defense Revisited" (1977) 125 U. of Pa. L. Rev. 699, at 710ff.

[76] For explanations of the economic theory, see: H. Hovenkamp, *supra*, note 8 at 295-99; B. Dunlop, D. McQueen & M. Trebilcock, *Canadian Competition Policy:A Legal and Economic Analysis* (Toronto: Canada Law Book, 1987) at 160-65.

> Canada. The efficiency gains described above are balanced against the latter effect, i.e., the deadweight loss to the Canadian economy.[77] (footnote omitted)

This interpretation of section 96 is also found in the text *Mergers and the Competition Act* by Crampton.[78] The Tribunal[79] has difficulty accepting this interpretation.

In the first place, the Tribunal is directed by subsection 96(1) of the *Competition Act* to balance "the gains in efficiency" against the "effects of any prevention or lessening of competition that will result or is likely to result".[80] If only allocative inefficiency or the deadweight loss to the Canadian economy was intended by Parliament to be weighed in the balance then one would have thought that the section would have been drafted to specifically so provide. The interpretation which both the Director and the respondents put on section 96 requires a reading down of the phrase "effects of substantial lessening of" so that it does not include the transfers from consumers to producers which will generally be the largest effect of the substantial lessening.[81]

---

[77] Director of Investigation and Research, Information Bulletin No. 5, March 1991 (Supply and Services Canada, 1991) at 49.

[78] P.S. Crampton, *Merger and the Competition Act* (Toronto: Carswell, 1990) at 520-31, especially 524-31.

[79] When the word Tribunal is used here and elsewhere in these reasons and the decision relates to a matter of law alone that decision has been made solely by the presiding judicial member.

[80] The French text speaks of "des gains en efficience" against "les effets de l'empêchement ou de la diminution de la concurrence qui résulteront ou résulteront vraisemblablement".

[81] Whether one would expect to see terms such as "allocative inefficiency" or "deadweight loss" in the text of the statute does not matter; these concepts can be phrased in less technical terms.

Indeed, earlier bills respecting proposed revisions to the *Combines Investigation Act*, which preceded the *Competition Act*, contained clauses which made it clear that efficiency gains were to be given precedence without any necessity to weigh them against the total effects arising out of a substantial lessening of competition occurring by reason of the merger. For example, Bill C-42 read:

> (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.[82]

And, Bill C-29 provided:

> 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.[83] (underlining added)

But these clauses were not enacted and the text of subsection 96(1) does not provide that if substantial efficiency gains exist the merger should be allowed. Rather, the subsection requires a weighing of "efficiency gains" against the "effects of any prevention or lessening of competition that will result or is likely to result from the merger".

---

[82] Bill C-42, *An Act to amend the Combines Investigation Act and to amend the Bank Act and other Acts in relation thereto or in consequence thereof*, 2d Sess., 30th Parl., 1976-77.

[83] Bill C-29, *An Act to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof*, 2d Sess., 32d Parl., 1983-84.

A description of the various purposes served by competition law in relation to efficiency gains is found in the text entitled *Competition Law*.[84] It is noted that one traditional purpose has been to protect the consumer from being charged supra-competitive prices. While one can argue that this is insignificant from the point of view of loss to the economy as a whole, Whish notes that there is a powerful political argument for preventing such accretions of wealth at the consumer's expense. Another purpose which has traditionally been seen as served by competition law is to encourage the dispersal of power and the distribution of wealth:

> Aggregations of resources in monopolists or multinational corporations or conglomerates could be considered a threat to the whole notion of democracy, individual freedom of choice and economic opportunity. This argument has been influential in the US where for many years there was fundamental mistrust of big business, and it was under the antitrust laws that the world's largest corporation, AT and T, was eventually dismembered.[85]

A third objective of competition law is seen as that of protecting the small firm against more powerful rivals:

> Somehow the competition authorities should hold the ring and ensure that the `small guy' is given a fair chance to succeed. This idea has had a strong appeal in the US, in particular during the period when Chief Justice Warren led the Supreme Court. However it has to be appreciated that the arrest of the Darwinian struggle, whereby the most efficient succeed and the weak disappear, in order to protect small business can run directly counter to the idea of consumer welfare. It may be that competition law is used to preserve the inefficient and to stunt the performance of the efficient. Bork has been particularly scathing of the `uncritical sentimentality' in favour of the small guy in the US and in recent years US law has been developing in a noticeably less sentimental way.

---

[84] *Supra*, note 34 at 12-15.

[85] *Ibid.* at 30.

> Meanwhile the current darling of the European Commission is the `small and medium sized undertaking', indicating that the little guy is still in favour on this side of the Atlantic.[86] (footnote omitted)

These objectives can run counter to the fourth objective which is that of furthering the efficiency of the economy as a whole:

> Also it is important to appreciate that economic and political fashions change and that the priority of objectives over a period can alter. In the US a fundamental change is taking place and yesterday's naked restraint of competition may turn out to be tomorrow's precondition for efficiency.[87]

With this background in mind, then, one turns to the purpose clause of the *Competition Act*. That clause makes it clear that several objectives are meant to be served by the Act. The clause states that:

> 1.1 The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices. (underlining added).

The interpretation of section 96 which both parties adopt requires a selective reading of that clause. It requires that one give precedence to the instruction that the Act be interpreted "in order to promote the efficiency ... of the

---

[86] *Ibid.*

[87] *Ibid*. at 15.

Canadian economy" over the instruction that the Act be interpreted "in order to provide consumers with competitive prices". Equally, the instruction that the Act be interpreted "in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy" is accorded lesser significance. The Tribunal has not been referred to any jurisprudence which indicates that in a listing of objectives in the purpose clause of a statute that which is listed first is to be given greater weight than those which follow. Also, there is nothing in the text of the purpose section which indicates that such preference is to be given. Indeed, in debates in the House of Commons, the Minister responsible for the Act indicated that it was the fourth objective which was of overriding concern:

> The fourth but not the least objective is to provide consumers with competitive prices and product choices. As such, this objective becomes the common denominator in what we are trying to achieve. This is the ultimate objective of the Bill.[88]

Reference is made by Crampton[89] to the evidence given before the Legislative Committee on Bill C-91.[90] In that forum it was pointed out that the efficiency section was unclear because it required a balancing of two different things. The response at 11:40 reads as follows:

---

[88] House of Commons Debates, 7 April 1986 at 11927.

[89] *Supra*, note 78.

[90] *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-91, Issue No. 11* (May 21, 1986) at 11:34ff.

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 [sic] efficiency, and the lessening of competition. According to the government, which of the two is most important?

Mr. Domm: I thing 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 for 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 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?

• 1735

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: In their presentation the Canadian Federation of Independent Business suggests guidelines in regard to the efficiency defence be embodied in the legislation. Why are you not giving some guidance precisely to the tribunal in this regard?

Mr. Domm: I would refer you to proposed subsection 68.(2). Proposed subsection 68.(2) directs the tribunal to consider if the gains will result in a significant increase in the real value of exports or substitution of domestic products or importer producers.

It is to be noted that the answers which were given relate to a determination of what should be considered as an efficiency gain and not to a clarification of what such gains, however they might be defined, should be balanced against.

The Tribunal is not unaware of the debate which has raged south of the border as to whether allocative efficiency should be the only goal of

merger policy.[91] The debate in the United States is well described in *Horizontal Mergers: Law and Policy*.[92] It is useful to quote a summary set out therein of the various positions relating to efficiencies:

> *Absolute Defense*. Muris may be the leading proponent of an absolute efficiencies defense. Although he concedes that a full efficiencies defense would "somewhat complicate merger proceedings and economies can not always be demonstrated," Muris nevertheless believes that merger law must be based on economic theory and that that premise dictates consideration of efficiencies.
>
> *Partial Defense*. Some commentators believe that efficiencies ought to be considered on a case-by-case basis, but suggest that the scope of an efficiencies defense may be limited to minimize the extent of judicial resources necessary to resolve such claims. Areeda and Turner would limit the defense to certain types of efficiencies (i.e., plant size and plant specialization where there is product complementarity) which they feel are most likely to result in significant cost savings. Former FTC Chairman Miller similarly would recognize an efficiencies defense, but only for efficiencies related to economies of scale.
>
> Sullivan also favors a partial efficiencies defense, but he would limit it according to an evidentiary standard rather than by types of efficiencies:
>
> > An alternative, not leading the Court into an unbearably complex or value laden area of judgment, would be to say that where cost saving efficiencies are clear, and arise in a context where market forces will oblige the seller to pass them on to consumers, and where competitive harm is only speculative ... the wise course is to risk the possible social harm for the certain benefit. Even if the Court is not ready to weigh the social benefit of efficiencies against the social harm of competitive injury when both seem similarly likely or certain to eventuate, it might nevertheless value a significant and likely social benefit higher than a much more doubtful harm.
>
> Similarly, some commentators would require that claimed efficiencies be of a certain minimum size before being subject to litigation.

---

[91] A.A. Fisher & R.H. Lande, "Efficiency Considerations in Merger Enforcement" (1983) 71 Calif. L. Rev. 1582; H. Hovenkamp, *supra*, note 8 at 41-42.

[92] *Supra*, note 9 at 219-32.

In an effort to integrate efficiency considerations with traditional antitrust concerns, Rogers writes that "efficiencies are relevant as a procompetitive factor only when they produce a more competitive market". This condition is likely to be satisfied, he suggests, where a merger involves two moderate-sized firms in a market dominated by larger firms with identifiable efficiency advantages. A corollary is that efficiencies in other situations may make a market less rather than more competitive and therefore should not be considered a defense in those circumstances.

Prosecutorial Discretion. One method for accommodating efficiencies without placing the issue squarely before the courts is to allow the enforcement agencies to consider efficiencies in deciding whether to challenge a transaction. Under this approach, efficiency claims would not be entertained once a suit is brought. Williamson suggests that enforcement authorities should decline to bring cases in which "a reasonably plausible showing of real economies can be made," but he do[es] not think it feasible or rewarding for the courts to entertain explicitly an economies defense involving a full-blown trade-off assessment. This approach is outlined in the FTC Statement and, apparently, in the 1984 Merger Guidelines.

One could expect, however, to see parties attempt to urge district courts to revisit the efficiencies issue when the prosecutor decides that the claim is not sufficient to justify the merger. It has been suggested, for example, that parties will present evidence of efficiencies to the courts in any event and may even argue that it would be arbitrary and capricious for the enforcement authorities but not the courts to consider such evidence.

Raise Enforcement Thresholds. Other commentators, while sympathetic to the notion that efficiencies are desirable and can sometimes justify otherwise harmful mergers, believe that the costs of fully litigating a vast range of efficiency claims would impose an intolerable burden on the judicial system. Moreover, even if efficiencies could be quantified with precision, it might still be impossible to quantify a merger's competitive costs, against which the efficiencies must be balanced.

The proponents of this view generally assert that most efficiency-enhancing mergers will be permitted if the general standards under the Merger Guidelines are set at such a level as to balance market power and efficiency effects. Fisher and Lande, citing evidence of the high cost of business uncertainty and of litigating efficiency claims, conclude:

> [W]e would incorporate efficiency concerns by adjusting the Guidelines' threshold for challenging mergers and urging the government and the courts to follow them with practically no exceptions. This change would have the effect of allowing more merger efficiencies and weeding out many of the mergers

> whose effect on market power was unduly speculative, without increasing litigation and business adjustment costs excessively.
>
> The commentators who advocate setting of the general standards with efficiency goals in mind generally do not suggest specific numerical thresholds. Some of the material cited above was published prior to the 1982 Guidelines, so it is unclear how the revised standards would affect the commentators' views. For example, Areeda and Turner have supported a partial efficiencies defense because mergers with combined market shares in the 10 to 13 percent range - which would likely have been subject to challenge under the 1968 Guidelines, but not under the 1982 or 1984 Guidelines -could frequently involve efficiencies. Another observer points out that, according to a study by Scherer, firms in eleven out of twelve industries studied could achieve most if not all advantages of multiplant size with a national market share of 14 percent or less - a level unlikely to be challenged under the current Guidelines.[93] (footnotes omitted)

With respect to subsection 96(1) of the *Competition Act*, it is argued that if the words "effects of substantial lessening of competition" are not limited to deadweight loss then there will be a significant number of efficiency enhancing mergers that will not be allowed. Whether this is the case or not is not a matter which can be determined on the evidence given in this case. Certainly, one interpretation which is open on the basis of the wording of subsection 96(1) is to weigh any alleged efficiency gains against the degree of likelihood that detrimental effects (both wealth transfers and allocative inefficiency) will arise from the substantial lessening of competition. That is, in those cases where such effects are likely but not positively certain to follow, one could give more weight to efficiency gains than where the reverse is true. The likely detrimental effects of a merger may on some occasions be moderate in extent, in others they may be quite extreme. It is not unreasonable to expect that a balancing of the alleged

---

[93] *Ibid.* at 229-32.

efficiency gains could be assessed by references thereto. To the extent that the efficiency gains would be likely to lead to lower prices for consumers this would likely be determinative.[94]

One other consideration arises with respect to the arguments concerning the efficiency defence. The parties both rely on the judgment that the wealth transfer is a neutral one. A question posed during argument and which will be repeated here is, is this always so. If, for example, the merging parties in question were drug companies and the relevant product market related to a life-saving drug would economists say that the wealth transfer was neutral. The Tribunal does no more than raise this as a question. Another question respecting the alleged neutrality of the wealth transfer is: if the dominant firm which charges supra-competitive prices is foreign-owned so that all the wealth transfer leaves the country, should the transfer be considered neutral? Dr. McFetridge referred to this in his affidavit and concluded that a decision that such was not neutral would be discriminatory. The Tribunal does no more than raise these questions since for the reasons expressed above it is not necessary to make a decision on them in the present context.

VII. ORDER FOR DIVESTITURE - EFFECTIVENESS

[94] For a recent discussion of such an analysis see: A.A. Fisher, F.I. Johnson & R.H. Lande, "Price Effects of Horizontal Mergers" (1989) 77 Calif. L. R. 777.

It has been argued that an order for divestiture would not be effective in this case. For an order to be effective Rothsay must respond to it by taking positive steps to ensure that it remains a vigorous competitor in the red meat rendering business. The Director assumes that Rothsay will do so. Rothsay asserts that it will not.

Since the divestiture requires the removal from Orenco of the Rothsay (Toronto) volumes which are now being processed at Orenco, this implicitly requires that Rothsay either expand its Moorefield facility or construct a new facility, for example, in Hamilton. While counsel for the Director suggested that some other arrangement might be made, for example, the continued processing of materials at Orenco under contract, it is difficult to conclude that this would be a viable long term solution. While Orenco would undoubtedly be willing to process such materials under a tolling agreement on a temporary basis if Rothsay were constructing additional facilities, it is difficult to accept that Orenco under independent management would agree to such an arrangement on a permanent basis, rather than insisting that Rothsay sell the relevant contracts to Orenco.

An order cannot now be given which will put Rothsay and Orenco back in the position in which they were pre-merger. At the time of the merger Rothsay was vigorously pursuing a solution to the expropriation of its Toronto plant. There is no reason to assume that Rothsay would not have been allowed to stay in the Toronto

location until new facilities were constructed. Mr. Kosalle, at least, is of the opinion that the solution would have been the construction of a new facility on the Hamilton Harbour Commission lands. With the merger the momentum towards that solution died.

Orenco has changed its facility so that a significant amount of the Rothsay (Toronto) volumes are being accommodated at that plant. Orenco has not purchased a hydrolyzer nor moved into the processing of poultry feathers. A divestiture of Orenco would leave all the captive materials originating from both Hillsdown's and Canada Packers Inc.'s red meat and poultry processing operations with Rothsay (Moorefield). Approximately 680 metric tonnes per week of captive red meat material are processed by Orenco. The merger of the upstream red meat and poultry processing operations of Hillsdown and Canada Packers Inc. has been approved. The merger of those operations does not raise competitive concerns. With a divestiture order the total volume of captive materials would be processed by Rothsay (Moorefield). In the absence of the expansion of Moorefield this would occupy a significant amount of available capacity.

In addition to the captive red meat materials, Maple Leaf Foods Inc., Rothsay's upstream poultry processing operation, processes 40% of the poultry processed in the province of Ontario. Since the supply of poultry materials is expected to increase, the Moorefield facility over time will be required to process

additional captive poultry materials and it is argued that it is likely to elect to concentrate on rendering poultry, both captive and non-captive, rather than compete with Orenco in providing rendering services for red meat materials. Thus, it is argued that Rothsay (Moorefield) will cease to be a vigorous competitor for red meat material in the relevant market in any event.

The Tribunal accepts the respondents' argument that the continued decline in red meat material together with other changes in the market make construction of a new plant in Hamilton less attractive now than it was in 1989-90. Insofar as Rothsay's Moorefield facility is concerned, while the Tribunal is not convinced that expansion of that facility would be impossible as a result of environmental concerns and community opposition, the question is whether Rothsay would choose to pursue that option.

If there had been no expropriation of the Toronto plant the question of the effectiveness of a divestiture order would not have arisen. In the particular circumstances of this case, however, the Tribunal doubts that an order for divestiture would be effective to preserve a significant degree of competition in the relevant market for a sufficient period of time to justify its issuance.

The Tribunal does not want to leave the impression that merely because the respondents have changed their positions in response to the merger before the

application for an interim order was brought by the Director, the Tribunal is reluctant to order divestiture. That is clearly not the case. The Tribunal's comments on the likely ineffectiveness of a divestiture order pertains only to the particular facts of this case including the particular market conditions. The Tribunal is not convinced that issuing an order which depends for its effectiveness on one of the parties constructing additional facilities in a market where there is already excess capacity and shrinking volumes would accomplish a pro-competitive result.

VIII. ORDER

FOR THESE REASONS, THE TRIBUNAL HEREBY ORDERS THAT the application for a divestiture order is denied.

DATED at Ottawa, this 9th day of March, 1992.

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

(s) B. Reed
B. Reed

TAB 8

CPR

Competition Tribunal | Tribunal de la Concurrence

PUBLIC VERSION

Reference: *The Commissioner of Competition v. Superior Propane Inc.*, 2000 Comp. Trib. 15
File no.: CT1998002
Registry document no.: 192b

00 256 007

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*.

BETWEEN:

The Commissioner of Competition
(applicant)

and

Superior Propane Inc.
ICG Propane Inc.
(respondents)

Dates of hearing:	19990923, 24, 27-29; 19991004-08, 13-15, 18-21, 25-29; 19991101-03, 23, 25, 29, 30; 19991201-03, 06-09, 13, 14; 20000119, 24, 31; 20000201-04, 07-09
Members:	Nadon J. (presiding); L.R. Bolton (19990923 to 19991103); C. Lloyd (19991129 to 20000209); and L.P. Schwartz
Date of order:	20000830
Order signed by:	Nadon J.

REASONS AND ORDER

TABLE OF CONTENTS Paragraph

GUIDE TO ACRONYMS

2SLS	two-stage least squares
cpl	cents per litre
EBITDA	earnings before interest, taxes, depreciation and amortization
IOL	Imperial Oil Limited
mbpd	million barrels per day
MEG's	*Merger Enforcement Guidelines*
OLS	ordinary least squares
SMS	Superior Management Services Limited Partnership

I. INTRODUCTION

[1] An application is brought by the Commissioner of Competition ("Commissioner") pursuant to section 92 of the *Competition Act*, R.S.C. 1985, c. C-34, (the "Act") for an order to dissolve the merger of Superior Propane Inc. ("Superior") and ICG Propane Inc. ("ICG") or otherwise remedy the substantial prevention or lessening of competition that is likely to occur in the market for propane in Canada upon the implementation of the said merger.

[2] The application arises by reason of Superior's acquisition of ICG on December 7, 1998. Prior to the acquisition, Superior submitted a short-form prenotification filing pursuant to section 121 of the Act to the Competition Bureau regarding its proposed acquisition of all of the shares of The Chancellor Holdings Corporation, a wholly-owned subsidiary of Petro-Canada. The Chancellor Holdings Corporation, in turn, owned ICG. An inquiry into this merger was commenced by the Commissioner on August 14, 1998, pursuant to section 10 of the Act. On December 6, 1998, following two days of hearing, the Tribunal dismissed the Commissioner's application of December 1, 1998 brought under section 100 of the Act for an order forbidding the closing of the transaction for a period of 21 days. Further, on December 11, 1998, a consent interim order was issued by the Tribunal to hold separate the assets of Superior and ICG, excluding the non-overlapping locations situated in areas where Superior had no market presence.

[3] Superior is a corporation constituted under the laws of Canada and is engaged primarily in the retailing and wholesaling of propane, as well as in the sale of propane consuming appliances and equipment and related services in all 10 provinces and territories. All of the outstanding shares of Superior are owned by the Superior Income Trust Fund (the "Fund"), a limited purpose trust established for the purpose of holding debt and equity of Superior. The Fund has issued trust units which are listed on the Toronto Stock Exchange.

[4] ICG is a corporation constituted under the laws of Canada and is engaged in selling and distributing propane and providing related services to customers in all Canadian provinces and territories except Prince Edward Island, Newfoundland and to a lesser extent, Nova Scotia. ICG operates through a network of company-owned distribution outlets and independent dealers located throughout its sales and distribution areas. In 1990, Petro-Canada indirectly acquired ICG and combined Petro-Canada's retail propane operations with ICG's business.

[5] The Commissioner alleges that the merger will create a dominant national propane marketer and in several markets, a dominant local propane marketer. Both Superior and ICG compete against each other in the same geographic and product markets through their operations of propane distribution systems and wholesale supply of propane to agents and dealers.

[6] Interlocutory proceedings in this matter were lengthy and vigorously contested. Upon application by the Commissioner, an interim order was issued on December 11, 1998 to preserve ICG's business as independent and viable pending the Tribunal's decision on the application. Various orders regarding confidentiality of documents and the scope of discovery were issued by the Tribunal.

[7] Following the illness and inability of a panel member, Lorne Bolton, to attend the hearing in this matter, an Order Regarding the Constitution of a New Panel was issued on December 13, 1999. This order terminated the hearing before the panel constituted of Mr. Bolton, Dr. Schwartz, and Nadon J. and further constituted a new panel composed of Ms. Christine Lloyd, Dr. Schwartz and Nadon J. pursuant to section 10 and subsection 12(3) of the *Competition Tribunal Act*. The evidence on the record of the previous proceedings, including all the orders and rulings made by the Tribunal, were entered into the record of the hearing before the new panel pursuant to section 70 of the *Competition Tribunal Rules*.

[8] The hearing of this matter took 48 days, 91 witnesses including 17 expert witnesses were called and a large number of documents were entered as exhibits.

II. PROPANE BUSINESS

[9] Propane is a chemical commodity produced as a by-product of natural gas extraction and of crude oil refining. In Canada, 85 percent of propane production is derived from natural gas and accordingly is produced in the Western Canadian Sedimentary Basin. Propane volumes from crude oil are produced at oil refineries that are generally closer to population centres where the consumption occurs (e.g., Edmonton, Southern Ontario, Montreal, Quebec City).

[10] Propane sourced from gas production is extracted and transported mixed with other natural gas liquids to fractionation sites where separation into "specification propane" takes place. In Canada, raw natural gas liquids are transported from producing regions in Alberta and northeast British Columbia via pipelines to "hubs" at Edmonton/Ft. Saskatchewan and at Sarnia, Ontario, where fractionation takes place. Fractionation into specification propane also takes place at straddle plants along pipelines and gas field plants in Alberta for marketing to western Canada.

[11] Approximately 63 percent of propane produced in Canada is exported to the United States (expert affidavit of G. Mathieson (18 August 1999): exhibit A-2073 at 15). According to Statistics Canada data which are themselves disputed, total domestic consumption of approximately 77 million barrels per day ("mbpd") in 1998 occurred in the segments of residential/commercial/agricultural for space and water heating, cooking, appliances, crop drying (32 mbpd); industrial uses, e.g., forklifts, heating (17 mbpd), collectively, the "traditional segments"; in transportation, primarily automobile fuel (18 mbpd); and petrochemical feedstock (10 mbpd). Consistent with industry usage, "retail propane" includes total propane consumption less propane consumed as petrochemical feedstock and propane consumed by producers.

[12] Although it appears that there are discrepancies in the consumption data published by different sources, autopropane consumption seems to have peaked in 1994 at 23 mbpd, stimulated by government-supported fleet conversions, and then declined steadily as those programmes of financial assistance were ended along with other factors including the improved efficiency of gasoline engines.

[13] Consumption of propane used as a heating fuel is subject to seasonal fluctuation and dropped dramatically from 39 mbpd in 1997 to 32 mbpd in 1998 due to warmer weather. Consumption in the industrial and petrochemical feedstock segments appears to have levelled. It seems that Canadian propane consumption is characterized by stable demand or modest growth at best.

[14] There is some dispute as to the number of propane marketers operating in Canada. ICG's amended preliminary prospectus claims approximately 75 propane marketers including Superior, while Superior claims a total of 189 independent propane distributors. These propane marketers obtain propane supplies at refinery racks and at storage facilities owned by the major propane producers at prices based on postings at the Edmonton or Sarnia hubs and varying with the distance between these hubs and the supply point. Large marketers typically purchase their supplies under contracts that specify volume and price, or a pricing formula in terms of price per litre. These buyers may own or rent storage space close to the supply points which allows them to enter into "keep dry" arrangements at lower prices from producers. A keep-dry arrangement requires the buyer to take propane sufficiently regularly so that the producer does not have to maintain storage and, therefore, sells at a lower price to a buyer capable of honouring its commitments.

[15] These buyers transport propane by truck or rail to their local storage facilities (primary distribution). Secondary distribution occurs when delivery to customers is made, usually by truck, from these local storage facilities.

[16] Smaller propane marketers purchase propane on spot markets from the producers or from the larger marketers. In some cases, a smaller marketer acts as an agent in a local area for a major marketer that does not have a local delivery capability. For such arrangements, the customer contract is held by the major marketer who determines the pricing. Another relationship is the "bulk dealer", whereby a local company purchases propane from a major marketer under an agreement that specifies a territory in which that local dealer will not face competition from the major marketer or any of its other bulk dealers.

[17] Propane marketers tend to be local and regional in their operations. At present, only two companies, Superior and ICG, supply end-users across Canada, either directly or through agents and dealers. The merging parties are well suited to supply customers that demand propane at multiple locations across the country.

[18] The customer relationship is most frequently contractual. Almost all propane marketers undertake to deliver propane on a regular basis to customer locations at the prevailing price established by the marketer from time to time for a specific term with agreements lasting up to five years. The customer is free to terminate the contract on sufficient notice, but as the contract will often contain "meet or beat" and/or "right of first refusal" clauses, the current supplier may be able to maintain the customer's business.

[19] In addition to delivering the propane, particularly to residential customers, the marketer usually provides customer storage tanks on a rental basis and installs and services

propane-related equipment. It appears that most marketers do not fill a residential tank that they do not own.

[20] Propane delivery is a regulated activity in all jurisdictions. Propane storage tanks and customer tanks must meet various safety standards, and the individuals who handle the propane must be licensed.

[21] Although specification propane is a well defined commodity, the propane marketing companies generally differ with respect to reputation, length of time in the business, the terms and conditions they offer to customers, the ability to meet a customer's needs at multiple locations, etc. In addition, some marketers specialize in serving certain segments, while others seek customers in all segments. The result is that the "product" provided by a propane marketer is often differentiated on these dimensions from the offerings of its competitors.

III. MARKET DEFINITION

A. PRODUCT MARKET

[22] With respect to product market definition, the Commissioner submits in final argument that the relevant product market is the supply and delivery of propane, propane equipment and related services to retail and wholesale customers. The Commissioner also submits that the relevant product market can be further broken down into various end-uses and customer classifications including: residential, agricultural, commercial, industrial (collectively, the "traditional" segment), automotive, national and major account customers. As propane and related equipment and services appear to be strong complements, it will be convenient to define one product market rather than consider the three separate business lines mentioned.

[23] The Commissioner alleges, in effect, that retail propane constitutes, by itself, a market over which market power can be exercised. Such a market will be referred to as a "competition market". The respondents assert that it is not a competition market because alternate fuels exist and consumers can and do easily switch to these alternatives. Their position is that retail propane is part of a broad energy market and hence that any attempt to exercise market power over retail propane could not be successful.

(1) Commissioner's Position

[24] The Commissioner's experts, Richard Schwindt and Steven Globerman, presented a report evaluating the competitive effects of the proposed merger between Superior and ICG. With respect to product market definition, they provided opinion evidence that retail propane is the relevant competition market (expert affidavit of R. Schwindt and S. Globerman (16 August 1999): exhibit A-2056). They conclude that switching from propane to alternate fuels is difficult. For example, regarding residential heating applications, Professors Schwindt and Globerman observe, at page 10 of their report, that while most propane appliances can be readily converted to natural gas, nevertheless "in residential households where the piping from the outside of the house to the furnace is sized for propane and not for natural gas, conversion

costs can be quite high". Further, regarding electricity, they observe at page 11 of their report that "at this time and into the foreseeable future, the price of electricity is so high relative to propane in several parts of the country that it is an unlikely substitute".

[25] Further, Professors Schwindt and Globerman observe that heating oil could be a substitute for propane although propane is superior to oil with respect to cleanliness, environmental impact and odour. Convenience, storage requirements and capital costs do not differ significantly between the two fuels. However, their estimated costs of converting a residence in the Lower Mainland of British Columbia from a propane to an oil fired forced air furnace range from $4,500 to $5,300. At pages 12 and A-2 of their report, they conclude that it would take very significant price increases, in the range of 50 to 60 percent, to justify a switch to fuel oil. At page A-3, they conduct a similar analysis regarding switching from propane to heating oil in commercial heating and from propane to electricity for forklift trucks which leads to the same conclusion.

[26] Regarding autopropane, Professors Schwindt and Globerman note at page 19 of their report that substitutability of alternate fuels, particularly gasoline, depends upon whether the vehicle is dual-fuel or dedicated to propane. They infer from an Imperial Oil Limited ("IOL") document that 95 percent of conversions to propane in British Columbia in the early 1990's were for commercial vehicles and nearly all of those were "propane dedicated" rather than dual-fuel, suggesting that substitution is slight.

[27] The Commissioner further submits that switching costs are high and "create a lock-in effect for customers" with the result that cross-elasticity of demand is low.

[28] The Commissioner submits that the payback period for changing related equipment and appliances from propane to alternate fuels may be significant. He states that, for instance, the life-cycle for fuel related equipment and appliances for the traditional sector such as residential furnace is on average in the range of 15 to 25 years. Therefore, a customer facing a propane price increase would have to consider this factor before converting this equipment.

[29] In this regard, the Commissioner cites a study commissioned by ICG and produced by M. Paas Consulting Ltd. in August 1999, dealing with locations and markets where alternative fuels may pose either a competitive threat or an opportunity for ICG (exhibit A-2099). The study measures customer payback to switching fuel types (i.e., the time it would take for the savings in fuel costs to match the initial outlay for switching) under two scenarios: (a) when the existing appliance has useful life remaining, and (b) where the appliance requires replacement. The study demonstrates that converting from propane to electricity or fuel oil, for most of the seven end-uses analysed, involves long and, in many cases, infinite payback periods and hence does not make economical sense in the short to mid-term when factoring all the relevant switching costs and not only the cost of the fuel.

[30] The Commissioner also called a number of factual witnesses who testified that switching to alternate fuels was impeded by the difficulty and inconvenience of breaking existing contracts for supply and equipment. The inconvenience includes the difficulty in coordinating the removal

of existing equipment and the installation of new supplier's equipment in a timely fashion (e.g., to avoid plant shut down or loss of residential heating), the cost of removing the leased equipment and the delays associated with getting a refund for the propane left in the tank. Superior's own public share offering documents (exhibits A-10 at 03890 and A-202 at 03899) emphasize these barriers to customer switching.

[31] With respect to conversion costs, the Commissioner presented the evidence of a factual witness, Marilyn Simons, a residential user of propane from Renfrew, Ontario, who evaluated the costs to convert her home furnace from propane to heating oil, her propane stove to an electric stove and to replace her propane fireplace with wood-burning equipment. The total conversion costs amounted to approximately $12,300. Some witnesses testified that conversion costs would prevent them from switching to alternate fuels while others testified that an increase in the price of propane would have to be very significant before such conversion was made.

[32] The Commissioner submits that there is only imperfect substitutability of alternate fuels for propane. In particular, he concedes that propane consumers do switch from propane to natural gas when this option is available and that, therefore, natural gas displaces rather than competes with propane.

[33] The Commissioner also introduced the expert evidence of David Ryan and André Plourde whose report provides "empirical evidence concerning the role, importance and substitutability of propane as an energy source in Canada" (expert affidavit of D. Ryan and A. Plourde (16 August 1999): exhibit A-2076 at paragraph 1(a)). They studied energy consumption for propane, electricity, natural gas, refined oil products and wood in three sectors (residential, industrial and commercial) for each province or region depending on data availability. Then, using Statistics Canada and other government data from 1982 to 1996, the last year for which all of the relevant data series were available, they estimated short-run and long-run cross-price elasticities and own-price elasticities of propane demand for the years 1990 and 1996.

[34] At paragraph 6.3.4(a) of their report, Professors Ryan and Plourde find that in about 35 percent of the cases considered, the own-price elasticity of propane demand is negative and significant, while it is positive and significant in fewer than four percent of the cases. The own price elasticity of demand is the percentage change in quantity of the product consumed that results from a one percent price increase in its price. In all other situations considered, no significant relationship between the quantity of propane demanded and its price can be detected. They conclude that, in general, a change in the price of propane will lead to smaller than proportional reductions in propane consumption, i.e., that propane demand is inelastic.

[35] Regarding cross-price elasticity, statistically significant responses to propane price changes were identified in approximately 45 percent of the cases considered with substitution relationships outnumbering complementarity by a factor of about two-to-one. However, with the exception of oil products in Saskatchewan/residential and Quebec/industrial for 1996, all cross-price elasticities reported were less than one in absolute value. Indeed, in only two cases do cross-price elasticities exceed 0.6 in absolute value. They conclude that changes in propane prices induce proportionally smaller changes in the consumption of other energy types and,

therefore, that propane and other energy types form different markets in the provinces/regions in Canada.

[36] Although arguing for an "all propane" product market, the Commissioner suggests through expert evidence that certain end-use segments constitute relevant markets in themselves. This would indicate that if, for example, market power could be exercised in residential propane but not in the other end-use segments, then it would properly constitute a relevant competition market, and total consumption and market shares would be calculated within that segment.

[37] At page 1 of their report (exhibit A-2056), Professors Schwindt and Globerman conclude that "retail propane distribution does constitute a relevant product market", despite the fact that they find evidence of segmentation among suppliers and customers and they suggest that this segmentation is strong enough to qualify theses segments as separate product markets. They conclude at page 23 of their report as follows:

> . . . However, given the limited availability of data with respect to market structure by geographical market, application, and in some cases customer, it would not be possible to determine the differential effects of the merger on competitive conditions across more rigorously and narrowly defined product markets. Moreover, the analysis that follows *would not be fundamentally altered by adopting a more refined product market definition.* (emphasis added)

[38] Finally, the Commissioner argues that "national accounts" are a separate category of business in which the merged entity will be in a position to exercise market power. According to the Commissioner, a significant component of the customer base of each of the merging firms is the national and major accounts which have multiple locations spanning one or more regions across Canada.

(2) Respondents' Position

[39] The respondents' position on the relevant product market is that propane competes with alternative fuels in the energy market and for each end-use, different alternate fuels are substitutes. They assert that interchangeability of propane and alternate fuels together with the evidence of inter-industry competition and the views of industry participants strongly indicate that propane and alternate fuels compete in the same market.

[40] On the matter of customer switching, the respondents referred to the evidence of William Katz, a senior executive of AmeriGas Propane Inc. ("AmeriGas"), who testified that customers would switch to propane when it could be demonstrated that switching was economically attractive for them and not only at the end of the useful life of the equipment (transcript at 15:2602-604 (19 October 1999)). Mr. Katz also indicated that AmeriGas had success in switching customers to propane well before the end of the useful life of their existing equipment.

[41] Further, the respondents assert that every year, a substantial number of propane and alternate fuel customers replace their existing equipment or make an initial fuel choice and accordingly choose from among the "entire menu" of fuel choices. The respondents note that customers making an initial fuel choice or replacing existing equipment face no incremental switching costs and, therefore, that customers whose equipment is in mid-life cycle pay the same price as those who are at the end of the cycle.

[42] The respondents argue that propane industry views support the substitutability of alternative fuels. They state as an example that Steven Sparling of Sparling's Propane Company Limited ("Sparling") testified that his company considered any energy provider a competitor. This includes electricity, natural gas, fuel oil and propane marketers.

[43] The respondents also submit that the Tribunal in the context of denying an injunction to the Commissioner in this case (see *Director of Investigation and Research v. Superior Propane Inc.* (1998), 85 C.P.R. (3d) 194 at 207, 208, [1998] C. C. T. D. No. 20 (QL)) acknowledged the statements made by Superior and ICG in their securities filings regarding competition between propane and alternate fuels. At the time, Rothstein J. accepted that they were competing in a wide energy market on the basis that the statements contained in the prospectus and annual reports and in ICG's preliminary prospectus were "of some significance" and something upon which he should "place weight".

[44] The respondents also assert that supply substitution is possible and that the relevant market should take account of firms that can easily switch their facilities to propane marketing. They submit that it is appropriate to include upstream industry participants and industrial gas companies as well as other distributors of alternate fuels.

[45] Finally, the respondents suggest that the analysis conducted by the Commissioner's experts, Professors Ryan and Plourde, explicitly recognizes that alternate fuels and propane are substitutes in various places at various times for various end-uses.

(3) Analysis

[46] There is clearly no commonality in the positions of the parties before the Tribunal on the appropriate definition of the product market. Accordingly, the Tribunal must decide which evidence is the more convincing.

[47] The purpose of defining the relevant product market is to identify the possibility for the exercise of market power. This purpose was clearly asserted in the two previous merger cases heard by the Tribunal. In *Director of Investigation and Research v. Southam Inc.* (1992), 43 C.P.R. (3d) 161 at 177, 178, [1992] C.C.T.D. No. 7 (QL), the Tribunal reiterated:

> The general issues with respect to the definition of a market in a merger case have been set in the *Hillsdown Holdings (Canada) Ltd.* decision, *supra.* The relevant market for purposes of merger analysis is one in which the merging firms acting alone or in concert with other firms could exercise market power. Market

power is the ability of a firm or group of firms to maintain prices above the competitive level. Market power may also be exercised by offering, for example, poor service or quality or by restricting choice. When used in a general context, "price" is thus a shorthand for all aspects of firms' actions that bear on the interest of buyers . . . .

The delineation of the relevant market *is a means to the end of identifying the significant market forces* that constrain or are likely to constrain the merged entity. . . .

The critical issue is to ensure that all factors have been considered that have a bearing on whether there has or is likely to be a prevention or lessening of competition to a substantial degree. (emphasis added)

[48] While market definitions should be as precise as possible within the limit of reasonableness to provide a framework within which competition implications of a transaction can be analysed, the Tribunal should not be preoccupied with market definition to the point of losing sight of the purpose of the exercise under the Act which is to determine whether the merger is likely to lead to a substantial prevention or lessening of competition. As stated by the Supreme Court of Canada in *Director of Investigation and Research v. Southam Inc.*, [1997] 1 S.C.R. 748 at 788:

> . . . More generally, I notice that the Tribunal seems to have been preoccupied with the definition of the relevant market. It is possible that the members may occasionally have lost sight of the ultimate inquiry, which is whether the acquisition of the community newspapers by Southam substantially lessened competition.

[49] In the Tribunal's view, the factual and expert evidence on substitutability is very important. The Tribunal distinguishes between "switching" in its common sense meaning and substitutability in the economic sense; it is the latter that is important in delineating a relevant product market. It may be, as the respondents claim, that at the end of the useful life of their heating or other energy-using equipment, consumers do switch to propane from alternate fuels depending, in part at least, on differences in fuel prices. However, this behaviour demonstrates *de novo* choice; at the end of their equipment life cycle, those consumers are in the same position as when they first chose a fuel. This behaviour is not evidence of substitutability, which refers to changing a consumption pattern in response to a price change with all other determinants of change, including the age of equipment, held constant.

[50] Mr. Katz stated that AmeriGas was successful in attracting customers to propane from other fuels before the end of the useful life of their existing equipment. However, he provided no quantitative evidence as to AmeriGas's success in this regard and accordingly, it is difficult for the Tribunal to judge the extent of such success.

[51] Mr. Sparling's testimony is that Sparling is seeking to attract new propane customers in the new housing developments. If Sparling is successful, it is evidence that such customers are

making fuel choices as a consequence of a decision to relocate. While this residential location decision may involve a change in fuel, it does not demonstrate that the price of propane was the reason for the move and hence does not provide evidence of substitution.

[52] In its 10-K securities filing in the United States, AmeriGas makes similar comments about competition from alternate fuels. However, in the absence of evidence showing significant customer switching during the life of the existing equipment, the Tribunal is of the view that the evidence of AmeriGas does not support the substitutability of alternate fuels for competition market purposes.

[53] As to the views of industry participants, Sparling may well be correct in some long-term sense in its view that propane competes with all alternate fuels. However, no evidence indicates that Sparling's behaviour is affected by inter-fuel competition. According to Mr. Sparling, the company is mainly concerned about "consistent pricing" from customer to customer and not with pricing in relation to alternate fuels (transcript at 12:1731 (14 October 1999)). Moreover, Sparling has not experienced customers switching to other fuels other than natural gas (*ibid.* at 1733).

[54] Hence the Tribunal does not accept that propane industry views support the substitutability of alternate fuels in the mind of consumers. Indeed, witnesses consider alternate fuels for the most part at the end of equipment life cycle, rather than in a shorter period of time in which market power could be exercised and which is relevant for merger review.

[55] As to the conclusions drawn by Rothstein J. in denying the injunction sought by the Commissioner, it suffices to note that he did not have the benefit of the extensive record and expert opinions that were produced during the 48-day hearing of the application under section 92.

[56] The Tribunal notes that the Act does not require that markets be delineated. However, the Tribunal accepts that the delineation of competition markets is one way of demonstrating the likely competitive effect of a merger and that, where such an approach is valid, the competition market adopted must be relevant to the purposes and goals of the merger provisions of the Act, which focus on the creation or enhancement of market power. In this connection, the Tribunal notes that there could be many competition markets containing retail propane. For example, it might be found that market power could be exercised over a product market consisting of retail propane, fuel oil, natural gas and electricity or any sub-group thereof. The share of retail propane in a market becomes larger as products are removed from the definition of the market. It is not clear, however, that any such market is the relevant competition market.

[57] The Tribunal believes that it is important to provide a principled basis in this regard in order to avoid gerrymandering of market boundaries. To determine which set of products is the relevant one for the purpose of merger review under the Act, the Tribunal agrees with the approach taken in the *Merger Enforcement Guidelines* ("MEG's") (Consumer and Corporate Affairs Canada, Director of Investigation and Research, *Merger Enforcement Guidelines*, Information Bulletin No. 5 (Supply and Services Canada, March 1991)), which seeks to identify the smallest competition market, in terms of the number of included products, over which market

power could be exercised. Thus, if market power can be exercised over a market consisting only of retail propane, then that market is the competition market that is relevant for merger review.

[58] In this matter, the Tribunal accepts the statistical evidence of Professors Ryan and Plourde. Their evidence on cross-elasticity of demand clearly establishes that there are only a few areas of the country where substitution has occurred. Moreover, where substitution was found, the extent thereof was found to be small.

[59] The cross-price elasticity of demand concept is frequently used in market definition. This measure identifies a product as a substitute if its quantity demanded rises when the price of the good in question rises. For any pair of products A and B there will be two such elasticities (the percentage change in consumption of product A when the price of product B increases by one percent, and the percentage change in the consumption of product B when the price of product A increases by one percent). Absent direct evidence thereto, there is no reason to suppose that these two cross-price elasticities of demand will be equal or even that both will be positive; in short, there is no such thing as *the* cross-price elasticity of demand. Therefore, cross-elasticity evidence showing that B is a substitute for A does not establish that A and B are substitutes for each other and hence is not sufficient to place products A and B in the same competition market. To use cross-elasticity of demand for this purpose would require further evidence that A is also a substitute for B.

[60] The respondents' expert witness, Dennis Carlton, agreed in his testimony that both cross-elasticities of demand would be needed in order to place two products in the same competition market. The Commissioner implicitly adopts this approach when stating that, because of its lower price, natural gas "displaces" propane in an area when natural gas becomes available. This statement indicates the Commissioner's view that once propane users have switched to natural gas, they do not switch back; but since switching in the opposite direction does not occur, therefore, propane and natural gas cannot constitute a competition market. The Tribunal agrees that to show that natural gas and propane are in the same competition market would require evidence that propane customers switch to natural gas when the price of propane increases as well as evidence that natural gas customers switch to propane when the price of natural gas increases. In other words, reciprocal substitutability must be demonstrated. The displacement argument suggests only one-way substitutability between propane and natural gas. Therefore, the Tribunal is not convinced that natural gas and propane constitute a competition market.

[61] The more important limitation on the use of the concept of cross-price elasticity of demand to delineate markets is its indirect relevance to the exercise of market power. The definition of the relevant competition market does not depend on identifying particular substitutes in some pairwise fashion. Rather, the important question is whether, on a price increase by a firm, enough of its sales would be lost to all competing products, regardless of their number or identity, to make the price increase unprofitable. If this were the case, then a relevant competition market would not be found; that firm would not be able to exercise market power. A cross-elasticity estimate may identify a substitute and can be helpful in delineating a market, but it does not directly measure the ability of a firm to raise the price.

[62] As the Supreme Court of Canada stated in *Southam*, cited above at paragraph [48], at page 760, evidence of demand elasticities when available and reliable can be determinative for market definition. Thus, the Tribunal believes that the own price elasticity of demand is the correct elasticity for defining competition markets and should be preferred over cross-price elasticity of demand for the reasons above.

[63] The Tribunal places greater weight on Professors Ryan and Plourde's evidence regarding the "own-price elasticity of demand" as this concept is directly related to the issue of market power and hence to market delineation. The evidence demonstrates that the demand for propane is inelastic with respect to changes in its price, i.e., that consumers reduce their consumption of propane only slightly when the price rises. Although the data did not permit Professors Ryan and Plourde to measure retail propane demand by local market, their results were not challenged on this basis and the Tribunal is satisfied that propane demand is inelastic with respect to price for time periods for which the Act is intended to apply.

[64] Thus, consistent with the approach taken in the MEG's, cited above at paragraph [57], if retail propane were hypothetically monopolized, that monopolist would face an inelastic demand curve and, according to conventional monopoly theory, would raise the price at least to the point where demand became elastic. Once the monopolist was operating on the elastic portion of the propane demand curve, further price increases would be imposed only if they were profitable.

[65] Accordingly, if retail propane demand is so price-sensitive (i.e., elastic) that a hypothetical monopolist that was the only current and future seller would not impose a significant and non-transitory price increase, then retail propane cannot be a relevant competition market and the market would have to be expanded to include another fuel. However, if the demand curve is sufficiently insensitive (i.e., inelastic) to price increases, then a monopolist would impose a significant price increase and the competition market would not be expanded. Therefore, there is a critical or "cutoff" level for the own-price elasticity of demand at the pre-merger price against which the measured own-price elasticity of the good under review could be compared in order to determine whether the relevant market has been identified. (For a general discussion of elasticities and market delineation, see G.J. Werden, "Demand Elasticities in Antitrust Analysis" (1998) 66 Antitrust L.J. at 363-414.)

[66] To counter a claim that a hypothetical monopolist would raise the price would require evidence that the pre-merger price was already above marginal costs. However, the respondents did not present such evidence.

[67] Other indicia such as functional interchangeability, inter-industry competition as well as the views of industry participants constitute indirect measures of substitutability and are often used to identify products in the relevant market, particularly when direct evidence on elasticities of demand is not available. However, it must be remembered that the relevant competition

market is the smallest set of products over which market power can be exercised and these indirect measures do not identify that set of products for competition purposes. A competition market is defined for the express purpose of measuring market power and may only loosely be related to markets as defined by business people whose definition is determined by profit maximisation considerations.

[68] The respondents' definition of the product market relies heavily on the functional interchangeability of propane and alternate fuels (functional test) and the evidence of inter-industry competition of a few witnesses but does not consider the evidence of elasticities which had been considered by the Supreme Court in the *Southam* decision, cited above at paragraph [48], as determinative when available. While functional interchangeability can indicate something about the possibility of substitution between two or more products, it does not convey any information about the actual or likely consumer behaviour in response to the exercise of market power.

[69] In that regard the evidence drawn from actual behaviour (i.e., the elasticities) and the opinions provided by expert witnesses such as Professors Ryan, Plourde, Schwindt and Globerman carry more weight in the Tribunal's opinion as to what products constitute the relevant competition market. Consequently, the Tribunal finds that the relevant competition market is "retail propane" and excludes other fuels.

(4) Segmentation

[70] Evidence that propane consumers systematically pay different prices depending on their end-use, and that such differences are not justified on the basis of cost differences, is necessary to support a finding of separate competition markets by end-use. However, no such evidence has been provided. Professors Schwindt and Globerman examined individual end-use categories and seemed to suggest that since market power could be exercised in each segment, therefore, a monopolist of all segments would be able to price-discriminate. While this is certainly possible, one would need to be sure that the price elasticity of demand varied systematically across end-uses so that a monopolist could exploit those differences. Professors Schwindt and Globerman did not present evidence on such differences. Professors Ryan and Plourde's evidence was suggestive in that regard; however, they did not advocate end-use markets.

[71] Indeed, Professors Schwindt and Globerman suggest at page 36 of their report (exhibit A-2056) that there are price differences among propane consumers within the same segment; this could reflect perfect price discrimination. However, since demand elasticities are unlikely to vary significantly by consumer in the same end-use segment and geographic market, it is possible that they have identified price dispersion reflecting lack of complete consumer information rather than perfect price discrimination by end-use by a seller with market power.

[72] Finally, at page 2 of their report, Professors Schwindt and Globerman consider that supply side segmentation supports separate relevant competition markets by end-use. Their argument, which is premised on product differentiation, is confusing. Differences among suppliers do not indicate differences in price-elasticity of demand by end-use segment. In light of

the evidence, the Tribunal is not satisfied that separate competition markets by end-use have been established.

(5) National Accounts

[73] The Commissioner alleges that national accounts are a separate category of business in which the merged entity will be in a position to exercise market power and that the appropriate geographic market for analyzing national account competition is Canada.

[74] The respondents submit that the Commissioner's experts, Professors Schwindt and Globerman, opined that national accounts did not constitute a separate product market.

[75] In the Tribunal's understanding, a national account customer is a consumer of propane at several sites across the country, or at least across a number of widely-dispersed geographic markets, such that the consumer finds it more convenient to contract for propane supply from one marketer with national operations or capabilities rather than from several marketers in local markets. Witnesses indicated a variety of reasons for preferring to obtain supply from a national marketer. John Fisher of U-Haul Ontario stated that one reason was the ability to negotiate a single price, or price formula, that allows U-Haul to charge the same price for propane at all of its 376 locations across the country. Michael Stewart of Canadian Tire emphasized the need for consistency of delivery, training and safety at all 96 store sites and 40 petroleum sites. Carole Bluteau of CN Rail noted the administrative problems of dealing with multiple local vendors given that propane represents such a small portion of CN's fuel purchases.

[76] Claude Massé of CP Rail noted that dealing with several suppliers was inconvenient not only in terms of multiple invoices and cheque handling, but also in problem-solving. In addition to centralized billing, he valued the capability with a national supplier of dealing with only one person to resolve issues at all sites, rather than contacting the local manager for each. Indeed, he allowed that there might even be some savings in direct costs of propane supply by using multiple, lower-priced suppliers because the administration of invoices (currently 100 bills per month) could be handled by existing personnel. However, propane pricing was not his reason for preferring a national supplier:

> . . . But the pricing, it's not an issue – it's not the first base of this, the plan to go with one. It was more the product itself, the service.
>
> I would hate to go to a small company who the staff, if it doesn't have the expertise and the training, and then would fuel up a propane tank and then it blows up. The safety of our people is also important.
>
> transcript at 10:1506, 1507 (8 October 1999).

[77] It appears to the Tribunal that national account purchasers seek the management and administrative efficiencies that arise from doing business with a sole supplier. These efficiencies define a product that might be termed "national account coordination services", the price of which is difficult to observe because the product is bundled with the propane itself.

[78] National account coordination services are provided only by those propane marketers with national capabilities, specifically Superior and ICG. Several witnesses noted that when they tendered for a national supplier, they sought bids only from these companies. In addition, when a national account customer had a problem with its national supplier, it approached the other for supply.

[79] The evidence is that firms who use a national supplier do so for a variety of reasons largely unrelated to the price of propane. While the possibility exists that lower propane costs could be achieved through multiple suppliers, the evidence of several witnesses is that they did not even bother to investigate the prices and possible savings; Mr. Stewart of Canadian Tire was one such:

> MR. MILLER: Is the dealing with the one person and the one company across the country, is that of value to you?
>
> MR. STEWART: Absolutely.
>
> MR. MILLER: In what sense?
>
> MR. STEWART: Everything gets funneled through one person. I don't have to chase down the person who is responsible for different areas of the business. I can funnel all my questions through one and it gets distributed from there.
>
> MR. MILLER: Can you quantify this value in any fashion?
>
> MR. STEWART: I do not believe so.
>
> THE CHAIRMAN: I take it that you have never tried? Based on your answer, you've never tried to quantify it?
>
> MR. STEWART: No, we haven't.
>
> THE CHAIRMAN: Is that because it doesn't matter?
>
> MR. STEWART: At the time, it doesn't.
>
> THE CHAIRMAN: Very well.
>
> MR. MILLER: In the event of a price increase, how much of a price increase would you sustain before moving to some other arrangement?
>
> MR. STEWART: Well, it's hard to say at this point in time because it would take a lot of investigative work to ascertain costs and the costs involved with using alternate suppliers.
>
> MR. MILLER: Have you examined that at all?
>
> MR. STEWART: No.
>
> MR. MILLER: Thank you, sir. Those are all my questions.
>
> transcript at 11:1572, 1573 (13 October 1999).

[80] The evidence is that some large propane consumers with multiple sites acquire propane from multiple local suppliers, rather than from a national supplier. These consumers have decided to supply coordination services internally. In the Tribunal's view, it would not be unusual for firms to accomplish their propane supply objectives in different ways. Internal coordination may well be efficient for some firms but not for others. However, the key question is not whether internal coordination is available as an alternative in the event of a small but

significant price increase but, rather, whether national account customers would switch to multiple suppliers and internal coordination in that event.

[81] Although no expert witness has provided an opinion that national account coordination services constitute a relevant product market, the Tribunal is satisfied, in the light of the totality of the evidence, that national account coordination services constitute a product over which market power could be exercised.

[82] In light of comments regarding national accounts by both parties, it should be noted that product markets are defined in terms of products alone. For example, does the market for retail propane include natural gas, electricity, wood, etc.? Neither competitors nor customers can be said to be "in" or "out of" a product market. For this reason, the Tribunal defined a product "national account coordination services" and considered whether market power could be exercised over such product.

B. GEOGRAPHIC MARKET

(1) Local Markets

[83] The geographic market dimension of the relevant product is critical in this case because delivery is an important component of the product. Failure to define the proper geographic boundaries of retail propane markets would lead to the incorrect measure of market shares and hence of the ability to exercise post-merger market power. In this case, both parties submit that the geographic market is local in nature rather than provincial, national or international; but the dispute concerns the actual boundaries of these markets. The Commissioner presents a set of geographic markets based on Douglas West's spatial analysis approach which identifies joint service areas. The respondents criticize these markets as being too small when compared with Superior's actual travel patterns.

[84] The geographic boundaries of a market are established by asking what would happen if a hypothetical monopolist at a particular location attempted to impose a small but significant non-transitory price increase. If this price increase would likely cause buyers at that location to switch sufficient quantities of their purchases to products sold at other locations as to render the price increase unprofitable, then the geographic market would be expanded by adding the location to which customers switched their purchases. This question would be asked in relation to the expanded market repeatedly until a set of locations was identified over which a hypothetical monopolist could profitably impose a small but significant and non-transitory price increase. That area would be the smallest area over which market power could be exercised and would constitute the relevant geographic market for competition analysis.

[85] This area may bear little resemblance to service areas or trade areas as defined by particular sellers in the conduct of their business activities. These service or trade areas could be helpful in delineating relevant geographic markets but they do not define areas over which market power can be exercised.

[86] Professor West states that Superior and ICG had approximately 130 and 110 branches and satellite locations respectively in 1997. Professor West's procedure grouped these locations into 74 local geographic markets. In his opinion, these markets are relevant for the purpose of computing market shares and inferring post-merger market power (expert affidavit of D. West (17 August 1999): confidential exhibit CA-2051).

[87] Professor West's methodology, which is set out at pages 21-25 of his report, relies on set theory. First, he plots all branches and satellite locations of all propane dealers in operation in 1997. This accords with the view that the product of this merger is produced at the local storage facility and conforms with the approach that geographic markets should, in general, be delineated based at the point of production rather than at the point of consumption.

[88] For an initial Superior location, Professor West finds the "nearest point set". The boundary between that location and another Superior location is the bisector of a straight line joining them. Bisectors for all adjoining Superior locations will completely specify the "market polygon" for that initial location. Similarly, Professor West determines the market polygon for each ICG location.

[89] Then, starting with a Superior location, Professor West assumes that the market polygon is part of the relevant market served by the branch at that location. If that polygon contains an ICG branch, then the Superior branch's market polygon is expanded to include the ICG branch's polygon. In essence, the market is defined as the union of the two polygons. If that ICG polygon includes a Superior branch/satellite location, the market is expanded again to include the union of the three polygons. The market is expanded in this way until no further polygons can be added to the union; at that point, Professor West defines a "candidate local market". He then undertakes the analysis for another Superior location.

[90] For each candidate local market, Professor West defines a buffer zone of 100 kilometers around the perimeter. He identifies all propane dealers with locations in that zone and considers, based on available information, whether those dealers can, in the event of a post-merger price increase, sell propane to customers located in the candidate market. Branches in the buffer that can compete with locations in the candidate market are included in the market for measuring market shares.

[91] Professor West notes that, in densely populated areas with many competing dealers, markets may be difficult to distinguish, particularly where branches of Superior or ICG are found in the buffer zone of a candidate local market. Such markets may be "linked". Accordingly, Professor West combines linked markets and re-estimates the market shares and reports that his market share estimates are not significantly altered in these larger markets.

[92] Professor West notes at page 3 of his report that:

> I have concluded that retail propane markets are local in geographic scope. They generally extend around 60 to100 kms. from the locations of SPI/ICG branches and satellites, depending on specific local market characteristics.

[93] The Commissioner further submits that Superior's own documents support Professor West's conclusion that the geographic market spans from 60 to 100 kilometers, as a general matter.

[94] With respect to the economical delivery distance, the 1997 Superior Propane Income Fund Annual Report (exhibit A-712) reads at page 07699:

> . . . The further propane is transported, the higher the delivered cost, therefore, the competitive operating area is limited to a reasonable radius of *70 to 80* kilometres around the branch or satellite locations. (emphasis added)

[95] The 1998 Superior Propane Income Fund Annual Report (exhibit R-111, tab 1) reads at page 01189:

> . . . The further propane is transported, the higher the delivered cost. Therefore, the competitive operating area is *generally* limited to a radius of *100 to 400* kilometres around branch or satellite locations. (emphasis added).

[96] The Commissioner also notes that, subsequent to the 1998 Superior annual report, the respondents took the position in their response to the Commissioner's application that Superior's appropriate delivery range is 50 to 300 kilometers.

[97] The respondents dispute that the relevant geographic market is 60 to 100 kilometers radius around Superior-ICG branches and satellites. They submit that Superior's trading areas have radii of 50 to 620 kilometers and that some competitors have even larger trading areas which contradict Professor West's conclusion that competition between propane distributors is limited to firms within a range of 60 to 100 kilometers of a given branch or satellite.

[98] The respondents also submit that Professor West's model has never been used for this type of competition analysis and he has not determined whether his geographic markets "function as markets".

[99] Mark Schweitzer, Superior's Chief Executive Officer, indicated that Superior's branches have been reorganized. For example, he testified that 10 branches have been closed, but most have been converted to satellite locations (transcript at 31: 5911, 5912 (3 December 1999)) so that other branches may serve now larger areas with a radius of 100 to 400 kilometers as stated in the 1998 Superior Propane Income Fund Annual Report (exhibit R-111, tab 1).

[100] The Tribunal is of the opinion that Professor West's analysis, while it does not follow the hypothetical monopolist approach entirely, nevertheless is similar in certain respects to that approach and can be used to identify relevant geographic markets (transcript at 22:3914 (29 October 1999)). Moreover, the respondents have not demonstrated that Professor West's spatial methodology was flawed in any significant respects. The respondents noted that the computer algorithm produced certain anomalies which led certain market boundaries to extend to the Arctic Ocean, but these criticisms were not crucial to the value of Professor West's approach

since these are functions of the computer mapping procedure. In addition, the respondents dispute some of his market share calculations.

[101] As to the argument of the respondents that Professor West's markets may not function as markets, the Tribunal is of the view that there is no necessary correspondence between a competition market, which is an analytical construct, and a market defined by management for operational purposes.

[102] Further, the Tribunal notes that the respondents did not present an alternate set of geographic markets for the purpose of competition analysis. Rather, they seemed to suggest that the business-service areas of their branches and satellites were appropriate for this purpose.

[103] The Tribunal notes that Mr. Schweitzer testified that he knew of no branch which could provide service to customers only as far as 60 kilometers or under 90 kilometers, which contradicts Superior's own evidence in some of the 1998 branch templates (e.g., Calgary 50 kilometers). Further, the Tribunal does not find the explanation of Mr. Schweitzer convincing because many of the branches were converted into satellite locations. Therefore, the Tribunal does not understand why converting branches to satellites would modify the boundaries of a geographic market.

[104] The Tribunal notes that there is no evidence that using the furthest distance travelled from a branch constitutes a valid method for defining a relevant geographic market. Further, even if referring to the furthest point of a trading area were appropriate for defining such a market, the Tribunal would be concerned about adopting a method that would be based on the delivery to the exceptional customer located at great distance rather than considering the typical distance travelled for the majority of customers. There is no evidence that a Superior branch whose furthest customer is located 620 kilometers away serves all customers within that distance. Therefore, even if the Tribunal accepted in principle that a branch trading area could be a competition market, it could still not conclude that this trading area would have a radius of 620 kilometers.

[105] The respondents submit that some independent firms serve customers in many of Superior's trading areas and that their travel distances are longer because they have fewer branches. However, it is not clear that such firms serve the entire Superior branch trading area. In addition, serving adjacent Superior trading areas does not necessarily mean that these independent firms deliver propane over longer distances than Superior does. Also, if the respondents were correct in their submissions, it would remain unclear whether these independent firms supply many customers at longer distances; that is, their trading areas may not be measured by the longest distance travelled.

[106] As stated above, the Tribunal does not agree that areas over which market power can be exercised are necessarily coincident with existing business or service areas such as those of

Superior. Accordingly, the Tribunal concludes that the "candidate local markets" produced by Professor West's methodology are reasonable and appropriate for the purpose of identifying the relevant geographic markets in order to determine whether the merged entity will have the ability to exercise market power.

(2) National Accounts

[107] With respect to the geographic market relevant for national accounts, the Commissioner submits that the relevant geographic market for the analysis of the national accounts is Canada. The respondents do not address the relevant geographic dimension for national accounts.

IV. SUBSTANTIAL PREVENTION OR LESSENING OF COMPETITION

[108] The Commissioner submits that there will be a likely substantial lessening of competition in many local retail propane markets, a likely substantial lessening of competition regarding national accounts and a likely prevention of competition in Atlantic Canada. The Commissioner also argues that there will be a likely substantial lessening of competition by virtue of the creation or enhancement of market power by the merged entity which he attempted to demonstrate with expert and factual witnesses. He argues that market power can be inferred from various factors such as high market shares and concentration, the high barriers to entry, the removal of ICG as a vigorous competitor, the lack of foreign competition and the fact that there is no effective remaining competition.

[109] The respondents submit that the merger is not likely to result in a substantial lessening of competition. They argue that the terms "likelihood of a substantial lessening of competition" are synonymous with "likely price increase" and that the Commissioner failed to demonstrate a likely post-merger price increase. They dispute the Commissioner's definitions of geographic and product markets, rely on the growth of independents' market share, advocate that ICG is not a vigorous and effective competitor and that barriers to entry in the retail propane business are low.

A. MARKET SHARES AND CONCENTRATION

[110] The Commissioner's expert witness, Professor West, studied the combined market shares of Superior and ICG in 74 local markets for 1997 as stated above. He concludes at page 29 of his report (confidential exhibit CA-2051) that in 17 such markets, the combined market share is between 95 and 100 percent, that 32 markets have combined market shares in excess of 80 percent, that 46 markets have combined market shares of 70 percent, and that 66 markets have combined market shares in excess of 60 percent. In order to get these results, Professor West relies upon a set of completed surveys for the year 1997 that the Commissioner has received from responding propane dealers (the competitor survey) as well as, *inter alia*, internal business plans and data regarding sales volume and market shares of Superior and ICG. Professor West states that he has relied on Superior's data in the absence of sufficient data provided from competitors.

[111] The respondents criticize Professor West's market share estimates on the grounds that he uses volume information for 1997 and Superior and ICG branch locations for 1998. The

Commissioner points out, however, that Professor West does not mix 1998 locations with 1997 volumes and further refers to page 21 of his report to demonstrate that he identifies all of Superior's, ICG's, and other propane dealers' satellite and branch locations in operation in 1997.

[112] Further, the respondents suggested to Professor West during cross-examination that he should have done a "reality check" by aggregating the volumes consumed in his 74 local candidate markets in 1997 with other measures of total consumption for that year. In final argument, they state that there were 200 competitors, only 67 of whom responded to the 1997 competitor survey. They also state that the 1998 volumes of the approximately 140 non-responding competitors would likely be a good estimate of those firms' volumes in 1997 and should have been used. The Commissioner points out that the competitor survey identified and sought responses from 118 competitors and that the figure of 200 is an internal estimate of Superior that includes agents of Superior and of ICG that Professor West specifically tried to eliminate. Moreover, the Tribunal heard evidence that 1998 volumes declined from 1997 levels due to warmer weather; thus, there would be no reason to assume that the volumes of the non-responding firms would have remained the same in 1998.

[113] The respondents also criticize Professor West's estimates because the total of the 1997 volumes by market differs from the Statistics Canada data on total retail propane demand. During Professor West's cross-examination, the respondents pointed out that the aggregate volume calculated from Professor West's individual market analysis differed from the aggregate number provided by Statistics Canada, as cited by the Commissioner's expert witness, Mr. Mathieson. However, the Commissioner pointed out that the 74 markets identified by Professor West did not cover the entire country. For example, they did not include a large part of the Maritimes, Northern Manitoba or the Territories. In addition, Mr. Mathieson noted that errors in the Statistics Canada data meant that it should only be used to establish trends in propane demand rather than accurate annual estimates of consumption by end-use.

[114] The respondents' experts, Dennis W. Carlton and Gustavo E. Bamberger, criticize Professor West's 1997 market share estimates as being less reliable than information provided to them by Superior. Professor West replies that Superior's share estimates contained in its 1998 branch templates are based on an internal survey prepared after the commencement of the proceedings and conducted by branch managers who have no actual sales volume information for independents for that year (expert affidavit in reply of D. West (20 September 1999): confidential exhibit CA-2052 at 2).

[115] The respondents argue that Professor West does not allocate all of the various independents' volume of propane sold in the relevant geographic markets, as defined by him, and that the allocation is arbitrary. Professor West explained that he used Superior's own market share evaluation when he did not have the sales volume information from other independent competitors (transcript at 22:3931 (29 October 1999)) and that he reduced Superior and ICG's combined market share in some of the geographic markets by several percentage points to reflect the sales volumes of several small competitors for which he did not have specific volume information. The Commissioner states that if Professor West did not have adequate volume data to calculate market share, he did not attempt to invent one in order to allocate some volumes to the market.

[116] Professor West's results, set out at page 29 of his report (confidential exhibit CA-2051), are very similar to a frequency distribution of Superior/ICG market shares that Superior has estimated, apparently based on its branch trading areas. For example, Superior's own analysis indicates that 15 out of 116 branches have a market share of between 95 and 100 percent. Although the methodology of the two studies differ, this result is common to both and gives the Tribunal further confidence in Professor West's analysis.

[117] In addition, the Tribunal has reviewed the criticisms made by the respondents on a market by market basis of Professor West's market share estimates. After careful review of his explanations and methodology (and having examined certain markets in detail), the Tribunal accepts that Professor West's approach is appropriate for a competition analysis in this case and that his inferences and conclusions about market shares are reasonable given the available data and the limitations therein identified by him. The Tribunal is of the opinion that it can rely on these results and conclusions for the purpose of determining whether the merger will result in a likely substantial prevention or lessening of competition.

[118] The Commissioner's experts, Professors Schwindt and Globerman, classify markets on the basis of post-merger market share in their expert report (exhibit A-2056 at 27-41). Using Professor West's relevant geographic markets and market share estimates, they identified 16 local markets in which the merged entity would have combined market shares of 95 percent and higher, which they referred to as "merger to monopoly" markets. At page 28 of their report, they indicate that the merger will substantially increase the probability of a unilateral price increase in these markets.

[119] They further identify eight markets ("category 1"), in which the Superior or ICG pre-merger market share is relatively small. In these markets, the merger may have minimal impacts on competition between Superior and fringe competitors and, therefore, the main concern is the removal of ICG as a potential future competitor (*ibid.* at 37). In addition, the merger in these markets would eliminate competition for propane buyers who prefer to deal with one of the major companies.

[120] A third set of markets ("category 3") identifies 16 markets in which ICG has a substantial market share prior to the merger but where there are at least three competitors including Superior and ICG. In these markets, Professors Schwindt and Globerman expect that the elimination of ICG is likely to enhance interdependence and reduce competition (*ibid.* at 38, 40).

[121] The final set of markets ("category 2") includes 33 local markets in which a relatively fragmented fringe of firms compete against Superior and ICG and where the merging parties are the two largest sellers (*ibid.* at 40). They state that there is a substantial likelihood that the merger will significantly reduce competition in these markets by creating a dominant firm and enhancing interdependence.

[122] The respondents criticize Professors Schwindt and Globerman's analysis of the anti-competitive effects of the merger. First, they submit that Professors Schwindt and Globerman provide no opinion regarding the likelihood of a price increase in any market. Secondly, they submit that even Professors Schwindt and Globerman have minimal concerns

about the anti-competitive effects of the merger in their category 1 and 2 markets. Thirdly, they argue that existing competitors will continue to compete vigorously in category 3 markets. Finally, they indicate that entry will restrain the merged entity from imposing a unilateral price increase in merger to monopoly markets.

[123] Further, the respondents' experts, Professor Carlton and Dr. Bamberger, state at page 4 of their report that Professors Schwindt and Globerman accept that the substantial presence of independent retailers can constrain the merged firm from raising retail propane prices (expert affidavit in reply of D.W. Carlton and G.E. Bamberger (14 September 1999): confidential exhibit CR-121). In the Tribunal's view, this is not an accurate characterization of Professors Schwindt and Globerman's opinion.

[124] The Tribunal believes that the respondents have incompletely depicted the opinion evidence of Professors Schwindt and Globerman and it accepts that, although they have not provided a firm opinion on the likelihood or quantum of a price increase, their conclusions regarding the anti-competitive effects of the merger are important and significant for the purpose of determining the likelihood of a substantial lessening of competition. The Tribunal will discuss the entry argument below under the heading "Evidence on Entry".

[125] A key issue in this case is the evaluation of the post-acquisition market share of the merged entity by market. The respondents argue strenuously that the post-merger market share on a national basis has been declining and may have reached between 50 and 60 percent in 1998. These national market shares were introduced to establish the significant growth of independent propane marketers over the period between 1990 to 1998. The Tribunal believes that since relevant geographic markets are local, evidence of high market shares on a local basis cannot be defeated by a trend of national market shares purporting to demonstrate that entry can overcome this substantial lessening of competition.

[126] Information on high market shares is, therefore, relevant but not determinative in respect of a finding of a likely substantial prevention or lessening of competition. However, the Tribunal notes that these market shares must be measured with respect to relevant product and geographic markets. In this case, since no national product market for retail propane has been demonstrated, information on market shares for Canada as a whole are not informative as to the exercise of market power in local markets.

B. BARRIERS TO ENTRY

[127] As stated by the Tribunal in *Director of Investigation and Research v. Hillsdown Holdings (Canada) Limited* (1992), 41 C.P.R. (3d) 289 at 324, [1992] C.C.T.D. No. 4 (QL):

> In the absence of significant entry barriers it is unlikely that a merged firm, regardless of market share or concentration, could maintain supra-competitive pricing for any length of time. An attempt to do so would cause competitors to enter the market and the additional supplies created in that manner would drive prices back to the competitive level.

[128] This statement emphasises the economic effect of entry. Evidence of commencement of operations, per se, is insufficient to establish the competitive restraint on a supra-competitive price or a likely exercise of market power. Moreover, if the impact on price is delayed beyond a reasonable period, then entry for the purpose of the Act has not occurred even if new businesses have started their operations. The appropriate length of time for judging the impact of entry is a matter of opinion; however, the Tribunal notes that the MEG's, cited above at paragraph [57], refer to a period of two years.

[129] The Commissioner submits that there are high barriers to entry into the propane distribution business. The barriers include the nature and existence of customer contracts and tank ownership, switching costs, minimal required scale, reputation, maturity of the market, the competitive response to entry (including litigation threats), access to propane supply, capital requirements, sunk costs and the time to get the business profitable.

[130] The respondents dispute the existence and/or significance of these barriers mainly on the basis of their evidence of alleged entry and expansion by independent retail propane marketers.

(1) Contracts

[131] The Commissioner's expert, Michael D. Whinston, conducted an analysis of the customer contracts used by Superior and ICG and the likely competitive effects arising from the merger (expert affidavit of M.D. Whinston (18 August 1999): exhibit A-2063). Professor Whinston reviewed the standard form contracts offered by Superior and ICG and found several provisions that could limit entry and/or expansion. These provisions include long-term exclusivity, automatic renewal, termination fees, right of first refusal (Superior only), and tank ownership.

(a) Contract Duration and Exclusivity

[132] It is not disputed that a high percentage of propane customers take delivery under contracts. For example, Superior has estimated that 90 to 95 percent of its customers are under standard form contracts with the remaining 5 to 10 percent under negotiated non-standard contracts (confidential exhibit CA-701 at 06976). The Commissioner's expert, Professor Whinston, provides the same number with respect to ICG. According to Mr. Schweitzer, 70 percent of Superior's propane customers are under five-year term contracts: "Well, our standard that we discussed earlier today has a five-year term in it. My understanding is that about 70 percent of our customers have standard contracts" (transcript at 31:5894 (3 December 1999)).

[133] Professor Whinston notes that long-term exclusive contracts can have both efficiency-enhancing and anti-competitive effects. In the case of propane supply contracts, the term can be as long as five years. This duration limits customer switching and can lead the supplier to offer less competitive prices than it would absent the exclusivity provision. Although sophisticated consumers will take into account the impact of exclusivity and will insist on compensation for the lack of choice for the term of the contract, Professor Whinston suggests that most residential customers may not understand the limitation of choice and the impact of loss of competition for their custom.

[134] Professor Whinston is more concerned about the entry-deterring effect of long-term exclusive contracts for propane supply. Noting that economies of scale appear to characterize the propane delivery business, he suggests that a new entrant will have to acquire enough customers to achieve the minimum efficient scale of operation, failing which the entrant will operate at a cost disadvantage compared to incumbents. In light of the exclusive nature of propane contracts, a new entrant will seek to acquire customers whose contracts with incumbents are expiring, but the long terms may limit the number of such "free customers" in any year to a level at which new entry is not profitable. He notes that this problem will be more severe when the contract expiration dates are staggered and when the contract terms are longer.

[135] Similar concerns will be raised for existing smaller firms that seek to invest in order to lower operating costs, expand capacity or improve quality. The "free customer" base may not justify such investment.

[136] Professor Whinston adopts the observation made by the Commissioner's expert, Terry Kemp, that the minimum efficient scale for a propane marketer is three million litres per year in order to demonstrate, in a general way, the impact of long-term exclusivity on the profitability of entry and expansion. If the average duration of contracts in a market is four years, then 25 percent of the contracted volume can be expected to come off-contract every year. If one new entrant could attract all of these free litres, then the market would require 12 million litres of total annual consumption in order for that new entrant to enter at the minimum efficient scale. Professor Whinston finds for example that the total consumption in 12 of 71 markets defined by Professor West is less than 12 million litres and concludes that entry will be difficult in these circumstances.

[137] The respondents submit that contract exclusivity is not a significant barrier to entry in this merger because only five markets will have less than 2.25 million litres required to support one new entrant. However, this result flows from assumptions that Professor Whinston regards as unrealistic.

[138] Professor Whinston recalculates the number of markets with minimum required volumes assuming that declining autopropane volumes will not be available to a new entrant in any markets as defined by Professor West, that the minimum efficient scale is six million litres per year and that all customers are on four-year contracts. On this basis, he finds that 37 out of 73 "West markets" will not be large enough to sustain one new entrant, even if right of first refusal clause and other contractual terms are not effective deterrents to switching.

[139] The Tribunal is of the view that the respondents' submission does not represent Professor Whinston's opinion. According to Professor Whinston's estimates, entry and expansion at minimum efficient scale are unlikely in many West markets.

(b) Automatic Renewal

[140] With respect to automatic renewal, Professor Whinston notes that the automatic renewal feature of propane customer contracts serves to increase the effective duration of these contracts, as the notice periods are long. For example, ICG's Fuel Supply and Equipment Agreement requires the customer to give notice of termination of 180 days, absent which the contract will be renewed at expiry for the original term of perhaps five years. Thus, in the event that a new entrant is successful in attracting an ICG customer under this contract, it would have to wait six months before commencing service.

(c) Right of First Refusal

[141] The right of first refusal clause in Superior's contracts also deters entry in Professor Whinston's opinion. Under this provision, Superior has the right to match the price offered by a competing supplier and the customer is required to provide the name of the competitor and its price. The result is that Superior is fully informed of the identity of any rival who is bidding for its customers and is better able to retaliate against it selectively.

[142] The right of first refusal clause greatly reduces the profitability of entry by new firms and expansion by existing firms. Since Superior can retain its customer by matching the new entrant's lower price (i.e., even if the entrant offers better quality service), a rival will have to offer a price that is below Superior's cost to make the offer unprofitable to Superior. Therefore, a rival with higher costs and quality may find a customer interested in switching but it cannot lower its price enough to avoid "matching" by Superior.

[143] The respondents do not challenge Professor Whinston's opinion on this point. Accordingly, the Tribunal accepts Professor Whinston's opinion that right of first refusal clauses reduce the profitability of entry and expansion.

(d) Tank Ownership

[144] Professor Whinston draws attention to the provisions in Superior and ICG contracts under which they retain ownership of the propane storage tank at the customers' site. This is a feature of all contracts except for Superior's Industrial Agreement to industrial customers and it is a feature of contracts offered by virtually all propane marketers. He concludes that the practice of not selling tanks greatly increases the costs of a customer switching to another supplier. The tank rental requirement makes the customer much less likely to switch than if the tank were owned. Professor Whinston concludes that the rental requirement effectively increases the duration of the long-term exclusive contracts and further reduces the likelihood of new entry or expansion.

[145] Based on the evidence on the record, it appears that switching to an alternate propane supplier typically results in direct and indirect costs. The direct costs would include a restocking cost calculated by Superior at 15 percent of the total value of propane in the tank being removed. Indirect costs to switching include important delays between the time the existing supplier removes its tank and the time when the new supplier installs its equipment. Commercial, industrial, or agricultural customers may have to reduce or stop operations during this period.

Residential customers will generally be unwilling to risk the loss of heating, particularly in winter months.

[146] The respondents submit that tank ownership by the marketer ensures proper tank inspection, maintenance and safety practices. They also allege that since independents are growing at the expense of Superior and ICG, tank ownership does not constrain independent entry or expansion.

[147] The Tribunal notes that there is no evidence that tank inspection, maintenance and safety practices have to be tied to tank ownership. Such services could be provided to a customer that owned the tank. Therefore, the Tribunal is of the view that tank ownership by the propane supplier makes customer switching more difficult and costly, and it accepts that it constitutes a barrier to entry and expansion. As to the alleged entry and growth of independents, the Tribunal will discuss that point below.

(e) Voluntary Undertakings

[148] Finally, Professor Whinston notes that Superior has indicated that if the merger is approved it will not enforce term provisions in its existing standard contracts for propane supply, that it will adopt 30-day notice periods in standard form customer agreements, that it will waive liquidated damages terms, and that it will waive right of first refusal provisions. He believes that these voluntary undertakings do not adequately address his concerns about the competition-reducing effects of Superior's and ICG's customer contracts. For example, he notes at paragraphs 97 to 104 of his report (exhibit A-2063) that Superior has not committed to actually advising its customers of these changes.

[149] The respondents submit that Superior and ICG do not enforce the provisions of their standard form contracts. Further, the respondents submit that only a few letters have been sent to customers and competitors in the last seven years addressing Superior's and ICG's legal rights but that neither Superior nor ICG has commenced litigation in regard to the matters raised in these letters.

(f) Conclusion on Contracts

[150] The Tribunal accepts that the provisions in the contracts, including long-term exclusivity, automatic renewal, termination fees, right of first refusal (Superior only), and tank ownership significantly raise the cost of entry and expansion and hence constitute a barrier to entry.

(2) Competitive Response to Entry

[151] An important component in the decision to enter the market is the assessment of the likelihood of a competitive response from the incumbents in the marketplace. The Commissioner introduced evidence in support of his argument that retaliation constitutes a response to competitors who have taken business away from Superior. This competitive response is generally in the form of intense price competition targeted at the entrant in order to affect its ability to compete in the market.

[152] The experience of Imperial Oil Limited ("IOL") demonstrates that even very large and sophisticated companies may not be able to enter the propane distribution business profitably. In 1990, IOL, the largest propane producer in Canada (following the Texaco merger), sought to expand its activities into propane distribution. The project manager, Meredith Milne, testified that IOL experienced a vigorous response from competitors following its attempt to enter the propane market. It found that margins were 30 percent lower than planned and 45 percent lower than in 1991. IOL found that incumbent marketers started to charge customers switching to IOL for tank removal and that they removed the tank rental charges.

[153] In addition to the competitive price response, IOL also found that it was difficult to get customers to switch due to the multi-year contracts and the "last look on tenders" available to incumbents. These were all elements that either increased IOL's costs or made it difficult to gain new accounts with the result that IOL exited the market (transcript at 13:1976 (15 October 1999)). Based on the evidence, the Tribunal notes that no other entry by companies of similar size or stature has occurred in this industry.

(3) Reputation

[154] The lack of a reputation for reliable supply and service can be an entry barrier. Reputation may be a crucial element in gaining customers, especially when services are an important element of the product.

[155] The Commissioner submitted evidence that reputation constitutes a barrier to entry in the propane supply and delivery market. In addition, the Commissioner's expert, Professor Globerman, stated that the incumbents had reputational advantages, which means that the entrant is likely to take longer to establish that critical mass in demand. The Canadian Market Research Study commissioned by Superior in October 1997 (confidential exhibit CA-1485) reads at page 17416:

> . . . commercial and residential markets display a significant lack of awareness and familiarity with alternative suppliers.

Further, at page 17437:

> Currently, four in ten (39%) Superior [commercial] customers are *not aware* of an alternative propane supplier on an unaided basis . . . . ICG is the most formidable competitor in Ontario and Quebec . . . . 64% of competitor customers have unaided awareness of the Superior brand and 29% designate it as the alternative supplier with which they are most familiar.

And at page 17527:

> Residential propane users also exhibit a fundamental lack of awareness and familiarity with the range of alternative suppliers (more pronounced than the commercial market) . . . .

> In the shot [*sic*] term, competitive threats may be limited. Currently 58% of Superior customers are *not aware* of an alternative propane supplier on an unaided basis, and 74% say they are not familiar with an alternative.

[156] The respondents submit that the existence of a "proven track record", as in the case of Superior and ICG, is not an impediment to competition; rather, it is the natural result of competition.

[157] Loyalty is a related consideration. The Commissioner presented witnesses from cooperatives and credit union organizations whose sellers offer propane and give dividends to member customers based on such purchases. These customers have an incentive to continue to be loyal to their propane supplier. Based on the evidence submitted by factual witnesses, the Tribunal accepts that reputation is an important feature of propane suppliers to which customers attach value. It appears that this is particularly true for major account customers whose factual witnesses testified that the reputation of the companies capable of delivering propane is an important factor in their purchasing decision. The Tribunal notes that the time to gain a reputation may make profitable entry more difficult and hence delays the competitive impact that an entrant would have in the marketplace.

(4) Maturity of Market

[158] The Commissioner called witnesses who testified that the market was mature and that the demand was flat (see testimony of John A. Osland from Mutual Propane, transcript at 6:833 (4 October 1999) and testimony of Luc Sicotte from Gaz Métropolitain, transcript at 18:3148 (25 October 1999)). Mr. Schweitzer testified that it was a relatively mature market (transcript at 31:5920 (3 December 1999)).

[159] The Commissioner's experts, Professors Schwindt and Globerman, testified on the competitive impact of this mature market at page 48 of their report (exhibit A-2056):

> . . . the industry is mature and has experienced slowly declining demand in recent years: As noted in the *Merger Enforcement Guidelines*, entry into start-up and growth markets is less difficult and time consuming than it is in relation to mature market.

[160] In light of the evidence submitted, the Tribunal is satisfied that the traditional retail propane market place can be qualified as mature.

(5) Access to Propane Supply

[161] The Commissioner refers to the opinion of many competitors that the ability to access propane supply is a "critical barrier to entry/expansion". Evidence in this regard consists of the disadvantages that independent firms face in obtaining supply that Superior and ICG do not face. For example, the respondents have established supply relationships and have invested in storage and transportation facilities that provide cost advantages over rivals who may be restricted to local pick-up from refinery racks. These arrangements are apparently valuable for serving

branches particularly distant from refinery sites. Superior and ICG also have "scale demand" for propane which gives them an edge over traditional patterns of supply.

[162] One of the Commissioner's experts, Terry S. Kemp, observes at pages 15 and 16 of his report (expert affidavit of T.S. Kemp (18 August 1999): exhibit A-2070) that:

> Sup-ICG with the exception of a few selective refineries, will have access to supply at virtually every producing location in the country. Sup-ICG will thus have an implied supply advantage and flexibility that cannot be matched by any other retail propane competitor.
>
> Sup-ICG should be able to selectively choose the most advantageous supply locations and drop others, thereby extracting the most out of supply arrangements. Sup-ICG will also be in a position to leverage supply from location to location for trades and exchanges and, will in essence, be able to create preferential access to supply and location adjustments. These advantages can be utilized in a number of ways:
>
> - Pressuring supplier price location arrangements
> - Using competitive advantages when bidding on new contracts
> - Servicing National accounts
> - Negotiating more favourable bulk transportation rates (volume discounts) with trucking and rail companies.

[163] The Commissioner's expert, Mr. Mathieson, notes that the respondents have access to supply at prices more favourable than simply the posted or rack price. [redacted] Mr. Kemp pointed out that propane producers generally prefer to supply those who have the ability to lift product on a regular basis. A new entrant would not be able to immediately demonstrate this ability and would be at a disadvantage to the respondents. The Commissioner's witness, Peter Renton of Gulf Midstream Services Ltd., confirmed that his company prefers customers who perform very well over those customers who fail to take a significant portion of their product each year and to whom sales would be reduced and rack prices charged.

[164] The Commissioner cites the Ontario Region 5 Year Strategic Plan from Superior (confidential exhibit CA-299) that indicates Superior's view that it creates barriers by "tying-up supply", specifically its ten-year supply arrangement with Shell. The respondents point out that the independent marketer, AutoGas, has a ten-year arrangement with IOL.

[165] Mr. Kemp observes at page 15 of his report (exhibit A-2070) that Superior's propane cavern storage allows it to purchase spot volumes at low prices and Mr. Mathieson is concerned that Superior's supply transportation costs are the lowest in the industry.

[166] The testimony indicates that in periods of tight demand, producers ration their supplies and give preference to their largest customers, causing some independents to deal with brokers. However, no independent testified that it could not obtain propane. The expert opinion evidence states that the merged entity will have advantages in acquiring propane that smaller competitors will not enjoy. The Tribunal accepts that new entrants and small firms seeking to expand bear the costs of investing in reputation with propane suppliers that incumbents do not have to bear and, to that extent, they face entry barriers. However, these costs are not a result of the merger and are not increased by it. Other advantages that reduce the cost of propane acquisition (such as buying at low "off season" prices and storing) to the respondents and the merged entity reflect efficiencies and do not create barriers to propane acquisition. The Tribunal does not agree that the new entrants and expanding firms face significant barriers to obtaining propane supply.

(6) Capital Requirements/Sunk Costs and Time to Get Business Profitable

(a) Scale of Entry or Expansion

[167] Several of the Commissioner's witnesses (Professors Globerman and Schwindt, Messrs. Kemp and Mathieson) note in their expert reports that entry into the propane business is costly. Mr. Kemp, for example, suggests at page 7 of his report (exhibit A-2070) that the capital costs for a start up greenfield retail propane operation are in the range of $675,000 to $920,000 to support initial sales of two million litres per year which he regards as minimally-required for success. He estimates operating costs, at page 9 of his report, at approximately $300,000 per year. Several fact witnesses mentioned the high costs involved in obtaining storage tanks, transport and delivery trucks and customer tanks, particularly when certain customers have requirements for on-site storage.

[168] The respondents have submitted in their amended response that one can enter the propane distribution business for a total investment of $120,000 to $300,000. The Commissioner submits that even if entry of that scale is possible in certain geographic locations, the respondents have understated the costs for the most part. According to the Commissioner, such a small entrant would be an uncommitted entrant, unable to constrain Superior/ICG's market power.

[169] The Commissioner argues therefrom that high capital costs are themselves a barrier to entry, ostensibly on the basis that few people had the required financial resources to enter the industry. Competitors in the industry testified to the effect that costs of entry may vary. [redacted] It cost Donald J. Edwards $935,000 to construct EDPRO Energy Group Inc.'s facility in London, Ontario, excluding the purchase of tanks for customer use (transcript at 6:1072, 1073 (6 October 1999)). Evidence was also submitted indicating that costs associated with meaningful entry might vary upon the end-use served.

[170] The Tribunal does not accept that high capital costs are inherently a barrier to entry. If a potential entrant's equity is insufficient to cover capital costs of entry at minimum efficient scale, then the balance can be obtained through credit markets providing that lenders are satisfied that the project is viable. In the event that lenders deny credit because of their assessment of the

project, their reluctance to lend does not indicate that capital is not available. In response to a question from the Tribunal, Professor Schwindt stated that high costs, per se, did not constitute an entry barrier.

[171] On this latter point, the Commissioner accepts that high capital costs are not, in absolute dollars, an issue relevant to entry; rather, the relevant costs to be considered are the sunk costs because they represent what the entrant will lose in the event of failure.

(b) Sunk Costs

[172] It is generally agreed that the portion of costs that are not recoverable in the event of exit (the sunk costs) can, where they are significant, constitute a barrier to entry. The Commissioner suggests that the retail propane market is characterized by significant sunk costs. There is a dispute between the Commissioner and the respondents as to the proportion of the costs that can be qualified as sunk costs. The extent of these costs depends on a variety of factors.

[173] In the propane industry, the sunk costs would include the market development costs, site-preparation costs, and the discounts to purchase price that would be incurred on asset disposals. Mr. Milne of IOL estimated that 50 percent of its costs were non-recoverable when IOL entered the Camrose market. Mr. Katz from AmeriGas indicated that 30 to 80 percent of investment in propane operations would be non-recoverable. As well, salaries and other operating costs incurred to the date of exit would also be non-recoverable. The respondents' experts, Cole Valuation Partners Limited and A.T. Kearney (expert affidavit of C. O'Leary and E. Fergin (17 August 1999): confidential exhibit CR-112), recognize at page 202 of their report that certain costs are sunk. For example, they assume decommissioning costs of $50,000 per site for locations to be closed, which costs would be non-recoverable.

[174] The Commissioner's experts, Professors Schwindt and Globerman, emphasize the sunk cost of time required for a new entrant to develop a reputation for reliability, as well as for obtaining the necessary permits to install storage capacity. They also characterize at page 49 of their report (exhibit A-2056) as sunk the cost penalty of operating below minimum efficient scale.

[175] The Tribunal is satisfied that sunk costs are meaningful in the industry and constitute a significant obstacle to a new entrant.

(7) Evidence on Entry

[176] The respondents seek to demonstrate that barriers to entry are low by presenting evidence on actual entry over time by independent firms. The respondents have chosen to rely, for the most part, on evidence of growing market shares of independent firms rather than presenting evidence contrary to each of the Commissioner's submissions regarding barriers to entry.

[177] The Commissioner submits that barriers to entry are high and that small scale entry is not an unusual event, but that entry occurs at a relatively low scale and expansion of entrants appears to be both modest and slow. Professors Schwindt and Globerman submit at page 53 of their

report (exhibit A-2056) that small scale entry has occurred in the marketplace and that there is considerable turnover or "churn" among small scale entrants. They cite the membership list of the Propane Gas Association of Canada and state that there were 41 new memberships from 1994 to May 1999. They also find that 22 of those members had left the association by mid-1999. Further evidence from Superior also suggests that both entry and exit by small firms are high. Superior indicates that 45 new firms have entered the market since 1996. However, there is only one example of large scale entry, which is IOL's entry into the agricultural, commercial, industrial and automotive segment in western Canada. As noted above, this attempted entry failed.

(a) Basic Trend (1988-98)

[178] The respondents submit that there have been 45 new entrants across the country in the past three years, that there is no evidence of business failure, and that ICG's volume has declined by 26 percent due to its inefficiency over a period of eight years when the national demand for propane increased and independent volume doubled. The respondents further assert, on the basis of Superior's best estimates, that independents have increased their share of retail propane sales from 17 percent in 1989 to 42 percent in 1998 (exhibit R-111, tab 5). They also submit that independents have grown from 24 percent in 1990 to 46 percent in 1998 based on Statistics Canada data.

[179] At the hearing, the respondents introduced numerous calculations of Superior/ICG's combined market share, including a chart handed up in final argument ("Comparison of SPI Estimates Over Time with Statistics Canada Estimates Over Time") comparing Superior's internal market share estimates to market share estimates based on Statistics Canada data from 1988 to 1998. This chart demonstrates that Superior and ICG had a combined market share of 81 percent in 1988. This estimate arises from the market share estimates reported in the Minutes of Norcen Energy Resources Limited Board of Directors meeting on October 11, 1988 (exhibit R-88), in which Superior estimated its market share to be 41 percent, ICG to be 33.1 percent and Premier Propane Inc. ("Premier") to be 6.6 percent. The respondents submit that the Superior/ICG's combined market share was down to 60 percent in 1998 on the basis of market share estimates contained in the 1998 branch templates (exhibit R-111, tab 2).

[180] In response to this chart, the Commissioner points out that the 1988 share of 81 percent includes the volumes of Premier despite the fact that Superior did not acquire Premier until 1993. It is not clear to the Tribunal why Premier's volume was included in the respondents' 1988 combined market share estimate as that volume could not have contributed to the market power of a combined Superior and ICG in that year. Excluding that volume would indicate a 1988 combined Superior and ICG volume of approximately 74 percent.

[181] With regard to the 1998 estimate of 60 percent, the Commissioner submits that this estimate is not accurate. The Commissioner notes that in order to get to this estimate, the respondents calculated the total volume of each branch trading area using the Superior branch manager's estimate of Superior's market share in that area and Superior's actual volumes for the

branch from the 1998 branch templates. The respondents calculated the volumes of ICG and the independents by using that total volume number and the branch manager's volume estimates for competitors to calculate the market shares of ICG and the independents.

[182] According to the Commissioner, in a further adjustment of this 60 percent estimate, the respondents added 133 million litres based on the difference between the total independents' volumes reported in the 1997 competitor survey compiled by the Commissioner and Superior's 1998 estimates of independents' volumes. Adding this 133 million litres to the total volumes estimated by the branch managers led to a combined market share of 58 percent for Superior and ICG in 1998. This adjustment of the estimate assumes that the independents sold as much in 1998 as in 1997 despite the warmer weather and other factors that allegedly depressed the industry wide volumes.

(b) 1998 Branch Templates

[183] The Commissioner submits that the data supplied by the 1998 branch templates to arrive at approximately 58 percent are flawed and conflict with the historical and current position taken by Superior and ICG in their public disclosure statements, the industry practice and other data before the Tribunal.

[184] The Commissioner submits that the 1998 branch templates are flawed for various reasons. The Tribunal notes that it remains unclear whether Superior's own estimated market share for a branch area includes sales to agents. Indeed, Mr. Schweitzer could not confirm at the hearing which approach was used by the branch managers who prepared the templates; he indicated that different approaches may have been used by Superior's branch managers. Further, according to him, the estimates were reviewed at Superior's corporate office and "followed up where inconsistencies arose" (transcript at 32:6109 (6 December 1999)). This part of the process also remains unclear.

[185] In addition, Mr. Schweitzer testified that he expected that the branch managers estimated competitors' volumes by looking at the physical delivery equipment of the competitors which they could observe by driving down the road past the competitors' locations and estimating the number of litres "typically" delivered in a year by those types of vehicles (transcript at 35:7000-02 (9 December 1999)). These estimated volumes were then apparently used to estimate competitors' market shares.

[186] The Tribunal is of the view that the apparent capacity of competitors does not provide an appropriate estimate of sales volumes as conditions change. As an example, a competitor with 15 percent of truck delivery capacity in the market would not necessarily reduce that capacity quickly in the event of warmer weather or reduced sales volumes. There is no evidence that there is a direct correlation between the equipment that a competitor may have and the actual volume of propane sold by that competitor in the marketplace. Further, looking at the equipment is not informative of the intensity with which the assets are used. For example, it does not reflect how much propane is contained in a truck or how often it is filled up in a given week.

(c) 1998 Actual Volumes

[187] The Commissioner notes that actual volumes for 1998 for Superior and ICG were approximately 1.23 billion litres and 0.92 billion litres, respectively, for a combined total of 2.15 billion litres according to the Commissioner. According to internal Superior documents, Superior's management believed that its market share was unchanged at 40 percent since 1996. Using its stated approach, Superior management would have estimated total propane demand for 1998 as 3.08 billion litres (i.e., 1.23/0.4), and on this basis, would have concluded that the combined market share of Superior and ICG was 70 percent (i.e., 2.15/3.08). Internal Superior documents show that this was in fact the combined share that Superior management believed at the time when it was studying the acquisition of ICG.

[188] However, after reviewing its branch templates in 1999, Superior's management concluded that the combined market share for 1998 had declined. For the first time apparently, Superior's management determined that the Statistics Canada estimate of total market demand, 3.95 billion litres in 1998, was the appropriate base for Superior's and ICG's combined share estimate and then calculated a market share of 54 percent using combined actual volumes (i.e., 2.15/3.95).

[189] The Commissioner attributes the decline in the 1998 volume to industry-wide factors. Indeed, the 1998 Superior Propane Income Fund Annual Report (exhibit R-111, tab 1) reads at page 01194:

> Gross profits of $203.5 million in 1998 (16.6 cents per litre of propane sold) declined from 1997 levels by 3%. Propane sales volume in 1998 were 14% lower as a result of reduced heating demand due to weather that was on average 12% warmer than 1997, reduced demand for auto propane due to a declining number of propane powered vehicles, lower oil field activity given the dramatic fall in oil prices in early 1998, and lower crop drying volumes in 1998 due to dry weather and low crop prices.

On this basis, the Commissioner disputes the respondents' claim that the decline in volume in 1998 was due to a decline in combined market share.

[190] In addition, the Commissioner's expert, Mr. Mathieson, estimated the 1998 retail demand to be three billion litres even though the Statistics Canada estimate for that year was 3.95 billion litres. Mr. Mathieson noted that Statistics Canada numbers were useful for establishing directional trends in demand in the industry, but that its annual consumption figures were distorted due to double counting. Until Superior management reviewed the 1998 branch templates in 1999, it did not accept Statistics Canada data and it believed that the combined market share was approximately 70 percent. Moreover, in the spring of 1999, Superior's management was of the view that Superior's market share was in excess of 40 percent of the estimated Canadian retail propane market and that there was no evidence at the time that Superior was losing market share to independents (see testimony of M. Schweitzer, transcript at 31:5861-84 (3 December 1999)).

[191] The Commissioner submits that the respondents have manipulated various data to show that Superior and ICG have been respectively losing market shares since 1989. The Commissioner notes further that Superior did not report this significant decline in its market share to its investors through its quarterly reports. Indeed, in the Commissioner's view, other sources of information for the year 1997, including the competitor survey, the business case and figures prepared by the respondents in preparation for the acquisition of ICG by Superior suggest otherwise.

[192] The Commissioner is critical of Superior's upward adjustment of 133 million litres to its estimate of independents' 1998 sales volumes in the 1998 branch templates summary. The Commissioner argues that an accurate estimate would reflect the decline in industry-wide demand in 1998, which was known when the templates were being prepared and analysed in 1999. The Commissioner argues that since the actual volumes of Superior and ICG has fallen by approximately 14 percent in 1998, the estimates of independents' volumes should be reduced by a similar percentage.

[193] The Commissioner points out that branch managers estimated 1998 competitor sales volume and market share by observing competitor capacity (e.g., number and size of trucks) in 1999, which likely overestimated 1998 sales volumes. He asserts that, although propane demand generally declined, capacity likely did not.

[194] Relying on Statistics Canada annual volume figures showing a decline in demand in 1998 of 511 million litres, the respondents reply that independents' aggregate volumes declined by only six percent. Further, these changes result in an increase in independents' aggregate market share of three percentage points that matches the equivalent decline in the combined market share of Superior and ICG.

[195] The Tribunal accepts the expert evidence of Mr. Mathieson that Statistics Canada data do not reflect actual demand for a given year, and hence doubts that propane demand declined by 511 million litres in 1998. As a result, the Tribunal is not persuaded by the respondents' submission that the independents' aggregate market share increased by three full percentage points in 1998 or that the combined share of Superior and ICG declined by three percentage points.

(d) Other Sources Recognizing a Combined 70 Percent Market Share

[196] Various sources state that Superior and ICG have had so far a combined market share of 70 percent, that the total Canadian retail propane market has been in the order of 3.5 billion litres per annum and that it has remained stable for about the last 10 years.

[197] In 1996, Petro-Canada assisted by a consultant, Arthur D. Little, carried out a valuation of ICG's business. The study entitled "Petro-Canada - ICG Business Valuation" (confidential exhibit CA-1019), dated September 19, 1996, concludes at page 21997 that baseload propane

equals 2.4 billion litres (Superior 45 percent, ICG 29 percent, regionals 16 percent, and independents 10 percent), and that autopropane equals 1.2 billion litres (Superior 45 percent, ICG 29 percent, regional 16 percent, and independents 10 percent).

[198] In 1998, the ICG prospectus and the information circular all referred to ICG maintaining an approximate 30 percent market share (exhibit R-47, tab 65, at 04373):

> 4.2 Who are your major competitors in the markets you serve ?
>
> Superior Propane Inc. is the largest Propane Company in Canada with approximately *40 % market share*. Together, *ICG and Superior serve approximately 70 % of the market*. In most geographic areas, *ICG has a 35-40 % market share* or greater except for Ontario, where ICG is in the 15% range and the Maritimes where ICG is a small player. The rest of the market is served by 10 regional and 60 small independent competitors. Within the smaller participants the industry is very dynamic, with buyouts, startups and exits occurring regularly; however *ICG's and Superior's combined market share has not materially changed in the past five years*. (emphasis added)

[199] With respect to Superior's estimates, the Tribunal notes that a detailed analysis of the propane market in 1995-96 was conducted by Superior ("SPI Market Assessment 1995/96": exhibit A-10). This study, which examines each geographic market and end-use across the country, concludes that Superior holds 43 percent, ICG, 29 percent and others, 28 percent of the Canadian retail propane market. This study also states at paragraph 2 on page 00251:

> . . . The sum of these Market estimates, which should theoretically be equal to *total retail propane demand in Canada, was 3.45 billion litres, 13 % lower than Statistics Canada's latest estimate of 3.95 billion litres*. (emphasis added)

[200] In 1996, Mr. Schweitzer attended and participated in the due diligence process which led to the 1996 Superior Propane Income Fund Annual Report. The prospectus, dated September 25, 1996 (exhibit A-202), states at page 03899:

> . . . Superior operates in all ten Canadian provinces and one territory and is the country's largest and only national retail propane marketer with *total sales volumes representing in excess of 40 % of the total estimated Canadian propane retail market*. Although demand varies within market segments, *overall market demand for propane is stable and Superior's size and breadth have historically resulted in consistent sales volumes*. (emphasis added)

[201] The 1997 Superior Propane Income Fund Annual Report (exhibit A-712), which was released in the spring of 1998, confirms at page 07697 that Superior generates sales volumes "in excess of 40 percent of the total estimated Canadian retail propane market".

[202] Peter Jones, formerly Vice-President of Western Operations of Superior, prepared a business case document (confidential exhibit CA-193) when he was at Superior in May 1998

after the publication of the ICG prospectus. At pages 03374 and 03380, the document shows a 41 percent market share for Superior and a 32 percent market share for ICG, on the basis of national volumes of 3.321 billion litres of propane in 1997.

[203] The 1998 Superior Propane Income Fund Annual Report (exhibit R-5, tab 161) also states at page 01693 that "[t]ogether, Superior and ICG serve approximately 300,000 customers through 250 branches and satellite units, representing *approximately 70 percent of the Canadian retail propane market*" (emphasis added).

[204] The Tribunal also notes that even the quarterly report dated October 27, 1999 of Superior Propane Income Fund (exhibit A-3126), which was issued after Mr. Schweitzer became aware of the alleged drop in Superior's market share following Superior's review of the 1998 branch templates, does not report any change to that effect or any correction to the 1998 estimate previously presented. Indeed, page 1 of the quarterly report states:

> . . . Results from the operations of Superior and ICG remained soft this quarter, largely due to *lower overall propane demand* experienced during the third quarter and pressure on margins, as wholesale propane costs continued to rise with the upsurge in crude oil pricing. Soft second and third quarter performance is not unusual in the propane business. Over 60 % of cash flow is usually generated during the winter October through March heating season. As crude oil prices have recently moderated and economic conditions have improved, *the outlook for 1999 remains unchanged.* (emphasis added)

[205] Therefore, it appears to the Tribunal that Superior chose not to report the alleged decline in Superior/ICG's historical 70 percent share of national propane sales to its investors through its quarterly reports.

(e) Conclusion on Market Shares

[206] The evidence suggests that the retail demand for propane was approximately 3.5 billion litres per year up to and including 1997. Similarly all the evidence, except Superior's 1998 branch templates summary, indicates that Superior's and ICG's market shares were approximately 40 percent and 30 percent, respectively, up to and including 1998. In contrast to the evidence stated above regarding Superior's and ICG's market shares, the 1998 branch templates estimates suggest that Superior's and ICG's market shares were 34 percent and 26 percent, respectively, in 1998. This single estimate apparently caused Superior's management to conclude that the drop in the 1998 volume resulted from the penetration of independents in the retail propane business rather than to the warmer weather during that year.

[207] The Tribunal has considerable doubt about the accuracy and validity of the information contained in the 1998 branch templates and hence in the branch templates summary for 1998. It appears to the Tribunal that the methodology for collecting and compiling the data was unsound. For example, errors by branch managers led particularly to double counting of propane volume sold by agents. Moreover, the branch managers' assessment of market shares of competitors were adjusted at Superior's corporate office so as to achieve agreement with Superior's total

market size estimate. It appears that the branch templates and the summary thereof are flawed. Errors were made by some branch managers in completing the survey; the procedure for inferring competitor volume and market share from observed capacity likely overstates volume and sales. The Tribunal finds it surprising that Superior's branch managers were unaware until recently of the significant growth of independents' market shares over a ten-year period, but were able to provide accurate estimates of competitors' volume for 1998. Finally, the Tribunal is of the opinion that Superior's management did not properly design the questionnaires, collect the data, or ensure quality control to the extent needed to ensure reliability. Consequently, the Tribunal does not place any weight on the respondents' evidence regarding market shares from the branch templates.

[208] The Tribunal is further concerned about the addition of 133 million litres for the year 1998 to the competitors' aggregate volume in the branch templates summary. This addition was apparently done in recognition that the branch templates summary understated competitor volumes for 1998 in comparison to 1997. The Tribunal believes that such adjustment was inappropriate given that industry-wide volumes declined in 1998.

[209] As noted above, the decline appears due to warmer weather and reduced economic activity in certain propane end-use segments. Given its concern about the branch templates, the Tribunal cannot attribute Superior's and ICG's decline in volume to the suggested increased penetration of independents. Indeed, aside from the 1998 branch templates, there is no evidence to support the changes in market shares claimed by the respondents. The evidence submitted for the period 1988 to 1998 and even for the year 1999 supports the stability of Superior and ICG's combined market share.

[210] As mentioned earlier, the Tribunal accepts that relevant geographic markets are local. Therefore, evidence of high market shares on a local basis can only be rebutted by evidence that entry on a local basis can constrain the exercise of market power. No evidence of that nature has been adduced in this case. Instead, the respondents rely for their evidence on entry and expansion on an alleged declining trend in the combined market share of the merging parties.

[211] In light of the evidence, the Tribunal cannot accept the assertion of the respondents regarding entry and expansion. The Tribunal is of the view that there have been no significant changes in Superior's and ICG's market shares that would suggest such a penetration by independents.

C. REMOVAL OF A VIGOROUS AND EFFECTIVE COMPETITOR

[212] The Commissioner submits that the merger will result in a loss of an effective and vigorous competitor in the market. The Commissioner points out that Superior's own view is that ICG is an important competitor. Based on its internal documents, Superior refers to ICG as its "key-most" important competitor, to ICG's low prices and its low costs, that ICG uses discounted price to acquire new customers, etc. In addition, the Commissioner refers to the

affidavit sworn by Mr. Jones in support of the section 100 application in which he said that under his management, ICG would continue as a vigorous competitor to Superior. In his testimony, Mr. Schweitzer also testified that ICG was Superior's most frequent competitor (transcript at 35:6925, 6926 (9 December 1999)).

[213] The Commissioner also refers to the prospectus of September 25, 1996 for the 1996 Superior Propane Income Fund (exhibit A-202) which states at page 03897:

> In addition to Superior, ICG Propane Inc. ("ICG"), which is wholly-owned by Petro-Canada, is the only other retail propane marketer with substantial interprovincial operations. Superior and ICG share approximately three quarters of the Canadian retail market with the balance of the market served by local and regional marketers.

[214] Finally, the Commissioner submits that innovative programs such as the Cap-It program and the Golf-Max program are not offered by any other competitor. The Commissioner argues that the Cap-It program has given ICG a competitive edge over its competitors, including Superior.

[215] The respondents argue that ICG is an ineffective and inefficient competitor. They refer to the testimony of Mr. Sparling who stated that "[i]n the markets where we are we have not seen them as an effective competitor" in support of that argument (confidential transcript at 6:122 (14 October 1999)). They also rely on Mr. Jones's evidence, who described ICG's inefficiency by reference to various cents per litre ("cpl") measures tied to ICG's declining volumes such as operating costs generally and administrative, fleet and delivery costs in particular (transcript at 35:7056-67 (9 December 1999)). They also rely on the expert evidence of Professor Carlton and Dr. Bamberger, who testified that their research was consistent with the evidence that independents, not ICG, constrain Superior's pricing.

[216] The Tribunal is not persuaded that ICG is an ineffective competitor. First, Professor Carlton's analysis of gross margin and earnings before interest, taxes, depreciation and amortization ("EBITDA") in his report (expert affidavit of D. Carlton (17 August 1999): confidential exhibit CR-120) shows at table 2 that from 1994 to 1998, ICG's average gross margin, as a percentage of total revenue, was 44.7 while Superior's was 44.5. Similarly, table 3 of his report shows that ICG's average EBITDA, as a percentage of total revenue, was 11.2 and Superior's was 12.9 over the same period. These numbers may indicate that Superior's financial performance was somewhat better than ICG's but do not indicate that ICG was an ineffective competitor.

[217] Secondly, at page 12 of their report in rebuttal (expert rebuttal affidavit of R. Schwindt and S. Globerman (15 September 1999): confidential exhibit CA-2078), the Commissioner's experts, Professors Schwindt and Globerman, reviewed Professor Carlton's analysis of customers gained and lost which tends to show that Superior loses more or gains fewer customers to or from independents than to or from ICG. They challenge that conclusion noting the case of Bromont, Quebec, where the average size of an account challenged by ICG is three times greater than the average size of an account challenged by an independent. Thus, while ICG may figure

in fewer competitive challenges with Superior compared to independents, it is a strong and aggressive competitor for large volume accounts. Accordingly, what appears to Superior as weak competition from ICG may simply be ICG's strategy of competing more intensively for larger accounts which are smaller in number than smaller accounts.

[218] Thirdly, the Tribunal reviewed the answer to undertaking 150 given by ICG on its examination for discovery. It provides a list of 18 services provided by ICG such as the Cap-It program, the Golf-Max program, the Auto-fill program, the SOS Cylinder Delivery and the Aquaculture program. This list also shows which competitors offer or do not offer such services by region. The Tribunal concludes that ICG is an important and aggressive competitor seeking to attract customers with these specialised services.

[219] It appears to the Tribunal that the respondents' submission concerns ICG's alleged financial performance rather than ICG's presence as an effective competitor in the market. The evidence before the Tribunal shows that ICG actively solicits customers from among the largest consumers and through specialised programs, that consumers from various end-uses recognize ICG as an alternative, that consumers use ICG to negotiate prices with Superior and that ICG's market share continues to be approximately 30 percent as indicated above. This evidence does not support the argument that ICG is an ineffective competitor. Professor Carlton's remaining evidence in this regard will be reviewed below.

D. FOREIGN COMPETITION

[220] The Commissioner suggests that foreign competitors do not provide effective competition. The respondents' expert, Professor Carlton, suggests at paragraph 21 of his report (confidential exhibit CR-120) that propane distributors in border states can enter the Canadian market in the event of a post-merger price increase and that the 10 largest propane retailers in the United Sates have over 1,500 retail locations in states that border Canada. However, as the Commissioner points out, entry by propane marketers from the United States has been virtually non-existent in the past.

[221] There are three ways in which a propane marketer from the United States could enter the Canadian propane industry: (1) by serving border locations from existing storage points in the Unites States; (2) by establishing branches in Canada; and (3) by acquiring a Canadian propane marketer. The only evidence of any of these alternatives is that of Professor West's reference to the American company, Lake Gas, located in International Falls, Minnesota, which sells a small volume (50,000 litres of propane) directly across the border in Fort Frances, Ontario.

[222] There is no evidence that a propane marketer from the United States has ever established a branch in Canada. In early 1998, Gaz Metropolitan Inc. indicated its interest through a partnership with AmeriGas, one of the largest propane marketers in the United States, in acquiring ICG. No transaction was concluded and there is no other evidence of successful entry through acquisition by an American propane distributor.

[223] In addition to the barriers to entry discussed above, and for a variety of reasons including billing systems, foreign currency, language and different measurement systems, it appears to the

Tribunal that American firms are unlikely to provide effective competition to the merged entity in the Canadian retail propane market.

E. EFFECTIVE REMAINING COMPETITION

[224] The Commissioner alleges that competition following this merger will be weak and ineffective. The Commissioner refers in particular to evidence that shows that Superior and ICG are the price leaders and that the independent firms typically follow the prices set by Superior and ICG. Hence the disappearance of ICG would remove the only significant constraint on Superior's ability to set prices.

[225] Regarding the effectiveness of independent competitors and the constraining role of ICG, the respondents present the expert testimony and report of Professor Carlton, which will be addressed below. Other evidence suggests that the Commissioner's concern for effective remaining competition is well founded. For example, the merged firm will be the only one in Canada with the capability to serve national accounts at the level of service currently offered by Superior or ICG. None of the remaining firms can offer that level of service effectively and hence will not be effective competitors to the merged firm for the business of national accounts.

[226] According to Superior, there are up to 200 independent firms. The Commissioner points out that many of these firms are agents of the merging firms or are associated with them as "bulk dealers". A bulk dealer purchases propane, takes title to the product, and agrees with either ICG or Superior to market in well defined territories. With respect to its bulk dealers, ICG determines the price, holds the customer contract, and bills the client directly. The Tribunal does not regard these agents and bulk dealers as strong competitors to the merging parties, particularly with respect to existing customers.

[227] The Commissioner contends that fringe and regional competition exists in some local propane markets, but that sustained or significant competition exists only between the merging parties. The evidence for this submission is that independent propane marketers are price followers, they are in many cases unknown to consumers in their own markets, they differentiate their products and locations to avoid direct competition with the merging parties and they compete mainly among themselves. The latter point leads to Professors Schwindt and Globerman's reference to "churn". For example, Mr. Sparling submitted that Sparling does not actively solicit customers from rivals, particularly from Superior. He testified:

> MR. MILLER: Do you actively solicit customers from your rivals?
> MR. SPARLING: No.
> MR. MILLER: Do you have any instructions or directions to represent --
> MR. SPARLING: We discourage that. We refer to that as cold calling. It's not to say it doesn't happen in this industry, but we certainly discourage it, and we would define that as a sales person driving up and down a given road and wherever they see a tank they simply go in and cold call the customer. We discourage that.
>
> transcript at 12:1731 (14 October 1999).

[228] He also testified that Sparling does not seek to be a price leader; rather, Sparling emphasizes "consistent pricing" from customer to customer (transcript at 12:1728 (14 October 1999)). In the Tribunal's view, this comment can reflect consciously parallel behaviour that characterizes some oligopoly markets; possibly it reflects only that Superior and Sparling have highly differentiated marketing strategies and hence do not compete directly for this reason. In either case, it suggests that Sparling cannot be viewed as an effective competitor to Superior or to the merged entity.

[229] Further evidence of weak remaining competition is provided by Mr. Edwards of EDPRO Energy Group Inc. ("EDPRO") who established his company in June 1997. Mr. Edwards said that he established the business in London, Ontario, because of its proximity to the Sarnia propane supply source and to avoid competing in a market with a dominant firm. Based on his experience in the Maritimes, Mr. Edwards felt that competing with a dominant propane marketer was not likely to yield success. Further, Mr. Edwards explained that after two years in the business, EDPRO's top three customers represent 75 percent of EDPRO's total volume.

[230] Moreover, EDPRO's own organization, effectively a franchise, indicates that its own dealer-associates operate as bulk dealers rather than as competitors. The dealer-associates purchase propane from EDPRO and operate under the EDPRO name in exclusive territories established by agreement with EDPRO.

[231] It appears to the Tribunal that residential customers are not well informed about alternate propane marketers serving their areas other than the merging parties. For instance, one of the Commissioner's factual witnesses, Ms. Simons, was unable to determine which suitable propane companies were delivering propane in Renfrew, Ontario. During cross-examination by the respondents, she stated that when building her house in Renfrew, she was aware only of Superior and ICG and selected ICG on the basis of price. She had not been solicited by any other propane suppliers and was only familiar with one other propane supplier, Rainbow Propane, which supplies 100-pound tanks to cottages (transcript at 19:3304 (26 October 1999)).

[232] The Tribunal also heard evidence that residential customers learn about competitors by word-of-mouth from neighbours. This lack of information regarding competitors suggests to the Tribunal that the independent firms do not market their services as aggressively as ICG or Superior and that customer awareness is weak as the Commissioner asserts.

[233] The respondents claim that certain firms could easily enter the retail propane business, and they twice quote part of paragraph 3.2.2.7 of the MEG's, cited above at paragraph [57], which indicates that, under certain conditions, potential competitors are considered at the stage of market delineation. On this basis, the respondents advocate including upstream propane producers, suppliers from distant locations, and suppliers of alternate fuels in the relevant market and they identify certain such firms by name. The respondents' quotation from paragraph 3.2.2.7 of the MEG's includes the following:

> ...Where it can be established that such a seller would likely adapt its existing facilities to produce the relevant product in sufficient quantities to constrain a

> significant and nontransitory price increase in the relevant market, this source of competition will generally be included within the relevant market.

[234] The Tribunal notes that the respondents have not provided any information on the sales of retail propane that the named potential competitors might reasonably be expected to make and, thus, have not established that such sales could exercise a constraining influence on the pricing of products sold within the relevant market.

[235] Claiming support from footnote 22 of the MEG's, the respondents also argue that, although market shares could not reasonably be attributed to these potential competitors, the existence of these firms implies that the market shares of actual propane retailers overstate the market position of the actual retailers. In effect, the respondents ask the Tribunal to place less weight on estimated market shares of Superior, ICG and presumably the independent firms because of the presence of potential competitors.

[236] In this regard, the Tribunal notes that the respondents have incompletely quoted from the MEG's which, immediately following their quoted passage, also state:

> . . . However, potential competition from sellers who could produce the relevant product by adapting facilities that are actually producing another product will not be assessed at the market definition stage of the assessment of the merger where:
>
> (i) such a seller would likely encounter significant difficulty distributing or marketing the relevant product; or,
>
> (ii) new production or distribution facilities would be required to produce and sell on a significant scale.
>
> In these circumstances, this source of competition will instead be considered subsequent to the delineation of the relevant market, in assessment of the likelihood of future entry pursuant to section 93(*d*) of the Act.

[237] On the basis of the evidence in this case regarding, *inter alia*, customer contracts and scale economies, the Tribunal believes that the output of the potential entrants cited by the respondents would not be included in the relevant market if the MEG's were applied. As a consequence, there is no reason to believe that the market shares of actual competitors overstate their market positions.

[238] On the basis of the evidence submitted, the Tribunal believes that there is insufficient evidence to demonstrate that there will be effective remaining competition capable of constraining the exercise of market power by the merged entity.

[239] The respondents' main piece of evidence in this area is Professor Carlton's statistical analysis of Superior's margin. He concludes that, whereas a substantial presence by ICG in Superior's market area does not constrain Superior's pricing, the aggregate of the independents'

volumes in that market does provide a competitive restraint on Superior's pricing. The Tribunal will discuss this opinion evidence below.

F. PREVENTION OF COMPETITION

[240] In addition to the alleged substantial lessening of competition pursuant to sections 92 and 93 of the Act, the Commissioner submits that the merger will lead to a prevention of competition in the Maritimes that will be substantial.

[241] ICG serves the Maritimes provinces from its branch located in Moncton, New Brunswick. The Commissioner points out that ICG had extensive plans, prior to its acquisition by Superior, to expand its business in the Maritimes by establishing branch operations in Sydney, Nova Scotia.

[242] The Commissioner submits that Irving Oil Limited and Superior were the principal alternate competitors in this region and that the merger terminates ICG's activity as a competitor in Atlantic Canada. He submits that Superior and Irving Oil had a duopoly in the Maritimes. The Commissioner argues that ICG has developed and pursued competition in the Maritimes and has evident capability and plans to expand its presence in order to increase competition in the Maritimes. He introduced ICG's plans to obtain Canadian Tire's business where ICG stated clearly that they would dedicate a $200,000 tractor-trailer to service the Canadian Tire dealer network in the Atlantic provinces (exhibit A-851 at 10980). The Commissioner submits that the acquisition of ICG by Superior will substantially prevent competition in Atlantic Canada.

[243] The respondents did not call any evidence nor made any submissions regarding the Commissioner's allegation that a substantial prevention of competition is likely to occur in Atlantic Canada.

[244] The Tribunal recognizes that the concept of prevention of competition has not received much attention in Canadian jurisprudence. In *Howard Smith Paper Mills, Ltd. et al. v. The Queen* (1957), 8 D.L.R. (2d) 449 (S.C.C.), the Supreme Court of Canada had to consider the meaning of the word "prevent" in relation to the word "unduly" and concluded that, when used together, the word "prevent" means "hinder or impede" in contrast to absolute elimination.

[245] The MEG's, cited above at paragraph [57], explain the expression "prevention of competition" at paragraph 2.3 as follows:

> Similarly, competition can be **prevented** by conduct that is either unilateral or interdependent. Competition can be prevented as a result of unilateral behaviour where a merger enables a single firm to maintain higher prices than what would exist in absence of the merger, by hindering or impeding the development of increased competition. For example, the acquisition of an increasingly vigorous competitor in the market or of a potential entrant would likely impede the development of greater competition in the relevant market. Situations where a market leader pre-empts the acquisition of the acquiree by

another competitor, or where a potential entrant acquires an existing business instead of establishing new facilities, can yield a similar result.

Competition can also be prevented where a merger will inhibit the development of greater rivalry in a market already characterized by interdependent behaviour. This can occur, for example, as a result of the acquisition of a future entrant or of an increasingly vigorous incumbent in a highly stable market.

[246] In light of ICG's plans to vigorously expand its activities in Atlantic Canada and in the absence of any evidence to the contrary, the Tribunal is of the view that there will likely be a substantial prevention of competition in Atlantic Canada as a result of the merger.

G. STATISTICAL AND ECONOMETRIC EVIDENCE

(1) Commissioner's Expert Evidence

[247] Michael R. Ward, one of the Commissioner's experts, provided econometric evidence about the likely effects of the merger on Superior's ability to exercise market power. He used the well established approach of "merger simulation", a method developed specifically for analysing the competitive effects of mergers in differentiated product industries. In such industries, the potential for a unilateral price increase is high when the merging parties place competitive constraints on each other by virtue of a high degree of substitutability between their products prior to the merger. Prior to a merger, a unilateral price increase by one firm may lead to a loss of sales to its closest competitors. However, a unilateral price increase following a merger among close competitors may lead to a reduced loss of sales when the products of the merging companies are closer substitutes for each other than for the products of other firms in the industry (see generally exhibit R-108, J.A. Hausman and G.K. Leonard, "Economic Analysis of Differentiated Products Mergers Using Real World Data" (1997) 5:3 George Mason L. Rev. 321).

[248] In the first part of his report (expert affidavit of M.R. Ward (30 August 1999): exhibit A-2059), Professor Ward estimates the structure of demand for propane. He then uses these estimates to simulate the instant merger's likely effects. In order to determine the degree of substitution between the products of the merging parties, Professor Ward obtained data on ICG and Superior branches in 46 out of 74 of Professor West's geographic markets for a period of 54 months up to 1998 for which data was available. He used Superior data on prices, sales, and product groupings, and ICG data on litres sold, dollar sales, gross profits, and product groupings to establish volumes and prices for each firm in four product segments: residential, industrial, autopropane, and "other" which includes construction, commercial, government and agriculture end-uses.

[249] With this data set, Professor Ward measures the extent to which consumers substitute between ICG and Superior using a linear approximation to the Almost Ideal Demand System, a widely-accepted approach to demand estimation. He finds that an increase in ICG's price results in a statistically significant increase in Superior's market share in the residential and industrial

segments, and that an increase in Superior's price reduces its market share significantly in those segments. Professor Ward interprets these findings as evidence for consumer substitution between the products of ICG and Superior, i.e., that they compete directly and their products are close substitutes for each other in the eyes of consumers. His report shows at page 21 that the results for the autopropane segment have the expected signs but are not statistically significant; results for the "other" segment are not reported due to lack of significance or implied upward-sloping demand curves.

[250] Professor Ward's evidence at page 26 of his report also demonstrates that Superior reacts strategically to ICG's pricing behavior. He finds that when increases in ICG's unique costs result in a price increase of one percent, Superior increases its price by approximately two-thirds of a percent in the residential, industrial and automotive categories. He expects that ICG would respond to Superior's price increases but does not have the data to estimate that strategic relationship. In his simulation analyses, he makes the assumption that ICG will react to Superior's price changes in the same way as Superior reacts to ICG's pricing decisions as stated at page 27 of his report.

[251] Using the statistical results obtained with the Almost Ideal Demand System, Professor Ward estimates the own-price and cross-price elasticities of demand in order to estimate the impact of the merger on product prices, a step referred to as simulation. Since he did not know the price elasticity of demand for propane, he estimated firm-level elasticities with three different assumptions for that key measure. At table 6 on page 29 of this report, he finds, for example, that if the price elasticity of demand for propane is -1.5, then the price elasticity of demand for ICG propane is -2.40 in the residential segment and the corresponding Superior price elasticity is -1.97 with regional and discount dealers in the market. He assumes that substitutability between the merging parties and independent firms is exactly half as large as that between ICG and Superior.

[252] Combining the firm-level price elasticities with the evidence on strategic pricing (which would no longer occur post-merger), Professor Ward estimates the change in price due to the merger assuming there are no changes in marginal costs, i.e., no efficiency gains and no entry or supply-substitution by product segment. Depending on the elasticity assumed for propane demand, on the presence or absence of regional and discount dealers, and on the product segment, the average estimated price increases are between 1.4 percent and 15.1 percent. Table 7 on page 30 of his report shows that, using propane demand elasticity of -1.5, the average price increases are 8 percent in residential, 8.9 percent in industrial and 7.7 percent in automotive taking regional and discount dealers into account. He concludes at page 36:

> . . . Fifth, ignoring possible price reductions from merger efficiencies, entry or supply-side substitution, the incorporation of these estimates into a merger simulation implies prices will increase due to the merger. The size of the price increase depends primarily on the demand for propane. Specifically, if propane demand is relatively inelastic, the merger is likely to raise average prices by 8 % or more.

[253] At the time of his analysis, Professor Ward did not have the statistical results of Professors Ryan and Plourde regarding the price elasticity of demand for propane. When this information was made available, he re-calculated the effects of the merger on prices using a propane demand elasticity of -1.0, based on their conclusion that the demand for propane was price-inelastic. In those calculations, he also relaxed his assumption that substitutability between independent firms and ICG and Superior was half that of the estimated substitutability between ICG and Superior. Instead, he assumed that they were equally substitutable. Table 2 on page 8 of his report in reply (expert reply affidavit of M.R. Ward (4 October 1999): confidential exhibit CA-2060) shows that he estimates that the average price increases for residential, industrial and automotive are 11.7 percent, 7.7 percent, and 8.7 percent, respectively, when independent firms are in the market.

[254] The respondents' experts, Professor Carlton and Dr. Bamberger, in their report in rebuttal (expert rebuttal affidavit of D.W. Carlton and G.E. Bamberger (27 September 1999): confidential exhibit CR-123), argue that Professor Ward's estimated price increases are overstated because he does not include the effects of efficiencies, entry or supply-side substitution in his analyses. They also criticize Professor Ward for not justifying his assumptions in this regard. They also consider that he has not adequately recognized the constraining effects of independent firms on Superior and ICG pricing. The respondents argue strenuously that Professor Ward did not provide an opinion as to the quantum of any likely price increases post-merger and, therefore, did not provide a basis for finding a substantial lessening of competition.

[255] Noting its earlier comments regarding the evidence of entry and of supply substitution, the Tribunal does not accept the criticisms of Professor Carlton and Dr. Bamberger in these areas.

[256] In reply to their criticism, Professor Ward re-calculated the price impacts including the effects of efficiencies and reported virtually identical price increases at all levels of efficiency gains up to and including $40 million per year, as shown at tables 3 to 5 on pages 10 to 12 of his report in reply (confidential exhibit CA-2060). In a further re-calculation, at the request of the respondents, that incorporated the approach to cost savings as outlined by Hausman and Leonard, cited above at paragraph [247], Professor Ward found that efficiencies had a stronger impact but resulted in price reductions of -0.9 percent in residential, -1.1 percent in industrial and -1.9 percent in automotive only at the $40 million level and then only if 100 percent of these efficiency gains resulted in variable-cost savings (Ward Undertaking (16 November 1999): exhibit A-2079, tables 3-5). As discussed below, no one including the respondents' experts on efficiency gains has suggested that this merger will produce $40 million of annual savings in variable costs.

[257] In the Tribunal's view, Professor Ward's analysis, even though it does not take efficiencies into account, is highly relevant to a determination as to whether there is a likely substantial lessening of competition.

[258] The Tribunal concludes that evidence of an actual or likely price increase is not necessary to find a substantial lessening of competition. What is necessary is evidence that a merger will

create or enhance market power which, according to paragraph 2.1 of the MEG's, cited above at paragraph [57], is "the ability to profitably influence price, quality, variety, service, advertising, innovation or other dimensions of competition". There is no requirement under the Act to find that the merged entity *will* likely raise the price (or reduce quality or service). The only requirement under section 92 is for the Tribunal to decide whether the merged entity has the ability to do so.

[259] For this reason, Professor Ward's simulations both in his report in reply and his undertaking which take efficiencies into account to address the respondents' criticism are irrelevant. The Tribunal infers from the results of his other simulations that the merged entity would have the ability to raise the price of propane.

[260] As to the respondents' claim that Professor Ward has not offered an opinion on the extent and likelihood of a price increase, the Tribunal notes that his initial simulation results at table 7, on page 30 of his report (exhibit A-2059), provided six sets of estimates that were calculated based on three assumed values for the price elasticity of propane demand and on two scenarios concerning the presence or absence of regional and discount dealers in the market. He concluded that the merger would lead to higher prices under all assumed conditions. In his re-calculations in reply at table 2, on page 8 of his report in reply (confidential exhibit CA-2060), Professor Ward further varied his assumptions and obtained similar results.

[261] The fact that Professor Ward simulated the merger's effects under a variety of assumptions and reached the same conclusion gives the Tribunal more confidence in his opinion than it would have if he had restricted his simulations to a narrowly defined set of assumptions. The Tribunal views Professor Ward's conclusion in his initial report, that average prices would rise by eight percent or more as a result of the merger assuming that propane demand is relatively inelastic, as a valid opinion, particularly given his further simulation results in reply.

(2) Respondents' Expert Evidence

[262] The respondents' experts, Professor Carlton and Dr. Bamberger, were asked to evaluate the Commissioner's claim that Superior's proposed acquisition of ICG would result in a substantial prevention or lessening of competition in the market for propane in Canada. They concluded that there was no systematic evidence that the proposed merger would have such effect. They considered the competitive restraint on Superior, customer gains and losses, gross profit margin and EBITDA.

(a) Competitive Restraint

[263] Professor Carlton presented econometric evidence that ICG has not provided a competitive restraint on Superior's pricing but that the independent propane dealers, in aggregate, have provided such constraint. This evidence contradicts the Commissioner's assertion that where significant competition takes place in the propane business, it is between ICG and Superior. If Professor Carlton is correct, then the removal by this merger of ICG as a competitor should not allow Superior to raise its price.

[264] In his econometric models, Professor Carlton posits a relationship between Superior's gross profit margin and the "substantial presence" of ICG and of the remaining firms in aggregate. A substantial presence is measured in four separate ways. In the first model, the presence of ICG and of the other firms in aggregate are deemed substantial if their respective market shares are at least 15 percent. In the second and following models, a deemed substantial presence requires a market share of at least 20 percent, 25 percent and 30 percent, respectively.

[265] Professor Carlton measures these hypothesized relationships by applying the regression analysis technique of ordinary least squares ("OLS") to 1998 monthly data on Superior's prices, costs, margins and volumes at the branch level, hence pooling time-series and cross-sectional data. These data come from Superior's internal records as do the proxies for secondary distribution costs. The prices of alternative fuels come from Statistics Canada databases. The 1998 market share data used to define the dichotomous substantial presence variables are taken from the branch templates prepared by Superior's branch managers in 1999. Professor Carlton controls for a variety of other exogenous variables and conducts additional OLS regression analyses for 1997 (using 1998 market shares) and also by profit margin in various end-uses. His results in these latter OLS analyses appear to use similar models and definitions of variables and to support his 1998 results; accordingly, the 1998 OLS results will be the focus of the Tribunal's review.

[266] Professor Carlton finds that Superior's gross profit margin is higher where ICG has a substantial presence. Selecting model 1 as an example, Superior's margin is 1.47 cpl higher at locations where ICG has a substantial presence (i.e., 15 percent or greater market share) than where it does not. In all four models, the margin impact is positive and statistically significant.

[267] The results for the independent firms show that the aggregate substantial presence of those firms decreases Superior's margin. Where the aggregate market share of the other firms is at least 15 percent, Superior's margin is 0.80 cpl lower than where the aggregate market share is less than 15 percent. Similarly, where the aggregate market share of the other firms is at least 30 percent, Superior's margin is 0.56 cpl lower than where the aggregate market share is less than 30 percent. The effect on margin is negative and statistically significant in all four models.

[268] On the basis of these econometric results, Professor Carlton concludes that ICG does not constrain Superior's pricing behaviour, and that the merger will not enable Superior to increase prices, principally because of the discipline exerted by independent firms. At footnote 31, on page 15 of his report (confidential exhibit CR-120), Professor Carlton suggests that his results are consistent with the alleged "inefficiency" of ICG (i.e., that it has been badly managed).

[269] The Tribunal notes that Professor Carlton's finding that Superior's gross margin is higher at locations where ICG has a substantial presence is an unexpected and unusual result and it is perhaps his most important result. Several criticisms were offered; the Tribunal will comment on the ones that seem most significant.

[270] The Commissioner suggests that substantial presence variables may be proxies for market concentration. If this were the case, then Professor Carlton's results would tend to show that

Superior's gross profit margin is higher in areas where concentration is higher, rather than demonstrating that ICG is a weak competitor. Despite Professor Carlton and Dr. Bamberger's reply on this point, when taken in conjunction with various internal Superior reports of challenging behaviour by ICG, the Tribunal believes that the better view is that Professor Carlton's results reflect concentration.

[271] The specification of the substantial presence of the independent firms is also problematic. Professor Carlton aggregates the volumes of all independent firms into one market share. Thus, as Professors Schwindt and Globerman point out at page 9 of their affidavit in rebuttal (confidential exhibit CA-2078), the statistical result would be the same whether the substantial presence variable combined market shares of many independent firms or represented the market share of one large independent firm. The Tribunal would expect different competitive effects if there were many independent firms with a certain combined share than if there were just one with that share. Hence the substantial presence variable that Professor Carlton used may not be a good measure of the competitive effect of independent firms.

[272] Professor Carlton's models posit that Superior's margin is affected by ICG's and the independents' substantial presence. The Commissioner suggests that the opposite relationship may also hold simultaneously and criticizes Professor Carlton's statistical results for failing to take account of the simultaneous relationship between Superior's profits and the substantial presence variables. Such simultaneity is known to lead to biassed statistical estimates when the OLS method is used.

[273] Replying to a similar criticism of his OLS results from Professor Ward (expert rebuttal affidavit of M.R. Ward (14 September 1999): exhibit A-2080), Professor Carlton repeats his analysis using the method of two-stage least squares ("2SLS") in order to take simultaneity into account. This further work indicates to the Tribunal that Professor Carlton gives some credence to this criticism. Footnote 15 on page 12 of his report in reply (expert reply affidavit of D.W. Carlton and B.E. Bamberger (19 September 1999): confidential exhibit CR-122) states that the results therefrom:

> . . . provide no systematic support for the Commissioner's claim that ICG significantly constrains Superior's retail propane prices. Full regression results are reported in Appendix G.

[274] It is instructive to compare Professor Carlton's 2SLS results with his OLS results. All four OLS models demonstrated that Superior's profit margin was higher where ICG had a substantial presence and that the positive relationship was statistically significant. With the method of 2SLS, one model results in a positive coefficient for ICG's substantial presence, three of the models now show negative coefficients for this relationship, and none of these four coefficients is statistically significant. These differences suggest to the Tribunal that Professor Carlton's OLS results are statistically biassed and not reliable.

[275] For example, where substantial presence is defined at the 15 percent level, Professor Carlton's OLS results indicate that Superior's margin is 1.47 cpl higher where ICG's presence is

substantial than where it is not, and that the relationship is statistically significant. However, the 2SLS results indicate that Superior's margin is 1.60 cpl lower where ICG's presence is substantial than where it is not; the relationship is not statistically significant.

[276] Thus, while Professor Carlton is correct to claim that his 2SLS results do not provide systematic support for the Commissioner's claim, it also appears that they do not provide support for his own conclusions. In particular, the 2SLS results support neither the conclusion that Superior is more profitable at locations where ICG has a substantial presence nor the suggestion that ICG is an ineffective competitor. Indeed, the lack of statistical significance for ICG's substantial presence indicates that no relationship has been found.

[277] With respect to the presence of independents, Professor Carlton's 2SLS results for the aggregate effect thereof also differ from his OLS results. In all four models, the substantial presence of independents has a much stronger statistically significant effect on Superior's margin than with OLS methods. For example, with a 15 percent substantial presence, the OLS impact of independents is -0.80 cpl; with 2SLS, the impact is -3.49 cpl. Similar differences are found across all four models.

[278] The Tribunal observes that the measures of substantial presence for independent firms in aggregate depend on the market share data from Superior's branch templates, the limitations of which have already been noted. Simply put, the Tribunal believes that the substantial presence of independent firms has been measured with error and that the resulting coefficient estimates, whether OLS or 2SLS, are unreliable.

[279] The Tribunal regards Professor Ward's criticism regarding simultaneity as appropriate and, therefore, places greater weight on Professor Carlton's 2SLS results. The Tribunal rejects Professor Carlton's OLS results and the implications which he draws therefrom. Moreover, since Professor Carlton's 2SLS results provide no information on the relationship between Superior's margin and ICG's substantial presence, the Tribunal can only conclude that Professor Carlton's econometric results are not useful in this case.

(b) Acquisition of Premier

[280] To determine whether the merger is likely to result in a price increase, Professor Carlton examined the price effects of Superior's acquisition of Premier, which was completed in 1994. Premier had been a strong competitor in British Columbia and Alberta. After studying Superior's prices in those provinces before and after the acquisition, Professor Carlton finds, at paragraph 47 of his report (confidential exhibit CR-120), that Superior's average margin is statistically lower after the acquisition and that end-use margins are significantly lower for three end-uses -- agent, automotive and residential.

[281] Apart from the statistical and interpretive problems which Professors Schwindt and Globerman find with Professor Carlton's evidence, they note at page 14 of their report in rebuttal (confidential exhibit CA-2078) that Premier's sales were more heavily oriented to autopropane than were Superior's and suggest that this is why the average margin declined post-merger. That

the Premier merger lowered Superior's profit margin is surprising. Together with the differing circumstances of the instant merger and the absence of reply by Professor Carlton to Professors Schwindt and Globerman's rebuttal points, the Tribunal believes that Professor Carlton's analysis of the Premier merger does not provide a good indication of the likely effects of the merger under consideration here.

(c) Customer Gains and Losses

[282] Professor Carlton reports at paragraph 42 and table 12 of his report (confidential exhibit CR-120) his analysis of Superior's customer gains and losses. For 1996, his customer count data show that Superior experienced a net loss of 149 customers to ICG and 1,862 customers to independent firms. In 1997, Superior enjoyed a net gain of 157 customers from ICG but a net loss of 2,435 customers to independents. In 1998, Superior also had a net gain of 448 customers from ICG and a net loss of 995 customers to independents. He concludes that "Superior systematically loses more, or gains fewer, customers to or from independents than ICG. These results are consistent with my regression findings that independents, and not ICG, constrain Superior's propane prices" (*ibid.* at paragraph 42).

[283] The Tribunal finds Professor Carlton's conclusion somewhat difficult to understand. It is not the case that Superior gained fewer customers from independents than from ICG. In each of the three years, his data show that Superior gained more customers from independents than from ICG (1,298 from independents versus 793 from ICG in 1996; 1,201 versus 1,115 in 1997; and 1,207 versus 1,116 in 1998). On a net basis, Superior gained more customers from ICG than it lost in two of those years and lost more customers than it gained from ICG in one year. It is not clear to the Tribunal what systematic solutions can be drawn from these numbers.

[284] Professors Schwindt and Globerman, at page 12 of their report in rebuttal (confidential exhibit CA-2078), point out that the counting of actual customer gains and losses does not measure the number of customers that ICG challenged. Moreover, as they point out, counting customers will not reflect the size of those customers or the volumes won or lost. It may be, for example, that ICG's business strategy is more focussed on large-volume customers and hence, it may not challenge many small accounts that would likely be of interest to independent marketers. Referring to ICG's experience in Bromont, Quebec, they state that a simple counting of customers gained and lost is misleading.

[285] As Professor Carlton does not challenge these criticisms in his report in reply (confidential exhibit CR-121), the Tribunal is of the view that counting actual customers gained and lost does not, in itself, establish the ineffectiveness of ICG as a competitor to Superior.

(d) Gross Profit Margin

[286] In Professor Carlton's view, as stated at paragraph 12 of his report (confidential exhibit CR-120), the Commissioner's claim is that retail propane prices depend on the number of national suppliers in a country. If the Commissioner were correct, he argues, then gross profit margins of propane dealers should be higher in Canada where the industry is more concentrated

than in the United States where there are more "national retail suppliers" competing in a local market. He presents evidence for the period 1994-98 showing that the average gross profit margin (i.e., gross profits as a percentage of revenues) was lower for Superior (44.5) and ICG (44.7) than for a sample consisting of the seven largest American propane dealers with multi-market operations on which he could collect such data (47.9). This evidence, he argues, suggests that profitability is not a function of industry concentration and hence the merger of ICG and Superior will not present a problem for competition.

[287] The Commissioner's experts, Professors Schwindt and Globerman, criticize this statistical finding for failing to take differences in product mix into account. The overall gross margins of propane dealers might vary because of profitability differences in the end-use markets they serve. Accordingly, they argue, the lower gross profit margins of ICG and Superior reflect the fact that they are more heavily involved with low-margin autopropane supply and less involved with residential propane than their American counterparts. Once the gross margins are corrected for differences in product mix, the margins of ICG and Superior are higher than the ones of the dealers in the United States.

[288] At page 2 of his report in reply (confidential exhibit CR-122), Professor Carlton recalculates Superior's gross margin for 1998 assuming it had the same business mix as each of the three American propane dealers. The resulting average profit margin is higher than Superior's margin for that year and tends to support Professors Schwindt and Globerman's citation. Professor Carlton does not report such calculations for ICG. In the Tribunal's opinion, Professor Carlton has not shown that the Commissioner's business mix criticism is mistaken.

(e) EBITDA

[289] Professor Carlton's evidence at table 3 of his report (confidential exhibit CR-120) is that EBITDA as a percentage of revenues are lower for ICG (11.2) and Superior (12.9) than for his sample of American dealers (15.6) for the 1994-98 period. He interprets these data as further support for his view that profitability is not related to industry concentration.

[290] In the propane business, EBITDA equal gross profit less secondary distribution and other administrative costs, and hence, is a measure of net cash flow from operations. As a profit measure, it has the advantage of not being distorted by the arbitrary treatment of depreciation/amortization under generally accepted accounting rules, by the choice of capital structure which influences interest expense or by tax planning opportunities. Accordingly, EBITDA may be preferred to other profitability measures (such as net income) that measure profit with such distortions and are unreliable when making inter-firm comparisons.

[291] The Commissioner takes issue with Professor Carlton's interpretation, stating that differences in EBITDA can be due to differences in "net margin" across applications. He notes, for example, that net margins can differ due to differences in capital investment across end-uses with the resulting differences in depreciation expense across end-uses. This argument is similar to the business mix argument discussed above with respect to differences in gross profit margins across firms.

[292] In fact, Superior's own estimate of its 1996 net margins was 0.1118 cpl in the residential segment and -0.0032 cpl in auto. In 1995, those net margins were 0.1065 cpl and 0.0044 cpl, respectively (confidential exhibit CA-16 at 00923). The Commissioner appears to suggest that such differences in net margin account for differences in EBITDA/revenue between Canadian and American propane dealers as the former are more heavily involved in autopropane than are the latter.

[293] However, the definition of net margins is not clear. If, as it appears, it includes depreciation and other costs such as head office costs, interest expense and taxes that are not measured by end-use, then any attempt to allocate such expenses to end-uses served by a propane dealer will require arbitrary allocation rules that make the results similarly arbitrary, if not meaningless. For example, how should the depreciation on a delivery truck that serves both agricultural and residential customers be allocated between these end-uses? Should it be done proportionately to litres delivered, to the number of customers, to distances, to time involved? Each such allocation procedure is as good as any other, and equally arbitrary. Moreover, it is not clear how depreciation should be measured. Certainly, the accounting treatment of depreciation does not attempt to measure the "wear and tear" that takes place; accounting rules attempt only to spread the purchase price of an asset over some period of time in order to match the cost of the asset against the revenue it generated in a particular period of time as required by accounting principles.

[294] The allocation procedures adopted by Superior illustrate the problem. Overhead costs were allocated to market segments and to geographic markets according to volumes, and operating costs according to the number of deliveries. The stated justification for these procedures is that "they appear to produce the best results" (confidential exhibit CA-16 at 00923).

[295] At paragraph 9 of his report in reply (confidential exhibit CR-122), Professor Carlton suggests that although gross margins differ according to business mix, they reflect differences in secondary distribution costs across end-uses. Presumably, he means that a firm requires a higher gross profit margin in an end-use with higher secondary costs than in an end-use with lower secondary costs in order to operate profitably. However, he presents no evidence that this relationship holds in the propane business. Indeed, he simply states that "[t]here is no reason to believe that prices for residential and auto end-uses differ substantially after all (not just primary distribution) costs are accounted for".

[296] The evidence cited above on Superior's net margins appears to provide a reason for such a belief. However, these margins depend crucially on the allocation procedures adopted.

[297] The Tribunal is not bound by the allocation procedures that Superior used, and it cannot be sure that other equally reasonable procedures would not produce very different net margins. The Tribunal believes that it cannot attribute differences in EBITDA to differences in margins across end-uses as suggested by the Commissioner. However, it cannot accept without evidence that gross profits reflect higher secondary costs across end-uses as Professor Carlton suggests. It may be that, as with gross profit margins, differences in business mix and secondary distribution

costs account for some, possibly large, portion of the EBITDA differences between large Canadian and American dealers. Hence the Tribunal is not prepared to accept Professor Carlton's conclusion that ICG and Superior are less profitable than his sample of large American propane dealers.

H. CONCLUSION

[298] The Commissioner submits that this merger will lead to a substantial lessening of competition in local markets other than "category 1" markets referred to by Professors Schwindt and Globerman, the linked market number one (markets numbers 3, 4, 6, 9, and 7, 27, 40, 50, and 53, as defined by Professor West) and the Sechelt-Powell River market of British Columbia; he also submits that the merger will lead to a prevention of competition in the Maritimes. The Commissioner also submits that national accounts are a separate category of business over which the merged entity will be in a position to exercise market power. In addition to the evidence of high market shares and the difficulty of entry, the Commissioner relies on the expert opinion of Professors Schwindt, Globerman and Ward as to the merger's impact on market structure and the ability of the merged entity to raise price unilaterally.

[299] The respondents argue that the impact of the merger on market structure will be minimal because ICG has not been a strong competitor. In particular, they rely on the expert opinion evidence of Professor Carlton who claims, on the basis of his statistical analysis, that ICG has not constrained Superior's prices in markets where they compete. On this basis, the respondents argue that the removal of ICG by this merger will have no significant competitive impact.

[300] The legal test to be applied under section 92 of the Act is whether the merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially.

[301] In *Hillsdown*, cited above at paragraph [127], at page 314, the Tribunal held that a finding of a substantial lessening of competition depends on whether the transaction will result in additional market power:

> . . . In assessing the likely effects of a merger, one considers whether the merged firm will be able to exercise market power additional to that which could have been exercised had the merger not occurred. A merger will lessen competition if it enhances the ability of the merging parties to exercise "market power" by either preserving, adding to or creating the power to raise prices above competitive levels for a significant period of time. One considers the degree of any such likely increase and whether by reference to the particular facts of the case it should be characterized as substantial.

[302] The Tribunal is largely in agreement with this statement; however, it does not agree that a merger which merely preserves existing power over price should be seen as lessening competition. The objective of merger review is to determine whether market power is increased at the margin.

[303] In *Southam*, cited above at paragraph [47], at page 285, the Tribunal states:

> . . . Most simply, are advertisers *likely* to be faced with significant higher prices or significantly less choice over a significant period of time than they would be likely to experience in the absence of the acquisitions? (emphasis added)

[304] Subsection 92(2) of the Act makes it clear that market shares and concentration, per se, cannot lead to a finding that a merger will likely prevent or lessen competition in a substantial way. It reads:

> For the purpose of this section, the Tribunal shall not find that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially solely on the basis of evidence of concentration or market share.

[305] Although evidence of high market share or concentration is not sufficient to justify for finding that a merger is likely to prevent or lessen competition substantially, it is no doubt a relevant factor. This evidence will be particularly useful in identifying mergers that are likely to result in greater interdependence among the remaining firms in the market.

[306] In light of the evidence, the Tribunal is of the view that the merger is likely to lessen competition substantially in many local markets. The Tribunal accepts the opinion of Professors Schwindt and Globerman regarding the 16 local markets in which the merged entity will have post-merger combined market shares of 95 percent or more and which they referred to as "merger to monopoly". The Tribunal's concern in these markets is that the merged entity will have the ability to exercise market power by imposing a unilateral price increase.

[307] The Tribunal accepts the Commissioner's conclusion regarding the eight markets referred to as "category 1" because the merger is expected to have minimal impact on competition between Superior and fringe competitors.

[308] The Tribunal also finds that the merger is likely to lessen competition substantially in a set of markets referred to as "category 3" which identifies 16 markets in which ICG had a substantial market share prior to the merger but where there were at least three competitors including Superior and ICG. In these markets, the Tribunal expects that the elimination of ICG will enhance interdependence and reduce competition.

[309] Finally, the Tribunal finds that the merger is likely to lessen competition substantially through the creation of a dominant firm in the 33 local markets referred to as "category 2". In these markets, the Tribunal is concerned about the increased interdependence effects that the merger is likely to produce.

[310] The Tribunal finds that the merger is likely to lessen competition substantially in coordination services offered to national account customers. It is uncontested that only the merging firms provide these services across Canada. The merger will leave one remaining firm in Canada offering coordination services and there is no evidence to suggest that anyone capable of

offering coordination services across Canada will commence those operations. The Tribunal recognizes that not all national account customers rely on these two companies for coordination services. However, the issue is to determine whether the merged firm will be able to exercise market power over its national account customers by imposing a unilateral price increase. The Tribunal is of the view that the merged entity will have the ability to do so as some witnesses indicated that they would be willing to pay more for these services in order to avoid the higher costs of internal coordination.

[311] In coming to the conclusion that the merger will likely result in a substantial lessening of competition, the Tribunal considered the evidence of market shares and concentration provided by Professors West, Schwindt and Globerman and the econometric evidence of Professor Ward on the ability of the merged entity to impose unilateral price increases.

[312] The Tribunal also considers that barriers to entry in the retail propane business are high based on the evidence of Professor Whinston and of several factual witnesses. The Tribunal also notes that entry has occurred in the past but that no evidence demonstrates that it would occur within a reasonable period of time to prevent the exercise of market power. The Tribunal is of the view that Superior's and ICG's respective market shares have remained relatively constant through the last decade. Therefore, the Tribunal believes that Superior and ICG' combined market share constitutes approximately 70 percent of the market on a national basis despite entry by relatively small competitors.

[313] The Tribunal also finds that the merger is likely to prevent competition substantially in Atlantic Canada. In making this finding, the Tribunal relies on the evidence of ICG's plans to vigorously expand its activities in Atlantic Canada. In this respect, the Tribunal also considered the evidence of high market shares, the evidence of high barriers to entry and the lack of evidence that entry did occur in the past.

V. REMEDY

[314] In light of the Tribunal's finding pursuant to section 92 of the Act that the merger is likely to lessen competition substantially in many local markets and for national account customers and that the merger is likely to prevent competition substantially in Atlantic Canada, the Tribunal is of the view 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).

[315] We take note of the Supreme Court's direction in *Southam,* cited above at paragraph [48], at pages 789 and 790, regarding the appropriate remedy:

> The evil to which the drafters of the *Competition Act* addressed themselves is substantial lessening of competition. See Competition Act, s. 92(1). It hardly needs arguing that the appropriate remedy for a substantial lessening of competition is to restore competition to the point at which it can no longer be said to be substantially less than it was before the merger.

Further, the Supreme Court stated at page 791:

> . . . If the choice is between a remedy that goes farther than is strictly necessary to restore competition to an acceptable level and a remedy that does not go far enough even to reach the acceptable level, then surely the former option must be preferred. At the very least, a remedy must be effective. If the least intrusive of the possible effective remedies overshoots the mark, that is perhaps unfortunate but, from a legal point of view, such a remedy is not defective.

[316] The Tribunal is of the view that since the merger between Superior and ICG is likely to prevent or lessen competition substantially in many local markets across Canada, an order for total divestiture is the sole effective remedy available to the Tribunal. Indeed, the Tribunal is of the view that any order for partial divestiture remedy, while less intrusive, would not effectively restore competition in these markets to the level at which it can no longer be said to be substantially less than it was prior to the merger.

[317] The Tribunal will now turn to the respondents' argument under section 96 of the Act in order to determine whether an order for total divestiture can be made.

VI. EFFICIENCIES

A. SUMMARY OF EFFICIENCY GAINS

[318] The respondents submit that the merger will allow Superior to achieve substantial gains in efficiency. They presented the opinion of Cole Valuation Partners Limited ("Cole") stating that the aggregate of such gains ("efficiency value") falls in the range of $381 million to $421 million measured in constant dollars over 10 years. Cole also opines that these efficiency gains cannot be achieved through other means common to industry practice (expert affidavit of C. O'Leary and E. Fergin (17 August 1999): confidential exhibit CR-112 at 2).

[319] Cole's report entitled "Quantification of the Efficiency Value Resulting from the Merger of Superior Propane and ICG Propane" is exhibit A. Appendix 1 to Cole's report is the report of A.T. Kearney Ltd., a management consulting firm with expertise in, *inter alia*, logistics and operations management. The two reports and opinions therein constitute the "Cole-Kearney report".

[320] The Cole-Kearney report is lengthy and detailed, but its main conclusions are the efficiency gains in each of the three major areas of operation: corporate centre, customer support and field operations. The corporate centre comprises the functions of corporate management and includes, *inter alia*, head office management activities, personnel and facilities, information systems technology, wholesale propane dealing and purchasing. The Cole-Kearney report projects that the merged entity will require 44 fewer employees in the head office functions than in the two companies separately, that the head office rent will decline, as will public company costs, legal, and marketing expenditures. The report states that estimated annualized savings of $15.4 million will arise from the elimination of redundancies and that, over 10 years, total

projected savings will be $141.5 million taking into account certain one-time gains (e.g., on asset disposals) and costs (such as severance) of achieving those savings (*ibid.* at 9-12 and appendix 1 at section A).

[321] Customer support functions include sales force and related management, customer service and administration, and regulatory and safety. The Cole-Kearney report expects cost savings arising from the duplication of facilities and redundant personnel in areas where both merging companies operate and from the adoption of Superior's decentralized "business model" in which branches are supported by a centralized branch support centre and regional branch support centres. ICG's five customer care centres will be eliminated. Annualized savings of $7.2 million are projected, resulting in $65.7 million in savings over 10 years after including one-time items (*ibid.* at 13-16 and appendix 1 at section B). The Cole-Kearney report notes that its estimates of cost savings exclude the expected savings from restructurings that Superior and ICG had already planned independent of the merger (*ibid.* appendix 1, tab B1 at 135, 136).

[322] Field operations consist of field sites, branches and plant operations, delivery and service fleets, propane and tank inventory, and supply and transportation. Cost savings are anticipated to result from redundancies due to overlapping geographic markets and from the larger delivery volumes in each territory that will enable the merged entity to reduce supply and transportation costs. For example, the Cole-Kearney report projects 157 eliminated positions, a reduction of 17,694 tanks, and the elimination of 5.9 million litres of propane inventory. Annualized savings of $16.7 million are expected, for a total of $193.6 million over 10 years taking one-time items into account (*ibid.* at 17-20 and appendix 1 at section C).

[323] The aggregate cost savings identified in the Cole-Kearney report amount to $400.8 million (with a margin of approximately $20 million) over 10 years, for a projected efficiency gain of $40.08 million (with a margin of approximately $2 million) per year. The Cole-Kearney report asserts a very high level of confidence in its realization, in part because (a) $13 million to $21 million of savings that would likely be realized in the absence of the merger were excluded; (b) identified efficiency gains from the merger were included only if they could be realized with a high degree of confidence; and (c) the efficiency gains are based on cost savings that are held to be more likely to be realized than revenue gains that are more speculative.

[324] For greater certainty, the Tribunal notes the distinction between "annualized savings" as used in the Cole-Kearney report and "annual savings". The former term is a representative amount of one-year savings in an item when that item's cashflows are measured year by year over 10 years, before taking one-time related cashflows (e.g., due to severance payments, or asset disposals) into account. Accordingly, the savings for that item over 10 years need not equal the annualized saving multiplied by 10. Adding the annualized savings from the three categories discussed above leads to annualized savings of $39.3 million when rounded to one decimal. The latter term refers to all cashflows; for example, if the total savings over 10 years are $400.8 million, then the annual savings are $40.08 million.

B. EFFICIENCY NET PRESENT VALUE

[325] The Cole-Kearney report also provides estimates of the discounted present value of the efficiency gains, the "efficiency net present value", which falls in the range of $291 million to $308 million (*ibid.* at 24). This calculation depends on the discount rate chosen and the particular set of cashflows evaluated (*ibid.*, appendix 4 at 318). Cole adopts the midpoint of $300 million for the point estimate of the efficiency net present value.

C. TRIBUNAL'S SUMMARY AND EVALUATION

[326] The Commissioner argues, based on the report in rebuttal of Professors Schwindt and Globerman and Mr. Kemp (expert rebuttal affidavit of R. Schwindt, S. Globerman, and T. Kemp (15 September 1999): confidential exhibit CA-3131), that $38.51 million claimed annual savings overstate what the merger is likely to generate and that only $21.2 million thereof are appropriately considered. The Commissioner argues that many of the claimed gains in efficiency are cost savings that are pecuniary in nature and should, therefore, be disregarded because they do not represent savings of real economic resources that would be redeployed by other sectors of the economy. Similarly, the Commissioner asserts that certain real economic costs have been classified as pecuniary and hence ignored when they should be deducted from claimed efficiency gains.

[327] The Commissioner also asserts that the magnitudes of certain properly included efficiencies are overstated, and that costs incurred as a result of the merger have been inadequately treated.

[328] In reply, the respondents dispute several of the Commissioner's criticisms and they submit that the Commissioner's claims in these areas should be disregarded. As many of the Commissioner's concerns are not challenged (for example, the elimination of the "wellness programme" as pecuniary savings), the Tribunal is concerned only with those points of disagreement.

(1) Corporate Centre

[329] The Commissioner asserts that claimed cost savings in corporate centre are overstated by approximately $11.9 million per annum. Of these, the respondents defend their treatment of the Management Agreement, procurement, and public company costs which amount to $11.4 million per annum of the Commissioner's sought-after reduction in corporate centre cost savings.

(a) Management Agreement

[330] Superior is managed by Superior Management Services Limited Partnership ("SMS") which acquired the obligations and benefits (the "Management Agreement") of managing Superior from the previous manager, Union Pacific Resources Inc., in May 1998 for $5 million (Cole-Kearney Report Compendium Binder: confidential exhibit CR-114, tab A1, appendix B). Superior Incentive Trust ("Incentive Trust"), which holds the class A units of SMS, receives

distributions thereon of the management fees which Superior pays to SMS pursuant to the Management Agreement. The management group of Superior (Grant Billing, Mark Schweitzer and Geoff Mackey) owns 28 percent of Incentive Trust's units and hence is entitled to 28 percent of the distributions made by Incentive Trust. A group of investors, Enterprise Capital Management Inc. (the "Enterprise investors"), owns the remaining 72 percent of Incentive Trust's units.

[331] The Commissioner asserts that the schedule of management fees in the Management Agreement provides incentives to SMS to increase (a) the profitability of Superior, and (b) the cash distribution to unitholders of the Superior Income Fund ("cash distribution") which owns Superior. The schedule provides no entitlement to SMS when the cash distribution per unit is less than $1.27. For cash distributions between $1.27 and $1.45, SMS is entitled to an amount equal to 15 percent of those cash distributions and to 25 percent when the cash distribution per unit is between $1.45 and $1.89. Above $1.89, SMS receives an amount equal to 50 percent of the cash distributions.

[332] Accordingly, if the management group could achieve efficiencies that resulted in increased cash distributions, SMS would be entitled to the management fees in respect of such efficiency-based cash distributions. Assuming that the management group achieves the $40 million of efficiencies claimed in the Cole-Kearney report, the Commissioner estimates that SMS would receive management fees in respect thereof of approximately $7.5 million per annum. This amount is an average based on differing assumptions about Superior's future tax position given that management fees are a tax-deductible expense.

[333] In summary, the Commissioner asserts that the management fees arising from achieving efficiencies attributed to the instant merger are payments that compensate SMS for providing the additional management services that are required to achieve these efficiencies. Viewed in this light, these fees are a cost of achieving the efficiencies and should therefore be deducted from the $40 million per annum of efficiencies claimed by the respondents. The Commissioner submits that the full amount of these fees should be deducted, not just the 28 percent thereof that would be distributable to the management group, because the Enterprise investors have management obligations and involvement through representation on Superior's or ICG's boards.

[334] The respondents offer several objections (expert reply affidavit of S. Cole, C. O'Leary, J.P. Tuttle, and E. Fergin (5 October 1999): confidential exhibit CR-113 at 9-13), the main one being that the fees do not call forth additional management efforts by the management group because the managers were fully engaged prior to the merger and because there will be no material change in the level of services provided by the managers; hence, no increase in economic costs will arise (*ibid.* at 10). As a result, the respondents argue that no deduction of the fees against claimed efficiencies is warranted.

[335] The respondents indicate that the managers received interest-free, non-recourse loans from the Enterprise investors in order to facilitate the purchase of their 28 percent share in the Management Agreement (confidential exhibit CR-113, appendix B at 56).

[336] It appears to the Tribunal that the respondents' position is that the managers are being paid more for providing the same amount of management services and hence that the fees they receive in the form of distributions from Incentive Trust are a pecuniary cost only. In simpler terms, the Management Agreement redistributes some of Superior's profit to the managers at the expense of Superior's owners since no additional management effort is provided. If the respondents' view is correct, the Tribunal finds it a strange argument to make, as it amounts to a statement that, in effect, the management group will be overpaid for the services they provide.

[337] The respondents further argue that the Management Agreement is an investment made and paid for by the managers and that the payments they receive from Incentive Trust are distributions of profit rather than compensation for management services. They point out that the owners of the Management Agreement have the right to sell their interests therein. They also submit that since the Management Agreement predates the merger and has not been amended in this respect, the level of management services to be provided has not changed since 1996 when the terms of the agreement were established. Hence, the respondents argue that any change in payment must be a pecuniary transfer (confidential exhibit CR-113 at 11, 12).

[338] The Tribunal does not agree that the Management Agreement is solely an investment, although it may have aspects thereof. In view of the fact that the management fees paid to SMS pursuant to the Management Agreement are tax-deductible expenses to Superior, they cannot be distributions of after-tax profits. While the managers purchased for their interests in the Management Agreement supported in part by interest-free non-recourse loans, the Tribunal finds that the acquisition price they paid only provides further incentive to them to supply additional services that increase their remuneration. Moreover, it appears to the Tribunal that the managers' ability to transfer their interests in the Management Agreement is highly circumscribed by section 6.1 of the Unitholders Agreement (confidential exhibit CR-113, appendix G, tab 3).

[339] The Tribunal observes that managers of for-profit enterprises often receive compensation in the form of investments or investment-related vehicles, such as shares of the managed company, stock options on company shares, low-interest loans to acquire shares of the managed company, etc. Although the payments that they receive from these investments may be in the form of dividends or capital gains, these forms of managerial compensation are nonetheless techniques for improving the quality and quantity of managerial effort. In particular, these methods seek to align the interests of managers with those of owners so that managerial decisions benefit the latter group. Thus, even when the incentive payments are in the form of distributions on company securities held by the managers, their purpose is to provide incentive to managers to achieve corporate goals and those payments are properly viewed as compensation for effort.

[340] The Tribunal agrees with the Commissioner that, in all relevant respects, the Management Agreement provides additional compensation to the managers for supplying additional managerial effort. Thus, these additional management fees are a true economic cost of achieving the efficiencies claimed by the respondents and hence are properly deducted from those efficiencies.

[341] However, the Tribunal disagrees with the Commissioner regarding the appropriate amount of that deduction. The proper quantum is that amount that compensates the managers for additional effort and hence must be less than the total fees paid to SMS under the Management Agreement because 72 percent thereof accrues to the Enterprise investors. There is no evidence that Enterprise investors or their board representative are or will be involved in active management or in achieving the claimed efficiencies. Accordingly, they benefit from the additional efforts provided by the management group but supply none themselves.

[342] The Tribunal views the distributions on SMS's class A units by Incentive Trust to the Enterprise investors as a pecuniary redistribution of Superior's pre-tax profit from Superior's owners, particularly because those owners receive nothing from the Enterprise investors when the Management Agreement changed hands.

[343] The respondents calculate the payments to the managers under the Management Agreement under different assumptions about Superior's future tax position and conclude that the managers will receive between $1.5 million and $2.8 million per annum if $40 million of efficiencies are properly claimed and achieved. Following the Commissioner's approach, the Tribunal adopts the average thereof, $2.2 million as the deduction from the claimed efficiencies (confidential exhibit CR-113 at 13 and appendix B at B1).

[344] The Tribunal notes that the $7.5 million deduction claimed by the Commissioner is the Commissioner's estimate of the management fees payable to SMS in respect of this merger when the efficiency gains are $40 million per year. Since the Commissioner asserts that this amount is itself overstated for a variety of reasons, the amount of the management fees and hence any deduction in respect thereof must necessarily be lower if the Commissioner's assertion is correct.

[345] The Tribunal notes further that the Commissioner's amount of $7.5 million average estimated management fees equals 18.75 percent of the $40 million claimed efficiency gain. The $2.2 million average fees resulting from the respondents' calculations are 5.5 percent of those efficiencies. Since the Tribunal agrees with the respondents as to exclusion of amounts received by the Enterprise investors, in determining the proper amount to deduct when efficiencies are less than $40 million, the Tribunal will use the latter percentage.

(b) Procurement

[346] The Cole-Kearney report indicates that suppliers to the merged company will experience cost savings as a result of the combination of purchasing activities in one company rather than two. The merged company will be able to demonstrate these savings and negotiate discounts in truck freight and rail freight rates, among other areas (confidential exhibit CR-112, tab A9 at 115). The Cole-Kearney report had claimed approximately $2.84 million per year in savings to the merged company, but revised its estimate to $3.28 million per year in reply to the report prepared by the Commissioner's experts in rebuttal to include cost savings at Superior's transportation affiliate, Energy Transportation Incorporated (confidential exhibit CR-114, tab 6).

[347] The Commissioner submits that the procurement savings of $3.28 million per year are largely pecuniary and not well documented. Indeed, in their report in rebuttal, the Commissioner's experts, Professors Schwindt and Globerman and Mr. Kemp, note that the estimates are based solely on A.T. Kearney's experience in negotiating transportation contracts for other clients (confidential exhibit CA-3131 at 19).

[348] The Tribunal finds that there is insufficient evidence to support the claimed savings in the Cole-Kearney report. The Tribunal accepts the Commissioner's criticisms and consequently concludes that no savings have been established.

(c) Public Company Costs

[349] The respondents claim an annual saving due to the merger of $660,000 in avoided public company costs. Such avoided costs include stock exchange listing fees, costs of outside directors, trustee's fees, regulatory filing costs, legal and audit fees, etc. Absent the merger, the respondents argue that ICG would have gone public and incurred these costs (confidential exhibit CR-112, tab A-8 at 111).

[350] The Commissioner's experts criticize these savings on the basis that ICG could plausibly have been acquired by another company and could have avoided these costs. As a result, they argue that the cost savings are not properly attributed to the instant merger (confidential exhibit CA-3131 at 18).

[351] The evidence of witness Henry Roberts, vice-president of Petro-Canada, is that arrangements had already been put in place to take ICG public through an offering of trust units when Superior made its offer to acquire ICG; ICG had already issued a preliminary prospectus and was promoting the offering via road shows. According to Mr. Roberts, Petro-Canada had received expressions of interest by a few potential buyers and had discussions with them; however, no such buyer made a binding offer to purchase ICG.

[352] History aside, will these savings likely be attained if the Tribunal orders total divestiture. At the present time, the Tribunal does not and cannot know how the ordered divestiture would take place. However, since Superior is claiming the savings in public company costs as efficiencies, it has the burden of demonstrating to the satisfaction of the Tribunal that those savings are properly included in the analysis under subsection 96(1). Thus, Superior must establish that it would or would likely take ICG public in the event of a total divestiture order. It has not done so, and the efficiency claim is therefore denied.

(2) Field Operations

(a) Fleet and Driver Reductions

[353] The Cole-Kearney report estimates that the merged entity will require fewer trucks of all types in the overlapping trade areas of the merging firms, so that a number of trucks and related delivery driver positions in overlapping areas can, therefore, be eliminated. The efficiencies in

these categories arise from the elimination of certain planned vehicle purchases, the elimination of the operating costs on vehicles removed from service, proceeds of disposal of certain delivery vehicles (confidential exhibit CR-112, section C, tab C4), and the savings in driver remuneration (*ibid.*, tab C-5).

[354] The Cole-Kearney report uses statistical regression methods (as subsequently presented during the hearing in confidential exhibit CR-113, appendix G, tab 5) to determine the relationship between operating hours per bulk truck and three determinants thereof, a trade area proxy measure of distance travelled, volumes delivered, and number of calls. Based on this statistical analysis (Predictive Regression Model Results: exhibit A-3122 at 2), a reduction of 13.27 percent in operating hours was found to be achievable. With this relationship, they conclude that the merged firm will require 661 trucks of all types and that 80 trucks (75 bulk trucks and 5 cylinder trucks) currently serving the overlapping trade areas of the merging parties can be eliminated (confidential exhibit CR-112, tab C4 at 236, 237). Correspondingly, 80 fewer delivery drivers would be needed (*ibid.*, tab C5 at 244).

[355] As a result of this analysis, the Cole-Kearney report estimates annualized savings of $2.6 million ($33.4 million over 10 years) through the elimination of these trucks, and annualized savings of $3.9 million ($36.3 million over 10 years) through eliminating delivery driver positions (confidential exhibit CR-112 at 18). These cost savings account for approximately 17 percent of the ten-year, total gains in efficiency claimed by the Cole-Kearney report.

[356] The Commissioner's experts, Professors Schwindt and Globerman, have criticized the methodology used by the Cole-Kearney report to predict the fleet and driver position reduction and the results therefrom (Evaluation of Appendix D of the Cole/Kearney Reply: exhibit A-3132). They note that the key variable for assessing savings is the average distance between customers, which is not measured by the Cole-Kearney report's trade area proxy. Moreover, they point out that while the Cole-Kearney report measures the relationship between operating hours per bulk truck in their sample and three determinants thereof including volume, their measure of that volume is total branch volume (including volumes delivered by cylinder trucks) rather than actual volumes delivered by those bulk trucks. Other problems include a poor statistical "goodness of fit" measure which the Commissioner's experts were able to improve on by using a different model.

[357] The Commissioner's experts recalculated the analysis of the Cole-Kearney report with the correct data and concluded that the estimated reduction in operating hours was 3.62 percent (exhibit A-3132, table A-4) versus the estimate of 13.27 percent in the Cole-Kearney report. Accordingly, 30 trucks (28 bulk trucks and 2 cylinder trucks) could be eliminated as compared with the estimate of 80 in the Cole-Kearney report. On this basis, the Commissioner submits that cost savings will be $1.69 million per year less than the annualized estimate in the Cole-Kearney report.

[358] Professors Schwindt and Globerman and Mr. Kemp note that since the truck reduction estimate in the Cole-Kearney report is too high, so accordingly is its estimated reduction in the

number of delivery drivers (confidential exhibit A-3131 at 7). Assuming cost savings of $48,500 per driver (confidential exhibit CR-112 at 246) eliminated, the overstatement by 50 trucks means that Cole-Kearney's annualized cost savings from delivery driver elimination should be reduced by $2.43 million (i.e., 50 x $48,500). The Tribunal notes that the Commissioner's approach fails to consider the reduction in one-time severance costs that would result from terminating fewer drivers.

[359] In response, the respondents emphasize that the Commissioner's experts, Professors Schwindt and Globerman, have no experience in the propane business and have never adjusted distribution routes or implemented a merger of this type.

[360] In claiming a reduction of 28 bulk trucks in overlapping areas, the Commissioner's experts advocate a reduction of only 5.8 percent of the combined 481 bulk vehicles over 10 years, as compared with Cole-Kearney's estimated 15.6 percent reduction. In claiming a reduction of two cylinder trucks in overlapping areas, they advocate a 4.4 percent reduction over 10 years in the 45-vehicle cylinder fleet, as compared with Cole-Kearney's estimate of 11.1 percent.

[361] The Tribunal cannot endorse the truck reduction estimates of the Commissioner's experts. Although they have demonstrated that the Cole-Kearney's approach to estimating truck reductions is flawed by a serious data problem, the Tribunal recognizes that some gains in efficiency are likely to result from truck reduction, especially in light of the overlapping routes of the merging parties. In the Tribunal's view, the truck reductions estimated by the Commissioner's experts are, at best, the bare minimum of what might be achievable. Accordingly, the Tribunal is of the view that the Commissioner's claimed reduction of $1.69 million in Cole-Kearney's estimated savings from truck reductions is likely too high.

[362] The Tribunal believes that $1 million per year is a more realistic estimate of the savings from bulk truck reductions than the $770,000 calculated by the Commissioner's experts; a similar adjustment to their cylinder truck savings yields approximate annual savings of $150,000. With total estimated annual savings of $1.15 million, the Tribunal believes that Cole-Kearney's estimated annualized savings should be reduced by $1.43 million rather than by the Commissioner's figure of $1.69 million.

[363] Applying the same percentage adjustment to savings in delivery drivers, the Tribunal believes that the savings will be approximately $1.9 million, rather than the $1.46 million claimed by the Commissioner. Accordingly, the Cole-Kearney's estimate of savings of $3.88 million per year should be reduced by $1.98 million, rather than by the Commissioner's figure of $2.43 million.

(b) Propane Supply and Transport

[364] The Commissioner submits that Cole-Kearney's estimated cost savings of $1.39 million per year in this category are overstated. The Commissioner claims that cost savings due to bringing idle equipment into use rather than continue purchasing transport from independent

haulers are pecuniary (i.e., that the idle capacity will be transferred from the merged entity to the private haulers that were formerly used). The Commissioner also submits that the savings attributed to reduction in the backup rail car fleet have not been established.

[365] The respondents do not challenge the Commissioner's submissions, except to point out an apparent difference in amounts claimed between the text of the Commissioner's memorandum at page 222 and the corresponding data in table E2. According to the Commissioner, the text error is typographical and the data in table E2 are correct.

[366] On this basis, the Tribunal accepts the Commissioner's criticisms of Cole-Kearney's cost savings.

(3) Other

(a) One-Time Items

[367] The Commissioner states that Cole-Kearney's "annual claimed savings" of $38.51 million are overly optimistic, unrealistic and exaggerated. The Commissioner claims that this figure should be reduced by $17.3 million to produce annual estimated savings of $21.21 million, a figure that would still be too high for lack of a contingency factor.

[368] The Cole-Kearney report claims cost savings of $400.8 million over 10 years with a contingency factor of approximately five percent, for a range of $381 million to $421 million. Thus, on an annual basis, claimed savings are approximately $40 million, the midpoint of the range of $38 million to $42 million, for 10 years.

[369] It appears to the Tribunal that table E2 in the Commissioner's memorandum lists and aggregates Cole-Kearney's "annualized savings" and rounds such items and their sum to two decimals; hence the Commissioner's figure of $38.51 million per year omits one-time expenditures and receipts. Accordingly, the Commissioner's estimate of $21.21 million in annual cost savings from the merger does not include the one-time costs and receipts that result from achieving efficiencies.

[370] In final argument, the Commissioner defended this exclusion in table E2 on the basis that it would be arbitrary to express any one-time cost or receipt as an annual amount by dividing by 10 years in order to add it to the recurring amounts. Indeed, dividing by any other number of years would be equally arbitrary. The Tribunal agrees that it is arbitrary to express a one-time cost or receipt as an annual amount over 10 years. However, the Tribunal does not agree that excluding these one-time amounts is appropriate.

[371] In the Tribunal's view, the appropriate way to value all costs and receipts resulting from the merger, whether one-time or recurring, is through discounting the cashflows at the time of disbursement or receipt at an appropriate discount rate to a present value. Cole-Kearney did this

in calculating the efficiency net present value discussed above. The Commissioner did not question the methodology or the results of that calculation or offer corresponding calculations. Moreover, it appears to the Tribunal that the respondents abandoned this approach by the time the hearing started:

> DR. SCHWARTZ: No, I don't. I thought you had discounting in your report.
>
> MR. COLE: Yes. In the original report the $40 million, or the $39 million, and the $400 million are nominal dollars, and in all our discussions with you we have used that paradigm. So while here in Calgary, we have not discussed discounted dollars or net present values.
>
> In our original report there is discussion of that, if need be, but we have not discussed it with you here today or yesterday.
>
> transcript at 34:6863, 6864 (8 December 1999).

[372] Absent this approach, the Tribunal adopts as the basis for its consideration of cost savings the respondents' estimate of $400.8 million in total cost savings over 10 years or $40 million per annum, rather than $38.51 million per annum in annualized savings. This is done to recognize the one-time costs and receipts, although the Tribunal is well aware that a one-time cash receipt is more valuable the earlier it is received, while a one-time cost is more valuable the later the disbursement is made.

(b) Miscellaneous

[373] The Commissioner submits that the Cole-Kearney cost savings in several other areas are overstated by approximately $620,000 per year in aggregate. The respondents do not challenge the Commissioner's submissions. On this basis, the Tribunal accepts the Commissioner's claims in these areas.

(c) Property Tax

[374] The respondents claim that property tax payments saved by the merger are savings in user-based payments for local services that will not be needed after the merger and hence represent real savings to the municipalities. They say that the local property tax differs from income taxes in this respect. However, they also appear to recognize that not all of the municipal services supported by the property tax payments will be reduced. They claim that, absent a principled way to determine which resources will be saved, the full amount of property tax savings should be viewed as gains in efficiency.

[375] The MEG's, cited above at paragraph [57], refer to merger-based tax savings as redistribution of income from taxpayers to firms; hence tax-savings are pecuniary gains rather than true cost savings. The MEG's at paragraph 5.3 do not distinguish between income taxes and

other taxes. At the local level, many services supported by the property tax will not be reduced by the merger (e.g., local spending on education, health, social assistance, road maintenance, councillors' salaries).

[376] At the hearing, the Tribunal suggested a principled way of distinguishing between pecuniary and real savings in the area of local services and taxes. If the firm receives an invoice for products or services provided by local government (e.g., the water bill from the local authority) and if the merged entity will use less of that product or service, then the savings are appropriately regarded as resource savings. Where it is not possible to determine whether property tax savings represent real resource savings or a pecuniary redistribution, the Tribunal agrees with the Commissioner that no claimed efficiency savings should be allowed. However, in this case, as the amount claimed by the respondents is relatively small, the Commissioner does not seek to reduce the efficiencies by that amount.

(d) Integration Costs

[377] The Commissioner submits that the costs of the Cole-Kearney report should be deducted from claimed efficiencies as should the costs of management in planning the merger. The respondents dispute this submission regarding the Cole-Kearney report on the basis that the cost of retaining the consultants was incurred to satisfy the Commissioner.

[378] In the Tribunal's view, the costs of the Cole-Kearney report and pre-merger planning costs should not be deducted from claimed efficiencies. The reason is that these costs have already been incurred and do not depend on whether the merger is allowed to proceed or on whether the efficiencies will be achieved. These costs are sunk costs and hence differ from the costs (e.g., severance payments) that will only be incurred as a result of implementing the merger. Thus, as an economic matter, it would be appropriate to deduct the consultants' fees only, for example, if they were contingent on the outcome of the instant hearing, for in such case they would not be sunk.

[379] In any event, on the evidence before us, the Cole-Kearney consultants were only retained by the respondents after the December 1998 merger. Hence, it cannot be said that the costs of the Cole-Kearney report are costs which relate to the planning of the merger by management.

(4) Net Efficiencies

[380] As noted at paragraph [372], the Tribunal includes one-time items in its analysis and, therefore, accepts $40 million per annum as the starting point to assess efficiency claims. In view of our findings and conclusions regarding the Commissioner's criticisms of the Cole-Kearney report, we conclude that the efficiencies and deductions therefrom are as follows:

TABLE 1: Deductions in Efficiencies

	Sought by Commissioner	Allowed by Tribunal
	($million/year)	
Deductions		
i) one-time items	$ 1.50	$ 0.00
ii) procurement	$ 3.28	$ 3.28
iii) public company costs	$ 0.66	$ 0.66
iv) delivery fleet	$ 1.69	$ 1.43
v) delivery drivers	$ 2.43	$ 1.98
vi) propane supply	$ 1.12	$ 1.12
vii) other (excl. management fees)	$ 0.62	$ 0.62
(a) Total deductions before management fees	$ 11.30	$ 9.09
(b) Gross efficiencies claimed by respondents	$ 40.00	$ 40.00
(c) Net efficiencies before management fees (b-a)	$ 28.70	$ 30.91
(d) Deduction regarding management fees	$ 7.50	$1.70 *
(e) Net efficiencies (c-d)	$ 21.20	$ 29.21

* 5.5 % of $30.91

[381] Apart from the specific adjustments to the gains in efficiency claimed in the Cole-Kearney report, the Commissioner states that even after reducing the efficiency gains to $21.2 million, that figure is still unrealistically high, in part because it allows for no contingency factor. The Commissioner submits that the Tribunal should keep this overstatement in mind when balancing claimed efficiencies against the anti-competitive effects of the merger.

[382] The Cole-Kearney report does not contain a deduction from claimed aggregate efficiency gains as a provision for the possibility that those gains may not be achieved. In this sense, there is no provision for contingency. Mr. Cole testified that the efficiency gains were estimated conservatively and were expressed in aggregate with a margin of approximately five percent. He also stated that, as described in the Cole-Kearney report (confidential exhibit CR-112,

appendix 5), between $12 to $ 21 million of efficiency gains over 10 years were excluded because they could not be quantified precisely (transcript at 33: 6365-67 (7 December 1999)). The Tribunal is satisfied that there is a buffer zone around the estimated efficiency gains and is, therefore, of the view that the absence of an explicit contingency provision is immaterial.

[383] In this case, the Commissioner chose not to lead evidence on efficiency gains and, therefore, was limited to rebutting the expert opinion evidence of Cole-Kearney. On its view of the evidence concerning the respondents' efficiencies, the Tribunal is satisfied that these efficiencies of $29.2 million per year will likely be brought about by the merger.

D. LEGAL ANALYSIS

(1) Section 96 of the Act

[384] Section 96 provides that:

> 96.(1) *The Tribunal shall not make an order under section 92* if it finds that the merger or proposed merger in respect of which the application is made has brought about or 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 merger or proposed merger and that the gains in efficiency *would not likely be attained if the order were made.*
>
> (2) In considering whether a merger or proposed merger is likely to bring about gains in efficiency described in subsection (1), the Tribunal shall consider whether such gains will result in
> (*a*) a significant increase in the real value of exports; or
> (*b*) a significant substitution of domestic products for imported products.
>
> (3) For the purposes of this section, the Tribunal shall not find that a merger or proposed merger has brought about or is likely to bring about gains in efficiency by reason only of a redistribution of income between two or more persons. (emphasis added)

[385] Section 96 states, in unequivocal terms, that the Tribunal is not to make an order under section 92 if efficiency gains are greater than and offset the effects of any prevention or lessening of competition. As stated above, the respondents claim that significant efficiencies will result from this merger. The Commissioner, however, disputes the efficiencies claimed and further argues that section 96 is not available, as a matter of law, to the respondents in this case.

(2) Position of the Parties

(a) Commissioner

[386] The Commissioner argues that section 96 is not available, as a matter of law, in cases where a merger eliminates competition and results in the creation of a monopoly in a relevant market. Further, he submits that in assessing the trade-off analysis in section 96, the Tribunal has a statutory responsibility to exercise its judgment as to the weight to be accorded to the transfer from consumers to producers, hence that applying a standard with a fixed predetermined weight is contrary to section 96.

[387] The Commissioner suggests that the balancing weight standard as introduced by his expert, Peter G.C. Townley, is consistent with a proper interpretation of section 96. He submits that the efficiency gains do not offset the anti-competitive effects caused to the economy as a whole by this merger.

[388] The Commissioner further submits that the respondents bear the onus of demonstrating all of the elements of the efficiency defence stated in section 96.

(b) Respondents

[389] The respondents claim that significant efficiencies in the range of $40 million per annum will result from the merger between Superior and ICG. They argue that the test to be met under section 96 is that the efficiencies must offset any substantial lessening of competition. They further argue that a substantial lessening of competition is permitted provided it is outweighed by the efficiencies attributable to the merger. They also submit that the effects of the substantial lessening are measured by the deadweight loss to the economy and exclude wealth transfers between producers and consumers which are neutral to the economy.

[390] Further, the respondents submit that the Commissioner is distancing himself from the MEG's, cited above at paragraph [57], by adopting a "distributional weights" approach articulated by his expert, Professor Townley. The respondents submit that the efficiencies will not be realized in the absence of the merger and that there is no evidence of any existing alternative proposals which could reasonably be expected to generate these efficiencies if a divestiture order were made under section 92.

[391] With respect to the burden of proof, they argue that the Commissioner has not met his burden of establishing the effects of the substantial lessening of competition and that the efficiencies might be achievable in some other way.

(3) Status of the MEG's

[392] The parties referred to the MEG's, cited above at paragraph [57], in their written submissions and in oral argument.

[393] Although the Tribunal and the Federal Court of Appeal have held in *Director of Investigation and Research v. Tele-Direct* (1997), 73 C.P.R. (3d) 1 (Comp. Trib.) at 37 and in *Director of Investigation and Research v. Southam Inc.* (1995), 63 C.P.R. (3d) 1 (FCA) at 41, that the MEG's are not sacrosanct nor legally binding, the Tribunal notes that they provide important enforcement guidelines reflecting the Commissioner's view on how the Act should be interpreted. The MEG's, which were published in 1991, were prepared to inform the business community and the public as to how the Competition Bureau analyzes the competitive impact of mergers including how it considers efficiencies.

[394] The Tribunal takes notes that, since their adoption in 1991, no changes as to the interpretation of section 96 have been made to the MEG's. Indeed, even after the issuance of the decision in *Hillsdown*, cited above at paragraph [127], where Reed J. questioned whether the wealth transfer should be treated as neutral, the Commissioner continued, without amending his position, to apply the MEG's. Howard Wetston, the Director of Investigation and Research at the time, stated that he saw no need to revise the guidelines as the comment made by Reed J. in the *Hillsdown* decision was in *obiter dictum*.

[395] The total surplus standard was reiterated on July 14, 1998 with the publication of *The Merger Enforcement Guidelines as Applied to a Bank Merger* by the Competition Bureau at paragraph 109, online: Industry Canada < http://strategis.ic.gc.ca/SSG/ct01280e.html > (last modified: 5 July 1998):

> Where a merger results in a price increase, it brings about both a neutral redistribution effect and a negative resource allocation effect on the sum of producer and consumer surplus (total surplus) within Canada. Ordinarily, the Director measures the efficiency gains described above against the latter effect, i.e., the deadweight loss to the Canadian economy. (reference omitted)

[396] It is only after the Commissioner decided to file the application against the respondents in this case that changes to his position became apparent. Indeed, two recent speeches by Gwillym Allen, Assistant Deputy Commissioner of Competition, Economics and International Affairs, demonstrate a change in the Commissioner's interpretation of the efficiencies exception. In these speeches, Mr. Allen suggests that in some cases "it is more appropriate for the Competition Tribunal to determine whether the merger increases aggregate welfare or not" ("The treatment of Efficiencies in Merger Analysis": remarks given at "Meet the Competition Bureau" conference, Toronto, 3 May 1999) and that "given the evidence presented in a particular merger case, total surplus may not be an all-inclusive measure of the anticompetitive effects that are likely to arise from the merger". Hence, "other qualitative and quantitative subjective comparisons need to be performed in order to determine if the efficiency gains offset the anticompetitive effects" ("The Enforcement of the Efficiency Exception in Canadian Merger Cases": remarks given to the Competition Law Group, Stikeman Elliott, Barristers and Solicitors, Toronto, 25 June 1999).

[397] This change in position is quite surprising. It must not be forgotten that the point of view put forward in the MEG's represents the considered opinion of the Commissioner, the official

appointed by the Governor in Council to administer and enforce the Act. That view, it goes without saying, is the view arrived at by the Commissioner following careful advice given to him by his legal and economic advisers regarding the meaning of the various provisions of the Act. Although the Commissioner is not bound by the MEG's nor are they binding upon this Tribunal, the MEG's should be given very serious consideration by this Tribunal. Needless to say the Tribunal can disagree and in fact should disagree if it is of the opinion that the interpretation proposed in the MEG's is wrong. However, when referring and considering the MEG's, one should bear in mind the comments in the preface to the MEG's made by Howard Wetston, then Director of Investigation and Research. He stated that the Merger Guidelines were published to promote a better understanding of the Director's merger enforcement policy and to facilitate business planning. He also noted the extensive consultation process which was followed in their preparation.

(4) Efficiency "Exception"

[398] The Commissioner submits that section 96 provides *a defence* to an otherwise anti-competitive merger to the respondents if they can demonstrate that the efficiency gains from the merger will be greater than and will offset the effects of any prevention or lessening of competition resulting from the merger. The respondents, on the other hand, argue that section 96 constitutes rather a limitation on the Tribunal's jurisdiction to make an order under section 92.

[399] In *Director of Investigation and Research v. Canadian Pacific Ltd.* (1997), 74 C.P.R. (3d) 55 at 63, [1997] C.C.T.D. No. 7 (QL), the Tribunal held that section 96 was a defence available to the respondents. The Tribunal further held that the onus of alleging and proving the material facts which form the basis of the defence fell upon the respondents:

> In my view, the Director's request for particulars is reasonable. Under the Act, the existence of efficiencies essentially constitutes *a defence* to the Director's application. Just as it is improper for the Director to plead bald allegations without pleading the material facts upon which he relies, so too must the respondents plead the material facts which form the basis of a "defence" of efficiency gains. (emphasis added)

The Tribunal can see no reason to disagree with the above statement.

(5) Burden of Proof

(a) Commissioner

[400] The Commissioner submits that the respondents bear the burden of proving all the elements of the efficiency defence on a balance of probabilities and that, once a substantial lessening competition is established pursuant to section 92, the Tribunal should proceed to make an appropriate order unless the respondents are successful with their defence under section 96. The Commissioner suggests that the respondents must bear the onus of establishing all the elements because they have the best knowledge of what strategies are available to them to generate the efficiency gains that they claim and what, if any, alternate means would or would

not be available to achieve those gains. Further, the Commissioner submits that the section 11 powers provided by the Act do not place the Commissioner in a position as knowledgeable as the respondents about their business strategies. In support of his argument, the Commissioner relies on two Tribunal decisions: *Director of Investigation and Research* v. *Canadian Pacific Ltd.*, cited above at paragraph [399], at page 63, and *Hillsdown*, cited above at paragraph [127], at pages 332-34, where the Tribunal recognized that the burden of proving the elements of the "efficiency defence" falls on the respondents.

[401] The Commissioner also asserts that the respondents must show not only the likely efficiency gains but must also demonstrate the scope and extent of the anti-competitive effects of the merger, absent which the Tribunal is not in a position to determine whether the gains in efficiency are greater than and offset those effects and whether "the defence" has been established.

(b) Respondents

[402] Relying on the *Hillsdown* decision, cited above at paragraph [127], the respondents submit that they bear the onus of proving the existence of the efficiencies claimed or the likelihood of their existence if the merger has not been implemented. They claim that the Commissioner bears the burden of establishing the effects of the substantial lessening of competition (i.e., the deadweight loss) and that the efficiencies might be achievable in some other way (e.g., a sale to third party). Indeed, the respondents submit that the Commissioner is in a good position, in view of his investigatory powers pursuant to section 11 of the Act, to obtain third party information.

(c) Conclusion

[403] The Tribunal is of the view that the respondents bear the burden of proving all of the elements of section 96 on a balance of probabilities, except for "the effects of any prevention or lessening of competition", which must be demonstrated by the Commissioner.

(6) Role of Efficiencies under the Act

[404] The Commissioner reminds us that section 1.1 states that the purpose of the Act is to "maintain and encourage competition in Canada" and that competition is not seen as an end in itself, but rather as a means to achieve the four objectives identified in section 1.1. The Commissioner further submits that no hierarchy is established among those "potentially conflicting" objectives. The Commissioner argues that it becomes clear when sections 96 and 1.1 are read together, that a section 96 defence will prevail only when a merger enhances the objectives of competition policy more than it diminishes them. The Commissioner argues that the Tribunal must decide whether Canadians and the Canadian economy are better off with or without the merger.

[405] The respondents submit that the Commissioner's interpretation of section 96 is wrong since section 96 is not subordinate to the purpose clause of section 1.1. Further, the respondents

suggest that where there is a conflict between a purpose clause statement and a substantive provision, the latter must prevail.

[406] There are significant differences in the positions of the parties as to the proper interpretation of sections 1.1 (the purpose clause) and 96 (the efficiency exception) of the Act. Many of the issues raised are of long standing, in part because there have been so few litigated mergers in Canada since the Act was amended. In particular, no decision in a litigated merger has turned on the question of efficiency gains and hence it appears to the Tribunal that there is considerable confusion over the meaning of certain key terms. Before dealing with the positions of the parties, the Tribunal will set out its understanding of the relevant sections of the Act.

[407] The Act seeks to obtain the benefits of a competitive economy. As set out in the purpose clause, these benefits, which we have characterized as the objectives of competition policy, are economic efficiency and adaptability, the expansion of opportunities for Canadian participation in world markets and openness to foreign competition at home, opportunities for small businesses to participate in economic activity, and competitive consumer prices and product choices. Under the purpose clause, the Act seeks to achieve these objectives by maintaining and encouraging competition. To this end the Tribunal may, pursuant to section 92 of the Act, order divestiture where a merger is found to prevent or lessen competition substantially.

[408] There was some discussion at the hearing concerning the status that should be given to the stated objectives, particularly whether the ordering of objectives in the list contains any useful information in interpreting the Act. Such discussion is misdirected; the true goal specified in the purpose clause is the maintenance and encouragement of competition. It is noteworthy that the Act does not give the Tribunal the powers to achieve the objectives individually.

[409] For example, small businesses are not protected under the Act. The purpose clause indicates only that the opportunities for small businesses to participate in economic activity will result from maintaining and encouraging competition. Hence, no other powers are needed to realize this objective.

[410] Accordingly, the listing of objectives of competition policy simply presents the rationale for maintaining and encouraging competition. No hierarchy among the listed objectives is indicated and hence no meaning can be taken from the order in which the listed objectives of competition policy appear in the purpose clause. Under the purpose clause, all of the objectives flow from competition.

[411] There are, of course, other objectives that could be sought, one such being the proper distribution of income and wealth in society. It is clear, however, that when competition is maintained and encouraged, the resulting distribution of income and wealth may not be the proper one depending on one's political or social outlook. By not including distributional considerations in the list of objectives in the purpose clause, Parliament appears to have recognized this. Indeed, if distributional issues were a concern, Parliament might have felt it necessary to restrict or place limits on competition in order to achieve the proper distribution of

income and wealth in society. However, such limits would place competition policy at war with itself.

[412] Turning to section 96 of the Act, the "efficiency exception", the Tribunal notes that this section contains the only provision in the Act which limits or restricts the pursuit of competition. As noted above, section 1.1 states that competition should, in and of itself, promote efficiency; normally there will be no conflict between the statutory means (encouraging competition) and the desired end (efficiency). However, the existence of section 96 makes it clear that if competition and efficiency conflict in merger review, the latter is to prevail. Thus, an anti-competitive merger that created or increased market power but also increased efficiency could be approved. Addressing this possibility, the MEG's, cited above at paragraph [57], state at paragraph 5.1:

> One such circumstance is highlighted in section 96 of the Act, where it is recognized that some mergers may be both anticompetitive and efficiency enhancing. When a balancing of the anticompetitive effects and the efficiency gains likely to result from a merger demonstrates that the Canadian economy as a whole would benefit from the merger, section 96(1) explicitly resolves the conflict between the competition and efficiency goals in favor of efficiency.

The Tribunal cannot but agree with this view of section 96.

[413] The existence of section 96 signals the importance that Parliament attached to achieving efficiency in the Canadian economy. Indeed, in the view of the Tribunal, section 96 makes efficiency the paramount objective of the merger provisions of the Act and this paramountcy means that the efficiency exception cannot be impeded by other objectives, particularly when those other objectives are not stated in the purpose clause. To be more explicit, if, pursuant to the purpose clause, the pursuit of competition is not to be limited by distributional concerns, then as a matter of both law and logic, the attainment of efficiency in merger review cannot be limited thereby when competition and efficiency conflict.

(7) Commissioner's Position that Section 96 Does Not Apply to a Merger to Monopoly

[414] The Commissioner submits, as a matter of law, that section 96 does not apply in the circumstances of a merger-to-monopoly. The Commissioner's position is based on the underlying purpose of the Act stated in section 1.1 which is to "maintain and encourage competition". He submits that when a merger creates an absolute monopoly, competition is eliminated which runs counter to the underlying purpose of the Act. Further, the Commissioner submits that when one of the effects of a merger is the creation of a monopoly, that monopoly can never be offset or "neutralized" by efficiency gains regardless of how substantial they are. The Commissioner also argues that if section 96 were intended to allow mergers that eliminate competition to be saved, Parliament would have used some very specific language to so provide.

[415] The Commissioner argues that there is a distinction to be made between sections 92 and 96 of the Act. Subsection 92(2) means that one would not be able to find that a merger, for example, substantially lessens competition simply by virtue of it being a monopoly. That subsection specifically states:

> *For the purpose of this section*, the Tribunal shall not find that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially solely on the basis of evidence of concentration or market share. (emphasis added)

[416] According to the Commissioner, subsection 92(2) is very specific and only applies for the purposes of that particular section, hence that a substantial lessening of competition leading to a 100 percent market share constitutes an elimination of competition which is not covered by section 96. In other words, the argument is that if a merger eliminates competition, the efficiency defence contemplated in section 96 should not apply.

[417] The Commissioner conceded at the hearing that, as a matter of law, a respondent could invoke the section 96 exception as long as its market share did not attain 100 percent:

> MS STREKAF: Our submissions are that there is a different standard in the legislation that we read into the Act in Section 96 in the case of 100 percent that would not apply in your example in the case of a 96 percent situation.
>
> If you had a 96 percent market share, we would say that it would be very difficult, in those cases, for the Respondents to demonstrate that you could offset the effects of a 96 percent market share. But that's a question where we nonetheless recognize and acknowledge that in those kind of situations the Section 96 balancing needs to be performed. Our position is different for 100 percent.
>
> THE CHAIRMAN: A 98 percent market share and a 100 percent market share, the difference may simply be theoretical. Practically, it may not mean anything insofar as consumers are concerned.
>
> But you are saying, in the case of the 98 market share, they could at least attempt to have resort to 96?
>
> MS STREKAF: That's correct.
>
> THE CHAIRMAN: And you are saying, when they reach 100, they shouldn't be entitled to stop at the barrier and go back home.
>
> MS STREKAF: Yes.
>
> transcript at 41:8234, 8235 (1 February 2000).

[418] The position taken by the Commissioner cannot be right. A merger that leads to a monopoly (i.e., where a merged entity has a 100 percent market share) is not, per se, a merger in regard to which the Tribunal may make an order under section 92. Subsection 92(2) requires, in effect, the Commissioner to adduce further evidence in order to show that the merger in question prevents or lessens or is likely to prevent or lessen competition substantially.

[419] If the Tribunal concludes that the merger is likely to prevent or lessen competition substantially, it may make an order under section 92, subject to sections 94 to 96. Section 96 clearly provides that the Tribunal is not to make an order under section 92 if the gains in efficiency resulting from the merger are greater than and will offset the effects of any prevention or lessening of competition. Section 96 does not make any distinction between the "elimination" and the "substantial lessening" of competition. The section applies to any merger in respect of which the Tribunal may make an order under section 92. A merger leading to monopoly and in respect of which the Tribunal has concluded that there will be a substantial lessening of competition, is without doubt a merger to which section 96 applies.

(8) Effects of a Merger

[420] In order to decide whether the efficiencies are greater than and offset the effects of any prevention or lessening of competition under section 96, the Commissioner suggests that the Tribunal should adopt the balancing weight standard described by his expert, Professor Townley. The Commissioner submits that using predetermined weights to the transfer would, as a matter of law, be contrary to section 96. According to the Commissioner, applying a predetermined weight would constitute an abrogation by the Tribunal of its statutory responsibility to exercise judgment. Professor Townley explained the reasons why the various approaches (price standard, the consumer surplus standard and the total surplus) are not consistent with a proper interpretation of section 96. In the Commissioner's view, only the balancing weight approach is consistent with a sound interpretation of section 96.

[421] The respondents submit that the total surplus standard, as stated in the MEG's, cited above at paragraph [57], is the proper standard. They note that the Tribunal's decision in *Hillsdown*, cited above at paragraph [127], dated March 9, 1992, where Reed J. in her *obiter dictum*, questioned the appropriateness of the total surplus standard, has not led to any change to the MEG's. Indeed, at page 343, Reed J., in response to the submission made by both parties that the wealth transfer from consumers to producers was neutral, raised as a question whether the transfer is always neutral and suggested that it might be appropriate to include redistributional concerns when conducting the analysis required by subsection 96(1):

> One other consideration arises with respect to the arguments concerning the efficiency defence. The parties both rely on the judgment that the wealth transfer is a neutral one. A question posed during argument and which will be repeated here is: is this always so? If, for example, the merging parties in question were drug companies and the relevant product market related to a life-saving drug would economists say that the wealth transfer was neutral. The Tribunal does no more than raise this as a question. Another question respecting the alleged neutrality of the wealth transfer is: if the dominant firm which charges supra-competitive prices is foreign-owned so that all the wealth transfer leaves the country, should the transfer be considered neutral?

(a) Efficiency Effects and Redistributive Effects

[422] An anti-competitive horizontal merger is a transaction that creates or enhances market power in the merged entity, the exercise of which leads to a higher price for the same good or reduced quality therein at the same price. If competitive conditions prevailed before the merger, the exercise of market power has several effects.

[423] The economic effects of an anti-competitive merger are the effects on real resources, that is, the changes in the way the economy deploys those resources as the result of the merger. When market power results in an increase in the price of a product, allocative efficiency is reduced as consumers acquire less of the product and switch to lower-valued substitutes. Technical or productive efficiency is reduced because, with less consumption of the product, industry output falls and economic resources are diverted to the production of more costly substitute goods. A reduction in dynamic efficiencies as defined in the MEG's could also be an effect of an anti-competitive merger.

[424] Since consumers pay more for the quantity of the product at the higher price, they lose some of the surplus they had when they paid the competitive price. A portion of this loss in consumer surplus is realized by the firm and its shareholders in the form of higher profits. Such loss is not a social loss, but rather a redistribution of gains from the merger; real resource use is not affected by this transfer of income.

[425] However, the remaining loss of consumer surplus, beyond that realized by the shareholders in the form of increased profits, is a social loss and is often referred to as the "deadweight loss" because there are no offsetting gains. The lost value of output and consumption associated with the deadweight loss measures the allocative and technical inefficiency caused by the exercise of market power and represents the economic effect of the merger.

[426] As we have already stated, the Tribunal is of the view that nothing in the Act allows us to consider distributional goals in merger review. Had this been Parliament's intention, surely the Act would have been worded differently. Robert H. Bork, in his seminal work *The Anti-Trust Paradox* (New York: The Free Press, 1993), albeit in the American context, puts forward the view that income distribution and its effects are not to be considered in antitrust matters. The Tribunal agrees entirely with the following extract from pages 110 and 111:

> The model outlined addresses the total welfare of consumers as a class. It says nothing of how shares of consumption should be allocated through changes in the distribution of income. Yet all economic activity has income effects and, in particular, restriction of output by the exercise of monopoly power has income effects not taken into account by weighing only changes in allocative and productive efficiency. If the reader will look once more at Figure 4 he will see that at the competitive price, P_1, there is a large area under the demand curve that lies above the market price. This area represents the amount above the actual price that consumers would be willing to pay rather than go without the product; it

is generally called the "consumer's surplus," perhaps on some notion that the consumer gets surplus value for his money.

Those who continue to buy after a monopoly is formed pay more for the same output, and that shifts income from them to the monopoly and its owners, who are also consumers. This is not dead-weight loss due to restriction of output but merely a shift in income between two classes of consumers. The consumer welfare model, which views consumers as a collectivity, does not take this income effect into account. If it did, the results of trade-off calculations would be significantly altered. As Williamson notes, referring to his diagram: "The rectangle ... bounded by P_2 and P_1 at the top and bottom respectively and o and Q_2 on the sides represents a loss of consumers' surplus (gain in monopoly profits) that the merger produces. ... Inasmuch as the income distribution which occurs is usually large relative to the size of the dead-weight loss, attaching even a slight weight to income distribution effects can sometimes influence the overall valuation significantly."

The issue is not crucial, perhaps, since most antitrust cases do not involve trade-off. The law's mistake has generally consisted of seeing restriction of output where there is none, and in such cases there will be no loss of consumer surplus. But even in cases where the trade-off issue must be faced, it seems clear the income distribution effects of economic activity should be completely excluded from the determination of the antitrust legality of the activity. It may be sufficient to note that the shift in income distribution does not lessen total wealth, and a decision about it requires a choice between two groups of consumers that should be made by the legislature rather than by the judiciary. (reference omitted)

(b) Standard for Merger Review

[427] Assessing a merger's effects in this way is generally called the "total surplus standard". As discussed by the Commissioner's expert, Professor Townley (expert affidavit (16 August 1999): exhibit A-2081), and in a recent article by Michael Trebilcock and Ralph Winter, transfers from consumers to shareholders are not counted as losses under the total surplus standard. The anti-competitive effect of the merger is measured solely by the deadweight loss (M. Trebilcock and R. Winter, "The State of Efficiencies in Canadian Merger Policy" (1999-2000) 19:4 Canadian Competition Record 106). Under the total surplus standard, efficiencies need only exceed the deadweight loss to save an anti-competitive merger.

[428] Other standards have been proposed. Under a "price standard", efficiencies are not recognized as a justification for a merger which results in a price increase to consumers. Under a "consumer surplus standard", efficiencies can be considered in merger review only if they are sufficiently large as to prevent a price increase. Effectively, this means that transfers of income are considered as losses; hence efficiencies must exceed the sum of the transfer of income and the deadweight loss.

[429] From an economic point of view, the cost to society of an anti-competitive merger is the deadweight loss which measures lost economic resources. If, on the other hand, the merger generates efficiencies, it creates economic resources and hence the net economic effect of the merger in terms of resources may be much less than the deadweight loss. Indeed, the merger could be economically positive if efficiencies were sufficiently large, in which case society would benefit economically from allowing the merger.

[430] This possibility is the basis for considering efficiencies in merger review. It is not to determine whether shareholders will be better off at the expense of consumers, but rather whether the economy gains more resources than it loses through the transaction. For this reason, it is important to distinguish true efficiencies, those savings that enable the firm to produce the same amount with fewer inputs, from "pecuniary" economies, those savings that increase shareholder profits but do not allow the firm to be more productive. This distinction is recognized in subsection 96(3) which excludes pecuniary efficiencies from consideration. The only standard that addresses solely the effects of a merger on economic resources is the total surplus standard.

(c) Reasons for Total Surplus Standard

[431] Professor Townley offers an approach ("balancing weights") in which the members of the Tribunal are invited to use their individual judgment and discretion to evaluate whether the gains to shareholders are more or less important to society than the losses of surplus imposed on consumers by the exercise of market power. However, the members of the Tribunal are selected for their expertise and experience in order to evaluate evidence that is economic or commercial in nature, not to advance their views on the social merit of various groups in society. As noted by Iacobucci J. in the Supreme Court's decision in *Southam*, cited above at paragraph [48], at pages 773 and 774:

> As I have already said, the Tribunal's expertise lies in economics and in commerce. The Tribunal comprises not more than four judicial members, all of whom are judges of the Federal Court -- Trial Division, and not more than eight lay members, who are appointed on the advice of a council of persons learned in "economics, industry, commerce or public affairs". See *Competition Tribunal Act*, s.3. The preponderance of lay members reflects the judgment of Parliament that, for purposes of administering the *Competition Act*, economic or commercial expertise is more desirable and important than legal acumen.

[432] First, the Tribunal is of the view, as already stated, that distributional concerns do not fall within the ambit of the merger provisions of the Act. If Parliament had intended that transfers from consumers to shareholders be considered, it would no doubt have clearly stated this intent in the Act.

[433] Second, merger review must be predictable. Adopting Professor Townley's approach would result in decisions that vary from case to case depending on the views of the sitting members of the Tribunal regarding the groups affected by the mergers.

[434] Third, the deadweight loss resulting from a price increase is typically quite small as Professors Trebilcock and Winter note in their article, cited above at paragraph [427]. On the other hand, as the Commissioner observes, the transfer is much larger than the deadweight loss resulting from the instant merger. This being the case, a standard that includes the transfer as an effect under subsection 96(1) would effectively result in the unavailability of the section 96 defence.

[435] Professor Ward's evidence makes this clear. Using the calculations in table 8 of his initial report (exhibit A-2059 at 34), consider a large price increase of 15 percent. The resulting deadweight loss is 1.7 percent of sales but the transfer is 11.6 percent of sales when the price-elasticity of demand is -1.5. Accordingly, a merger that offered gains in efficiency of at least 1.7 percent of sales would be approved under a total surplus standard. However, under a consumer surplus standard, the efficiency gains would have to be at least 13.3 percent of sales.

[436] When the elasticity of demand is -2.5, the deadweight loss and transfer are 2.8 percent and 9.4 percent of sales respectively. Accordingly, the total surplus standard would approve a merger if efficiency gains were at least 2.8 percent of sales. However, a consumer surplus standard would reject a merger unless efficiency gains were at least 12.2 percent of sales.

[437] In an *obiter dictum* in the *Hillsdown* decision, cited above at paragraph [127], Reed J. appeared to favour the consumer surplus standard. However, as the above numbers indicate, applying a consumer surplus standard would lead the Tribunal to reject many efficiency-enhancing mergers on distributional grounds. As noted above, efficiency was Parliament's paramount objective in passing the merger provisions of the Act and it intended the efficiency exception in subsection 96(1) to be given effect. Accordingly, the Tribunal is not prepared to adopt a standard that frustrates the attainment of that objective.

[438] Fourth, omitting income and wealth redistributional concerns from merger review does not mean that these concerns are to be ignored by public policy. Indeed, governments at all levels have adopted specific tax and social policy measures to address their distributional objectives. The Tribunal regards these measures as more effective ways of meeting social policy goals. Blocking efficiency-enhancing mergers to achieve the same ends is, in our view, contrary to the Act.

[439] Fifth, the MEG's, cited above at paragraph [57], endorse the total surplus standard. Although the Tribunal is not bound by these guidelines, it recognizes that they contain a substantial degree of economic expertise and it agrees with the observation at footnote 57 therein that "[w]hen a dollar is transferred from a buyer to a seller, it cannot be determined *a priori* who is more deserving, or in whose hands it has a greater value".

(d) Other Effects

[440] The Commissioner submits that the ordinary meaning of "effect/effet", that is, something which flows causally from something else, is the most logical to apply to interpret that language

used in section 96. The parties referred to *The Shorter Oxford Dictionary*, 3rd ed. (Oxford: Clarendon Press, 1973) at 631, which defines "effect" as "[s]omething caused or produced; a result, consequence. Correl. w. cause." Similarly, they referred to the *Larousse de la Langue Française* (Paris: Librairie Larousse, 1979) at 605, which defines "effet" as "[c]e qui est produit, entraîné par l'action d'une chose."

[441] The Commissioner further submits that, provided the effects flow from a prevention or lessening of competition resulting from the merger, section 96 does not place any other limitations upon the scope or range of "effects" to be considered, which includes detrimental effects of a merger that will affect consumers such as an increase in prices, a decrease in service, product choice or quality.

[442] The respondents submit that the test to be met under section 96 is that the efficiencies must offset any *substantial lessening of competition*. They further argue that a substantial lessening of competition is permitted provided it is outweighed by the efficiencies attributable to the merger. They also submit that *the effects of the substantial lessening of competition* are measured by the deadweight loss to the economy and exclude wealth transfers between consumers and producers, which are neutral to the economy.

[443] The Tribunal observes that an anti-competitive merger may well have other important economic and social effects. Job terminations and plant closures are often emphasized in the press, presumably because of their immediacy and significance to the people and communities involved.

[444] While not seeking to minimize the importance of these effects on those affected, the Tribunal wishes to point out that they are not restricted to anti-competitive mergers. Layoffs and closures often result from mergers and business restructurings that are not offensive and the Commissioner may take no notice thereof under the Act. Accordingly, the Tribunal is of the view that these effects are not to be considered when they result from anti-competitive mergers.

[445] As a result, the Tribunal cannot accept the Commissioner's submission that section 96 does not place any other limitations upon the scope or range of "effects" to be considered.

(e) Conclusion

[446] In final argument, the Commissioner refers to the "anti-competitive effects" of the merger as including the redistributive effects of the transfer. The Tribunal does not regard the redistributive effects of a merger as anti-competitive.

[447] 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. Accordingly, the Tribunal believes that the total surplus standard is the correct approach for analysing the effects of a merger under subsection 96(1).

[448] As a practical matter, the effects of an anti-competitive merger include effects that are difficult to quantify and may not be captured through statistical estimation of the deadweight loss. Subsection 96(1) specifically provides that gains in efficiency must both be greater than and offset the effects of any lessening of competition. Thus, it may be that, in a strict quantitative comparison of efficiencies and the estimated deadweight loss, the former exceeds the latter, yet the requirement to be "greater than" may not be met because of unmeasured qualitative effects.

[449] If the word "offset" (or in French, "neutraliseront") were taken to mean "prevent" or "neutralize", this would imply that efficiency gains had to prevent the estimated deadweight loss and the other effects of prevention or lessening of competition from occurring or to neutralize these effects. Such interpretation would be inconsistent with the existence of the efficiency exception which clearly allows such effects. The Commissioner submits that "offset" (in French, "neutraliseront") must be interpreted to mean "compensate for" rather than "prevent" or "neutralize". The Tribunal agrees with this submission.

[450] Whether, in a given case, the efficiency gains "offset" the effects of any prevention or lessening is a matter which the Tribunal must assess and decide in light of the available evidence. However, the requirement to "offset" cannot be used to justify consideration of qualitative or other effects which are not open for consideration under the Act.

(9) Deadweight Loss

[451] In final argument, the Commissioner presented several estimates of deadweight loss, the transfer, and the balancing weights resulting from the calculations undertaken to apply Professor Townley's approach. Certain of these estimates were based on information provided in final argument that was excluded. Moreover, since the total surplus standard is, in our view, the correct standard to use in the trade-off analysis under subsection 96(1), the Tribunal will discuss only the deadweight loss estimate calculated from properly introduced information.

[452] The Commissioner adopts the approach presented in evidence by Professor Ward, whose expert report (exhibit A-2059) provides at table 8, on page 34, estimates of deadweight loss and consumer surplus transfer as percentages of initial sales under various assumed values of the price elasticity of demand. In that table, Professor Ward presents those percentage estimates for each of three values of the elasticity between -1.5 and -2.5 only, because at the time of his initial report, he did not have the evidence of Professors Plourde and Ryan that showed that demand for propane was inelastic and hence could not have a price-elasticity of less than -1.0.

[453] The Commissioner adopts Professor Ward's estimated price increases shown at table 2 on page 8 of his affidavit in reply (confidential exhibit CA-2060) for the residential, industrial, and automotive end-use segments of 11.7 percent, 7.7 percent and 8.7 percent respectively, and reduces each by 0.7 percent to take account of the pass-through of cost savings. Professor Ward

obtained his estimates after the results of Professors Plourde and Ryan became available and, accordingly, he assumed an elasticity of -1.0 in obtaining those estimates. Since Professor Ward was not able to estimate the price increase for his "other" segment, the Commissioner adopts seven percent as appropriate for that segment because it was the smallest increase that Professor Ward found.

[454] The Commissioner presents estimates of 1998 combined sales of the merging companies in each of those segments: $94 million, $239 million, $139 million, and $113 million respectively, accounting for the combined total volumes sold by Superior and ICG. Thus, the Commissioner's segmented sales estimates are for combined total sales, not just the combined sales of the merging parties in overlapping areas. Since, according to Professor Ward's table, the deadweight loss varies directly with sales, the Commissioner's estimates thereof likely overstate the deadweight losses by segment in overlapping areas.

[455] The Commissioner obtains estimates of deadweight loss by segment by taking the segment sales and price increase information and applying them to Professor Ward's table where the assumed demand elasticity is -1.5. The resulting deadweight loss estimates based on 1998 sales data are as follows:

residential	$0.8 million
industrial	$1.0 million
automotive	$0.7 million
other	$0.5 million
total	$3.0 million

[456] The respondents point out that the estimates of deadweight loss would be lower had they been calculated at an industry demand of -1.0, as suggested by the work of Professors Plourde and Ryan. They also note the inconsistency in calculating deadweight losses assuming an elasticity of demand of -1.5 while using price increases estimated with an elasticity of demand of -1.0.

[457] The Commissioner submitted in final argument Table R1 which calculates the deadweight loss assuming a nine percent price increase across all segments in overlapping markets and a price elasticity of demand of -1.0. The resulting estimate of deadweight loss is $3.43 million, although the sales revenue figure used ($572 million) was among the materials submitted in final argument that were excluded.

[458] Even though it is probably overstated, the Tribunal is prepared to accept the deadweight loss estimate of $3.0 million put forward by the Commissioner, since the overstatement is inconsequential in view of our finding that the merger is likely to bring about gains in efficiency in the order of $29.2 million.

(10) Trade-off Analysis

[459] Pursuant to subsection 96(1), the Tribunal must ask whether the gains in efficiency exceed and offset the effects of any prevention or lessening of competition that the merger has brought about or is likely to bring about. The Tribunal observes that while the gains in efficiency claimed by the respondents have been measured and reduced to dollar figures, efficiency gains could also include qualitative elements such as, for example, better service and higher quality. No evidence of qualitative efficiency gains has been produced.

[460] Similarly, the effects of any lessening of competition can also have both measurable and qualitative elements. The estimated value of the deadweight loss, while measuring the effect of the higher price on resource allocation, may not capture lessening of service or quality reduction.

[461] For greater certainty, the Tribunal is of the view that all of the gains in efficiency must be compared with all of the effects of any prevention or lessening of competition, even though this requires judgment when combining measured gains (effects) with qualitative gains (effects).

[462] The Commissioner submits that subsection 96(1) requires the Tribunal to consider whether the efficiency gains would likely be realized absent the merger. The Commissioner criticizes the Cole-Kearney report for not considering whether claimed efficiencies could have been achieved through less anti-competitive means than a full scale merger. Following the decision on this point in *Hillsdown*, cited above at paragraph [127], at page 332, the Tribunal is of the view that the test to be applied is whether the efficiency gains would likely be realized in the absence of the merger. In dealing with this issue in *Hillsdown*, the Tribunal stated:

> The Director's position is that cost savings that do not arise *uniquely* out of the merger are not to be considered as efficiency gains. The respondents' position is that the test to be applied is whether the efficiency gains would *likely* have been realized in the absence of the merger. The tribunal accepts the respondents' position.

[463] The Tribunal finds that the estimated gains in efficiency from this merger are $29.2 million per year over 10 years and these gains in efficiency would not likely be attained if the order for total divestiture were made. The Tribunal finds that the estimated deadweight loss is approximately $3.0 million per year over the same ten-year period.

[464] The Commissioner submits that qualitative effects include distributional impacts and other qualitative elements including changes to levels of service, product quality and product choice, increased probability of coordinated behaviour, and innovation. For the reasons already given, the Tribunal will not consider distribution impacts.

[465] The Tribunal took into account the increased probability of coordinated behaviour in its consideration of the evidence regarding a substantial lessening of competition. To the extent that the effect of such anti-competitive behaviour is a higher price, then it has already been reflected in the deadweight loss estimate. If there are other effects of coordinated behaviour to be

considered under section 96, further and better evidence about those effects is required. It cannot suffice simply to restate the concern under section 92.

[466] A decline in service levels, holding quality of service constant, is also reflected in the deadweight loss estimate. However, the evidence indicates that ICG had established certain services and pricing arrangements (e.g., the Golf-Max program) that Superior and other propane marketers did not offer. Their removal or reduction would reduce the real output of the industry. Although no evidence was given on the likelihood or scope of the reduction or removal of these product offerings following the merger, the exercise of market power might take such forms together with, or instead of, a direct increase in price.

[467] The Tribunal must determine whether all of the gains in efficiency brought about or likely to be brought about by the instant merger are greater than the estimated deadweight loss and the negative qualitative effects resulting or likely to result therefrom. As noted above, this determination requires that the latter two components be combined and then compared with total efficiency gains. The Tribunal views the impact on resource allocation of the negative qualitative effects as minimal and as most unlikely to exceed in amount the estimated deadweight loss. Thus, the combined effects of lessening or prevention of competition from the instant merger cannot exceed, in the Tribunal's opinion, $6 million per year for 10 years. On this basis, the Tribunal finds that the gains in efficiency are greater than those effects.

[468] The Tribunal must also determine whether all of the gains in efficiency will offset those effects. Gains in efficiency exceed those effects by at least $23.2 million per year for 10 years and, in the Tribunal's opinion, adequately compensate society for those effects. Accordingly, the Tribunal finds that the gains in efficiency will offset those effects.

[469] For theses reasons, the Tribunal is of the view that the Commissioner's application for an order under section 92 of the Act should be denied.

VII. DISSENT OPINION (MS. CHRISTINE LLOYD)

[470] There are several areas with respect to the appreciation of the facts underlying the efficiency defence and the legal interpretation of section 96 of the Act stated by the majority of the Tribunal with which I strongly disagree. The majority accepted for the most part the evidence on efficiencies claimed by the respondents, Superior and ICG. The respondents relied on the Cole-Kearney report; this expert report was prepared by two consulting firms whose mandate was to provide an opinion as to the value of the efficiencies that are likely to result from the merger. I have great concerns with certain aspects of the methodology and assumptions adopted by the experts that led to their calculations and resultant conclusions. Consequently, I am not satisfied, on a balance of probabilities, that the gains in efficiency as claimed by the respondents are *likely* to be brought about by the merger as required by subsection 96(1) and that the claimed efficiencies would not likely be attained if the order for total divestiture were made. Finally, when conducting the trade-off analysis in section 96, I conclude that even if $29.2 million of efficiencies were likely to be realized (as accepted by the majority), the proposed gains in efficiency will not be greater than and will not *offset* the effects of any prevention or lessening of competition that will result or is likely to result from the merger.

A. QUANTUM OF EFFICIENCIES

(1) Problematic Aspects of the Methodology Used

[471] The respondents submit that the merger between Superior and ICG will allow them to achieve substantial gains in efficiency in the range of $40 million per annum based on the opinion of Cole-Kearney. They state that the aggregate of such gains is approximately $381 to $421 million measured in constant dollars over 10 years. I have great concerns regarding the respondents' efficiencies claimed in this proceeding as certain aspects of the methodology used to conduct the analysis are problematic.

[472] The efficiencies claimed by the respondents depend largely on the elimination of costs at the level of field operations, i.e., redundant branches and trucks and other related cost savings. Professors Schwindt and Globerman and Mr. Kemp state at page 23 of their report in rebuttal (confidential exhibit CA-3131) the following:

> C. Total Field Operations ($193.6 million, 48.3% of savings)
>
> Projected efficiencies generated at the field operations level are very significant, accounting for *nearly half of the anticipated total.* These efficiencies are largely attributable to the rationalization of the branch system and the improvement of delivery logistics. (emphasis added)

[473] These cost savings identified by Cole-Kearney are based on a definition of Superior's trade area size and overlaps with ICG's trade areas. The size of each trade area of Superior is defined on the basis of the farthest customer located from each respective branch as reported in the 1998 branch templates. This farthest distance then constitutes the radius of the trade area for each specific branch. The extent of the trade areas and trade area overlaps, in turn, constitute the framework on which the experts calculated the efficiencies claimed to result from the implementation of the merger of Superior and ICG.

[474] As stated above at paragraph [207] when assessing the validity of the 1998 branch templates, the Tribunal concludes that these templates are suspect and unreliable. Therefore, it appears that since Superior's trade areas may not be as large as 620 kilometers, relying on these estimates to determine the extent of the overlaps may well overstate the cost savings that can be realized. Consequently, the impact on the results of the calculated efficiencies remains unknown.

[475] Further, I have noted that the experts estimate trade area overlaps through a manual process which was not verified in a way to assure accuracy. In response to a question asked by the Tribunal, Eric Fergin, one of the respondents' experts responsible for this process, explained how these overlaps were identified:

> MS LLOYD: Getting back to the trade area size, Mr. Fergin, do you have any sort of scatter map or anything that indicates the customers so that we can actually see on a map indicating where the overlap is?

MR. FERGIN: No, we don't. I don't have one with me. I know one was constructed -- *sketches were constructed, because they were based on rough estimates looking at the two areas, the overall area that they overlaid, and based on the raw data that we had which was actually provided to the Bureau.* I don't have a reference number for the documents.

We did that, but unfortunately, no, I don't have a scatter map.

MS LLOYD: It would be nice to see what that overlap is.

MR. FERGIN: *I'm afraid I don't have something like that.* (emphasis added).

transcript at 34:6722 (8 December 1999).

[476] As I mentioned earlier, the methodology to define the trade areas and their resultant overlaps raise significant concerns for errors that would impact on the quantum of the efficiencies claimed. By using the farthest point to establish the radius as opposed to a defining line around the greatest density of customers, the respondents could have overstated the number of branches that could potentially be closed as well as the number of trucks and related equipment that could be eliminated. In fact, using smaller trade area definitions dictated by customer density may have resulted in no overlap between certain branches.

[477] Further, no mechanism or tools were used (other than the alleged review by Andrew Carroll of Superior, a process that remains unclear) to verify the validity of the analysis conducted by the respondents' experts. I am of the view that a thorough *reality check* should have been conducted. For instance, the respondents could have used a Geographic Information System (commonly referred to as "GIS") to create a scatter map to plot customer locations in relation to each of their respective branches. This system would have produced accurate trade area overlaps to assist the experts in determining the number of redundant branches and accurate drive time patterns. The fact that the experts did not have recourse to an equivalent safeguard, in my view, undermines greatly the validity of the findings made by the experts. They were discussed with Mr. Fergin at the hearing:

MR. FERGIN: . . . In fact, *we don't have information of granularity to show where all the branches were in each particular area.*

I believe it was Ms Lloyd who asked us last Wednesday, in fact, if we had maps that plotted out the delivery sites relative to the branches, and as I stated at that time, we did not have that information.

MS LLOYD: I thought you told me that you did it in lead-up to the analysis.

MR. FERGIN: I'm sorry?

MS LLOYD: I thought I understood that you actually did have it, but that was in the lead-up to the analysis, that you had done it. I must have misunderstood you.

MR. FERGIN: *We had done it for the areas that we rode along in during our ride-alongs, but we hadn't done it for all the particular customers that were served by a particular branch.*

MS LLOYD: I misunderstood you.

MR. FERGIN: Okay. The other comment I have is: *Mr. Schwindt indicated that our methodology in terms of determining the area served for Superior was based solely on the radius of the trade area as determined by the farthest customer.*

Now, *that was the initial basis*, but we didn't strictly use that information without going back to Andrew Carroll of Superior Propane, who was our key liaison on this project in terms of giving us information and validating information as to what areas, particular branches, particular satellites served to determine that would in fact be a valid area or it should be adjusted accordingly somewhat because of the fact that a situation like this might exist or there might be one far outlying branch.

So the point I am trying to make is that: *We did not simply use the branch radius as the only factor for determining the trade areas served by Superior for a given branch.* (emphasis added)

transcript at 37:7782, 7783 (14 December 1999).

[478] The only validation process presented by the respondents is that of the "ride-alongs", which were conducted to validate the model used to predict reduction in fleet and driver personnel and other results therefrom. They submit that these ride-alongs, which consist of spending a day with a driver delivering propane to customer locations, allow them to validate the model that they have developed. Yet, in cross-examination by the Commissioner, Mr. Fergin conceded that he had participated in only two ride-alongs in Sudbury (with Superior) and Stratford (with ICG) where a detailed analysis was done as to time spent on various activities (i.e., comparing time spent driving, pumping propane, delivering and generating delivery receipts). He mentioned that ride-alongs were also conducted without tabulating the data in Moncton, Lloydminster, Concord, Vimont, Coquitlam and Burnaby (transcript at 37:7795 (14 December 1999)).

[479] I am of the view that the validation process that was conducted in this case is insufficient to provide the assurance that the quantum of the efficiencies claimed is accurate. Further, the validation process was only performed with respect to the efficiencies claimed at the field operations level, most particularly with respect to the fleet reduction (annualized savings of $2.6 million which represents $33.4 million over 10 years) and related costs. In addition, inadequacies are further demonstrated by the fact that ride-alongs were conducted and reported using a sample of only two locations, one Superior and one ICG. As well, no allowance for regional differences was accounted for in this analysis.

(2) Highly Optimistic Assessment (That Does Not Account for Any Costs)

[480] The Commissioner's experts point out that the evaluation made by Cole-Kearney of the efficiencies is highly optimistic not to say unrealistic because their projection of the efficiencies does not account for any costs resulting from the integration of the two companies. They point out at pages 9 and 10 of their report in rebuttal (confidential exhibit CA-3131) that Cole-Kearney did not account for transition and integration costs and some volume losses. As they stated:

> The projected efficiencies of this transaction are largely driven by the integration of customer support (the second tier of administration) and field operations. These two broad categories of activities account for nearly two-thirds of the estimated cost savings, and both are complex. The proposed integration would involve the merging of ICG's 100,000 customers with SPI's 200,000 customer base, the integration of and rationalization of ICG's 110 distribution sites with SPI's 140 sites, the integration of a substantial number of ICG's 700 employees into SPI's workforce of 1,300 people, and the integration and rationalization of an extensive delivery fleet. The business involves the distribution of propane, so integration will require the meshing of two complex networks. Moreover, the two enterprises have adopted fundamentally different operating philosophies. One, ICG, is moving towards a more centralized, information technology dependent model, while the other, SPI, continues to operate a more decentralized system. Given these facts, the integration of these two firms would appear to be a daunting task. However, the Kearney Report identifies very few costs attributable to the actual process of integration.

[481] It is indubitable that the rationalization of the two site networks will generate real resource savings. However, the respondents' experts did not account for any increases in operating expenditures or ongoing capital expenditures that will result from additional costs related to volumes, staffing levels and number of customers. I am in agreement with Professors Schwindt and Globerman and Mr. Kemp when they state in their report in rebuttal (confidential exhibit CA-3131) at page 24 that:

> . . . Volumes in all rationalised trade areas will increase, and, at some, volumes will more than double. Staffing will increase at the branches . . . . [C]ustomers per branch will increase significantly, and this will increase the number of administrative staff required to serve these customers. . . . [M]any tasks will be reallocated to branch employees . . . . This will also increase staffing. . . . [I]ncreased volumes will require more delivery and service staff . . . .

[482] Further, Professors Schwindt and Globerman and Mr. Kemp point out that equipment located at the branch or operating from the branch (including storage tanks and trucks) will increase, which, in turn, will require more space and expanded infrastructure and further storage space for inventories (parts and customers tanks). This will result in increased costs that have not been accounted for by the respondents' experts. In support of their criticism, the Commissioner's experts examined changes to operations and used the example of the Peterborough branch (a

branch where the rationalization is straight forward) to demonstrate the effects that the integration will have on costs, as shown at table 7 on page 26 of their report in rebuttal (confidential exhibit CA-3131). They conclude at page 26 that:

> *The staffing level will increase by 60 percent.* Cylinder operations will be consolidated at this site which will increase cylinder truck traffic. *The bulk delivery fleet will double.* The increased fleet will require additional maintenance capacity on the site as well as general access and parking area. This could require reconfiguration of the site to handle the step change in delivery equipment. *Bulk delivery volumes are projected to increase by 220 percent.* Such a large increase will mean that *both primary deliveries and bulk truck daily liftings will also increase proportionately.* This suggests that the *site will have to be reconfigured* to handle the significant increase in load factors. (emphasis added)

[483] The expert opinion of Professors Schwindt and Globerman and Mr. Kemp, as stated above, supports the Commissioner' submission that the efficiencies claimed by the respondents are overstated and hence, have not been demonstrated on a balance of probabilities:

> Secondly, we reiterate that the efficiency gains that were used for the purposes of this calculation of 21.2 million, on an annualized basis, is overstated for the reasons that we set out in the quantitative section of our materials.
>
> While that represents taking off the deductions that we were able to specifically identify in the evidence of Professors Schwindt and Globerman and as detailed in the argument, *we have pointed out many instances where the Respondents' efficiency gains are excessively optimistic, exaggerated, or don't meet the standard, in our submission, of being established on a balance of probabilities.* (emphasis added)
>
> transcript at 44:8737 (4 February 2000).

[484] As stated in paragraph 5.7.2 of the MEG's, cited above at paragraph [57], and as discussed by the author A. Neil Campbell in *Merger Law and Practice, The Regulation of Mergers under the Competition Act* (Scarborough: Carswell 1997) at 162, I am of the view that efficiencies should be measured net of the implementation costs that would be incurred in obtaining them. Therefore, "retooling" and other costs necessary to achieve efficiency gains should be deducted from the total value of the efficiencies.

[485] In light of my remarks on the methodology used by the experts and the insufficient consideration being given to additional costs that will result from the integration of field sites, I am of the view that the respondents have not demonstrated *on a balance of probabilities* the existence of the claimed $40 million of efficiencies per annum. As I have explained earlier, some problems identified with the methodology undermines greatly the validity of the efficiencies claimed by the respondents. There is no question that efficiencies can be realized in any merger or most particularly in this merger. However, the requirement under section 96 of the Act is to demonstrate the existence or the likelihood that the gains in efficiency will be brought about by

the merger, hence the quantum of the claimed efficiencies on a balance of probabilities. In my view, the respondents have not met their burden of proof on that crucial element of their efficiency defence. As a result, I do not accept the respondents' efficiencies claim of $40 million per annum nor the reduced quantum of $29.2 million of efficiencies as accepted by the majority. Since I am not able to measure the degree to which these errors have affected the results nor able to quantify the inevitable costs that will result from this merger, I am not in a position to assess the real value of the efficiencies that will result or is likely to result from the merger and, therefore, will not speculate on their quantum.

B. THE MERGER HAS BROUGHT ABOUT OR IS *LIKELY* TO BRING ABOUT GAINS IN EFFICIENCY (I.E., LIKELY TO BE REALIZED POST-MERGER)

[486] The respondents have not convinced me on a balance of probabilities that the $40 million of efficiencies claimed will be realized for the reasons stated above. In addition, regardless of the quantum of efficiencies that *theoretically* could be realized, the Tribunal has not been provided, in my opinion, with any evidence that they are likely to *materialize* post-merger.

[487] In my view, the term "likely" used in section 96 requires more than the sole demonstration of the quantum of possible efficiencies. Rather, I believe that the term "likely" requires some evidence of the implementation process leading to the materialization of the claimed efficiencies. It is my opinion that evidence of this nature is necessary to provide the Tribunal with a *level of assurance* necessary to conclude that the efficiencies are *likely* to be realized post-merger (i.e., implemented by management).

[488] Evidence before the Tribunal stresses the importance of the merging parties having a detailed plan to ensure success of the merger. On that point, Paul Inglis, one of the respondents' experts on efficiencies, discussed a study that examines 115 mergers that took place between 1993 and 1996 in North America and which identifies the factors contributing to a successful merger. In that regard, Mr. Inglis explained that the *existence of a business plan* was one of the key factors leading to a successful merger:

> Success in a merger is, in large part, *determined during the planning stage, but of course* ***is executed after the merger happens.*** *You have to make sure that you follow through on the good plans that are made up front.* And so I would like to talk about, once again, ***the post-merger factors***; and that is once the deal has consummated, once the agreement has been made.
>
> What are the things that allow us to believe that there is ***a good chance that the merger will be executed?*** Again, there are five things that we believe correlate. ***Is there a clear vision and strategy for the company? Do they know who the management is going to be? Do they have a good plan for putting that management in place? Have they got the capabilities to show results early and to gain momentum from developing those results? Have they recognized that there are cultural differences and do they have a plan to break through those cultural differences and meld the two organizations together?*** And finally, have

> they got a communications plan in place that will help them to execute that change in the cultures?...
>
> Let me turn next to determine the *management responsibility* point. Now, already there has been an identification of how many people will be in the management team. They plan to go forward with *ten senior management positions*. And they have a pool of senior resources to draw from. And that pool includes the likes of Geoff Mackey and Peter Jones and the other people that are the senior managers at ICG, as well as the people inside Superior. (emphasis added)
>
> transcript at 33:6347, 6348, 6350 (7 December 1999).

[489] Mr. Inglis was touching upon a crucial point when addressing the importance of having an implementation plan in order to assure that the claimed efficiencies are executed. In the absence of such a plan, there is no assurance or any indication as to the degree of probability that this merger will achieve the efficiency gains identified by the experts.

[490] A business plan setting out the implementation process/action plan outlining time frames for each step of the integration of the merger is necessary to achieve the claimed efficiencies. I take note that Mr. Inglis mentioned that Superior had a plan that was well *articulated* and that had been scrutinized over a long time frame. Unfortunately, the Tribunal was not presented with that alleged plan or any other plan. In fact, no such evidence was presented at the hearing. Mr. Schweitzer, Superior's Chief Executive Officer, the sole representative of Superior's management who testified at the hearing, did not provide evidence of the existence of a post-merger plan. It appears to me that a detailed business plan which expresses clearly the commitment and accountability of Superior's management (including the commitment of the Chief Executive Officer) should have been demonstrated. Further, there is no evidence that any study or due diligence was conducted to determine the cost effectiveness of merging the two companies prior to the decision by Superior to acquire ICG. Had this exercise been undertaken, the cost savings presented by Cole-Kearney would have had more credibility. Consequently, it appears to me that the realization of the efficiencies claimed strictly remain *possibilities and not probabilities* hence, the respondents have not demonstrated on a balance of probabilities that the efficiencies are likely to be realized.

[491] One could argue that the Management Agreement referred to at paragraphs [330]-[345], which provides incentives to SMS to increase the profitability of Superior and the cash distribution to unitholders of the Superior Income Fund (cash distribution), further supports the view that the efficiencies are likely to be realized. However, since the additional profits, which lead to SMS's entitlements can come from either an increase in price resulting from the exercise of market power and/or from cost reductions, I am of the view that the Management Agreement does not offer the level of assurance necessary to conclude that extra profits will be generated from the realization of the claimed efficiencies and hence, that these efficiencies are *likely* to be achieved.

[492] In the absence of any provision under the Act regarding the enforcement of the outcome, (i.e., the realization of the claimed efficiencies), it is even more critical that the respondents demonstrate that the merger is *likely* to bring about gains in efficiency *not solely on a theoretical level* through experts but also through direct evidence that *this is the direction that management is committed to seriously undertake with some assurance of completion post-merger*. Without such a crucial piece of evidence, it appears to me that the efficiencies claimed remain only a *theoretical* exercise that may never be implemented by management. This demonstration that the merger is *likely* to bring about gains in efficiency is an important element of the efficiency defence that they had to demonstrate in order to meet their burden of proof.

[493] In light of my previous comments regarding the efficiencies claimed by the respondents' experts and the lack of information regarding the alleged commitment of management to the actual implementation, including time frames dedicated to each step of the implementation process, I am of the view that the requirement that the respondents must demonstrate that the merger has brought about or is *likely* to bring about gains in efficiency has not been met.

C. "THAT THE EFFICIENCIES WOULD NOT LIKELY BE ATTAINED IF THE ORDER WERE MADE"

[494] Subparagraph 96(1) of the Act provides that:

> 96.(1) The Tribunal shall not make an order under section 92 if it finds that the merger or proposed merger in respect of which the application is made has brought about or 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 merger or proposed merger ***and that the gains in efficiency would not likely be attained if the order were made.***
>
> (2) In considering whether a merger or proposed merger is likely to bring about gains in efficiency described in subsection (1), the Tribunal shall consider whether such gains will result in
>
> (*a*) a significant increase in the real value of exports; or
>
> (*b*) a significant substitution of domestic products for imported products.
>
> (3) For the purposes of this section, the Tribunal shall not find that a merger or proposed merger has brought about or is likely to bring about gains in efficiency ***by reason only of a redistribution of income between two or more persons***. (emphasis added)

[495] While the Commissioner bears the onus of proving the effects of any prevention or lessening of competition resulting from the merger on a balance of probabilities, it is the respondents' burden to prove all the elements of their defence in order to be successful. These elements are: the existence of the claimed efficiencies, the likelihood that they will be brought about by the merger (realized post-merger through their actual implementation), *the fact that they would not likely be attained if the order for total divestiture were made* and that they are not

pecuniary in nature. Once a determination has been made of what gains (both quantitative and qualitative) should be considered in the trade-off analysis, then the balancing process can take place.

[496] Indeed, section 96 limits the efficiency gains that can be considered in the trade-off analysis to those that *would not likely be attained if the order were made* and to those that do not constitute *a redistribution of income between two or more persons*. While I agree with the majority that only efficiencies that constitute "real" resource savings must be considered and not those that are pecuniary in nature, I disagree with their appreciation of the requirement set out in subparagraph 96(1) *and that the gains in efficiency would not likely be attained if the order were made.*

[497] This requirement of subparagraph 96(1) that they would not likely be attained if the order were made leads to this question: would the gains in efficiency likely be realized if the order for total divestiture were made? In other words, if the order for total divestiture were made, would the two companies independently likely realize gains in efficiency in some other way? The burden of proving this element also falls on the respondents and, in my view, has not been met on a balance of probabilities.

[498] Indeed, *only those gains* which would not likely be attained if the order were made can be claimed by the respondents. This requirement is to ensure that gains that would likely be obtained absent the merger for instance as a result of internal growth, merger or joint venture with a third party, *restructuring*, or contractual arrangements (e.g., specialization agreement) are excluded from efficiencies claimed. Therefore, it appears that the merging parties had the onus of providing a reasonable explanation as to why efficiencies would not likely be sought through an alternative mean if the order for total divestiture were made.

[499] In this case, the respondents have not, in my view, proved that the claimed efficiencies would not likely be attained if the order for total divestiture were made. Cole-Kearney's mandate was to provide *an opinion as to the value of efficiencies* that were likely to result from a merger of Superior and ICG. Their report states that alternative means were explored within the context of common industry practice such as internal growth, merger or joint venture with a third party or specialization agreement or licensing lease or other contractual arrangements. On that basis, they concluded that the merger is the only means by which to achieve efficiencies. No comparative evidence was provided on the results arising from the value of efficiencies from alternative means to assure the Tribunal that a merger was the *only* means by which to achieve the efficiencies. Surprisingly, restructuring was not mentioned by the experts.

[500] Further, no evidence in support of their conclusions was provided to the Tribunal nor any explanation as to why measures such as restructuring would not likely be undertaken by Superior to reduce its costs in order to achieve efficiencies in some other way, absent the merger. Indeed, while evidence was provided regarding ICG's transformation process (a process that led to efficiencies which were properly not claimed by the experts), no evidence was provided as to what Superior would or would not likely undertake to achieve efficiency gains if the order were made. The Tribunal does not have evidence to conclude that Superior, on its own, had already

"cut-out the fat" within its organization before undertaking the merger with ICG. Consequently, the efficiencies claimed by the respondents could include cost savings that Superior would likely achieve on its own, absent the merger. Such efficiencies resulting from Superior's own restructuring would have been discounted from the efficiencies claimed. Indeed, as stated in the MEG's, cited above at paragraph [57], where *some or all* of the claimed efficiency gains would likely be attained through other means if the order were made, they cannot be attributed to the merger and hence, must not be considered in the section 96 trade-off analysis. For these reasons, I am of the view that the respondents failed to prove that the gains in efficiency would not likely be attained if the order were made.

D. ISSUES REGARDING THE TRADE-OFF ANALYSIS

[501] As stated above, the respondents argue that the test to be met under section 96 of the Act is that the efficiencies must be greater than and offset any substantial lessening of competition and that the effects of such are measured by the deadweight loss to the economy and exclude wealth transfers between producers and consumers which are neutral to the economy.

[502] The Commissioner submits that in conducting the trade-off analysis set out in section 96, the Tribunal has a statutory responsibility to exercise its judgment as to the weight to be accorded to the transfer from consumers to producers. Hence, he submits that applying a standard with a fixed predetermined weight would be contrary to section 96. Further, the Commissioner submits that the efficiency gains do not *offset*, i.e., "neutralize" or "compensate for", the anti-competitive effects caused to the economy as a whole by this merger.

[503] The majority accepted that $29.2 million of efficiencies per annum is likely to be realized and is satisfied that the gains in efficiency are greater than and offset the effects of any prevention or lessening of competition that is likely to result from the merger. In their view, these quantitative efficiencies are greater than and offset the deadweight loss to the economy evaluated at $3 million per annum and the qualitative effects of any prevention or lessening of competition.

[504] I agree with the majority that the trade-off analysis must be conducted through a single test where quantitative (productive) and qualitative (dynamic) efficiency gains together must be greater than and offset the quantitative (deadweight loss) and qualitative (e.g., reduction in non-price dimensions of competition) effects of any prevention or lessening of competition resulting from the merger. While I agree with the single test approach (i.e., as opposed to two tests, one quantitative and one qualitative), I disagree with their interpretation of the word "offset" in subsection 96(1) and with the weight that they attach to the effects of this merger.

[505] It is clear to me that Parliament intended the members of the Tribunal to exercise their judgment when assessing the trade-off set out in section 96 of the Act. During the proceedings of the Legislative Committee on Bill C-91, there were several references to the fact that the terms used in that section should not be so precise as to restrict the Tribunal's interpretation and discretion. Rather, there was an agreement that the Tribunal should have the jurisdiction to exercise its discretion based on the merits of a specific case. It appears that the legislator intended that the Tribunal should not become so rigid when applying the law as to prevent some

mergers that would benefit the economy and conversely allowing others that would clearly not benefit the economy. Therefore, the legislator decided not to provide a specific list of factors in addition to those already stated in subsection 96(2); the increase in the real value of exports and substitution of domestic products for imported products. Instead, the legislator preferred to rely on the discretion of the Tribunal members who have expertise to hear competition law matters.

[506] While I recognize that efficiencies are given special consideration under section 96 and may constitute a defence to an otherwise anti-competitive merger, it appears to me that section 96 is an *exception to the application of section 92 of the Act* and not an *exception to the Act itself.* As Parliament stated, the trade-off set out in section 96 involves a balancing process and does not constitute, in my view, an *absolute* defence where the effects of the anti-competitive merger ought to be ignored. By that, I mean while the section 96 trade-off gives precedence to the gains in efficiency likely to result from the merger, this section must be interpreted 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 (i.e., 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). Therefore, it appears to me that the effects of any prevention or lessening of competition, which are contrary to the goals stated in the purpose clause of the Act, ought to be considered (for instance, the reduction or loss of consumer choice) in the trade-off analysis in order to determine whether the gains in efficiency are greater than and offset those effects.

[507] In my view, if the analysis under section 96 were so simplistic as to only require the comparison between quantitative efficiency gains and the deadweight loss to the economy, this could lead to distorted outcomes. For instance, such a narrow interpretation would mean that an anti-competitive merger would more easily meet the test set out in the section as the demand for the relevant product becomes less elastic (i.e., less price-sensitive). This perverse result arises from the fact that the calculated deadweight loss is proportional to the elasticity of demand. Therefore, following the interpretation of the majority, smaller gains in efficiency are required to outweigh and offset the deadweight loss to the economy when the demand is inelastic. In my view, there is no obvious reason to explain why Parliament would have written section 96 to give preference to anti-competitive mergers involving products for which demand is relatively inelastic (e.g., commodities).

[508] Consequently, I am of the view that the qualitative effects must be given appropriate consideration in the trade-off analysis. Indeed, while the deadweight loss can simply be depicted on a matrix and quantified, a matrix does not take into account the peculiar effects of the merger under review. As it is recognized by authorities in the field and by the MEG's, cited above at paragraph [57], some effects of a merger cannot be valued in dollar terms, for instance reduction in service, quality, variety, innovation and other non-dimensions of competition. Therefore, these effects must receive a weight that is qualitative in nature. Accordingly, as certain effects in this merger cannot be quantified, I am of the view that they must be considered as qualitative and given an appropriate weight in the trade-off analysis.

[509] As I explained earlier, I do not accept the quantum of efficiencies as adopted by the majority. However, I will use that amount in table 2 (contained in paragraph [512]) simply for the purpose of illustration. As seen in table 2, which compares the efficiency gains claimed in this merger to the effects of any prevention or lessening of competition, the respondents have not claimed any qualitative effects that will benefit society as a whole. For instance, they do not claim any dynamic efficiencies or that the efficiencies will result in a significant increase in the real value of exports as stated at subsection 96(2) of the Act. Therefore, I cannot conclude that this merger will generate *qualitative* gains in efficiency that will benefit the economy as a whole.

[510] As to the qualitative effects of any prevention or lessening of competition, I have identified some that have not been given, in my view, sufficient weight in the analysis conducted by the majority. These effects are the loss of a vigorous competitor, which reduces consumer choice generally, particularly for national account customers and the absence of choice due to the elimination of competition in 16 markets. Further, the merged entity will have the ability to exercise market power which may result in the imposition of unilateral *price increases* and/or a *reduction or elimination of programs* such as the Cap-It and Auto-fill offered to customers. Conversely, the merged entity could use its market power to reduce prices for a period of time in order to squeeze competitors out of the market. This latter effect would be contrary to one of the goals stated at section 1.1 of the Act which seeks to provide an equitable opportunity for small and medium businesses to participate in the Canadian economy.

[511] Finally, I am of the opinion that consideration must be given to the significant wealth transfer from consumers to producers that will result from a price increase. Controversy surrounds the issue as to whether the wealth transfer is an effect that should be considered in the analysis stated at section 96. While a wealth transfer resulting from a merger is deemed to be neutral from a pure economic standpoint, it is not neutral in the context of the purpose clause of the Act which states that the objective is to promote and encourage competition in order to, among other goals, *provide consumers with competitive prices and product choices*. I am of the view that if Parliament's intention were that gains resulting from higher profits (due to a reduction in competition) and achieved at the expense of consumers should be viewed as neutral, surely it would have stated so in the Act. Indeed, if this had been the intention of the legislator, no references would have been made to consumers in section 1.1 and further, the term "effects" in section 96 would have been defined as to exclude any consideration of that nature. Therefore, I agree with the *obiter dictum* of Reed J. in *Hillsdown*, cited above at paragraph [127], at page 337, that the word "effects" should not be given such a restrictive interpretation as to exclude the transfer from consumers to producers.

[512] I am of the opinion that the wealth transfer from consumers to producers should not be viewed as a quantitative effect. There are no provisions in the Act suggesting that the effects must be quantified. It is my opinion that the transfer should be given qualitative consideration in the balancing process, which requires an exercise in judgment. A qualitative consideration allows for flexibility in the evaluation of each individual case under review.

TABLE 2: Trade-off Analysis

	Quantitative	Qualitative
Positive	$29.2 million as accepted by the majority (see my dissenting opinion above)	The respondents provided no evidence of any qualitative "positive" effects.
Negative	$3 million (deadweight loss)	Loss of a vigorous competitor which *reduces* consumer choices. *Absence* of choice for consumers in 16 markets and for national account customers. Ability to exercise market power that may result in: - the imposition of a *unilateral price increase* or *price decrease* ("to squeeze competitors out" of the market); - the *reduction or elimination of programs* offered to customers (i.e., Cap-It, Auto-fill, etc.); - the *reduction or elimination of services* (e.g., delivery services in certain areas); and - significant wealth transfer from consumers to producers.

[513] I am of the view that when assessing the gains in efficiency against the effects of any prevention or lessening of competition, the claimed efficiencies are not greater than and do not *offset* these effects.

[514] As stated by the Commissioner, I am of the view that in order for the defence to be successful, the respondents must demonstrate that the efficiencies will be greater than and *will offset* (i.e., compensate for) the effects of a merger. 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.

E. CONCLUSION

[515] In light of my dissenting reasons, I conclude that the respondents have not met their burden of proof of demonstrating, on a balance of probabilities, that the merger has brought about or 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. Therefore, the Tribunal should make the order for total divestiture by Superior of all of ICG's shares and assets (including those of the previously integrated branches thereof) formulated pursuant to section 92 of the Act.

VIII. ORDER

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

DATED at Ottawa, this 30th day of August, 2000.

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

(s) Marc Nadon

APPEARANCES:

For the applicant:

The Commissioner of Competition

William J. Miller
Jo'Anne Strekaf
Steven T. Robertson
Jennifer A. Quaid
James E.J. Bocking
Ken Davidson

For the respondents:

Superior Propane Inc.
ICG Propane Inc.

Neil Finkelstein
Melanie L. Aitken
Russell Cohen
Brian Facey
Martha Cook (student-at-law)

109p

TAB 9

CANADA

CONSOLIDATION

CODIFICATION

Federal Courts Rules

Règles des Cours fédérales

SOR/98-106

DORS/98-106

Current to August 8, 2022

Last amended on January 13, 2022

À jour au 8 août 2022

Dernière modification le 13 janvier 2022

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

Publié par le ministre de la Justice à l'adresse suivante :
http://lois-laws.justice.gc.ca

Questioning by other parties

(4) A person being examined under rule 238 may also be questioned by any other party.

Cross-examination or hearsay

(5) A person being examined under rule 238 shall not be cross-examined and shall not be required to give hearsay evidence.

Use as evidence at trial

(6) The testimony of a person who was examined under rule 238 shall not be used as evidence at trial but, if the person is a witness at trial, it may be used in cross-examination in the same manner as any written statement of a witness.

Scope of examination

240 A person being examined for discovery shall answer, to the best of the person's knowledge, information and belief, any question that

(a) is relevant to any unadmitted allegation of fact in a pleading filed by the party being examined or by the examining party; or

(b) concerns the name or address of any person, other than an expert witness, who might reasonably be expected to have knowledge relating to a matter in question in the action.

Obligation to inform self

241 Subject to paragraph 242(1)(d), a person who is to be examined for discovery, other than a person examined under rule 238, shall, before the examination, become informed by making inquiries of any present or former officer, servant, agent or employee of the party, including any who are outside Canada, who might be expected to have knowledge relating to any matter in question in the action.

Objections permitted

242 (1) A person may object to a question asked in an examination for discovery on the ground that

(a) the answer is privileged;

(b) the question is not relevant to any unadmitted allegation of fact in a pleading filed by the party being examined or by the examining party;

(c) the question is unreasonable or unnecessary; or

Interrogatoire par les autres parties

(4) Toute autre partie à l'action peut également interroger la personne interrogée aux termes de la règle 238.

Contre-interrogatoire interdit

(5) La personne qui est interrogée aux termes de la règle 238 ne peut être contre-interrogée ni tenue de présenter un témoignage constituant du ouï-dire.

Utilisation en preuve

(6) Le témoignage de la personne interrogée aux termes de la règle 238 ne peut être utilisé en preuve à l'instruction mais peut, si celle-ci sert de témoin à l'instruction, être utilisé dans le contre-interrogatoire de la même manière qu'une déclaration écrite d'un témoin.

Étendue de l'interrogatoire

240 La personne soumise à un interrogatoire préalable répond, au mieux de sa connaissance et de sa croyance, à toute question qui :

a) soit se rapporte à un fait allégué et non admis dans un acte de procédure déposé par la partie soumise à l'interrogatoire préalable ou par la partie qui interroge;

b) soit concerne le nom ou l'adresse d'une personne, autre qu'un témoin expert, dont il est raisonnable de croire qu'elle a une connaissance d'une question en litige dans l'action.

L'obligation de se renseigner

241 Sous réserve de l'alinéa 242(1)d), la personne soumise à un interrogatoire préalable, autre que celle interrogée aux termes de la règle 238, se renseigne, avant celui-ci, auprès des dirigeants, fonctionnaires, agents ou employés actuels ou antérieurs de la partie, y compris ceux qui se trouvent à l'extérieur du Canada, dont il est raisonnable de croire qu'ils pourraient détenir des renseignements au sujet de toute question en litige dans l'action.

Objection permise

242 (1) Une personne peut soulever une objection au sujet de toute question posée lors d'un interrogatoire préalable au motif que, selon le cas :

a) la réponse est protégée par un privilège de non-divulgation;

b) la question ne se rapporte pas à un fait allégué et non admis dans un acte de procédure déposé par la partie soumise à l'interrogatoire ou par la partie qui l'interroge;

(d) it would be unduly onerous to require the person to make the inquiries referred to in rule 241.

c) la question est déraisonnable ou inutile;

d) il serait trop onéreux de se renseigner auprès d'une personne visée à la règle 241.

Objections not permitted

(2) A person other than a person examined under rule 238 may not object to a question asked in an examination for discovery on the ground that

(a) the answer would be evidence or hearsay;

(b) the question constitutes cross-examination.

Objection interdite

(2) À l'exception d'une personne interrogée aux termes de la règle 238, nul ne peut s'opposer à une question posée lors d'un interrogatoire préalable au motif que, selon le cas :

a) la réponse constituerait un élément de preuve ou du ouï-dire;

b) la question constitue un contre-interrogatoire.

Limit on examination

243 On motion, the Court may limit an examination for discovery that it considers to be oppressive, vexatious or unnecessary.

Droit de limiter l'interrogatoire

243 La Cour peut, sur requête, limiter les interrogatoires préalables qu'elle estime abusifs, vexatoires ou inutiles.

Examined party to be better informed

244 (1) Where a person being examined for discovery, other than a person examined under rule 238, is unable to answer a question, the examining party may require the person to become better informed and may conclude the examination, subject to obtaining answers to any remaining questions.

Obligation de mieux se renseigner

244 (1) Lorsqu'une partie soumet une personne, autre que celle visée à la règle 238, à un interrogatoire préalable et que celle-ci est incapable de répondre à une question, elle peut exiger que la personne se renseigne davantage et peut mettre fin à l'interrogatoire préalable à la condition d'obtenir les réponses aux questions qu'il lui reste à poser.

Further answers

(2) A person being examined who is required to become better informed shall provide the information sought by the examining party by submitting to a continuation of the oral examination for discovery in respect of the information or, where the parties agree, by providing the information in writing.

Renseignements additionnels

(2) La personne contrainte de mieux se renseigner fournit les renseignements demandés par la partie en se soumettant à nouveau à l'interrogatoire préalable oral ou, avec le consentement des parties, en fournissant les renseignements par écrit.

Information deemed part of examination

(3) Information provided under subsection (2) is deemed to be part of the examination for discovery.

Effet des renseignements donnés

(3) Les renseignements donnés aux termes du paragraphe (2) sont réputés faire partie de l'interrogatoire préalable.

Inaccurate or deficient answer

245 (1) A person who was examined for discovery and who discovers that the answer to a question in the examination is no longer correct or complete shall, without delay, provide the examining party with the corrected or completed information in writing.

Réponse inexacte ou incomplète

245 (1) La personne interrogée au préalable qui se rend compte par la suite que la réponse qu'elle a donnée à une question n'est plus exacte ou complète fournit sans délai, par écrit, les renseignements exacts ou complets à la partie qui l'a interrogée.

TAB 10

CANADA

CONSOLIDATION

CODIFICATION

Competition Act

Loi sur la concurrence

R.S.C., 1985, c. C-34

L.R.C. (1985), ch. C-34

Current to August 28, 2022

Last amended on June 23, 2022

À jour au 28 août 2022

Dernière modification le 23 juin 2022

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

Publié par le ministre de la Justice à l'adresse suivante :
http://lois-laws.justice.gc.ca

(f) in the case of a proposed merger, make an order directed against any party to the proposed merger or any other person

(i) ordering the person against whom the order is directed not to proceed with the merger,

(ii) ordering the person against whom the order is directed not to proceed with a part of the merger, or

(iii) in addition to or in lieu of the order referred to in subparagraph (ii), either or both

(A) prohibiting the person against whom the order is directed, should the merger or part thereof be completed, from doing any act or thing the prohibition of which the Tribunal determines to be necessary to ensure that the merger or part thereof does not prevent or lessen competition substantially, or

(B) with the consent of the person against whom the order is directed and the Commissioner, ordering the person to take any other action.

(iii) en sus ou au lieu des mesures prévues au sous-alinéa (i) ou (ii), de prendre toute autre mesure, à condition que la personne contre qui l'ordonnance est rendue et le commissaire souscrivent à cette mesure;

f) dans le cas d'un fusionnement proposé, rendre, contre toute personne, que celle-ci soit partie au fusionnement proposé ou non, une ordonnance enjoignant :

(i) à la personne contre laquelle l'ordonnance est rendue de ne pas procéder au fusionnement,

(ii) à la personne contre laquelle l'ordonnance est rendue de ne pas procéder à une partie du fusionnement,

(iii) en sus ou au lieu de l'ordonnance prévue au sous-alinéa (ii), cumulativement ou non :

(A) à la personne qui fait l'objet de l'ordonnance, de s'abstenir, si le fusionnement était éventuellement complété en tout ou en partie, de faire quoi que ce soit dont l'interdiction est, selon ce que conclut le Tribunal, nécessaire pour que le fusionnement, même partiel, n'empêche ni ne diminue sensiblement la concurrence,

(B) à la personne qui fait l'objet de l'ordonnance de prendre toute autre mesure à condition que le commissaire et cette personne y souscrivent.

Evidence

(2) For the purpose of this section, the Tribunal shall not find that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially solely on the basis of evidence of concentration or market share.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37.

Preuve

(2) Pour l'application du présent article, le Tribunal ne conclut pas qu'un fusionnement, réalisé ou proposé, empêche ou diminue sensiblement la concurrence, ou qu'il aura vraisemblablement cet effet, en raison seulement de la concentration ou de la part du marché.

L.R. (1985), ch. 19 (2^{e} suppl.), art. 45; 1999, ch. 2, art. 37.

Factors to be considered regarding prevention or lessening of competition

93 In determining, for the purpose of section 92, whether or not a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially, the Tribunal may have regard to the following factors:

(a) the extent to which foreign products or foreign competitors provide or are likely to provide effective competition to the businesses of the parties to the merger or proposed merger;

Éléments à considérer

93 Lorsqu'il détermine, pour l'application de l'article 92, si un fusionnement, réalisé ou proposé, empêche ou diminue sensiblement la concurrence, ou s'il aura vraisemblablement cet effet, le Tribunal peut tenir compte des facteurs suivants :

a) la mesure dans laquelle des produits ou des concurrents étrangers assurent ou assureront vraisemblablement une concurrence réelle aux entreprises des parties au fusionnement réalisé ou proposé;

(b) whether the business, or a part of the business, of a party to the merger or proposed merger has failed or is likely to fail;

(c) the extent to which acceptable substitutes for products supplied by the parties to the merger or proposed merger are or are likely to be available;

(d) any barriers to entry into a market, including

(i) tariff and non-tariff barriers to international trade,

(ii) interprovincial barriers to trade, and

(iii) regulatory control over entry,

and any effect of the merger or proposed merger on such barriers;

(e) the extent to which effective competition remains or would remain in a market that is or would be affected by the merger or proposed merger;

(f) any likelihood that the merger or proposed merger will or would result in the removal of a vigorous and effective competitor;

(g) the nature and extent of change and innovation in a relevant market;

(g.1) network effects within the market;

(g.2) whether the merger or proposed merger would contribute to the entrenchment of the market position of leading incumbents;

(g.3) any effect of the merger or proposed merger on price or non-price competition, including quality, choice or consumer privacy; and

(h) any other factor that is relevant to competition in a market that is or would be affected by the merger or proposed merger.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 2022, c. 10, s. 264.

b) la déconfiture, ou la déconfiture vraisemblable de l'entreprise ou d'une partie de l'entreprise d'une partie au fusionnement réalisé ou proposé;

c) la mesure dans laquelle sont ou seront vraisemblablement disponibles des produits pouvant servir de substituts acceptables à ceux fournis par les parties au fusionnement réalisé ou proposé;

d) les entraves à l'accès à un marché, notamment :

(i) les barrières tarifaires et non tarifaires au commerce international,

(ii) les barrières interprovinciales au commerce,

(iii) la réglementation de cet accès,

et tous les effets du fusionnement, réalisé ou proposé, sur ces entraves;

e) la mesure dans laquelle il y a ou il y aurait encore de la concurrence réelle dans un marché qui est ou serait touché par le fusionnement réalisé ou proposé;

f) la possibilité que le fusionnement réalisé ou proposé entraîne ou puisse entraîner la disparition d'un concurrent dynamique et efficace;

g) la nature et la portée des changements et des innovations sur un marché pertinent;

g.1) les effets de réseau dans le marché;

g.2) le fait que le fusionnement réalisé ou proposé contribuerait au renforcement de la position sur le marché des principales entreprises en place;

g.3) tout effet du fusionnement réalisé ou proposé sur la concurrence hors prix ou par les prix, notamment la qualité, le choix ou la vie privée des consommateurs;

h) tout autre facteur pertinent à la concurrence dans un marché qui est ou serait touché par le fusionnement réalisé ou proposé.

L.R. (1985), ch. 19 (2e suppl.), art. 45; 2022, ch. 10, art. 264.

Exception

94 The Tribunal shall not make an order under section 92 in respect of

(a) a merger substantially completed before the coming into force of this section;

(b) a merger or proposed merger under the *Bank Act*, the *Cooperative Credit Associations Act*, the *Insurance Companies Act* or the *Trust and Loan*

Exception

94 Le Tribunal ne rend pas une ordonnance en vertu de l'article 92 à l'égard :

a) d'un fusionnement en substance réalisé avant l'entrée en vigueur du présent article;

b) d'une fusion réalisée ou proposée aux termes de la *Loi sur les banques*, de la *Loi sur les associations coopératives de crédit*, de la *Loi sur les sociétés*

TAB 11

CANADA

CONSOLIDATION

CODIFICATION

Competition Tribunal Act

Loi sur le Tribunal de la concurrence

R.S.C. 1985, c. 19 (2nd Supp.)

S.R.C. 1985, ch. 19 (2e suppl.)

NOTE

[*1986, c. 26, assented to 17th June, 1986*]

NOTE

[*1986, ch. 26, sanctionné le 17 juin 1986*]

Current to August 28, 2022

Last amended on November 1, 2014

À jour au 28 août 2022

Dernière modification le 1 novembre 2014

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

Publié par le ministre de la Justice à l'adresse suivante :
http://lois-laws.justice.gc.ca

Jurisdiction and Powers of the Tribunal

Jurisdiction

8 (1) The Tribunal has jurisdiction to hear and dispose of all applications made under Part VII.1 or VIII of the *Competition Act* and any related matters, as well as any matter under Part IX of that Act that is the subject of a reference under subsection 124.2(2) of that Act.

Powers

(2) The Tribunal has, with respect to the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record.

Power to penalize

(3) No person shall be punished for contempt of the Tribunal unless a judicial member is of the opinion that the finding of contempt and the punishment are appropriate in the circumstances.

R.S., 1985, c. 19 (2nd Supp.), s. 8; 1999, c. 2, s. 41; 2002, c. 16, s. 16.1.

Costs

8.1 (1) The Tribunal may award costs of proceedings before it in respect of reviewable matters under Parts VII.1 and VIII of the *Competition Act* on a final or interim basis, in accordance with the provisions governing costs in the *Federal Court Rules, 1998*.

Payment

(2) The Tribunal may direct by whom and to whom any costs are to be paid and by whom they are to be taxed and allowed.

Award against the Crown

(3) The Tribunal may award costs against Her Majesty in right of Canada.

Costs adjudged to Her Majesty in right of Canada

(4) Costs adjudged to Her Majesty in right of Canada shall not be disallowed or reduced on taxation by reason only that counsel who earned the costs, or in respect of whose services the costs are charged, was a salaried officer of Her Majesty in right of Canada performing those services in the discharge of that counsel's duty and remunerated for those services by salary, or for that or any other reason was not entitled to recover any costs from

Compétence et pouvoirs du Tribunal

Compétence

8 (1) Les demandes prévues aux parties VII.1 ou VIII de la *Loi sur la concurrence*, de même que toute question s'y rattachant ou toute question qui relève de la partie IX de cette loi et qui fait l'objet d'un renvoi en vertu du paragraphe 124.2(2) de cette loi, sont présentées au Tribunal pour audition et décision.

Pouvoirs

(2) Le Tribunal a, pour la comparution, la prestation de serment et l'interrogatoire des témoins, ainsi que pour la production et l'examen des pièces, l'exécution de ses ordonnances et toutes autres questions relevant de sa compétence, les attributions d'une cour supérieure d'archives.

Outrage au Tribunal

(3) Personne ne peut être puni pour outrage au Tribunal à moins qu'un juge ne soit d'avis que la conclusion qu'il y a eu outrage et la peine sont justifiées dans les circonstances.

L.R. (1985), ch. 19 (2e suppl.), art. 8; 1999, ch. 2, art. 41; 2002, ch. 16, art. 16.1.

Frais

8.1 (1) Le Tribunal, saisi d'une demande prévue aux parties VII.1 ou VIII de la *Loi sur la concurrence*, peut, à son appréciation, déterminer, en conformité avec les *Règles de la Cour fédérale (1998)* applicables à la détermination des frais, les frais — même provisionnels — relatifs aux procédures dont il est saisi.

Détermination

(2) Le Tribunal peut désigner les créanciers et les débiteurs des frais, ainsi que les responsables de leur taxation ou autorisation.

Couronne

(3) Le Tribunal peut ordonner à Sa Majesté du chef du Canada de payer des frais.

Frais adjugés à Sa Majesté du chef du Canada

(4) Les frais qui sont adjugés à Sa Majesté du chef du Canada ne peuvent être refusés ni réduits lors de la taxation au seul motif que l'avocat pour les services duquel les frais sont justifiés ou réclamés était un fonctionnaire salarié de Sa Majesté du chef du Canada et, à ce titre, rémunéré pour les services qu'il fournissait dans le cadre de ses fonctions, ou bien n'était pas, de par son statut ou

Her Majesty in right of Canada in respect of the services so rendered.

Amounts to Receiver General

(5) Any money or costs awarded to Her Majesty in right of Canada in a proceeding in respect of which this section applies shall be paid to the Receiver General.

2002, c. 16, s. 17.

pour toute autre raison, admis à recouvrer de Sa Majesté du chef du Canada les frais pour les services ainsi rendus.

Versement au receveur général

(5) Les sommes d'argent ou frais accordés à Sa Majesté du chef du Canada sont versés au receveur général.

2002, ch. 16, art. 17.

Court of record

9 (1) The Tribunal is a court of record and shall have an official seal which shall be judicially noticed.

Cour d'archives

9 (1) Le Tribunal est une cour d'archives et il a un sceau officiel dont l'authenticité est admise d'office.

Proceedings

(2) All proceedings before the Tribunal shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit.

Procédures

(2) Dans la mesure où les circonstances et l'équité le permettent, il appartient au Tribunal d'agir sans formalisme, en procédure expéditive.

Interventions by persons affected

(3) Any person may, with leave of the Tribunal, intervene in any proceedings before the Tribunal, other than proceedings under Part VII.1 of the *Competition Act*, to make representations relevant to those proceedings in respect of any matter that affects that person.

Intervention des personnes touchées

(3) Toute personne peut, avec l'autorisation du Tribunal, intervenir dans les procédures se déroulant devant celui-ci, sauf celles intentées en vertu de la partie VII.1 de la *Loi sur la concurrence*, afin de présenter toutes observations la concernant à l'égard de ces procédures.

Summary dispositions

(4) On a motion from a party to an application made under Part VII.1 or VIII of the *Competition Act*, a judicial member may hear and determine the application in a summary way, in accordance with any rules on summary dispositions.

Procédure sommaire

(4) Sur requête d'une partie à une demande présentée en vertu des parties VII.1 ou VIII de la *Loi sur la concurrence* et en conformité avec les règles sur la procédure sommaire, un juge peut entendre la demande et rendre une décision à son égard selon cette procédure.

Decision

(5) The judicial member may dismiss the application in whole or in part if the member finds that there is no genuine basis for it. The member may allow the application in whole or in part if satisfied that there is no genuine basis for the response to it.

R.S., 1985, c. 19 (2nd Supp.), s. 9; 1999, c. 2, s. 42; 2002, c. 16, s. 18.

Pouvoirs du juge

(5) Le juge saisi de la requête peut rejeter ou accueillir, en totalité ou en partie, la demande s'il est convaincu que, soit la demande, soit la réponse, n'est pas véritablement fondée.

L.R. (1985), ch. 19 (2e suppl.), art. 9; 1999, ch. 2, art. 42; 2002, ch. 16, art. 18.

Organization of Work

Sittings of Tribunal

10 (1) Subject to section 11, every application to the Tribunal shall be heard before not less than three or more than five members sitting together, at least one of whom is a judicial member and at least one of whom is a lay member.

Judicial member to preside at hearings

(2) The Chairman shall designate a judicial member to preside at any hearing or, if the Chairman is present at a hearing, may preside himself.

Organisation du Tribunal

Séances du Tribunal

10 (1) Sous réserve de l'article 11, toute demande présentée au Tribunal est entendue par au moins trois mais au plus cinq membres siégeant ensemble et, parmi lesquels il doit y avoir au moins un juge et un autre membre.

Président de séance

(2) Le président désigne, pour chaque séance du Tribunal, un juge à titre de président, mais s'il est présent, il peut lui-même la présider.

TAB 12

CANADA

CONSOLIDATION

CODIFICATION

Competition Tribunal Rules

Règles du Tribunal de la concurrence

SOR/2008-141

DORS/2008-141

Current to August 28, 2022

À jour au 28 août 2022

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

Publié par le ministre de la Justice à l'adresse suivante :
http://lois-laws.justice.gc.ca

electronic transmission includes transmission by electronic mail (e-mail) or via the Tribunal website. (*transmission électronique*)

file means to file with the Registrar. (*déposer*)

intervenor means

(a) a person granted leave to intervene by the Tribunal in accordance with rule 46;

(b) an attorney general who intervenes under section 88 or 101 of the Act; or

(c) the Commissioner who intervenes under section 103.2 or subsection 124.2(3) of the Act. (*intervenant*)

originating document means either a notice of application, a notice of reference, or an application for leave under section 103.1 of the Act. (*acte introductif d'instance*)

paper hearing means a hearing in which documents are provided in paper form to the registry and are presented in paper form in the course of the hearing. (*audience sur pièces*)

party means an applicant or a respondent. (*partie*)

person includes a corporation, a partnership and an unincorporated association. (*personne*)

reference means the reference of a question to the Tribunal for determination under section 124.2 of the Act. (*renvoi*)

Registrar means the Registrar of the Tribunal. (*registraire*)

registry means the Registry of the Tribunal. (*greffe*)

respondent means a person who is named as a respondent in a notice of application. (*défendeur*)

magnétoscopique ou informatisé, ou toute reproduction totale ou partielle de ces éléments d'information. (*document*)

greffe Le greffe du Tribunal. (*registry*)

intervenant Selon le cas :

a) toute personne à qui le Tribunal a accordé la permission d'intervenir aux termes de la règle 46;

b) le procureur général qui intervient en vertu des articles 88 ou 101 de la Loi;

c) le commissaire, lorsqu'il intervient en vertu de l'article 103.2 ou du paragraphe 124.2(3) de la Loi. (*intervenor*)

Loi La *Loi sur la concurrence*. (*Act*)

membre judiciaire Sauf à la partie 10, juge nommé au Tribunal aux termes de l'alinéa 3(2)a) de la *Loi sur le Tribunal de la concurrence*. (*French version only*)

partie Demandeur ou défendeur. (*party*)

personne S'entend notamment d'une personne morale, d'une société de personnes et d'une association sans personnalité morale. (*person*)

président Membre judiciaire nommé président du Tribunal en application du paragraphe 4(1) de la *Loi sur le Tribunal de la concurrence*. (*Chairperson*)

registraire Le registraire du Tribunal. (*Registrar*)

renvoi Renvoi d'une question au Tribunal conformément à l'article 124.2 de la Loi. (*reference*)

transmission électronique S'entend notamment de la transmission par courrier électronique (courriel) ou au moyen du site Web du Tribunal. (*electronic transmission*)

Rules Applicable to All Proceedings

Dispensing with Compliance

Variation

2 (1) The Tribunal may dispense with, vary or supplement the application of any of these Rules in a particular case in order to deal with all matters as informally and

Règles applicables à toutes les instances

Dispense d'observation des règles

Dérogation

2 (1) Le Tribunal peut, dans des cas particuliers, modifier ou compléter les présentes règles ou dispenser de l'observation de tout ou partie de celles-ci en vue d'agir

expeditiously as the circumstances and considerations of fairness permit.

Urgent matters

(2) If a party considers that the circumstances require that an application be heard urgently or within a specified period, the party may request that the Tribunal give directions about how to proceed.

Time Limits

Interpretation Act

3 Unless otherwise provided in these Rules, time limits under these Rules or under an order of the Tribunal shall be calculated under sections 26 to 30 of the *Interpretation Act*.

Calculating time limits

4 (1) If the time for doing an act expires on a holiday or a Saturday, the act may be done on the next day that is not a holiday or a Saturday.

Time limit less than six days

(2) If a time limit is less than six days, holidays and Saturdays shall not be included in the calculation of the time limit.

Varying time limits

5 The time limits prescribed by these Rules may only be shortened or extended by an order or a direction of a judicial member.

Documents

Memorandum of fact and law

6 Where in these Rules a reference is made to a memorandum of fact and law, the memorandum of fact and law shall contain a table of contents and, in consecutively numbered paragraphs,

(a) a concise statement of fact;

(b) a statement of the points in issue;

(c) a concise statement of the submissions;

(d) a concise statement of the order sought, including any order concerning costs;

(e) a list of the authorities, statutes and regulations to be referred to; and

(f) an appendix, and if necessary as a separate document, a copy of the authorities (or relevant excerpts)

sans formalisme et en procédure expéditive dans la mesure où les circonstances et l'équité le permettent.

Demandes urgentes

(2) La partie qui est d'avis que les circonstances exigent qu'une demande soit entendue sans délai ou dans un délai précis peut demander au Tribunal de lui donner des directives sur la façon de procéder.

Délais

Loi d'interprétation

3 Sauf disposition contraire des présentes règles, le calcul des délais prévus par celles-ci ou fixés par une ordonnance du Tribunal est régi par les articles 26 à 30 de la *Loi d'interprétation*.

Calcul de délais

4 (1) Le délai qui expirerait normalement un jour férié ou un samedi est prorogé jusqu'au jour suivant qui n'est ni un jour férié ni un samedi.

Délai de moins de six jours

(2) Les jours fériés et les samedis ne comptent pas dans le calcul de tout délai de moins de six jours.

Modification de délais

5 Les délais prévus par les présentes règles ne peuvent être abrégés ou prorogés que par une ordonnance ou une directive d'un membre judiciaire.

Documents

Mémoire des faits et du droit

6 Le mémoire des faits et du droit comprend une table des matières, est divisé en paragraphes numérotés consécutivement et comporte les éléments suivants :

a) un exposé concis des faits;

b) les points en litige;

c) un exposé concis des arguments;

d) un énoncé concis de l'ordonnance demandée, notamment toute ordonnance relative aux frais;

e) la liste des décisions, des textes de doctrine, des lois et des règlements qui seront invoqués;

f) en annexe et, au besoin, dans un document distinct, copie des arrêts cités — ou des extraits pertinents de ceux-ci — et des dispositions législatives ou

Technology

(2) The Tribunal may give directions requiring the use of any electronic or digital means of communication, storage or retrieval of information, or any other technology it considers appropriate to facilitate the conduct of a hearing or case management conference.

Questions as to practice or procedure

34 (1) If, in the course of proceedings, a question arises as to the practice or procedure to be followed in cases not provided for by these Rules, the practice and procedure set out in the *Federal Courts Rules* may be followed.

Tribunal may direct

(2) If a person is uncertain as to the practice or procedure to be followed, the Tribunal may give directions about how to proceed.

PART 2

Contested Proceedings

Application

Application of Part

35 This Part applies to all applications to the Tribunal, except applications for interim or temporary orders (Part 4), applications for specialization agreements (Part 5), applications for leave under section 103.1 of the Act (Part 8) and applications for a loan order (Part 9).

Notice of application

36 (1) An application shall be made by filing a notice of application.

Form and content

(2) A notice of application shall be signed by or on behalf of the applicant and shall set out, in numbered paragraphs,

(a) the sections of the Act under which the application is made;

(b) the name and address of each person against whom an order is sought;

(c) a concise statement of the grounds for the application and of the material facts on which the applicant relies;

Directives sur la technologie

(2) Il peut donner des directives qui exigent l'utilisation de moyens électroniques ou numériques de communication, de stockage ou d'extraction de renseignements, ou de tout autre moyen technique qu'il juge indiqué, afin de faciliter la tenue d'une audience ou d'une conférence de gestion d'instance.

Questions concernant la pratique ou la procédure

34 (1) Les *Règles des Cours fédérales* peuvent s'appliquer aux questions qui se posent au cours de l'instance quant à la pratique ou à la procédure à suivre dans les cas non prévus par les présentes règles.

Directives du Tribunal

(2) En cas d'incertitude quant à la pratique ou à la procédure à suivre, le Tribunal peut donner des directives sur la façon de procéder.

PARTIE 2

Instances contestées

Demandes

Application de la présente partie

35 La présente partie s'applique à toutes les demandes présentées au Tribunal, à l'exception des demandes d'ordonnance provisoire ou temporaire (partie 4), des demandes relatives aux accords de spécialisation (partie 5), des demandes de permission présentées en vertu de l'article 103.1 de la Loi (partie 8) et des demandes d'ordonnance de prêt de pièces (partie 9).

Avis de demande

36 (1) La demande est introduite par dépôt d'un avis de demande.

Forme et contenu

(2) L'avis de demande est signé par le demandeur ou en son nom, est divisé en paragraphes numérotés et comporte les renseignements suivants :

a) les dispositions de la Loi en vertu desquelles la demande est présentée;

b) les nom et adresse de chacune des personnes contre lesquelles une ordonnance est demandée;

c) le résumé des motifs de la demande et des faits importants sur lesquels se fonde le demandeur;

(a) a use to which the person who disclosed the evidence consents;

(b) the use, for any purpose, of

(i) evidence that is filed with the Tribunal,

(ii) evidence that is given or referred to during a hearing; or

(iii) information obtained from evidence referred to in subparagraph (i) or (ii),

(c) the use of evidence obtained in one proceeding, or information obtained from such evidence, to impeach the testimony of a witness in another proceeding, or

(d) the use of evidence or information in a subsequent Tribunal proceeding.

a) l'utilisation d'éléments de preuve ou de renseignements à laquelle consent la personne qui a divulgué ceux-ci;

b) l'utilisation, à une fin quelconque, de ce qui suit :

(i) les éléments de preuve qui sont déposés auprès du Tribunal,

(ii) les éléments de preuve qui sont présentés ou mentionnés au cours d'une audience,

(iii) les renseignements tirés des éléments de preuve visés aux sous-alinéas (i) ou (ii);

c) l'utilisation d'éléments de preuve obtenus au cours d'une instance, ou de renseignements tirés de ceux-ci, pour attaquer la crédibilité d'un témoin dans une autre instance;

d) l'utilisation d'éléments de preuve ou de renseignements dans des instances subséquentes devant le Tribunal.

Non-application

(4) If satisfied that the interest of justice outweighs any prejudice that would result to a party who disclosed evidence, the Tribunal may, on motion, order that the deemed undertaking referred to in subrule (2) does not apply to the evidence or to information obtained from it, and may impose any terms and give any directions that are just.

Ordonnance de non - application

(4) S'il est convaincu que l'intérêt de la justice l'emporte sur tout préjudice que pourrait subir une partie qui a divulgué les éléments de preuve, le Tribunal peut ordonner que la présomption d'engagement implicite visée au paragraphe (2) ne s'applique pas aux éléments de preuve ou aux renseignements tirés de ceux-ci, et imposer les conditions et donner les directives qu'il estime justes.

Supplementary affidavit

63 A party who has served an affidavit of documents and who comes into possession or control of or obtains power over a relevant document, or who becomes aware that the affidavit of documents is inaccurate or deficient, shall as soon as possible serve a supplementary affidavit of documents listing the document or correcting the inaccuracy or deficiency.

Affidavit supplémentaire

63 La partie qui a signifié un affidavit de documents et qui soit entre en possession d'un document pertinent, en assume la garde ou le prend sous son autorité, soit constate que l'affidavit comporte des renseignements inexacts ou incomplets signifie sans délai un affidavit supplémentaire qui fait état du document ou qui complète ou corrige l'affidavit original.

Examination for discovery

64 (1) Examination for discovery shall occur as of right.

Interrogatoire préalable

64 (1) L'interrogatoire préalable est un droit des parties.

Power of the Tribunal

(2) The Tribunal may, in case management, make rulings to deal with the timing, duration, scope and form of the discovery as well as the appropriate person to be discovered.

Pouvoirs du Tribunal

(2) Le Tribunal peut, dans le cadre de la gestion d'instance, rendre des décisions sur le moment, la durée, la portée et la forme des interrogatoires préalables, ainsi que sur les personnes qu'il convient d'interroger.

CT-2022-002

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c.C-34, as amended;

AND IN THE MATTER OF the proposed acquisition by Rogers Communications Inc. of Shaw Communications Inc.;

AND IN THE MATTER OF an application by the Commissioner of Competition for an Order pursuant to section 92 of the *Competition Act*.

B E T W E E N:

COMMISSIONER OF COMPETITION

Applicant

and

ROGERS COMMUNICATIONS INC.
SHAW COMMUNICATIONS INC.

Respondents

and

ATTORNEY GENERAL OF ALBERTA
VIDEOTRON LTD.

Intervenors

BOOK OF AUTHORITIES

ATTORNEY GENERAL OF CANADA
Department Of Justice Canada
Competition Bureau Legal Services

Place du Portage, Phase I
50 Victoria Street, 22nd Floor
Gatineau, QC K1A 0C9
Fax: 819-953-9267

John Tyhurst
john.tyhurst@cb-bc.gc.ca

Jonathan Bitran
Tel: 416-605-1471
jonathan.bitran@cb-bc.gc.ca

Kevin Hong
Tel: 819-665-6381
kevin.hong@cb-bc.gc.ca

Counsel to the Commissioner of Competition